NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. TRENT C. PICKARD, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1229 EDA 2012

Appeal from the PCRA Order March 23, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s):
CP-51-CR-0403291-2001
CP-51-CR-0403301-2001

BEFORE: FORD ELLIOTT, P.J.E., BENDER, J., and SHOGAN, J.

MEMORANDUM BY BENDER, J. Filed: March 19, 2013

Trent C. Pickard (Appellant) appeals from the order entered March 23, 2012, denying his petition for post-conviction relief without a hearing pursuant to the Post Conviction Relief Act (PCRA) 42 Pa.C.S. §§ 9541 – 9546. After careful review, we affirm.

The following pertinent facts were adduced at trial:

The Commonwealth presented evidence that Appellant operated a drug house on the 2300 block of North 30th Street in Philadelphia. N.T., 9/3/03, at 7 – 15. One of Appellant's employees in the criminal operation, Waldo "Pee Wee" Wilson, served as a lookout at the drug house. ***Id***. Wilson was working outside the drug house on the day the victims, Chad Alexander and Terrell Dean, were killed. Wilson had known the victims from around the

neighborhood for 10 – 15 years. ***Id***. at 4, 18. When the drug house had run out of product that evening, Wilson made his way up the street to talk to his sister who lived nearby. ***Id***. at 20. Appellant was irate when he found Wilson returning to his abandoned post. Appellant began "cussing" him out for shirking his responsibilities as a lookout. ***Id***. at 19 – 20.

Simultaneously, a customer arrived at the drug house. After discovering that Appellant's operation was out of drugs, he walked over to talk to the victims. Dean and Alexander were standing on a corner across the street from where Appellant and Wilson were arguing.[1] ***Id***. at 24. Wilson testified that Appellant abruptly ended their argument, ran across the street, and began firing a gun at Dean and Alexander. ***Id***. Wilson observed one of the victims falling to the ground before Wilson ran away. ***Id***. at 32.

Other witnesses to the shooting were unable to directly identify Appellant. One eyewitness noted that the shooter was wearing a hoodie and sported a Muslim-like beard. N.T., 9/3/04, at 98 – 99. Another witness observed the verbal altercation between Wilson and Appellant just before the shooting, and noted that Appellant was wearing a hoodie and had "kind of a scraggly beard[.]" ***Id***. at 136.

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[1] Wilson stated that when Appellant's drug house ran out of product, he would direct the disappointed customers to Dean and Alexander to fulfill their needs. This was another point of contention between Wilson and Appellant during their verbal quarrel that occurred just before the shooting. ***Id***. at 31 – 32.

A key witness for the Commonwealth, Roger Vella testified that while incarcerated in the Philadelphia County Jail (PCJ) with Appellant, Appellant told Vella that he had killed two men for encroaching on the territory of his drug business. N.T., 9/5/03, at 57. Vella also testified that he had known Appellant beforehand, going back as far as 1994, and had in the intervening years worked in concert with Appellant in committing at least two crimes unrelated to the instant matter. ***Id***. at 51, 60 – 63. As a result, Vella said he knew Appellant often wore a fake Sunni Muslim beard when committing criminal acts. ***Id***. at 60 – 63. A former driver and bodyguard for known organized-crime boss Joseph Merlino, Vella was himself charged with murder in an unrelated case when he spoke with Appellant in the PCJ. He was still incarcerated on those charges at the time he testified at Appellant's trial. ***Id***. at 51, 53.

The jury convicted Appellant of two counts of third degree murder and related offenses. The trial court sentenced him to an aggregate term of 40 – 80 years' incarceration. Appellant filed a direct appeal to this Court. We affirmed his judgment of sentence in a consolidated memorandum. ***Commonwealth v. Pickard***, Nos. 572 EDA 2005 and 1211 EDA 2005, unpublished memorandum at 5 (Pa. Super. filed August 24, 2007) ("***Pickard I***"). Our Supreme Court denied Appellant's petition for allowance of appeal, ***Commonwealth v. Pickard***, 945 A.2d 169 (Pa. 2008) (table), and the United States Supreme Court denied his petition for writ of *certiorari*. ***Pickard v. Pennsylvania***, 555 U.S. 879 (2008).

On August 31, 2009, Appellant filed a timely, *pro se* PCRA petition. PCRA counsel was appointed and, on March 18, 2011, counsel filed an amended petition. Following the Commonwealth's motion to dismiss the amended PCRA petition, Appellant filed a second supplemental PCRA petition on September 12, 2011. The Commonwealth again moved to dismiss and, on March 23, 2012, the PCRA court formally dismissed Appellant's petition without a hearing.

Appellant now presents the following questions for our review:

> 1. Did the lower court err in finding "previously litigated" the claim that direct appeal counsel was ineffective for failing to properly brief the claim that the Commonwealth's failure to disclose central witness Roger Vella's FBI statement[,] in which he admitted that he lied[,] deprived Appellant of due process of law, where direct appeal counsel's effectiveness could not have been raised before?
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> 2. Did the lower court err in failing to consider Appellant's claim that the trial court's original ruling -- that the Commonwealth's concealment of central witness Roger Vella's FBI statement in which he admitted he lied, adopted wholesale and without any independent analysis by a Superior Court panel on direct appeal -- was so manifestly contrary to law that relief is due in the interest of justice even assuming this underlying due process claim was previously litigated?
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> 3. Did the lower court err in dismissing without a hearing Appellant's claim that the Commonwealth's use of informant Roger Vella to implicate Appellant violated Appellant's right to counsel since he alleged and would have proved at the evidentiary hearing that the Commonwealth directed or solicited Vella's interactions with him while in jail and the facts necessary to prove this claim were in the exclusive possession of the Commonwealth[, and did trial counsel render ineffective assistance for failing to raise, litigate, and preserve that claim]?
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> 4. Did the lower court err in dismissing without a hearing Appellant's claim that trial counsel rendered ineffective

> assistance in failing to request that the jury be instructed on how it should consider the evidence that purported eyewitness Waldo Wilson had pending criminal charges and a bias in favor of the Commonwealth?
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> 5. Did the lower court err in dismissing without a hearing Appellant's claim that trial counsel rendered ineffective assistance in failing to request or object to the absence of a "corrupt source/accomplice" instruction regarding Commonwealth witnesses Waldo Wilson and Roger Vella and that direct appeal counsel was ineffective for failing to preserve the trial court's error in failing to issue this instruction?
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> 6. Did the lower court err in dismissing without a hearing Appellant's claim that trial counsel rendered ineffective assistance in failing to request or object to the absence of an instruction directing the jury on how to consider the testimony of eyewitness Waldo Wilson as it proceeded from an admitted chronic and acute crack cocaine addict?
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> 7. Did the lower court err in dismissing without a hearing Appellant's claim that direct appeal counsel rendered ineffective assistance in failing to preserve as a distinct violation of the United States Constitution the claim that the trial court erred in admitting significant "other crimes" evidence whose prejudicial impact substantially outweighed its probative value?
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> 8. Did the lower court err in dismissing without a hearing Appellant's claim that direct appeal counsel rendered ineffective assistance in failing to preserve as a distinct violation of the United States Constitution the claim that the trial court erred in permitting the Commonwealth to unfairly bolster the credibility of Commonwealth witness Roger Vella with evidence that another inmate who allegedly made a jailhouse confession to Vella had pleaded guilty to those charges?

Appellant's Brief, at 3 – 4.

On appeal from the denial of PCRA relief, our standard of review is whether the findings of the PCRA court are supported by the record and are free from legal error. ***Commonwealth v. Abu–Jamal***, 833 A.2d 719, 731 (Pa. 2003). Even where the distinct legal grounds utilized by the PCRA court

in dismissing a petition are in error, we may affirm on any other valid legal basis. ***See Commonwealth v. Lambert***, 57 A.3d 645, 648 n.1 (Pa. Super. 2012); ***see also Commonwealth v. Doty***, 48 A.3d 451, 456 (Pa. Super. 2012) (affirming on alternate grounds the PCRA court's order dismissing the appellant's petition, notwithstanding this Court's conclusion that the PCRA court erred in finding that it lacked jurisdiction over Appellant's PCRA claims).

Previously Litigated *Brady* Claims

Appellant's first two claims concern whether the Commonwealth withheld from the defense certain statements, made by the Commonwealth's witness Roger Vella to the FBI, in violation of ***Brady v. Maryland***, 373 U.S. 83 (1963). The statement at issue revealed that Vella had told the FBI he had been officially inducted into the mafia, a statement that Vella later admitted was false. Appellant contends that the statement was valuable impeachment evidence that could have undermined Vella's credibility before the jury. Appellant raised a nearly identical issue on direct appeal. This Court, by incorporation of the trial court opinion, concluded that Appellant was not entitled to relief on his ***Brady*** claim because it "would be an unreasonable stretch to conclude that the result of the proceedings would have been different had Appellant been able to cross-examine Vella on his false statements to the FBI." Trial Court Opinion (TCO), 5/9/06, at 13 (incorporated in its entirety by this Court in our decision at ***Pickard I***. ***See Pickard I***, at 5.)

Appellant now attempts to resurrect his ***Brady*** claim in his PCRA by first claiming his direct appellate counsel provided ineffective assistance of counsel (IAC) by improperly or inadequately briefing the ***Brady*** claim on direct appeal (hereinafter referred to as Appellant's "derivative IAC claim" and/or Appellant's "***Brady***-related IAC claim"). Alternatively, he argues, the trial court's disposition of the ***Brady*** claim was so manifestly contrary to law that we should "correct the miscarriage of justice that has resulted" from this Court's "wholesale" adoption of the trial court opinion in ***Pickard I***. The PCRA court concluded that Appellant's claims are precluded as having been previously litigated.

The PCRA statute provides in pertinent part that:

> **(a) General rule.--**To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:
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> ...
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> (3) That the allegation of error has not been previously litigated or waived.

42 Pa.C.S. § 9543 (a)(3).

The PCRA statute subsequently defines previous litigation as follows:

> **(a) Previous litigation.--**For purposes of this subchapter, an issue has been previously litigated if:
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> ...
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> (2) 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).

In ***Commonwealth v. Collins***, 888 A.2d 564 (Pa. 2005), our Supreme Court thoroughly examined the PCRA statute's preclusion of previously litigated issue.[2] Our Supreme Court then addressed whether "a claim of ineffectiveness is a discrete legal ground or merely an alternative theory in support of the same underlying issue that was raised on direct appeal." ***Id***. The Supreme Court concluded that an IAC claim is a distinct claim, because IAC "claims challenge the adequacy of representation rather than the conviction of the defendant." ***Id***. at 573.

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[2] The Court in ***Collins*** stated:

> From these subsections, it is clear that the relevant statutory inquiry is the term "issue." 42 Pa.C.S. § 9544(a)(2). There is nothing in this subsection defining "issue". That term, as used in "pleading and practice," is understood to mean "a single, certain, and material point, deduced by the allegations and pleadings of the parties, which is affirmed on the one side and denied on the other." Black's Law Dictionary, 6th ed. 831. Thus, "issue" refers to the discrete legal ground that was forwarded on direct appeal and would have entitled the defendant to relief. ***See***, ***e.g.***, ***Sanders v. United States***, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) (defining "grounds" as "a sufficient legal basis for granting the relief sought by the applicant"). The theories or allegations in support of the ground are simply a subset of the issue presented. Stated another way, there can be many theories or allegations in support of a single issue, but ultimately, § 9544(a)(2) refers to the discrete legal ground raised and decided on direct review. Thus, at the most basic level, this section prevents the relitigation of the same legal ground under alternative theories or allegations.

Collins, 888 A.2d at 570 (footnote omitted).

The ***Collins*** Court went on to address the merits of the appellant's IAC claim, determining that it would remand the matter to the PCRA court for further consideration only if the Court found that the claims that were considered previously litigated by the PCRA court required further elucidation and could not be evaluated by the Supreme Court. ***Id***. at 574. The Court noted that "[u]ltimately, the [IAC] claim may fail on the arguable merit or prejudice prong for the reasons discussed on direct appeal, [even though] a Sixth Amendment claim raises a distinct issue for purposes of the PCRA and must be treated as such." ***Id***. at 573. Indeed, that is exactly what happened. The ***Collins*** court dismissed the appellant's derivative IAC claim for lack of arguable merit, concluding that the Court "need not reassess [the appellant's] Due Process claim anew, since the factors that we considered on direct appeal are the same as the factors Appellant now asks us to consider on collateral review." ***Id***. at 575.

Applying ***Collins***, we agree with Appellant that his derivative IAC claim has not been previously litigated, contrary to the conclusion of the PCRA court. Accordingly, we will address Appellant's ***Brady***-related IAC claim. However, because we do not have the benefit of an evidentiary hearing on the matter, we will remand if further inquiry is necessary to resolve the merits of the claim. ***See Id***. at 574.

"In order to establish ineffective assistance of counsel, [an] appellant must demonstrate that (1) his claims have arguable merit; (2) counsel had no reasonable basis for his action or inaction; and (3) counsel's action or

inaction prejudiced [the] appellant." ***Commonwealth v. Hawkins***, 894 A.2d 716, 721 (2006) (citing ***Commonwealth v. Pierce***, 527 A.2d 973, 975 (Pa. 1987)). A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim. ***Commonwealth v. Malloy***, 856 A.2d 767, 781 (Pa. 2004).

> The law governing alleged ***Brady*** violations is well-settled. In ***Brady***, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." ***Brady***, 373 U.S. at 87, 83 S.Ct. at 1196–97. The Supreme Court subsequently held that the duty to disclose such evidence is applicable even if there has been no request by the accused … and that the duty may encompass impeachment evidence as well as directly exculpatory evidence[.] Furthermore, the prosecution's ***Brady*** obligation extends to exculpatory evidence in the files of police agencies of the same government bringing the prosecution.
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> …
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> On the question of materiality, the Court has noted that "[s]uch evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" ***Strickler v. Greene***, 527 U.S. 263, 280, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286 (1999) …. The materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. "Rather, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" ***Strickler***, 527 U.S. at 290, 119 S.Ct. at 1952 …. "Thus, there are three necessary components that demonstrate a violation of the ***Brady*** strictures: the evidence was favorable to the accused, either because it is exculpatory or because it impeaches; the evidence was suppressed by the prosecution, either willfully or inadvertently; and prejudice ensued."

Commonwealth v. Lambert, 884 A.2d 848, 853-54 (Pa. 2005) (some internal citations omitted).

In the instant case, Appellant does not claim that a different standard applies than what was applied by this Court (by incorporation of the trial court opinion), nor that appellate counsel should have pursued an alternative theory of relief. Appellant instead complains that the trial court improperly applied the ***Brady*** standards, and did so as a result of all prior counsels' failure to make the appropriate arguments and "alert their respective tribunals to this body of controlling law." Appellant's Brief, at 26.

However, Appellant's argument does not deviate in substance from the issue raised on direct appeal. Appellant has asserted a ***Brady*** claim based upon the exact same evidence – Vella's statement to the FBI. Nevertheless, Appellant asserts that his IAC claim has arguable merit because, had prior counsel thoroughly presented and/or more effectively argued the claim, this Court would have been constrained to reach a different conclusion. Critical to such a claim is, of course, that this Court did err in concluding that Vella's statement was not material for ***Brady*** purposes and, thus, in order to address the arguable merit prong of the ***Brady***-related IAC claim, this Court is asked to again determine if Vella's statement was material. That is precisely the issue that was previously litigated in this case during Appellant's direct appeal.

Following the ***Collins*** court's decision, we will not reconsider Appellant's underlying ***Brady*** claim pursuant to the first prong of the

ineffectiveness standard because it is indistinguishable from the ***Brady*** issue he raised on direct appeal.[3] ***See Collins***, 888 A.2d at 573 (noting that a derivative IAC claim "may fail on the arguable merit or prejudice prong for the reasons discussed on direct appeal, [even though] a Sixth Amendment claim raises a distinct issue for purposes of the PCRA"). Accordingly, we conclude that Appellant's derivative IAC claim fails for lack of arguable merit.

Appellant also contends, however, that we should reconsider this Court's prior resolution of his ***Brady*** claim during Appellant's direct appeal because it was "so manifestly contrary to law that relief is due in the interest of justice." Appellant's Brief, at 3. Appellant contends that the PCRA court had the legal authority to grant a new trial in the interest of justice, citing several cases that we discuss below. We conclude that this claim is not at all distinct from the ***Brady*** claim raised on direct appeal, and as Appellant fails to cite any applicable exception to the PCRA statute's bar on previously litigated claims, he is not entitled to relief.

In ***Commonwealth v. Powell***, 590 A.2d 1240, (Pa. 1991), our Supreme Court did recognize the historical application of the "in the interest of justice" standard in providing "a viable ground for granting a new trial in

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[3] Appellant had the opportunity to challenge the propriety of our prior decision by seeking reargument or reconsideration of the issue with this Court, by petitioning our Supreme Court for allowance of appeal, and by petitioning for a writ of *certiorari* with the Supreme Court of the United States. Appellant did, in fact, pursue the latter two avenues for relief, albeit to no avail.

this Commonwealth." ***Id***. at 1242. The ***Powell*** court noted, "This concept of 'in the interest of justice' is merely a recognition of the trial court's discretionary power to ensure the fairness of the proceedings *during the adjudicatory stage*." ***Id***. at 1243 (emphasis added). The ***Powell*** Court did not suggest that this discretionary power extended beyond the adjudicatory stage to undermine the express limitations of the PCRA statute. Accordingly, ***Powell*** is decidedly off-point.

Appellant's citation to ***Commonwealth v. Hernandez***, 755 A.2d 1 (Pa. Super. 2000), *aff'd in part*, 817 A.2d 479 (Pa. 2003), is also misplaced. In ***Hernandez***, this Court reviewed a PCRA court's decision denying the appellant's petition for leave to appeal *nunc pro tunc*. The appellant sought review of the discretionary aspects of his sentence in his brief provided to this Court on direct appeal, but had waived the issue "due to counsel's failure to object to appellant's sentence at the time of its imposition, counsel's failure to file a motion to modify sentence and counsel's failure to file a concise statement of matters claimed on appeal, despite a court order [to do so]." ***Id.*** at 3. Thus, ***Hernandez*** does not concern previously litigated issues. An issue has been previously litigated 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). In ***Hernandez***, the appellant's direct appeal did not result in ruling on the merits of his sentencing claim because his prior counsel failed to adequately preserve the issue, resulting in waiver. Here, Appellant's ***Brady*** claim

received merits review on direct appeal. Accordingly, ***Hernandez*** affords Appellant no relief.

In ***Commonwealth v. Tyson***, 635 A.2d 623 (Pa. 1993), the Supreme Court granted a new trial based upon a IAC claim raised in a PCRA petition where the same IAC claim had been previously litigated on direct appeal. However, the ***Tyson*** court limited its decision to the unique circumstances presented by that case. While Tyson's claim was pending allowance of appeal, the Supreme Court granted allowance of appeal in a case raising an identical claim in ***Commonwealth v. Stonehouse***, 555 A.2d 772, 774 (Pa. 1989). ***Stonehouse*** was resolved in a manner favorable to Tyson, but her petition for allowance of appeal was denied before the Court issued the ***Stonehouse*** opinion.

Tyson filed for reconsideration of her petition for allowance of appeal, but the Supreme Court denied the petition. However, the order denying reconsideration stated that Tyson's claim was denied "without prejudice to the Petitioner to apply for relief under the [PCRA]." ***Tyson***, 635 A.2d at 624. Thus, the ***Tyson*** court concluded that:

> Appellant reasonably concluded from the wording of the … order that it was this Court's intention to permit her to seek collateral relief and thereby have the benefit of our then pending ***Stonehouse*** decision. Under the circumstances presented here it would be manifestly unjust for this Court to affirm the Superior Court's decision [denying Tyson relief because the issue on the basis that her IAC issue had been previously litigated] especially given the fact that it was our own order that no doubt misled appellant.

Id.

The relief afforded in ***Tyson*** was expressly restricted to the specific facts of that case. Even if ***Tyson*** can be read to apply more broadly, we conclude that Appellant's case is not sufficiently analogous to ***Tyson*** to justify similar relief. Appellant was not misled into seeking relief in the PCRA for a previously litigated issue by an explicit order disseminated by an appellate court. Having failed to cite any controlling authority that there exists an "in the interest of justice" or similar exception to the PCRA statute's bar on previously litigated claims, we conclude that Appellant's claim lacks merit.[4]

IAC: Sixth Amendment Claim

Appellant next claims that "trial counsel rendered [IAC] in failing to raise, litigate[,] and preserve the claim that the Commonwealth's use of informant Roger Vella to implicate Appellant violated Appellant's Sixth Amendment right to counsel." Appellant's Brief at 32. The essence of this claim posits that because Vella became a government informant in other cases before he communicated with Appellant in jail, the use of Appellant's incriminating remarks to Vella constituted a circumvention of Appellant's

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[4] Appellant's brief sets forth additional theories to resurrect his previously litigated ***Brady*** claim, arguing that Appellant's trial counsel provided IAC in its presentation of the claim to the trial court, and that Vella's statement constituted after-discovered evidence. Neither of these claims appeared in Appellant's Pa.R.A.P. 1925(b) statement and, therefore, those claims have been waived. ***See Commonwealth v. Lord***, 719 A.2d 306, 309 (Pa. 1998) ("Any issues not raised in a 1925(b) statement will be deemed waived.").

Sixth Amendment right to counsel. Appellant alleges that Vella effectively interrogated Appellant, on behalf of or as an agent of the Commonwealth, in circumstances in which the authorities were themselves legally barred from communicating with Appellant outside the presence of counsel. Appellant claims that trial counsel provided IAC by failing to seek to have Appellant's statements to Vella excluded from trial, arguing that the statements were obtained in violation of his Sixth Amendment rights. The PCRA court denied Appellant relief without the benefit of a hearing.

Initially, we agree with Appellant that at the time he communicated with Vella, his Sixth Amendment rights were in effect, because a prosecution had commenced against him in this case.

> The Sixth Amendment right of the accused to assistance of counsel in all criminal prosecutions is limited by its terms: it does not attach until a prosecution is commenced. We have, for purposes of the right to counsel, pegged commencement to the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. The rule is not mere formalism, but a recognition of the point at which the government has committed itself to prosecute, the adverse positions of government and defendant have solidified, and the accused finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.

Rothgery v. Gillespie County, Tex., 554 U.S. 191, 198 (2008) (footnotes, internal citations, and quotation marks omitted).

In ***Massiah v. United States***, 377 U.S. 201 (1964), the United States Supreme Court held that a defendant's Sixth Amendment right to assistance

of counsel was violated by the admission at trial of incriminating statements made by the defendant to a co-conspirator who had agreed to cooperate with authorities. The Supreme Court held that the defendant's right to counsel was in effect when "federal agents … deliberately elicited from him [incriminating statements] after he had been indicted and in the absence of his counsel." ***Id***. at 206. Since ***Massiah***, both the federal and state courts have grappled with the rule's application in situations where the government's involvement was less direct in eliciting incriminating statements.

United States v. Henry, 447 U.S. 264 (1980), involved a jailhouse informant who provided the prosecution with incriminating statements made by his cellmate. The informant was initially contacted by police, who specifically instructed him not to initiate any conversation with the defendant or to question him regarding the crime. Nevertheless, the police told him to be alert to any statements made by the defendant. The informant reported that the defendant had told him about a robbery, and the informant was then paid for furnishing the information. The Supreme Court found that the government had deliberately elicited incriminating statements from the defendant within the meaning of ***Massiah***, "[b]y intentionally creating a situation likely to induce [the defendant] to make incriminating statements without the assistance of counsel[.]" ***Henry***, 447 U.S. at 274.

Later, in ***Maine v. Moulton***, 474 U.S. 159 (1985), the Supreme Court reaffirmed the principles set forth in ***Massiah*** and ***Henry***. In ***Moulton***,

following their arrest, a defendant's co-conspirator was asked to wear a wire while speaking to the defendant pursuant to a plea agreement the co-conspirator had arranged with the government. The co-conspirator was instructed not to directly question the defendant, however, statements he made did, in fact, elicit the defendant's incriminating comments. The United States Supreme Court held that the conduct of the government violated the defendant's Sixth Amendment right to counsel. The Court explained that since the Sixth Amendment guarantees the right to rely on counsel as a "medium" between him and the State, there was an affirmative obligation on the government to avoid acting in a manner that circumvents that right. ***Moulton***, 474 U.S. at 176. The Supreme Court supplemented the rule articulated in ***Henry***, holding that the "Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." ***Id***. However, the Court advised that "the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached." ***Id***.

In ***Commonwealth v. Franciscus***, 710 A.2d 1112 (Pa. 1998), our Supreme Court expressly adopted the ***Massiah***, ***Henry***, and ***Moulton*** line of cases as expressing the appropriate test for whether a criminal defendant's right to counsel under the Sixth Amendment is violated when the Commonwealth uses a jailhouse informant to obtain incriminating

statements from him. Our Supreme Court held those standards to be at least coextensive with the protections provided by the Article I, Section 9 of the Pennsylvania Constitution.[5]

In ***Franciscus***, the defendant was arrested and charged with criminal homicide. While imprisoned pending trial, he befriended a fellow inmate, Krushinski, to whom he later made incriminating statements. Krushinski had previously assisted authorities as a jailhouse informant in at least two other cases prior to befriending Franciscus.[6] Soon after being transferred to the maximum security wing of the county prison,[7] Krushinski met

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[5] Our Supreme Court suggested that Article I, Section 9 of the Pennsylvania Constitution might provide greater protection than the Sixth Amendment when it stated that:

> Since the U.S. Supreme Court has not addressed the specific issue with which we are confronted, our analysis of Franciscus's federal constitutional claim reflects the policy considerations that we perceive to be important. Thus, we would hold that the right to counsel guaranteed by the state constitution was violated in this case for the reasons previously articulated, even assuming that the U.S. Supreme Court should later decide that the Sixth Amendment is not violated under circumstances such as those presented in this case.

Id. at 1121.

[6] Our Supreme Court noted that "in a span of only twenty-eight days, Krushinski had secured information that was used by the State Police and local law enforcement authorities in three separate cases. ***Id***. at 1115.

[7] This was a direct result of threats and an assault directed at Krushinski by other inmates who suspected him of being a jailhouse informant.

Franciscus. Krushinski was aggressive in his attempts to elicit information from Franciscus:

> At trial Krushinski testified extensively about his efforts to obtain information from Franciscus. This testimony established that from the moment Krushinski first came into contact with the teenager, he relentlessly questioned Franciscus about the details of the homicide charge. The conversations with Franciscus began over a game of chess. Krushinski deliberately elicited information from Franciscus under the guise of helping him through connections that Krushinski said he had outside of prison. Krushinski told Franciscus that he was part of an organized crime family. He asked Franciscus for the names and telephone number of his parents. Krushinski recommended an experienced criminal trial attorney from the city of Philadelphia.
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> Krushinski made notes of his interrogation of Franciscus. In their first conversation, he questioned Franciscus about the evidence that the police had and his clothing on the day of the murder, and he tried to get a description of the dagger that Franciscus claimed to possess. At that point they had to return to their cells, which were only six feet apart. Krushinski immediately began passing notes to Franciscus between the cells to obtain additional information about the charges.

Id. at 1115.

In concluding that Franciscus' Sixth Amendment rights had been violated, our Supreme Court reasoned as follows:

> The police officers continually communicated with Krushinski throughout his stay in the Chester County prison. Within two weeks of his initial contact regarding [another inmate that Krushinski provided unsolicited information about to the police], Krushinski supplied the officers with information about two more inmates in addition to Franciscus. This additional information clearly did not come to the officers through "luck or happenstance." When Krushinski's efforts to cooperate with the police were discovered and he was attacked by another inmate, the police reacted immediately to protect him.

> Krushinski's subsequent transfer to maximum security allowed him to continue his activities as a police informant because those inmates had no contact with the other inmates. This gave Krushinski the opportunity to manipulate 17–year old Chad Franciscus to his advantage. Krushinski deliberately set out to elicit inculpatory information from Franciscus. Franciscus's youth and inexperience made him particularly susceptible to Krushinski's claim of connections outside of prison and pressure tactics.
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> Krushinski was not "a passive listener to a heartfelt confession" by Franciscus. Krushinski conducted a deliberate interrogation of Franciscus intended to evoke an inculpatory disclosure. The interrogation was conducted while Franciscus was awaiting trial. There obviously was no disclosure of Krushinski's status as an informant.
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> ***It is of no moment that the police did not give specific instructions to Krushinski to target any particular inmate.*** Krushinski was encouraged to obtain whatever useful information he could. We cannot ignore the fact that communications of this nature are promoted by rewarding jailhouse informants for information. In the absence of a reward, whether it be pecuniary or in the form of an agreement to testify regarding the informant's assistance to the police, there would be no incentive for informants to aid law enforcement agencies.

Franciscus, 710 A.2d at 1120 (emphasis added).

Turning back to this case, Appellant claims his trial counsel should have sought to exclude Vella's testimony as having violated his Sixth Amendment right to counsel. The PCRA court dismissed this claim without the benefit of a hearing. In its Pa.R.A.P. 1925(b) opinion, after briefly stating the applicable standards, the PCRA court found that Appellant "provides no support for his claim that the government directed or solicited Vella's interactions with the defendant when they were incarcerated

together." PCRA Court Opinion (PCO), 7/25/05, at 6. The Commonwealth endorses this reasoning, stating in their brief that:

> [h]ere, defendant failed to cite or produce any evidence that the police sent Vella to question defendant, promised Vella anything to obtain information from defendant, intentionally placed Vella near defendant to further the investigation, or actively assisted Vella in obtaining incriminating statements from fellow prisoners. That is because there was no such evidence.

Commonwealth's Brief, at 32.

The record tends to support the Commonwealth's argument. Vella and Appellant were acquaintances prior to the January 2001 conversation that produced Appellant's incriminating statements. N.T., 9/5/03, at 51. Vella was placed in a holding pen as he waited to speak with his attorney when he encountered Appellant. ***Id***. at 56 – 57. Vella said the two struck up a conversation. ***Id***. at 57. Vella asked Appellant, "what are you doing here?" ***Id***. Appellant responded, "that thing I was telling you." ***Id***.[8]

Vella then asked, "what happened?" ***Id***. at 58. Appellant replied, "I killed them both guys, and one guy died later[.]" ***Id***. Vella then asked how Appellant got caught, and Appellant told him a "junkie" had seen him

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[8] Vella explained the nature of "that thing" when he testified that in October of 2000, Appellant came to him complaining of problems he was having with rival dealers that were trying to "push in on his drug business." ***Id***. Appellant wanted Vella to use his organized crime connections to "take them out." ***Id***. Vella told Appellant he would need to "get the okay from my boss." ***Id***. at 58. Ultimately, the plan was not approved by Vella's boss, and the two did not see each other again until they met in the holding pen at the county jail. ***Id***.

commit the murders. ***Id***. at 59. Appellant also told Vella that he had worn his disguise, the "Sunni beard." ***Id***. at 59 – 60.

There is no indication in the record that Vella had been cooperating with the FBI or the police *on any matter* at the time of his conversation with Appellant. Indeed, the record demonstrates that Vella did not begin cooperating with FBI until at least March of 2001, two months after the conversation with Appellant. ***Id***. at 66 – 67. Vella did not begin negotiating a plea with the Commonwealth until May or June of 2001. N.T., 9/8/03, at 19.

Hence, there is not one iota of evidence to support the claim that the Commonwealth or the FBI obtained "incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." ***Moulton***, 474 U.S. at 176. The evidence does not support the suggestion that the Commonwealth or the FBI were in communication with Vella at the time the January, 2001 conversation occurred. In fact, the record tends to support the conclusion that Vella did not negotiate with authorities on any matter until at least March of 2001. Accordingly, there is no basis on which to conclude, or even speculate, that the authorities knowingly subverted Appellant's right to counsel. For the same reasons, there is no evidence supporting a claim that the authorities "intentionally creat[ed] a situation likely to induce [Appellant] to make incriminating statements." ***Henry***, 447 U.S. at 274.

There are also critical differences between the events that transpired in this case and those our Supreme Court addressed in ***Franciscus***. Vella had not previously acted as an informant in unrelated matters at the time of his conversation with Appellant in January of 2001. There was no motivation to provide information to authorities to the degree encountered in ***Franciscus***, wherein the informant had already been rewarded for providing information in other matters. Vella did not engage in a deliberate interrogation akin to what had occurred in ***Franciscus***. The conversation Vella had with Appellant was brief, as was the duration of the contact he had with Appellant in the jail. The informant in ***Franciscus*** had "relentlessly questioned Franciscus about the details of the homicide charge." ***Franciscus***, 710 A.2d at 1115. Vella asked Appellant only a handful of general questions, like "what are you doing here?", "what happened?", and "how did they catch you?" during the course of their short exchange. N.T., 9/5/03, at 57, 59. The informant in ***Franciscus*** was aggressive in eliciting information from someone he did not even know beforehand, whereas here the conversation between Vella and Appellant was not nearly as suspicious considering their prior dealings with each other.

We conclude, therefore, that the trial court did not abuse its discretion in denying Appellant's IAC claim that his trial counsel should have objected to or sought exclusion of Vella's testimony as violative of Appellant's Sixth Amendment rights. Appellant's claim fails for lack of arguable legal merit

and, therefore, there is no need to remand for a hearing to address the other prongs of the IAC test.

Appellant additionally complains that because he was denied a hearing, he was denied the opportunity to prove his claim. He specifically points to the fact that, in his PCRA petition, he pled that Vella became an informant before the conversation with Appellant. He argues that proof of his claim "was and is within the exclusive possession of the Commonwealth." Appellant's brief, at 35. He cites several cases that he asserts support his claim that he should at least be entitled to have a hearing to demonstrate whether Vella was working for the government at that time. However, the cases cited by Appellant miss the mark and are off-point.[9]

Appellant has failed to even suggest what evidence or witnesses he intended to present. "[A] petitioner must present the facts supporting each issue asserted in his PCRA Petition, and if they do not appear on the record,

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[9] Appellant cites several cases that stand for the proposition that the Commonwealth has an affirmative duty to disclose ***Brady*** material. While we do not dispute the authority of such cases, Appellant's current predicament is not factually analogous. Appellant is claiming something exists that the Commonwealth is stating, emphatically, does not exist, namely evidence of Vella's status as an informant before his conversation with Appellant in January of 2001, or some other evidence tending to show that the Commonwealth directed or encouraged Vella to solicit incriminating statements from Appellant. The Commonwealth has no duty to disclose evidence it does not possess. ***See generally Commonwealth v. Smith***, 17 A.3d 873, 890 (Pa. 2011) ("The Commonwealth cannot violate ***Brady*** by suppressing evidence that does not exist.").

a petitioner must identify affidavits, documents or other evidence proving the alleged facts." ***Commonwealth v. Collins***, 687 A.2d 1112, 1115 (Pa. 1996). Appellant does not direct this Court's attention to any such documentation. Furthermore, our review of Appellant's PCRA petition (and the subsequent amended incarnations of the petition) failed to uncover any such documentation.

As a result, there does not appear to be a genuine issue of material fact with regard to Vella's status as an informant when Appellant made incriminating statements to him in January of 2001. It is well-established that "[a] petitioner is not entitled to a PCRA hearing as a matter of right; the PCRA court can decline to hold a hearing if there is no genuine issue concerning any material fact and the petitioner is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings." ***Commonwealth v. Taylor***, 933 A.2d 1035, 1040 (Pa. Super. 2007) (citing Pa.R.Crim.P. 907(1); ***Commonwealth v. Hardcastle***, 701 A.2d 541 (Pa. 1997)). Accordingly, we also conclude that the PCRA court did not abuse its discretion in dismissing Appellant's claim without a hearing.

IAC - Jury Instructions

Appellant's next claim asserts that trial counsel provided IAC by failing to request a jury instruction that the Commonwealth's witness, Wilson, had pending criminal charges that could bias him in favor of the prosecution. Appellant contends that the Commonwealth was permitted to "depict

Wilson's testimony … in a false light, as a statement motivated by no interest in the outcome of this case, when in fact the testimony was motivated by substantial personal interest in seeing to it that Appellant was convicted." Appellant's Brief, at 37.

The PCRA court rejected this claim, stating that Appellant could not possibly demonstrate prejudice since Wilson had been thoroughly cross-examined regarding his plea agreement, and also because the trial court mitigated any residual prejudice when it gave a general instruction regarding potential bias. The Commonwealth adds that "[w]hile Wilson did have a plea agreement, he had already given police a statement and testified at the preliminary hearing against [Appellant] before any deal was offered. Only then did the Commonwealth offer an agreement that included a provision that Wilson cooperate in the prosecution." Commonwealth's Brief, at 35 (citing N.T., 9/3/03, at 37, 42). We agree and conclude that Appellant cannot demonstrate prejudice.

In ***Commonwealth v. Evans***, 512 A.2d 626 (Pa. 1999), our Supreme Court held that a witness's potential bias in favor of the prosecution due to outstanding criminal matters "must be made known to the jury" even "if the prosecutor has made no promises." ***Id***. at 631 - 32. In ***Commonwealth v. Thompson***, 739 A.2d 1023, 1030 (Pa. 1999), the appellant argued his trial counsel provided IAC in failing to object when the trial court instructed the jury to only consider a Commonwealth witness's pending criminal cases in order "to determine whether he was in custody when he spoke with the

police." Relying on ***Evans***, our Supreme Court concluded that the instruction was objectionable because "a witness may be motivated to aid in the Commonwealth's case in hope of receiving favorable treatment in the future." ***Id***. Nevertheless, our Supreme Court held that prejudice was lacking because the jury was clearly made aware of the potential bias of the witness despite the inadequacies of the specific instruction.[10] 739 A.2d at 1031.

Here, as was the case in ***Thompson***, the jury was adequately informed about Wilson's potential bias. First, the Commonwealth made the jury aware of the fact that Wilson's plea deal in an unrelated matter was conditioned upon his cooperation in testifying at Appellant's trial. N.T., 9/3/03, at 40 – 41. Second, Wilson was extensively cross-examined by Appellant's trial counsel regarding the nature and timing of his agreement[s] with the Commonwealth. ***Id***. at 55 – 72. Third, during his closing

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[10] Our Supreme Court found that the appellant in ***Thompson*** was not prejudiced by the deficient instruction because:

> (1) trial counsel suggested in his closing remarks that the witness's statement was predicated on a desire to curry favor with the police; (2) the trial court extensively instructed the jury regarding the proper legal principles regarding a witness's credibility; and (3) the witness's credibility was extensively impeached by trial counsel.

Commonwealth v. Harris, 852 A.2d 1168, 1177 (Pa. 2004) (citing ***Thompson***, 739 A.2d at 1031).

argument, defense counsel repeatedly directed the jury's attention to the potential bias arising out of Wilson's plea agreement, including the fact that Wilson did not come forward to report what he saw to police until after he was arrested for his own crimes. N.T., 9/10/03, at 86 – 89, 95 – 96, 98 – 101, 113 – 115, 127. Finally, the PCRA court notes that the following general instructions were given to the jury:

> Think about whether the witness has an interest in the outcome of the case. Think about whether the witness has friendship for or animosity toward other person[s] in the case …. You saw the witness testify. What was that person's behavior on the witness stand? What was that person's demeanor? Think about the manner in which the person testified, whether or not that person showed any bias or prejudice that may somehow color that person's testimony … consider whether the witness appears to be biased or unbiased, whether they are interested or disinterested persons.

PCO, 7/25/12, at 9 (quoting N.T., 9/11/03, at 18 – 22).

Given all of these factors, we agree with the PCRA court that Appellant could not have been significantly prejudiced by the failure of trial counsel to seek a more specific jury instruction with respect to Wilson's testimony. Wilson's lack of credibility was a major theme of Appellant's defense. Part and parcel of that theme was the allegation that Wilson's testimony was biased because he was given favorable treatment by the Commonwealth in order to secure his testimony at Appellant's trial. The jury was made aware that Wilson had dodged a significant term of incarceration by providing his testimony. Accordingly, we conclude Appellant's IAC claim fails because trial

counsel's failure to seek a more specific jury instruction regarding Wilson's potential for bias did not result in any significant degree of prejudice.

Appellant next claims that his trial counsel provided IAC by failing to request, or object to the absence of, a "corrupt source/accomplice" instruction for witnesses Wilson and Vella. Appellant complains that both Wilson and Vella were "unindicted accomplices in Appellant's alleged organized crime and drug-trafficking activities." Appellant's Brief, at 40. The PCRA court rejected this claim, stating that neither Wilson nor Vella participated in the murders for which Appellant was charged in this case.

Section 306(c) and (d) of the Crimes Code defines accomplice liability as follows:

> **(c) Accomplice defined.--**A person is an accomplice of another person in the commission of an offense if:
>
> (1) with the intent of promoting or facilitating the commission of ***the offense***, he:
>
> (i) solicits such other person to commit it; or
>
> (ii) aids or agrees or attempts to aid such other person in planning or committing it; or
>
> (2) his conduct is expressly declared by law to establish his complicity.
>
> **(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 (emphasis added).

> [I]t is well established that, in any case in which an accomplice implicates the defendant, the trial court should instruct the jury that the accomplice is a corrupt and polluted source whose testimony should be considered with caution. ***See Commonwealth v. Chmiel***, 536 Pa. 244, 251, 639 A.2d 9, 13 (1994). The charge is indicated in cases in which the evidence is sufficient to present a jury question with respect to whether the Commonwealth's witness is an accomplice. ***Id***.; ***see also Commonwealth v. Spence***, 534 Pa. 233, 247-48, 627 A.2d 1176, 1183 (1993). Such a jury question is present when the witness could be indicted for the crime for which the accused is charged. ***Commonwealth v. Sisak***, 436 Pa. 262, 268, 259 A.2d 428, 431 (1969). A person may be indicted as an accomplice where the evidence would establish that he "knowingly and voluntarily cooperate[d] with or aid[ed] another in the commission of a crime" with the intent to assist the principal. ***Id***. at 268 & n. 4, 259 A.2d at 431 & n. 4 (citations omitted). ***See generally*** 18 Pa.C.S. § 306(c)(1) (setting forth the statutory definition of accomplice).

Commonwealth v. Williams, 732 A.2d 1167, 1181 (Pa. 1999).

Appellant has not highlighted any evidence that could establish a colorable argument that accomplice liability could attach to either Wilson or Vella for the two murders at issue in this case. The evidence did establish that, in the past, Vella had actively participated in other serious crimes with Appellant, as was evident from Vella's own testimony. However, there was no evidence presented that would support any theory of vicarious liability for Vella in the murders of Dean and Alexander.[11]

Wilson testified that Appellant employed him as a lookout in Appellant's drug enterprise at the time these murders occurred. Thus,

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[11] In fact, when Appellant sought Vella's help in getting rid of the rival dealers Dean and Alexander, Vella ultimately refused assistance.

Wilson was arguably an accomplice or co-conspirator in Appellant's drug operation. However, there is no evidence that he solicited Appellant to murder Dean and Alexander, nor is there evidence that he aided, agreed to aid, or attempted to aid Appellant in the commission of that offense. 18 Pa.C.S. § 306(c)(1)(i-ii).

We agree with Appellant that it is immaterial to our analysis that Wilson and Vella were not charged directly or indirectly, as accomplices or co-conspirators, with the murders of Dean and Alexander. However, there must be some evidence that Wilson and/or Vella "could [have] be[en] indicted for the crime for which the accused is charged" to support his claim. ***Williams***, 732 A.2d at 1181. Appellant fails to develop any argument in this regard, and instead offers the novel theory that a corrupt source instruction was required because their participation in other criminal activities with Appellant gave Wilson and Vella "motivation to cast blame at Appellant and away from themselves – the very reasons for the corrupt source charge." Appellant's Brief, at 43. Appellant fails to cite any controlling or even persuasive legal authority to support this novel claim, and "[c]ounsel cannot be faulted for failing to advance a novel legal theory which has never been accepted by the pertinent courts." ***Commonwealth v. Jones***, 811 A.2d 994, 1005 (Pa. 2002). Accordingly, we conclude that Appellant's corrupt source related IAC claims, targeted at both trial and direct appellate counsel, lack arguable merit.

Appellant's next IAC claim asserts that trial counsel rendered IAC in failing to request, or object to the absence of, a jury instruction cautioning the jury regarding Wilson's testimony because Wilson was "an admitted chronic and acute crack cocaine addict." Appellant's Brief, at 44. Appellant claims that an instruction was required because Wilson's drug abuse may have affected "his powers of observation on the day of the incident or his powers of memory at the time of trial." ***Id***. To support his argument, Appellant cites authorities that have held evidence of drug use admissible for the purpose of impeaching a witness's powers of observation and/or memory.[12] Appellant claims that trial counsel was ineffective "in failing to request an appropriate instruction that conveyed these points." ***Id***.

"When evaluating jury instructions, this Court must consider whether the instructions as a whole were prejudicial." ***Commonwealth v. Carson***, 913 A.2d 220, 255 (Pa. 2006). "A trial court is not required to use any particular jury instructions, or particular forms of expression, so long as those instructions clearly and accurately characterize relevant law." ***Id***.

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[12] "Questions pertaining to the use of drugs or alcohol are proper when asked for the purpose of attacking (the) credibility of (a) witness by showing at the time of the event to which he testified his powers of observation and memory were impaired so that his recollection and account of the experience might be inaccurate." ***Commonwealth v. Johnson***, 436 A.2d 645, 654 (Pa. Super. 1981) (quoting ***Commonwealth v. Duffy***, 353 A.2d 50, 57 (Pa. Super. 1975)).

Appellant suggests that trial "counsel should have requested a corollary to the federal standard jury instruction which cautions the jury to examine 'with greater scrutiny' testimony from a drug addict[.]" Appellant's Brief, at 44.[13] Appellant contends that because trial counsel put forward the defense theory that Wilson was unbelievable because of his drug abuse, "he should have requested that the jury be instructed on it." ***Id***. at 45.

The PCRA court concluded that Appellant was not prejudiced because the trial court instructed the jury on the issue of credibility as follows:

> Think about whether the person was accurate in his or her own memory and recollection of events. Think about whether the witness had the ability or the opportunity to actually acquire the knowledge or to make the observation of matters concerning that which the person testified to.

PCO, 7/25/12, at 10 (quoting N.T., 9/11/03, at 19). The Commonwealth also notes that the jury was instructed to "make the decision whether that witness was truthful or accurate in all or in part or not at all." Commonwealth's Brief, at 43 (quoting N.T., 9/11/03, at 15).

A review of the federal instruction suggested by Appellant reveals that the primary difference between that instruction and the general instructions given at trial in this case, as noted above, are that the federal instruction requires that the jury view an addict's testimony with greater scrutiny. However, Appellant fails to cite any compelling or persuasive legal authority

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[13] ***See*** Modern Federal Jury Instructions-Criminal P 7.01 ("Witness Using or Addicted to Drugs").

that would suggest greater scrutiny of drug addicts is required, *or even allowed,* under Pennsylvania Law. Certainly, as noted by Appellant, evidence of drug abuse is admissible to impeach a witness regarding their ability to observe accurately, or remember correctly, events that are pertinent to the trial. However, it does not logically follow that it is incumbent upon the trial court to require greater scrutiny, by instruction, of the drug addict's testimony above and beyond the natural inferences that flow from the impeachment evidence regarding drug use.

To the extent that Appellant is suggesting we adopt such a standard, we decline to do so. Appellant fails to offer any basis on which to conclude that a jury is somehow incapable of properly evaluating the weight of evidence of drug abuse as it pertains to a witness's ability to observe in the first instance, and recollect at trial. Nevertheless, even if we were to adopt such a standard, it would not provide Appellant with relief. ***See Jones***, 811 A.2d at 1005 ("[c]ounsel cannot be faulted for failing to advance a novel legal theory which has never been accepted by the pertinent courts."). Accordingly, we conclude that Appellant's claim lacks arguable merit.

Prior Bad Acts Evidence

Appellant next claims that his direct appellate counsel provided IAC by failing to preserve, "as a distinct violation of the United States Constitution the claim that the trial court erred in admitting significant 'other crimes' evidence whose prejudicial impact substantially outweighed its probative value." Appellant's Brief, at 46. Trial counsel filed a motion *in limine*

seeking to prevent the Commonwealth from introducing evidence of numerous prior bad acts/crimes in Appellant's trial. The motion was denied. At multiple points during the course of the trial, evidence of prior bad acts/crimes was admitted over Appellant's objection, and Appellant argued on direct appeal that the trial court abused its discretion in doing so. Appellant now claims that direct appellate counsel provided IAC because he did not assert that the admission of such evidence violated his federal due process rights. Appellant's Brief, at 46. The PCRA court dismissed Appellant's claim for having been previously litigated. We disagree with the PCRA court that Appellant's claim was previously litigated for the same reasons we set forth above with respect to Appellant's other derivative IAC claim, and therefore we will address the merits of Appellant's prior bad acts IAC claim.

On direct appeal, this Court reviewed the admissibility of the evidence of prior bad acts/crimes, concluding that the evidence was admissible under various exceptions set forth in Pa.R.E. 404(b).[14,15] We did not consider

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[14] **(b) Other crimes, wrongs, or acts.**

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.
>
> (2) Evidence of other crimes, wrongs, or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

(Footnote Continued Next Page)

whether the probative value of the evidence outweighed its potential for prejudice, which is the core issue at the heart of Appellant's federal due process claim, couched now in terms of Appellant's derivative IAC claim. Nevertheless, for the reasons that follow, we conclude that Appellant cannot establish the prejudice prong of his IAC claim. Appellant was not prejudiced by direct appellate counsel's failure to raise a federal due process claim (which would apply the same standard set forth in Pa.R.E. 404(b)(3)), because we conclude that the probative value of the admitted evidence did not outweigh its potential for prejudice.

Appellant complains of the following evidence that was admitted at trial:

(Footnote Continued) ––––––––––––––––––––––

> (3) Evidence of other crimes, wrongs, or acts proffered under subsection (b)(2) of this rule may be admitted in a criminal case only upon a showing that the probative value of the evidence outweighs its potential for prejudice.

Pa.R.E. 404(b).

[15] Evidence of Appellant's links to organized crime, including evidence of prior crimes committed by Appellant, were admitted for the purpose of establishing Appellant's identity as the shooter. Vella testified regarding Appellant's jailhouse admissions, and also regarding his prior criminal escapades with Appellant. That testimony established that Appellant had been observed using a fake Sunni beard, while committing crimes with Vella, to conceal his identity. Because witnesses testified that the shooter in this case wore a similar beard, the evidence admitted helped to establish Appellant's identity as the shooter. Evidence pertaining to Appellant's criminal drug operation was admitted to establish Appellant's motive. Both Vella's and Wilson's testimony established that Appellant shot the victims because they were encroaching on his drug territory.

> [T]he Commonwealth introduced evidence that Appellant was a drug dealer [N.T., 9/3/03, 33-35]; that Vella was Joey Merlino's driver and bodyguard and that Merlino was a "mob guy" and the boss of La Cosa Nostra [N.T., 9/2/03, 22; N.T., 9/5/03, 51-52]; that Appellant and Vella "used to do jobs together" [N.T. 9/5/03, 59-60]; that these "jobs" included a 1999 attempted ambush murder of a mobster named Ray-Ray Cisco and a 1999 strong-arm robbery in Mt. Airy [N.T., 9/5/03, 138-39]; that when arrested Appellant was at a restaurant frequented and owned by mobsters [N.T., 9/8/03, 69-70]; and that Vella, Merlino, Ligambi and others with whom Appellant associated were "mob guys" [N.T., 9/8/03, 109, 130].

Appellant's Brief, at 46 (format of citations to record revised).

First, the evidence that Appellant was a drug dealer was admitted to demonstrate motive. ***Commonwealth v. Hall***, 565 A.2d 144, 149 (Pa. 1989) (evidence of past drug dealings admissible to demonstrate motive for murder). This evidence was highly probative because other evidence established that the victims were also drug dealers. Wilson testified that he would direct potential drug customers to the victims when Appellant's drug distribution facility ran dry. Wilson said Appellant was upset with this activity, and that issue was part of the argument that they had just prior to the shooting. Wilson then observed Appellant shooting the victims immediately after the argument.

Motive, however, was not the only basis on which this evidence could have been found to be admissible. The evidence was essential in establishing the chain of events leading to the victims' murders. ***See Commonwealth v. Powell***, 956 A.2d 406, 419 (Pa. 2008) (prior bad acts evidence "may also be admitted where the acts were part of a chain or

sequence of events that formed the history of the case and were part of its natural development."). We conclude that the highly probative nature of this evidence outweighed its potential for undue prejudice. Its use as evidence of motive was not a tangential issue to the case; its relevance was direct and it was essential to describe the circumstances surrounding the shooting. Certainly, its potential prejudicial value as propensity evidence was significant; however, "[w]here the evidence is relevant … 'the mere fact that testimony of another crime may be prejudicial will not prevent its introduction into evidence.'" ***Commonwealth v. John***, 596 A.2d 834, 836 (Pa. Super. 1991) (quoting ***Hall***, 565 A.2d at 149). Furthermore, the prejudicial effect of this evidence was mitigated by the issuance of a cautionary instruction that stated "[i]f you find this defendant guilty, it must be because you are convinced by the evidence in this case that he committed the crime charged and not because you believe that he somehow improperly disguised himself or improperly committed other bad acts." TCO, 5/9/06, at 8 (quoting N.T., 9/11/03, 27).

Evidence of Vella's prior criminal conduct was probative because it established Vella's relationship with Appellant, which was critical in establishing Vella's credibility in this matter. The evidence established that Vella had worked in prior criminal operations with Appellant and therefore had the opportunity to observe Appellant wearing a Sunni beard *while committing other crimes*. It also explained the reason Appellant would have revealed incriminating information to Vella in prison and, it helped to

establish Appellant's motive, as Appellant had sought Vella's help in getting rid of the victims several months before the shooting.

Evidence of Vella's criminal activities, however, did not prejudice Appellant at all. In fact, Vella's criminality was one of the primary tools the defense used to cross-examine Vella and call into question his testimony. Indeed, in the context of this case, it would be extremely unlikely that Vella's criminality would not have been raised by the defense even if the Commonwealth had not introduced it in the first instance. Accordingly, we conclude that probative value of that evidence substantially outweighed its potential to prejudice Appellant.

Vella's testimony regarding Appellant's specific prior bad acts was probative because it was essential in demonstrating Appellant's identity as the shooter. While highly prejudicial, the fruit of that evidence was the establishment of Appellant's use of a particular form of disguise while conducting criminal activities, a highly probative and critical piece of evidence in this case. The cautionary instruction also served, in part, to mitigate any resultant prejudice. In light of the specific circumstances of this case, particularly, the high probative value of this otherwise highly prejudicial evidence, we conclude that its probative value narrowly outweighed its potential for prejudicial effect.

The evidence that police arrested Appellant at a known mob hangout was not exceptionally probative, but it was also minimally prejudicial, particularly in light of the other evidence admitted in this case. Similarly,

the identification of Vella and his associates as "mob guys" was minimally prejudicial, because it was not Appellant being identified as a member of the mob. Indeed, as we noted earlier, Vella's connections with the mafia largely weighed against his credibility, serving to bolster Appellant's case that Vella was lying about Appellant's jailhouse confession. Accordingly, the potential for prejudice did not outweigh the probative value of that evidence.

In summation, we conclude that Appellant was not prejudiced by direct appellate counsel's failure to raise these issues separately, either characterized as a federal due process claim or pursuant to Pa.R.E. 404(b)(3). Under either characterization, the pertinent question would be whether the evidence was so prejudicial as to outweigh its probative value. Because we conclude that none of the evidence's potential for prejudice outweighed its probative value, we conclude that the prejudice that stemmed from direct appellate counsel's failure to raise those issues did not constitute outcome-determinative prejudice for purposes of the third prong of the IAC test. Consequently, Appellant's claim must fail.

Previously Litigated Improper Bolstering Claim

Appellant also posits that direct appellate counsel provided IAC with respect to the improper bolstering claim he raised on direct appeal, wherein he argued that the prosecution had improperly bolstered the testimony of Vella by the introduction of evidence that Vella's testimony in the case of Anthony Persiano had led Persiano to enter a guilty plea. The claim was dismissed on direct appeal because the defense first raised the issue by

cross-examining Vella on the Persiano matter. Thus, the trial court permitted the Commonwealth to raise details concerning the Persiano case as fair response to the defense's calling into question Vella's truthfulness in that matter. Appellant again asserts that, though direct appellate counsel properly identified the issue on direct appeal, counsel failed to federalize the claim. The PCRA court determined that this claim had been previously litigated.

An IAC claim is distinct for purposes of the PCRA statute's bar on previously litigated claims. ***Collins***, 888 A.2d at 570. The ***Collins*** court noted, however, that "[u]ltimately, the [IAC] claim may fail on the arguable merit or prejudice prong for the reasons discussed on direct appeal, [even though] a Sixth Amendment claim raises a distinct issue for purposes of the PCRA and must be treated as such." ***Id***. at 573.

Appellant fails to assert how raising the improper witness-bolstering claim under federal constitutional grounds would have caused the claim to be subject to a different standard of review. The evidence was only admitted as rebuttal to the defense's cross-examination of Vella over his truthfulness in testifying in the Persiano case. Appellant fails to assert how federalization of the bolstering claim could have overcome the limited use of that evidence as rebuttal and, in fact, he does not even acknowledge the rebuttal issue. Appellant does not cite any federal cases that would suggest that evidence of truthfulness in another case, even if generally prohibited as improper bolstering, cannot be used as rebuttal evidence when the defense

itself calls into question the witness's truthfulness in the other case. Accordingly, Appellant cannot demonstrate the arguable merit prong of his Improper Bolstering related IAC claim.

Order affirmed.