

**[J-140-02]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	362 Capital Appeal Docket
	:	
Appellee	:	Appeal from the Order dated November 8,
v.	:	2001 denying post-conviction relief, at No.
	:	1134-88, in the Court of Common Pleas of
ROBERT FISHER,	:	Montgomery County
	:	
Appellant	:	SUBMITTED: July 8, 2002

**OPINION ANNOUNCING THE JUDGMENT OF THE COURT**

**MR. CHIEF JUSTICE ZAPPALA**

**DECIDED: December 31, 2002**

The present appeal challenges the denial of relief pursuant to Appellant's PCRA<sup>1</sup> petition.

In 1980, Appellant, Robert Fisher, murdered his girlfriend, Linda Rowden, because she gave statements to the police implicating Fisher in the drug-related killing of Nigel Anderson. Appellant shot Rowden in public, in front of eyewitnesses, then drove to the apartment of a friend and told her he had shot Rowden because she was cooperating with the police in their investigation of Anderson's murder. Appellant fled to New York where he was apprehended seven years later, extradited to Pennsylvania, tried for Rowden's murder, convicted of first-degree murder, and sentenced to death in 1988. On direct appeal, this Court vacated the conviction and remanded the matter for a new trial, due to improper evidence introduced in the first trial. Commonwealth v. Fisher, 591 A.2d 710 (Pa. 1991) (Fisher I).

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<sup>1</sup> Post Conviction Relief Act. 42 Pa.C.S. §§ 9541-9546.

Appellant was retried in 1991, again convicted of first-degree murder, and again sentenced to death. On direct appeal, this Court affirmed the conviction, but held that Appellant was entitled to a new sentencing hearing because of improper admission of victim impact evidence. Commonwealth v. Fisher, 681 A.2d 130 (Pa. 1996) (Fisher II).

Following a third sentencing hearing, Appellant was again sentenced to death. On appeal, this Court affirmed the death sentence. Commonwealth v. Fisher, 741 A.2d 1234 (Pa. 1999) (Fisher III).

Appellant then filed a petition for post-conviction collateral relief. Counsel was appointed and filed an amended petition. Following a hearing, the PCRA court denied relief. This is the appeal from the denial of PCRA relief.<sup>2</sup>

Appellant asserts that all prior counsel were ineffective. In order to demonstrate entitlement to relief for a claim of ineffectiveness of counsel, Appellant would have to demonstrate: (1) that there is merit to the underlying claim; (2) that counsel had no reasonable basis for his or her conduct; and (3) that Appellant was prejudiced by counsel's performance, i.e., that there is a reasonable probability that, but for the act or omission challenged, the outcome of the proceeding would have been different. Commonwealth v. Meadows, 787 A.2d 312, 319 (Pa. 2001). Moreover, the PCRA requires that the allegation of error has not been previously litigated or waived. 42 Pa.C.S. § 9543(a)(3). These standards govern our review of the issues raised by Appellant.

Appellant raises fourteen issues. They are:

1. "Whether the learned trial judge erred by denying Fisher's amended petition for post conviction relief?"

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<sup>2</sup> This Court directly reviews the denial of post-conviction relief in death penalty cases. 42 Pa.C.S. § 9546(d).

2. "Whether Appellant was denied a full and fair opportunity to develop and litigate his claims that prior counsel was ineffective, and was denied his state and federal constitutional rights to due process, where the trial court denied Appellant funds for investigation and mental health experts necessary to demonstrate counsel's ineffectiveness?"
3. "Whether the learned trial judge erred by not explaining to the jury that mitigating circumstances need not be connected to the crime itself and whether appellate counsel was ineffective for failing to raise and litigate this claim on direct appeal?"
4. "Whether Fisher was denied his state and federal constitutional rights to present all mitigation evidence to the jury when the trial judge precluded Fisher from testifying that he did not commit the crime and whether appellate counsel was ineffective for failing to raise and litigate this claim on direct appeal?"
5. "Whether Fisher was denied his state and federal constitutional rights to confrontation and due process during both the guilt and penalty phase, when the trial judge permitted hearsay allegations from the deceased regarding alleged assaults on the deceased by Fisher and whether appellate counsel was ineffective for failing to raise and litigate this claim on direct appeal?"
6. "Whether Fisher was denied his state and federal constitutional rights to due process by the prosecutor's numerous improper comments made during the closing arguments of the guilt phase and penalty phase?"
7. "Whether Fisher was denied his state and federal constitutional rights to due process and effective assistance of counsel where counsel failed to object or seek remedial actions following the prosecutor's numerous improper comments made during his closing arguments and whether appellate counsel was ineffective for failing to raise and litigate this claim on direct appeal?"
8. "Whether Fisher was denied his state and federal constitutional rights to due process by the trial judge's erroneous instructions on 'reasonable doubt' and whether all prior counsel were ineffective for failing to raise and litigate this claim at all prior stages of these proceedings?"
9. "Whether Fisher was denied his state and federal constitutional rights to effective assistance of counsel where his attorney failed to object or otherwise challenge the court's failure to give an appropriate cautionary instruction on identification testimony and whether appellate counsel was ineffective for failing to raise and litigate this claim on direct appeal?"

10. "Whether Fisher was denied his state and federal constitutional rights to effective assistance of counsel where his attorney failed to investigate, develop, present and argue mitigating circumstances and whether appellate counsel was ineffective for failing to raise and litigate this claim on direct appeal?"
11. "Whether Fisher was denied his state and federal constitutional rights to due process by the trial court's failure to instruct the jury on the defense of intoxication and counsel's failure to request such an instruction or object to its omission denied Fisher effective assistance of counsel and whether appellate counsel was ineffective for failing to raise and litigate this claim on direct appeal?"
12. "Whether Fisher was denied his state and federal constitutional rights to due process and a fair trial when the court failed to dismiss jurors who were exposed to outside information regarding his case and whether all prior counsel were ineffective for failing to raise and litigate this claim at all prior stages of these proceedings?"
13. "Whether Fisher was entitled to post conviction relief from his conviction and sentence because of the cumulative effect of the errors contained in this petition and litigated in prior proceedings?"
14. "Whether all prior counsel were ineffective for failing to raise the issues presented in Fisher's amended petition for post conviction relief at all prior stages of this case?"

We will consider these issues seriatim.

First, Appellant claims the PCRA court erred by denying his petition for post-conviction relief. As Appellant recognizes, this is the ultimate issue of this appeal, and depends on our resolution of the remaining thirteen issues.

Next, Appellant claims he was denied a full and fair opportunity to develop and litigate his claims that prior counsel was ineffective, and was denied his state and federal constitutional rights to due process, where the trial court denied him funds for investigation and mental health experts necessary to demonstrate counsel's ineffectiveness. He relies in part on Ake v. Oklahoma, 470 U.S. 68, 70 (1985) (stating that when a capital defendant's

mental health is at issue, "the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense.").

Appellant's reliance on Ake is misplaced. The Court in Ake held that indigent defendants are entitled to cost-free access to psychiatric experts only in very limited circumstances where the defendant's sanity at the time of the offense was a significant factor at trial. In Ake, there was a defense of insanity, not, as Appellant is arguing, questions of mitigation relevant to a sentencing determination. In fact, Appellant is not even arguing he should have received public funds to engage a neuropsychological expert to aid his defense during the penalty phase of trial—he claims it was error to deny public funds to engage a neuropsychological expert to aid him in a collateral proceeding to establish a claim of ineffective assistance of counsel.

This Court recently held that "a capital defendant is entitled to state-paid psychiatric assistance only where the assistance is needed to rebut the prosecutor's argument of future dangerousness, not to prove mitigating circumstances." Commonwealth v. Miller, 746 A.2d 592, 600 (Pa. 2001)<sup>3</sup> (citing Commonwealth v. Christy, 656 A.2d 877, 883 (Pa. 1995)). The Miller Court went on to say: "Here, future dangerousness was not an issue; therefore, appellant was not entitled to psychiatric assistance to prove the mental health mitigating circumstances. Nevertheless, appellant was provided with psychiatric assistance, and two mental health experts testified on his behalf during the penalty phase of his trial." Miller, 746 A.2d at 600. As in Miller, Appellant was provided with state-paid psychiatric assistance though future dangerousness was not an issue. See Fisher III, 741 A.2d at 1245. Unlike Miller, the psychiatrists selected by Appellant concluded that his

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<sup>3</sup> But see Miller, (Saylor, J., concurring) ("It might be an abuse of discretion for a trial court in a capital case to deny psychiatric funding in a broader array of circumstances, to insure that "an indigent defendant is provided core resources necessary to present a full and fair defense in all phases of capital litigation.").

capacity was not diminished on the day of the murder, and thus their reports were not helpful to his defense. Appellant was then provided funds to engage a third psychiatrist, who concluded that Appellant did not suffer from post traumatic stress syndrome or disorder. Now Appellant is urging that it was error to deny additional public funds to enable him to seek other psychiatric experts to support a claim of ineffective assistance of counsel in a collateral attack on his sentence. This claim is far too attenuated to have any credibility. As this Court stated recently, "a defendant is not entitled to unlimited court-appointed experts until he finds one that renders the opinion he desires." Commonwealth v. Chester, 733 A.2d 1242, 1252 (Pa. 1999) (citing Commonwealth v. Faulkner, 595 A.2d 28, 37 (Pa. 1991)).

Appellant next argues that the trial judge erred by failing to explain to the jury that mitigating circumstances need not be connected to the crime itself and that appellate counsel was ineffective for failing to raise and litigate this claim on direct appeal. The mitigation presented at Appellant's sentencing hearing consisted largely of his military experience, wounds received in battle in Vietnam, and his record in prison since his incarceration on these charges. Although the jury had been instructed on the mitigating circumstance of 42 Pa.C.S. § 9711(e)(8), the jury asked the Court the following question during deliberations: "Do mitigating factors have to correlate with [the] crime or can they have no correlation at all?" N.T., 6/24/97 at 145, 147. In response, the judge re-read the statutory language. When defense counsel objected, the judge responded: "I've given the instruction, which gives the opportunity to decide that it goes with the offense or it doesn't go with the offense," id. at 150, essentially allowing jurors freedom in weighing mitigating evidence whether or not it was connected to the crime.<sup>4</sup>

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<sup>4</sup> Imposition of the death penalty requires a unanimous jury. Aggravating circumstances must be found unanimously by the entire jury. Commonwealth v. Jermyn, 709 A.2d 849 (continued...)

The United States Supreme Court reviewed 42 Pa.C.S. § 9711(e)(8) in Blystone v. Pennsylvania, 494 U.S. 299, 308 (1990), and held that the statutory language satisfies the dictates of the Eighth Amendment. Section 9711(e)(8) states that mitigating circumstances shall include: "Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense."

It was not erroneous to repeat this language in response to the jury's question. It is within the sound discretion of the judge to determine the scope of additional instructions to be given to a jury which has requested information so long as the additional charge is a correct statement of the law. Commonwealth v. Perkins, 373 A.2d 1076, 1084 (Pa. 1977); see also Commonwealth v. Chambers, 685 A.2d 96, 106 (Pa. 1996).

Appellant's fourth claim is that he was denied his state and federal constitutional rights to present all mitigation evidence to the jury when the trial judge precluded him from testifying he did not commit the crime and that appellate counsel was ineffective for failing to raise and litigate this claim on direct appeal. Immediately before the killing, an eyewitness who had known Appellant for eleven years saw him riding with Rowden in her car. The other passenger in the car saw Appellant shoot the victim. Immediately after the killing, as he dumped Rowden's body on the sidewalk, Appellant explained to the bystanders that his "wife," the victim, had just shot herself, a claim conclusively disproved by forensic evidence. Then Appellant drove to the home of a friend and told her he had just shot Rowden and why. Appellant subsequently fled the jurisdiction and eluded capture for seven years.

The PCRA court denied relief because this Court has held that a capital defendant has no constitutional right to testify to his innocence at the penalty phase of trial, citing

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(...continued)

(Pa. 1998). Mitigating circumstances, on the other hand, may be found individually and personally by single jurors. Id.; Commonwealth v. Begley, 780 A.2d 605, 644 (Pa. 2001).

Commonwealth v. Stokes, 615 A.2d 704 (Pa. 1992). Appellant attempts to distinguish Stokes on the basis that the Stokes penalty-phase jury was the same body as the guilt-phase jury, whereas Appellant's penalty-phase jury was a new jury, not the same one which had decided his guilt. Nevertheless, the reasoning of Stokes applies in Appellant's circumstance as well: "testimony regarding appellant's guilt was no longer relevant at the sentencing phase. The appellant's testimony was properly limited to a consideration of the appropriate aggravating and mitigating circumstances." Stokes, 616 A.2d at 715.

Appellant argues that Stokes is undermined by Commonwealth v. Meadows, 787 A.2d 312 (Pa. 2001), whether or not the same jury is determining both guilt and penalty. Meadows referred to the concept of "residual doubt," whereby a jury which had any lingering or residual doubt about a defendant's guilt might minimize the damage by not sending him to his death. Meadows, 787 A.2d at 321. Meadows, however, did not undermine Stokes. Meadows held that trial counsel was not ineffective merely because he pursued a "residual doubt" strategy during the penalty phase rather than a different, inconsistent, mutually exclusive penalty-phase strategy. Meadows does not stand for the proposition that penalty-phase counsel must employ a "residual doubt" strategy, nor does it suggest that counsel might be deemed ineffective for failing to do so. We have said repeatedly that a petitioner is not entitled to relief because counsel's trial strategy was unsuccessful; when the course chosen was reasonable, counsel cannot be faulted for failing to pursue a different path. Chester, 733 A.2d at 1252-53. Speculation by hindsight that a different strategy might possibly have been successful is not the test which establishes ineffectiveness of counsel.

Appellant's next argument is that he was denied his state and federal constitutional rights to confrontation and due process during both the guilt and penalty phase, when the trial judge permitted hearsay allegations from the deceased regarding alleged assaults on



the deceased by Appellant and that appellate counsel was ineffective for failing to raise and litigate this claim on direct appeal. There is no merit to this contention.

This argument was litigated and decided in both Fisher II and Fisher III, and thus runs afoul of 42 Pa.C.S. § 9543(a)(3), which prohibits PCRA review of issues previously litigated. In Fisher II, this Court held that it was proper to allow introduction of the victim's hearsay statements to the police two days before her murder that Appellant had been assaulting and harassing her because she was cooperating with the police in connection with the Nigel Anderson murder investigation. The statements were not offered to prove the truth of the matter asserted by the declarant, but to establish her belief that this was the reason for Appellant's harassment. Thus the statements were admissible to establish the victim's state of mind, and the trial court admitted the statements with a cautionary instruction to that effect. The statements supported the Commonwealth's theory that the motive for Appellant's crime was retaliation for the victim's cooperation with the police or prevention of future cooperation. Fisher II, 681 A.2d at 138-39; Fisher III, 741 A.2d at 1242. As evidence of motive, the testimony was clearly relevant and admissible. Commonwealth v. Griffin, 515 A.2d 865 (Pa. 1986). An appellant cannot obtain post-conviction review of claims previously litigated on appeal by alleging ineffective assistance of prior counsel to support previously litigated claims. Commonwealth v. Bracey, 795 A.2d 935, 939 n.3 (Pa. 2001); Commonwealth v. Porter, 728 A.2d 890, 896 (Pa. 1999); Commonwealth v. Peterkin, 722 A.2d 638 (Pa. 1998); Commonwealth v. Albrecht, 720 A.2d 693, 703 (Pa. 1998).

The next issue is whether Appellant was denied his state and federal constitutional rights to due process by the prosecutor's numerous allegedly improper comments made during the closing arguments of the guilt phase and penalty phase and whether trial and appellate counsel were ineffective for failing to object or seek remedial actions and for failing to raise and litigate this claim on direct appeal.

The "numerous improper comments" alleged by Appellant are these. First, the prosecutor allegedly vouched for the credibility of Commonwealth witnesses and expressed his personal opinion about the evidence. N.T., 6/24/97, at 80; N.T., 8/27/91, at 146. Second, he allegedly expressed his personal opinion that the death penalty was required. N.T., 6/27/97, at 65. Third, he allegedly misled the jury that mitigating evidence must be connected to the crime and that mitigating circumstances had to exist at the time of the crime. N.T., 6/24/97, at 65, 80, 83-86. Fourth, he allegedly expressed his opinion that Appellant was just trying to fool the jury and wrongly told the jury that mercy and sympathy could play no part in their deliberations. N.T., 6/24/97, at 65, 82-85. Fifth, he allegedly made numerous improper references to the murder of Nigel Anderson. N.T., 6/24/97, at 66-70. Finally, the prosecutor allegedly tried to bolster the credibility of Commonwealth witnesses by referring to prior consistent statements, though such prior testimony had not been admitted into evidence. N.T., 6/24/97, at 80-81.

Comments by a prosecutor do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so they could not weigh the evidence objectively and render a true verdict. Commonwealth v. Hackett, 735 A.2d 688, 696 (Pa. 1999). The alleged erroneous remarks must be examined in light of the case as a whole and in the context of the aggravating and mitigating circumstances.

Appellant's first allegation is that the prosecutor improperly vouched for the credibility of prosecution witnesses. When read in context, however, the remarks were not improper. The prosecutor was reviewing the testimony of several prosecution witnesses after Appellant's counsel had attacked their testimony, in an effort to counter the argument of defense counsel. Second, the prosecutor's argument that the death penalty was required was not a statement of personal opinion but argument that the Commonwealth had proved an aggravating factor and Appellant had proved no mitigating factor, in which case

imposition of the death penalty is statutorily required. See 42 Pa.C.S. § 9711(c)(1)(iv). "At the penalty phase, where the presumption of innocence is no longer applicable, the prosecutor is afforded even greater latitude." Hackett, 735 A.2d at 696-97. Third, as to the prosecutor's alleged attempt to mislead the jury that mitigating circumstances had to exist at the time of the crime, the argument cannot be read as an attempt to mislead the jury, but only as disparaging, yet fair, comment on Appellant's presentation of his good prison behavior record as evidence in mitigation. Fourth, the prosecutor did not tell the jury that mercy and sympathy could not be considered, but only that a defendant was not entitled to an instruction that the jury may consider feelings of sympathy and mercy, which was a correct statement of the law. Inasmuch as the court properly instructed the jury as to 42 Pa.C.S. § 9711(e)(8), there was no error. Finally, the references to Nigel Anderson were based on the evidence in this case and were in no way improper.

Next, Appellant argues that he was denied his state and federal constitutional rights to due process by the trial judge's erroneous instructions on reasonable doubt and that all prior counsel were ineffective for failing to raise and litigate this claim at all prior stages of these proceedings. He objects specifically to two examples given by the trial judge to express the concept of reasonable doubt. First, the trial judge explained that prior to deliberations, a juror has reasonable doubt because he has not yet had a chance to deliberate. Once a juror has heard the evidence and deliberated, he may go beyond reasonable doubt and reach a verdict. Second, the judge used the example of a parent weighing the advantages of placing a child in a private school rather than public school. The judge described the point at which the parent reaches a decision as the point where he overcomes reasonable doubt.

A jury charge must be read as a whole, and will not be reviewed by taking isolated comments out of context. Commonwealth v. Gibson, 720 A.2d 473, 481 (Pa. 1998); Commonwealth v. Smith, 694 A.2d 1086, 1092-93 (Pa. 1997).

The court's charge was as follows:

Although the Commonwealth has the burden of proving the Defendant guilty beyond a reasonable doubt as to each and every charge, this does not mean that the Commonwealth must prove it beyond all doubt or to a mathematical certainty or to a hundred percent or beyond a peradventure of doubt or any other untoward and impossible burden, nor must the Commonwealth demonstrate the complete impossibility of innocence.

Now, what is reasonable doubt? A reasonable doubt, a word that I have used throughout this charge, is a doubt that would cause a reasonably careful and sensible person to pause and hesitate before acting upon a matter of importance in his or her own affairs. Let me repeat it. A reasonable doubt is a doubt that would cause a reasonably careful and sensible person to hesitate before acting upon a matter of importance in his or her own affairs.

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Let me put it in a civil context for you. Suppose you and your wife, you and your husband were arguing back and forth whether or not to send a child of yours to private school, sending your child to private school at considerable havoc to your personal budget, and if you did send this child to a private school, it would be a considerable inconvenience to you and sacrifice. And you were arguing back and forth as to the pluses of going to private school, small classes, individual attention, ability to participate in all of the activities and maybe the greater demands and more personal instructions versus a wider distribution of persons from all areas of the community versus the better equipment that may be provided by the public tax dollars and, perhaps, the ability to get rubbed up a little bit with all levels of society versus not so. And suppose, after discussing this with your wife or your husband, as the case may be, after two weeks, you really didn't make any determination whether you wanted to send the kid to private school or not. But suppose you continued on this discourse and you talked about it for another two weeks. And suppose after two weeks had transpired, you came to the firm conclusion that it was more advantageous to send this child to private school, even though it was going to cause some havoc to your personal budget but that the advantages outweighed the disadvantages and you were firmly committed to send this child to private school. It was at this point in this very important decision in your own private lives that, after great logic, reasoning and rationale and everything else being applied to this particular problem, that you came to the firm conclusion that you were going to send this child to private school. It would be at that point, after you had come to that firm conclusion, you had done something about it, that you would have gone beyond reasonable doubt.

So, to summarize, you may not find the Defendant guilty based on a mere suspicion of guilt. The Commonwealth has the burden of proving the Defendant guilty beyond a reasonable doubt. If it meets that burden, then the Defendant is no longer presumed to be innocent and you should find him

guilty. On the other hand, if the Commonwealth does not meet its burden, then you should find him not guilty.

The Commonwealth's burden, as I said, is to prove the Defendant's guilt beyond a reasonable doubt, but it does not mean that the Commonwealth must prove the utter impossibility of the Defendant's innocence or the Defendant's guilt to a mathematical certainty, nor must it prove the Defendant's guilt beyond all doubt. The Commonwealth's burden to prove the Defendant guilty beyond a reasonable doubt does not mean that the Commonwealth must prove the Defendant's guilt to a moral certainty.

A reasonable doubt can not be fancied or conjured up in the minds of the jury, as I said, to escape an unpleasant duty. It must be an honest doubt arising from the evidence, itself, the kind of doubt that would restrain a reasonable man from acting in a matter of importance to himself or herself, a reasonable woman.

N.T., 8/28/91, at 20-25. Viewing the lengthy charge on reasonable doubt as a whole, it clearly and accurately stated the law, and there was no error. Counsel, therefore, cannot be deemed ineffective for failing to object or to raise this issue in prior proceedings.

Appellant's ninth claim is that he was denied his state and federal constitutional rights to effective assistance of counsel where his attorney failed to object or otherwise challenge the court's failure to give an appropriate cautionary instruction on identification testimony and that appellate counsel was ineffective for failing to raise and litigate this claim on direct appeal. He claims that Commonwealth identification witness Frieda Sambrick failed to identify Appellant at a line-up. Trial counsel attacked her in-court identification, but did not request a Kloiber instruction<sup>5</sup> to the effect that her identification testimony must be received with caution.

This issue has been fully and finally litigated. In Fisher II, 681 A.2d at 141-42, this Court dealt with Sambrick's identification at length, concluding that her failure to identify Appellant in a pre-trial line-up was not due to lack of recognition but rather to her fear that identifying Appellant, whom she had known for eleven years, would endanger her and her

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<sup>5</sup> Commonwealth v. Kloiber, 106 A.2d 820 (Pa. 1954).

family. "[A] petitioner cannot obtain post-conviction review of claims previously litigated by alleging ineffective assistance of prior counsel and presenting new theories of relief to support previously litigated claims." Bracey, 795 A.2d at 939 n.2; Porter, 728 A.2d at 896.

Next, Appellant claims that he was denied his state and federal constitutional rights to effective assistance of counsel where his attorney failed to investigate, develop, present, and argue mitigating circumstances and that appellate counsel was ineffective for failing to raise and litigate this claim on direct appeal. He alleges that counsel should have investigated, among other things, "Fisher's family relationships, childhood, upbringing, incidences of abuse or neglect, education, injuries, diseases, psychological condition, marital status, etc.," and that failure to do so constituted ineffective assistance. Brief for Appellant at 44. We are not convinced that to meet the minimal constitutional standard of effectiveness, counsel must thoroughly investigate all the specified areas and other unspecified areas, as Appellant argues.

At his third sentencing hearing, Appellant testified at length about his childhood, education, military service, wounds, Purple Heart awarded personally by President Johnson, drug abuse to counter the pain from his military wounds, exemplary work history in prison, and treatment by psychologists and psychiatrists. Counsel requested and received state funds to employ a private investigator to aid his investigation, and counsel personally pursued leads suggested by Appellant. At the evidentiary hearing before the PCRA court, Appellant's counsel testified that Appellant instructed him he did not want any of his family members to testify. Counsel who represented Appellant at his first two sentencing hearings also testified that Appellant told him he did not want his family to testify.

Counsel cannot be deemed ineffective for following his client's instructions. Commonwealth v. Taylor, 718 A.2d 743, 745 (Pa. 1998); Commonwealth v. Sam, 635 A.2d 603, 611-12 (Pa. 1993). Appellant did not present anything at the PCRA evidentiary

hearing which would have produced a different result at his third sentencing hearing. Counsel cannot be faulted for failing to discover or present evidence if Appellant fails to meet the burden of establishing that the evidence exists. Commonwealth v. Morris, 684 A.2d 1037, 1045 (Pa. 1996); Commonwealth v. Pettus, 424 A.2d 1332, 1335 (Pa. 1981). We find no merit in this issue, and counsel cannot be deemed ineffective.

Appellant's next argument is that he was denied his state and federal constitutional rights to due process by the trial court's failure to instruct the jury on the defense of intoxication, and counsel's failure to request such an instruction or object to its omission denied Appellant effective assistance of counsel, and appellate counsel was ineffective for failing to raise and litigate this claim on direct appeal.

The issue of Appellant's intoxication has been fully and finally litigated. In Fisher III, 741 A.2d at 1246-47 (citation omitted), this Court stated:

Finally, Appellant argues that trial counsel was ineffective for failing to present evidence that Appellant's intoxicated state at the time of the murder resulted in his inability to fully appreciate the nature of his acts. We disagree. At the post-trial motion hearing, Appellant testified that he consumed a number of drugs on the day of the murder, including heroin and methamphetamine. The Sentencing Code permits a defendant to prove as a mitigating circumstance that his "capacity . . . to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired." 42 Pa.C.S. § 9711(c)(3).

Despite Appellant's claim that he was in a "drug-induced frenzy," two expert reports solicited by prior defense counsel indicated that Appellant's capacity was not diminished on the day of the murder. Counsel cannot be deemed ineffective for failing to pursue a claim of diminished capacity where the psychiatric records indicate that that theory was unsupported. Moreover, at the post-trial motion hearing, Appellant's counsel testified that Appellant continued to maintain his innocence even during the penalty phase. N.T. 1/20/98 at 29-30. Clearly, presenting evidence regarding Appellant's inability to appreciate the criminality of his conduct would have been inconsistent with Appellant's claim of innocence.

A petitioner cannot obtain post-conviction review of claims previously litigated by alleging ineffective assistance of prior counsel and presenting new theories of relief to support previously litigated claims. Bracey, Porter.

Appellant next claims that he was denied his state and federal constitutional rights to due process and a fair penalty hearing when the court failed to dismiss jurors who were exposed to outside information regarding his case and that all prior counsel were ineffective for failing to raise and litigate this claim at all prior stages of these proceedings. He alleges that a potential juror, Kevin Kulp, discussed outside knowledge of Appellant's case with two other potential jurors, Kristen Murphy and Jennifer Feulner. Kulp was dismissed for cause. Murphy and Feulner were not.

The trial court questioned Murphy and Feulner during voir dire regarding their discussions with Kulp. Murphy described Kulp's remarks about the case, and stated that she would pay no attention to what he said. Asked whether she had formed a fixed opinion about the sentence to be imposed, she answered, "I know nothing about the details. I couldn't form an opinion either way." N.T. Voir Dire, 6/19/97, at 145-48. Feulner, likewise, was questioned about Kulp's influence. She recalled nothing Kulp said specifically, and also said she would be impartial. The test for determining whether a prospective juror should be dismissed for cause is whether he or she is willing and able to eliminate the influence of any knowledge of the case and render a verdict according to the evidence, and this is to be determined on the basis of demeanor as well as the answers to the questions. Commonwealth v. Bridges, 757 A.2d 859, 873 (Pa. 2000). Based on the record in this case, there is no indication that Appellant was denied a fair and impartial jury at his third sentencing.

Appellant argues that he was entitled to post-conviction relief from his conviction and sentence because of the cumulative effect of the errors contained in this petition and litigated in prior proceedings. He cites no Pennsylvania cases to support his proposition of



cumulative ineffectiveness. We find no merit in his argument. Commonwealth v. Rompilla, 721 A.2d 786, 795 (Pa. 1998) (where individual claims of error fail for lack of merit, there could be no cumulative prejudicial effect when there was no harm in the first place).

Appellant's final argument is that all prior counsel were ineffective for failing to raise the issues presented in Fisher's amended petition for post-conviction relief at all prior stages of this case.

This blanket allegation of layered ineffectiveness is necessary to preserve issues for review when they would otherwise be deemed waived pursuant to 42 Pa.C.S. §§ 9543(a)(3) and 9544(b). See Commonwealth v. Miller, 746 A.2d at 598 n.3 (citing Commonwealth v. Chmiel, 639 A.2d 9 (Pa. 1994)). As we have found no merit in the underlying issues or that the claims have been previously litigated, there is no basis for a finding of ineffectiveness. Commonwealth v. Basemore, 744 A.2d 717, 738 (Pa. 2000).

Returning to the first yet ultimate issue stated by Appellant, he claims the PCRA court erred by denying his petition for post-conviction relief. Based on our thorough review of the record and Appellant's arguments, we hold that it was not error to deny post-conviction relief.

Accordingly, the judgment of the PCRA court is affirmed.

Mr. Justice Cappy files a concurring opinion.

Mr. Justice Nigro files a concurring opinion.

Mr. Justice Saylor files a concurring opinion.

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