

**[J-119-2004]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**MIDDLE DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 197 MAP 2002
	:	
Appellant	:	
	:	Appeal from the Order of the Superior
	:	Court entered on 3/27/02 at No. 853 EDA
v.	:	2001 which affirmed the Order of the
	:	Bucks County Court of Common Pleas,
	:	Criminal Division entered on 3/2/01 at No.
	:	2831/1981
DENNIS FLANAGAN,	:	
	:	
Appellee	:	RE-SUBMITTED: April 30, 2004

**OPINION**

**MR. JUSTICE SAYLOR**

**Decided: July 23, 2004**

In this appeal, the Commonwealth challenges the Superior Court's conclusion that a post-conviction court properly authorized a withdrawal of guilty pleas grounded on the absence from the plea colloquy of any discussion of the factual basis supporting the pleas.

On July 1, 1981, the victim, James Redman, was robbed, beaten, and killed. Ten days later, police arrested appellee, Dennis Flanagan, and George Yacob, based on an affidavit of probable cause detailing police interviews with persons to whom both Flanagan and Yacob had admitted to having assaulted, robbed, and killed a man, while describing circumstances closely resembling those surrounding Mr. Redman's death. Following their arrest, Flanagan and Yacob provided statements describing their respective roles in the events leading to the murder.

In his statement to police, Flanagan related that he and Yacob planned a non-fatal assault on Mr. Redman on account of Mr. Redman's sexual orientation and his having made advances toward Yacob. Flanagan indicated that he and Yacob arranged to meet with Mr. Redman in his automobile and lured him to a remote industrial park, which Flanagan selected as a suitable location for the beating, under the pretext that Flanagan would have sexual relations with Mr. Redman. According to this account, while the vehicle was parked and Yacob was outside of it, Mr. Redman made an advance toward Flanagan, who pushed him away, got out of the car, and told Yacob what had happened. The three then drove a short distance and exited the vehicle, with Flanagan pushing Mr. Redman against the car and holding him there (Flanagan purported to having done so defensively, believing that Mr. Redman may have intended to assault him).

Flanagan described the events that followed largely as a series of acts carried out by Yacob, who purportedly: began taunting, hitting, and kicking Mr. Redman; demanded Mr. Redman's wallet and car keys; gave the keys to Flanagan and instructed him to move the vehicle to the front of the industrial park and wait twenty minutes before returning; and, when Flanagan did so and returned, announced that he (Yacob) had dropped a rock on Mr. Redman's head, kicked him in the face, and choked him with a bandana. Flanagan purported to having asked Yacob if they should call an ambulance, and to having inferred from Yacob's response that Mr. Redman was dead or near death. Flanagan also admitted that: he acquiesced in leaving the scene without attempting to personally verify Mr. Redman's condition; personal items of Mr. Redman's were thrown from the vehicle upon leaving the industrial park; he and Yacob drove the automobile around the local area in the days following the killing, then took it on an excursion to the

New Jersey shore with several young women; and he and Yacob planned to conceal their crimes by hiding or “dumping” the vehicle.

In his statement to police, Yacob claimed that, on the evening of the killing, he and Flanagan had joined Mr. Redman in his automobile, believing that they would be taken on a trip to obtain and consume illicit drugs. Yacob indicated that Mr. Redman diverted to the industrial park, where he made advances toward Flanagan and, in an ensuing confrontation, approached Yacob with a knife. The purport of Yacob’s initial statement was essentially that he had killed Mr. Redman inadvertently and in self-defense, and that Flanagan had not participated or played a significant part in the killing or in the struggle that assertedly had preceded it. At the time of his arrest, Yacob’s hands bore impact injuries.

Following a preliminary hearing, charges against Flanagan and Yacob including, inter alia, first- and second-degree murder, robbery, and conspiracy were bound over to the common pleas court, and the Commonwealth gave notice of its intention to seek imposition of the death penalty. Flanagan, who was at the time seventeen years old, sought transfer to juvenile court. A series of decertification hearings was convened, during which Flanagan testified, offering a substantially different account of the circumstances of Mr. Redman’s killing than he had related in his statement to police. Flanagan’s decertification hearing testimony mirrored Yacob’s initial statement in the claim that he and Yacob believed that they had joined Mr. Redman for a drug-related excursion, and that Mr. Redman selected the industrial park location at which to stop for reasons that were unknown to Flanagan and Yacob. Flanagan testified that he understood at the time (based on Yacob’s assertion) that Mr. Redman had a knife in his possession; he also knew Yacob to carry a knife on occasion.

The remainder of Flanagan's account at the decertification hearing loosely tracked his statement to police. He stated that Mr. Redman made sexual advances; Yacob immediately responded with violence, pulling Mr. Redman from the vehicle and hitting him; a struggle ensued, during which Flanagan pushed Mr. Redman only after Mr. Redman grabbed his leg; as the confrontation between Yacob and Mr. Redman continued, Yacob instructed Flanagan to leave the scene for a period of time; and when Flanagan returned, Yacob was alone and implied that Mr. Redman had been killed. On direct examination, Flanagan testified that he had no prior agreement with Yacob to assault Mr. Redman, but that his frame of mind was that he would defend himself and Yacob if necessary. On cross-examination, however, Flanagan admitted that he and Yacob had made a prior agreement to assault Mr. Redman if sexual advances were made during the trip.<sup>1</sup> Flanagan's prior statement was discussed extensively on direct and cross-examination, and he admitted to having fabricated various portions of it, claiming to have done so because he knew that Yacob had confessed to the killing, and wished to conform his account to Yacob's and/or tell police "what they want[ed] to hear." At the conclusion of the hearings, the common pleas court denied decertification.

A suppression hearing followed, at which the Commonwealth presented testimony from the detectives who signed the affidavit of probable cause, who related, inter alia, witness descriptions of inculpatory conversations with Yacob and/or Flanagan in which the participation of both men in the robbery/homicide was described (Flanagan also testified briefly in support of his request for relief). Suppression was denied, and

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<sup>1</sup> In contrast to his statement to police, in this version of the events Flanagan was no longer admitting to having agreed with Yacob to deceive Mr. Redman into believing that Flanagan was amenable to having sexual relations with him. Thus, Flanagan newly took the position that an assault on Mr. Redman was neither the planned purpose of the encounter nor a foregone conclusion.

Yacob subsequently pled guilty to first-degree murder and the related offenses, and, as a result of a plea agreement, was sentenced to life-imprisonment.

By this time, the Commonwealth had filed discovery responses containing witness statements including those of a young acquaintance who affirmed that he had overheard Flanagan and Yacob discussing plans to rob and severely beat a man whom they believed to be a homosexual in the days prior to and on the evening of the murder, as well as several persons who attested that Flanagan and Yacob admitted to having beaten and killed a man in a joint physical and verbal assault motivated by discriminatory animus. Among the latter was one of the young women who had traveled to the New Jersey shore with Yacob and Flanagan. She affirmed that Flanagan had admitted to having personally stabbed the victim during the course of the assault, and conveyed that the victim was exposed to a prolonged period of suffering, throughout which he pled for mercy.

Two days later, on the day scheduled for commencement of his trial, Flanagan pled guilty to murder generally, see Pa.R.Crim.P. 802 (formerly Rule 352), robbery, and conspiracy to commit murder and robbery. At the plea hearing, Flanagan's counsel noted that Flanagan had endorsed the information by pleading guilty, and the plea court opened its colloquy by asking Flanagan if he wished to enter guilty pleas to the charges contained in the criminal information, to which Flanagan responded in the affirmative. The plea court then correctly elucidated the various elements of the crimes with which Flanagan had been charged; delineated various defenses; described the presumption of innocence and the burden of proof resting on the Commonwealth in a criminal prosecution; admonished Flanagan that he had a right to a trial by a jury on a unanimous verdict; and specified the applicable ranges of punishment for the offenses that were the subject of the pleas. With respect to the open plea to murder, Flanagan

affirmed his understanding that, as a result, it was initially presumed that he was guilty of the lowest degree of murder (third-degree). The plea court also elaborated on third-degree murder and the attendant concept of malice as follows:

Malice, generally speaking means, is said to be a hardness of heart, a mind or a heart that is disregarding his social duty, acting in a way which you know to be contrary to proper acceptable, ethical standards. Malice can mean a direct malice, a hatred of a particular person or it can be manifested generally speaking or indirectly by a generalized hardness of heart, wickedness of disposition.

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Murder of the third degree is an unlawful killing of another person with malice. I've defined malice for you. However, we say that the distinction is that where as first degree murder must be an intentional killing we say that for third degree murder the killing need not be intentional but rather that the intention be to inflict serious or greivous bodily harm upon someone, and if as a result of doing that he dies, that would be third degree murder if in fact the intention was not necessarily to kill but to inflict serious bodily harm. Do you understand that?

MR. FLANAGAN: Yes, sir.

Further, the court explained the purpose and mechanics of a degree-of-guilt hearing, as well as the Commonwealth's burden to prove a higher degree of murder than third-degree, beyond a reasonable doubt.

In connection with Flanagan's plea to conspiracy to commit murder and robbery, the court explained the central concept of an agreement:

Now, you are pleading guilty to conspiracy to commit robbery and murder.

A conspiracy is committed when any two or more people enter into an agreement to commit a crime if any one of the co-conspirators commits an overt act in furtherance of that agreement. An overt act means any substantial step toward the commission of the crime they have agreed to commit.

Do you understand that?

MR. FLANAGAN: Yes, sir.

Additionally, during the colloquy, Flanagan acknowledged in a generalized fashion that, by entering his pleas, he was admitting to having committed each of the specified crimes. Flanagan also affirmed that he had been afforded sufficient time and opportunity to consult with counsel and his parents, and that he was satisfied with his legal representation.

During the course of the colloquy, however, the plea court committed two errors that are relevant to this appeal. First, it failed to adduce the factual basis for the plea, see Pa.R.Crim.P. 590 (comment) (formerly Pa.R.Crim.P. 319); Commonwealth v. Willis, 471 Pa. 50, 51-52, 369 A.2d 1189, 1190 (1977) (reflecting the mandatory requirement for a plea court to adduce a factual basis for the plea during a guilty plea colloquy); instead, the court merely alluded to its basic familiarity with the circumstances underlying the plea. The plea court then erroneously advised Flanagan that accomplice theory renders an accomplice liable for “any crimes committed by any other accomplice regardless of whether a particular accomplice committed the particular crime about which we are talking.”<sup>2</sup> The court elaborated as follows:

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<sup>2</sup> Culpability of an accomplice is prescribed in Section 306(d) of the Crimes Code, 18 Pa.C.S. §306(d), as follows:

**(d) Culpability of accomplice.**--When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.

Thus, to be convicted as an accomplice, a person must act with the requisite mens rea, for example, in the case of third-degree murder, with malice. The plea court failed to (continued . . .)

THE COURT: So that if there are people who are accomplices in the commission of a crime, commission of a murder, commission of a robbery, in a commission of a theft, and if only one of them actually commits the crime but if the other person is his accomplice, he is helping him, he is aiding him, he is assisting him in committing it, then the person who aids and assists and helps and cooperates is equally guilty of the commission of any crimes committed by the person he aided.

Do you understand that?

MR. FLANAGAN: Yes, sir.

(emphasis added). Despite the absence of any discussion of the factual basis for the pleas during the plea colloquy, and the plea court's erroneous explanation of accomplice liability, Flanagan's counsel offered no objection, and the court accepted the pleas.

Immediately following the entry of Flanagan's pleas, the common pleas court commenced a degree-of-guilt hearing pertaining to the open plea to murder. The Commonwealth introduced evidence from medical and scientific experts concerning the severity of Mr. Redman's injuries (separated scalp, skull and larynx fractures, cerebral hemorrhaging, contusions to the trunk, and deep penetrating wound to the right-side rib area), the pathological diagnosis of multiple blunt impacts to the head, neck, and trunk; and the substantial likelihood that Mr. Redman endured a prolonged period of suffering. The person who discovered Mr. Redman's body testified to its concealment in a remote location under a substantial pile of debris. A detective testified to the recovery of items of Mr. Redman's personal property from along the roadside leading from the scene of

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(...continued)

develop this aspect of accomplice liability theory and, indeed, indicated to the contrary in its colloquy.

the killing, the discovery of Mr. Redman's automobile during the interview of a witness to whom Flanagan and/or Yacob related an account of the killing, the gathering of evidence from the vehicle, and the identification of various implements believed to have been used in the killing, including the rock used to smash Mr. Redman's skull. Fingerprints and hairs gathered from Mr. Redman's vehicle were identified as belonging to Flanagan and Yacob. The witness to Flanagan's and Yacob's planning of the robbery/assault testified, indicating that they had discussed with him, inter alia, a plan to leave the victim in such a condition as would render him incapable of implicating them; he also stated, inter alia, that Yacob showed him a bloody knife the day after the murder. The Commonwealth offered testimony from the female traveling companion who stated that, during the trip to the New Jersey shore, Flanagan boasted that he had beaten, stabbed, and killed a man to obtain the car. She also indicated that Yacob admitted his participation and showed her a knife with a substance on it that appeared to be blood. Further, she reiterated that both Flanagan and Yacob explained that they planned the robbery/homicide because the victim was a homosexual. A prisoner incarcerated with Flanagan testified that Flanagan told him that he had stabbed a man because he did not like his sexual orientation.<sup>3</sup>

Finally, Yacob testified, recanting his earlier statements that Flanagan had not been involved in the murder and explaining that he and Flanagan had devised a plan to kill Mr. Redman and to take his car and money in the weeks preceding the murder. Yacob admitted that Mr. Redman had never had a knife or weapon of any kind. After arriving at the industrial park, Yacob testified, both he and Flanagan participated in

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<sup>3</sup> We note that the credibility of the Commonwealth's witnesses did not go unassailed. For example, on cross-examination Flanagan developed that his traveling companion was under the influence of marijuana throughout the trip to New Jersey, and that the prisoner confidant was a friend of Yacob's.

prolonged and severe physical and verbal assaults, and while Yacob was choking Mr. Redman, Flanagan took the knife from Yacob's pocket and stabbed Mr. Redman twice. In addition, Yacob stated that Flanagan bludgeoned Mr. Redman's head with the rock, after commenting that it was taking too long for him to die. Yacob admitted that the two used the money stolen from Mr. Redman to buy drugs, alcohol, and gasoline, and confirmed that he, Flanagan, and Mr. Redman had never set out on any trip to obtain illegal drugs, but rather, the encounter resulted from the luring of Mr. Redman to the industrial park to be robbed and killed. The Commonwealth also introduced Flanagan's statement to the police in which he had admitted to a prior agreement with Yacob to assault Mr. Redman, as well as the materially different account that Flanagan related at the decertification hearing.

Flanagan did not present evidence at the degree-of-guilt hearing; however, his counsel contended that the felony-murder rule did not apply as, according to his account, he only developed an intent to rob Mr. Redman subsequent to the murder. Counsel also urged the court to disbelieve Yacob, arguing that the evidence supported a version of the events more in line with Flanagan's accounts, and asked that the court enter a verdict of guilty of third-degree murder. Counsel summarized his argument as follows:

If you believe the testimony of Dennis Flanagan, that his intent on that night was to conspire with George Yacob to go to a place with James Redman and George Yacob, where James Redman would be beaten and that that was the purpose of that conspiracy, that as a result of the beating a murder occurred and that they did not form an intent, that this perpetrator did not form any intent to take a car until after the murder occurred, that the murder did not occur during the perpetration of the underlying felony and, therefore, the felony murder rule would not apply.

This is George Yacob's whole affair; it's not Dennis Flanagan's. . . . [I]t was not his expectation that there

would be a killing. It certainly was his expectation that somebody would be beaten, and he plead (sic) guilty to that fact, and the fact that the beating ended up in a death.

The common pleas court, however, rendered a verdict of guilt on the charge of first-degree murder. Flanagan expressed a desire to waive his right to a jury in the penalty phase, and the court conducted a colloquy, explaining the character of a penalty proceeding in a first-degree murder case, delineating the statutory aggravating and mitigating circumstances, and admonishing that Flanagan had a right to a jury determination and unanimity in the verdict. At the conclusion of the proceeding, the common pleas court found that, although aggravating circumstances were present (killing in the perpetration of a felony, 42 Pa.C.S. §9711(d)(6)), there were sufficient mitigating factors to outweigh them and thus to prevent the imposition of the death penalty. Accordingly, the court sentenced Flanagan to life imprisonment, with a concurrent term of ten to twenty years' incarceration for the robbery and conspiracy to commit robbery convictions.

After sentencing, Flanagan filed a post-verdict motion, challenging only the common pleas court's refusal to decertify the matter to juvenile court, which was denied. The Superior Court affirmed, and this Court denied allocatur.

In May of 1988, Flanagan filed a pro se petition under the former Post Conviction Hearing Act, 42 Pa.C.S. §§9541-9551 (superseded) (the "PCHA"). Flanagan contended, inter alia, that his guilty plea was unlawfully induced; the plea colloquy was deficient; trial counsel was ineffective for giving inadequate advice and advocating guilty pleas; he was in need of mental health treatment at the time he entered his pleas; he did not participate in Mr. Redman's murder and had no intent to kill; he hit Mr. Redman only in self-defense; he was intoxicated when the crimes occurred; and he wished to call an ambulance after the attack. Although the post-conviction court immediately

appointed counsel to assist Flanagan with his petition, the case remained dormant for ten years.

In March of 1999, Flanagan filed a motion for the appointment of new counsel and requested an evidentiary hearing regarding the matters raised in his 1988 petition. He also filed a pro se amended petition and an extensive memorandum of law, asserting that the plea court erred in accepting his pleas, and his plea counsel was ineffective for failing to object to the plea colloquy, based on, inter alia, the absence of a factual predicate for the pleas and the errors and omissions in the plea court's descriptions of accomplice and co-conspirator liability, which Flanagan took the position resulted in an unknowing plea. As to his own mindset at the time he entered his pleas, Flanagan offered that he

mistakenly believed, and in part was subsequently instructed, that the loose plan hatched with Yacob (to "beat up" the victim), the failure to stop the beating, and the failure to immediately report the killing rendered him guilty as the killer, George Yacob. Of course, this is a tragic misunderstanding of the law.

Flanagan also asserted that trial counsel was ineffective for failing to present favorable witnesses during the degree-of-guilt hearing, in particular, persons to whom Yacob had related his initial accounts of having himself killed Mr. Redman alone and in Flanagan's absence.

The post-conviction court appointed new counsel and formally allowed the amendment to Flanagan's petition, without objection by the Commonwealth. After several different appointments of counsel, a hearing on the collateral petition occurred in September, 2000. As the trial judge who accepted Flanagan's guilty pleas and presided over the degree of guilt hearing had since retired, a different judge administered in the collateral proceedings.

Flanagan did not testify at the hearing, but presented his mother's account of the events on the day that he entered his guilty pleas. Mrs. Flanagan stated that she and her husband arrived at the courthouse believing that jury selection was to begin. Once they were inside the courtroom, however, Flanagan's attorneys asked them to convince their son that it was in his best interests to plead guilty, due to the nature of the crime and the possibility of a death sentence. She testified that her son expressed an unwillingness to plead guilty during this discussion and indicated that he did not understand why his attorneys wanted him to enter such a plea, because he was not responsible for Mr. Redman's murder.

The Commonwealth presented the testimony of Flanagan's plea counsel, who stated that, given the incriminatory evidence and particularly heinous circumstances surrounding the killing, Flanagan's best chance of avoiding the death penalty was to enter the open plea, as counsel believed that a jury would return a verdict of first-degree murder. In this regard, counsel explained that, in his experience, the presiding judge had never imposed a sentence of death in any murder case. He also stated that Flanagan had privately admitted to participating in the assault on Mr. Redman and inculpated himself in the murder, and that if Flanagan would have testified, he would have had to have admitted such complicity. Concerning the plea colloquy, counsel was of the opinion that an adequate factual basis for the plea existed on the record, as the evidence adduced at prior proceedings was incorporated into the colloquy by reference. In counsel's view, Flanagan's plea was knowingly, voluntarily, and intelligently entered.

The Commonwealth subsequently filed a motion to dismiss Flanagan's petition, arguing, inter alia, that the amended petition was untimely under the one-year filing limitation imposed by the Post Conviction Relief Act, 42 Pa.C.S. §§9541-9546 (the

“PCRA” or the “Act”). See 42 Pa.C.S. §9545.<sup>4</sup> As to the merits, the Commonwealth contended that Flanagan failed to satisfy his burden, arguing, in particular, that the factual basis for Flanagan’s pleas was adduced in detail during the extensive proceedings prior to and immediately after the pleas’ entry.

Following oral argument, the PCHA court awarded relief in Flanagan’s favor, authorizing the withdrawal of his guilty pleas. The court rejected the Commonwealth’s contention that Flanagan’s amended petition was time barred, as it did not constitute original process, but rather, represented a valid amendment to an already-filed, timely petition. Substantively, the PCHA court concluded that Flanagan’s ineffectiveness claim was of arguable merit, as the plea colloquy did not provide a sufficient factual basis for the involved crimes, thus rendering the pleas unknowing. In particular, the PCHA court found that, while the plea court explained the elements of the crimes with which Flanagan had been charged, it never established that Flanagan admitted to having murdered Mr. Redman, nor did it attempt to relate the elements of the offenses to the admitted facts, which was particularly essential since Flanagan had offered an exculpatory explanation prior to the entry of the pleas. The court further noted that, at the time that he entered his pleas, Flanagan was unaware of much of the Commonwealth’s evidence, and, in particular, Yacob’s revised account of the murder.

In addition, the PCHA court found plea counsel’s testimony unpersuasive, observing, among other things, that counsel’s recollection was murky at best. The court specifically rejected plea counsel’s testimony that Flanagan had inculpated himself

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<sup>4</sup> The 1995 amendments to the PCRA were enacted on November 17, 1995, and became effective 60 days after the amendments were promulgated. The amendments provided that a petitioner whose judgment became final before the effective date of the amendments would be deemed to have filed a timely petition under the Act only if the petitioner’s first petition was filed within one year of the amendments’ effective date. See Section 3(1) of the Act (Spec. Sess. No. 1), Nov. 17, 1995, P.L. 1118, No. 32.

personally in the attack on Mr. Redman, since it found nothing in the record that would so indicate, and Flanagan had previously testified to the contrary under oath at the decertification hearing. In this regard, the court concluded that counsel did not accurately recall the facts, since, if they were as he indicated, he would have knowingly permitted Flanagan to perjure himself at the decertification hearing. In addition, the PCHA court found counsel's contention that he believed that it was in Flanagan's best interests to plead guilty to avoid the death penalty flawed, as Flanagan faced the same possibility of the receiving a death sentence after pleading guilty that he did prior to the entry of his plea.

The PCHA court concluded:

The Commonwealth suggests that it would be disingenuous and contrary to the fundamental concepts of constitutional law to apply the standards for a guilty plea in a "hyper-technical fashion." It is our belief that there is no greater need for technical adherence to the laws of state and country than when a decision to forego one's constitutionally guaranteed rights is at stake. As stated by the United States Supreme Court in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969)], "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connoted and of its consequence." Assuring that a defendant has the information necessary to make an intelligent and informed decision on how to plead is the minimum required of the constitution and is not, as the Commonwealth insists, a perverted application of the law.

(citations omitted).

The Superior Court affirmed in a memorandum opinion, on reasoning similar to the PCHA court's. It emphasized, in particular, that the Commonwealth lacked authority for its assertion that evidence adduced at a degree-of-guilt hearing could cure a

preceding, inadequate guilty plea colloquy. The Superior Court summarized its finding of prejudice as follows:

The trial judge did not have Flanagan's open admission of the facts and actions which constituted the crime, and therefore no clear understanding as to what he was pleading guilty (sic). There is no indication in the record that Flanagan at any time was aware that he would be accused of conspiring to kill the victim; that he would be accused of stabbing and bludgeoning the victim; or that he would ever be accused of even touching the victim. The record as established in the PCHA court indicates that Flanagan apparently felt that he was guilty as an accomplice, and always maintained that he never touched the victim, and only agree to beat the victim, never to kill him.

Presently, the Commonwealth maintains that judicial review of Flanagan's amended petition is time barred. On the merits, the Commonwealth argues that the Superior Court and the PCHA court erroneously reviewed the record to determine whether a factual basis existed at the time of the plea to support a first-degree murder conviction; however, an open plea to murder is tantamount only to an admission to third-degree murder.<sup>5</sup> Thus, according to the Commonwealth, it need only establish that the record reflects a factual basis for third-degree murder, which does not require a specific intent to kill, but rather, attaches to the broader culpability conception of malice, as was explained by the plea court. In this regard, the Commonwealth emphasizes that it would be absurd to require a defendant entering an open plea to murder to admit to having had specific intent to kill, as the defendant will put the Commonwealth to its proofs in this regard at a degree-of-guilt hearing. The Commonwealth contends that the

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<sup>5</sup> Parenthetically, in Pennsylvania, the defendant retains the ability to rebut this presumption at the degree-of-guilt hearing to mitigate the offense to voluntary manslaughter. See generally Commonwealth v. Mitchell, 528 Pa. 546, 599 A.2d 624 (1991); Commonwealth v. Myers, 481 Pa. 217, 392 A.2d 685 (1978).

record of the proceedings before and immediately after the plea hearing amply establishes the predicate for third-degree murder -- malice; Flanagan was well aware of the charges against him and the character of the Commonwealth's evidence;<sup>6</sup> and the guilty plea colloquy between the plea court and Flanagan was otherwise thorough and comprehensive. Indeed, the Commonwealth stresses that the evidence considered in the totality overwhelmingly established that Flanagan and Yacob jointly committed a brutal, premeditated robbery/murder based, in large part, on personal prejudices. Additionally, the Commonwealth relies on plea counsel's testimony from the post-conviction proceedings concerning the rationale underlying the plea. Finally, the Commonwealth stresses that Flanagan did not testify at the PCHA hearing or present evidence relating to his claim that he did not apprehend the factual basis underlying his pleas, or that the pleas were not knowingly, voluntarily, and intelligently entered.

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<sup>6</sup> In this regard, the Commonwealth notes:

Appellee was arrested, charged and preliminarily arraigned on the charge of First Degree Murder for the murder of James Redman, Robbery and related charges, and Criminal Conspiracy with George Yacob. Appellee gave a taped statement to the police when interviewed about his involvement in the murder of James Redman. Appellee had a preliminary hearing on these charges, all of which were bound over for trial. Thereafter, Appellee was arraigned in open court on these charges. Appellee was aware that the Commonwealth was seeking the death penalty. Appellee petitioned the Trial Court to transfer his case to Juvenile Court, testified at the transfer hearing, and was questioned as to his involvement in James Redman's murder. Appellee moved to suppress certain evidence, and again testified at the pre-trial hearing. During that testimony, Appellee acknowledged that he knew he was charged with the beating death and murder of James Redman, that he knew he was charged together with George Yacob in this murder, and that he was aware of the facts and allegations in this case.

In his brief, Flanagan maintains that the defects in the plea colloquy not only rendered his pleas unknowing, but also contributed to his entering guilty pleas to crimes of which he was innocent. Again, he indicates that he mistakenly believed, and, by virtue of the plea court's erroneous description of accomplice liability, was in fact instructed, "that the loose plan hatched with Yacob (to 'beat up' the victim), the failure to stop the beating, and the failure to immediately report the killing rendered him guilty as the killer, George Yacob." Further, Flanagan highlights that at no time prior to the degree-of-guilt hearing did the Commonwealth produce any evidence in his presence running contrary to his statements concerning the degree of his involvement in Mr. Redman's murder. In the absence of such direct confrontation and/or factual development at the plea colloquy at least on the order of an inquiry into whether or not he killed or helped to kill Mr. Redman, and in the face of the purportedly exculpatory explanations that he had provided to police and to the court at the decertification hearing, Flanagan contends that his pleas cannot be sustained on this record. In this regard, he cites, in particular, Commonwealth v. Hines, 496 Pa. 555, 437 A.2d 1180 (1981), in which this Court afforded relief from a plea-based conviction grounded on the plea court's acceptance of the plea without a threshold inquiry as to the underlying factual basis. Flanagan concludes that the circumstances surrounding his pleas evidence manifest injustice.

Preliminarily, we agree with the Superior Court that the PCHA court properly declined to treat Flanagan's amended petition as a serial, post-conviction petition which would be independently subject to the PCRA's one-year time limitation. Accord Commonwealth v. Williams, 573 Pa. 613, 628-30, 828 A.2d 981, 990-91 (2003).<sup>7</sup> PCRA

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<sup>7</sup> This matter is factually distinguishable from the Court's recent decision in Commonwealth v. Rienzi, 573 Pa. 503, 827 A.2d 369 (2003), in which the Court found a (continued . . .)

courts are invested with discretion to permit the amendment of a pending, timely-filed post-conviction petition, and this Court has not endorsed the Commonwealth's position that the content of amendments must substantively align with the initial filing. Accord id. Rather, the prevailing rule remains simply that amendment is to be freely allowed to achieve substantial justice. See Pa.R.Crim.P. 905(A). The Court has recognized that adherence to such rules governing post-conviction procedure is particularly appropriate since, in view of the PCRA's time limitations, the pending PCRA proceeding will most likely comprise the petitioner's sole opportunity to pursue collateral relief in state court. See generally Commonwealth v. Williams, 566 Pa. 553, 565, 782 A.2d 517, 524 (2001).

On the merits we have noted that the colloquy supporting Flanagan's pleas was defective, by reason of both an absence of a contemporaneous record of the factual basis for the plea and the erroneous accomplice liability instruction.

The factual basis requisite is among six elements, which, as Flanagan notes, this Court has maintained are essential to a valid plea colloquy. See Pa.R.Crim.P. 590(A)(2) (comment);<sup>8</sup> see also Hines, 496 Pa. at 564, 437 A.2d at 1184. The salutary purposes of the requirement include protecting against the situation that Flanagan claims has occurred here, namely, a defendant's mistaken plea to an offense that is not

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(...continued)

second petition for collateral relief to be untimely. In Rienzi, the first petition for collateral relief had been withdrawn prior to the filing of the second, and thus, there was nothing pending before the PCRA court that the petitioner could amend. Here, as noted, Flanagan's original petition for collateral relief was never withdrawn or dismissed.

<sup>8</sup> As noted in the rules' commentary, the plea court must also ascertain whether the defendant understands the nature of the charges to which he or she is pleading guilty, that he or she has a right to a trial by jury, that he or she is innocent until proven guilty, the permissible range of sentences and/or the fines for the offenses charged, and that the court is not bound by the terms of any plea agreement unless it accepts the agreement.

actually implicated by his conduct. See generally 21 AM. JUR. 2D Criminal Law §714 (2003). As the PCHA court emphasized, compliance with the rule also facilitates appellate review and conserves judicial resources. See Boykin, 395 U.S. at 244, 89 S. Ct. at 1712-13 (“When the judge discharges [his] function [at a plea colloquy], he leaves a record adequate for any review that may be later sought, and forestalls the spin-off of collateral proceedings that seek to probe murky memories.” (citations and footnotes omitted)); Commonwealth v. Dilbeck, 466 Pa. 543, 547, 353 A.2d 824, 827 (1976). See generally A.B.A. STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY §14-1.6(a) (2d ed. 1980 & Supp. 1986).

Although this Court has stressed its strong preference for a dialogue in colloquies with meaningful participation by the defendant throughout, there is no set manner, and no fixed terms, by which factual basis must be adduced. See, e.g., Commonwealth v. Nelson, 455 Pa. 461, 464, 317 A.2d 228, 229 (1974) (cognizing, as a sufficient factual basis, an on-the-record summary of the Commonwealth’s evidence by the district attorney, which followed the plea court’s acceptance of the plea). Moreover, while the Court has admonished that a complete failure to inquire into any one of the six, mandatory subjects generally requires reversal, see, e.g., Commonwealth v. Chumley, 482 Pa. 626, 634, 394 A.2d 497, 501 (1978); Willis, 471 Pa. at 52, 369 A.2d at 1190; see generally Commonwealth v. Ingram, 455 Pa. 198, 203-05, 316 A.2d 77, 80-81 (1974) (holding that the character of a guilty plea is tested according to the adequacy of the on-the-record colloquy), as both parties acknowledge, in determining the availability of a remedy in the event of a deficient colloquy, it has in more recent cases moved to a more general assessment of the knowing, voluntary, and intelligent character of the plea, considered on the totality of the circumstances. See, e.g., Commonwealth v. Allen, 557 Pa. 135, 146, 732 A.2d 582, 588-89 (1999); Commonwealth v. Schultz, 505

Pa. 188, 192, 477 A.2d 1328, 1330 (1984); Commonwealth v. Shaffer, 498 Pa. 342, 350-51, 446 A.2d 591, 595-96 (1982); cf. Commonwealth v. Martinez, 499 Pa. 417, 422, 453 A.2d 940, 943 (1982) (“In a case where ample, competent evidence in support of a guilty plea is made a matter of record, allegations of manifest injustice arising from the guilty plea must go beyond a mere claim of lack of technical recitation of the legal elements of the crimes.”).

The Commonwealth and the dissent amplify a number of valid reasons why the plea court’s error in failing to adduce the factual basis for the plea, viewed in isolation, might not require the invalidation of Flanagan’s plea. However, upon consideration of the totality of the circumstances, it is apparent that the PCHA court did not err in affording relief, just as the Superior Court did not err in sustaining it.

As noted, in explaining to Flanagan the legal principles governing his acceptance of criminal liability, the plea court made a materially erroneous statement of controlling law to the effect that a defendant’s status as an accomplice gives rise to vicarious criminal liability for “any crimes” of the principal. In substantial contrast to this plea-affirmation, however, the culpability of an accomplice is prescribed in Section 306(d) of the Crimes Code, as follows:

**(d) Culpability of accomplice.**--When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.

18 Pa.C.S. §306(d) (emphasis added); see also 18 Pa.C.S. §305 (defining an accomplice according to his intent in relation to the crime with which he is charged as

an accomplice).<sup>9</sup> Thus, to be convicted as an accomplice, a person must act with the requisite mens rea, for example, in the case of third-degree murder, with malice. See, e.g., Commonwealth v. Gooding, 818 A.2d 546, 550-51 (Pa. Super.), appeal denied, 575 Pa. 691, 835 A.2d 709 (2003).<sup>10</sup> The plea court failed to develop this central aspect of accomplice liability theory and, indeed, caused Flanagan to affirm that his understanding of the controlling law was exactly to the contrary.<sup>11</sup>

This Court has maintained that the entry of a plea that is unknowing, in the sense that the defendant lacks a basic understanding of the legal principles giving rise to the

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<sup>9</sup> Sections 305 and 306 were enacted in 1972 (eight years prior to Flanagan’s trial), and are drawn directly from the Model Penal Code, which eschews the form of strict liability for “any crimes” of an accomplice affirmed by Flanagan in the plea colloquy in this case. The dissent’s contention Pennsylvania law was ever unclear in this regard is unsupported by any of the cases to which it cites generally.

<sup>10</sup> The Gooding case also cites the approved explanation of accomplice liability as follows:

A person does not become an accomplice merely by being present at the scene or knowing about a crime. He is an accomplice, if with the intent of promoting or facilitating the commission of that crime, he solicits, commands, encourages, or requests the other person to commit it or aids, agrees to aid, or attempts to aid the other person in planning or committing it.

Gooding, 818 A.2d at 550 (emphasis added).

<sup>11</sup> The Washington courts have dealt extensively with this sort of error in the context of defective jury instructions. See, e.g., State v. Roberts, 14 P.3d 713, 736 (Wash. 2000) (stating that “knowledge by the accomplice that the principal intends to commit ‘a crime’ does not impose strict liability for any and all offenses that follow”); State v. DeGruy, No. 43336-9-I, 2003 WL 1743098, at \*2 (Wash. Ct. App. March 31, 2003) (memorandum) (“The error in [the defendant’s] accomplice instruction requires reversal when ‘evidence of an uncharged crime is before the jury, and the State argues that the defendant’s participation in “any” crime triggered liability for the specific crime charged.’” (citations omitted)).

criminal responsibility that he is accepting, is a manifest injustice and grounds for post-conviction relief. See, e.g., Commonwealth v. Gunter, 565 Pa. 79, 84, 771 A.2d 767, 771 (2001) (plurality, but with all Justices agreeing that a manifest injustice is established in circumstances in which a plea is unknowing).<sup>12</sup> The standard for post-sentence withdrawal of guilty pleas dovetails with the arguable merit/prejudice requirements for relief based on a claim of ineffective assistance of plea counsel, see generally Commonwealth v. Kimball, 555 Pa. 299, 312, 724 A.2d 326, 333 (1999), under which the defendant must show that counsel's deficient stewardship resulted in a manifest injustice, for example, by facilitating entry of an unknowing, involuntary, or unintelligent plea. See, e.g., Allen, 557 Pa. at 144, 732 A.2d at 587 ("Allegations of ineffectiveness in connection with the entry of a guilty plea will serve as a basis for relief only if the ineffectiveness caused appellant to enter an involuntary or unknowing plea."); Commonwealth v. Frometa, 520 Pa. 552, 555, 555 A.2d 92, 93 (1989); see also Commonwealth v. Flood, 426 Pa. Super. 555, 567, 627 A.2d 1193, 1199 (1993). In terms of the other requirement for relief based on ineffectiveness, lack of reasonable basis, see Kimball, 555 Pa. at 312, 724 A.2d at 333, there is no reason that we can conceive of which would justify plea counsel's acquiescence in the patently defective colloquy under review in this case. Moreover, the PCHA court made an express credibility finding rejecting plea counsel's proffered excuse for not insisting on an adequate colloquy.

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<sup>12</sup> Indeed, at the time Flanagan entered his plea, the Court vigorously applied a per se rule in this regard. See, e.g., Commonwealth v. Kulp, 476 Pa. 358, 363, 382 A.2d 1209, 1212 (1978) (refusing to remand, following a finding of a materially defective plea colloquy, for a hearing on the state of the defendant's actual knowledge and stating: "For pleas entered after our decision in Ingram, there can be no excuse for a hearing court to have failed to recognize the need of an adequate on-the-record colloquy reflecting a knowledgeable and intelligent waiver." (emphasis in original)).

Indeed, it is difficult to hypothesize a more concrete example of a facially defective colloquy, and correspondingly legally unknowing plea, than a circumstance in which the plea court causes the defendant to affirm a materially erroneous understanding of the substantive law establishing criminal liability on the offenses charged. Accord Boykin, 395 U.S. at 243 n.5, 89 S. Ct. at 1712 n.5 (“[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.” (citation omitted)). By supplying the wrong legal framework against which to assess the facts, the plea court exacerbated the effect of the substantial deficiency arising out of its failure to adduce the factual basis and rendered the plea unknowing on the face of the record presented.

The dissent apparently views the issue concerning Flanagan’s on-the-record affirmation of a materially erroneous understanding of applicable law as entirely distinct from the plea’s other substantial deficiency, namely, the absence of any discussion of the factual basis for the plea, and irrelevant to the essential totality assessment. Thus, the dissent would relegate the former issue to consideration on remand in the PCHA court. We differ, however, with this approach, for several reasons.

First, as previously noted, a totality assessment of the knowing, voluntary, and intelligent character of a plea cannot be fairly undertaken without accounting for the plea court’s explanation of the relevant law. The dissent apparently acknowledges the United States Supreme Court’s admonition that, for a defendant to understand the charges against him he must have an understanding of the law in relation to the facts, see Boykin, 395 U.S. at 243 n.5, 89 S. Ct. at 1712 n.5, but would afford it no effect.

Second, the close interrelationship between the two material defects in the plea under review is apparent on the face of the record. The colloquy concerning both

accomplice liability and the attendant facts was central to this case, in particular, because another defendant, Yacob, participated in (and indeed had pled guilty to) the crimes, and Flanagan claimed on the record (at a decertification hearing) to have been absent during the actual killing and described his intent in a manner that facially could implicate a lesser culpable state.<sup>13</sup> Indeed, from the outset of the colloquy, the plea court stressed the centrality of accomplice liability theory to Flanagan's acceptance of criminal liability, as follows:

THE COURT: So in order to begin and in view of the fact that both you and Mr. Yacob are jointly involved or at least jointly charged with these various crimes, let me begin by explaining to you the law of accomplice, because that will sort of tie things together here, I think, and make it easier for you to understand how these charges came about. Okay?

[FLANAGAN]: Yes, sir.

Third, the factual basis requirement exists precisely to protect against a mistaken plea to an offense that is not actually implicated by the defendant's conduct. See generally 21 AM. JUR. 2D Criminal Law §714; A.B.A. STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY §14-1.6(a). The requirement, therefore, is designed to counterbalance any material misunderstanding of the law on the part of the defendant, which is, in the

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<sup>13</sup> On review of the record, we note, however, that even if a fact-finder were to accept Flanagan's most favorable version of the facts, it would nevertheless be free to find that he acted with malice and therefore was, at a minimum, an accomplice to third-degree murder. Moreover, the plea court conducted a degree-of-guilt hearing, at which Flanagan was found guilty of first-degree murder beyond a reasonable doubt. These observations, however, do not cure the plea court's defective explanation of accomplice liability, as a jury could also rely on Flanagan's most favorable version to infer a lesser degree of culpability; Flanagan waived his right to a jury trial having affirmed on the record a materially erroneous statement of relevant law; and the inquiry relevant to the validity of the plea centers on its knowing and voluntary character.

present case, a matter of record as a result of the plea court's defective explanation of accomplice liability.<sup>14</sup>

Fourth, even if the plea court's defective explanation of controlling law were not subsumed within the totality assessment, this Court has the ability to affirm a valid judgment or order for any reason appearing as of record.<sup>15</sup> There is good cause for invoking such authority here, since the decision to remand a case in which the colloquy is marred by facial error so apparent from the record and dispositive in terms of plea-invalidity represents an inefficient utilization of judicial resources.<sup>16</sup>

We therefore hold that a review of the totality of the circumstances establishes that Flanagan's plea was of an unknowing character and, for this reason, will not disturb the disposition of the Superior Court and PCHA court. On a closing note, we reinforce our expectation of compliance with the six, straightforward and relatively modest requirements that set the baseline for a valid guilty plea colloquy. See Pa.R.Crim.P. 590 (comment).

The Superior Court's order is affirmed, and the matter is remanded for trial.

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<sup>14</sup> Flanagan references the matter precisely on these terms in his brief. See Brief of Appellee at 18 (noting that the plea court's deficient colloquy as concerns accomplice liability exacerbated the impact of its failure to adduce a factual basis).

<sup>15</sup> See generally Commonwealth v. Katze, 540 Pa. 416, 425, 658 A.2d 345, 349 (1995) (opinion divided on other grounds); McAdoo Borough v. Commonwealth, Pa. Labor Relations Bd., 506 Pa. 422, 428-29 n.5, 485 A.2d 761, 764 n.5 (1984); E.J. McAleer & Co. v. Iceland Prods., Inc., 475 Pa. 610, 613 n.4, 381 A.2d 441, 443 n.4 (1977); Hader v. Coplay Cement Mfg. Co., 410 Pa. 139, 145-46, 189 A.2d 271, 274-75 (1963); Sherwood v. Elgart, 383 Pa. 110, 115, 117 A.2d 899, 901-02 (1955).

<sup>16</sup> The systemic problem manifested in this case, which languished in the PCHA court for approximately a decade, also does not go without notice.

Mr. Justice Castille files a dissenting opinion in which Mr. Chief Justice Cappy and Mr. Justice Eakin join.