

PHILADELPHIA COUNTY COMMN PLEAS COURT
CRIMINAL DIVISION

COMMONWEALTH OF)	
PENNSYLVANIA)	
Respondent-Appellee,)	
)	3485 EDA 2016
v.)	51-CR-0008035-2007
)	Non-Capital PCRA
)	First-degree murder
BIN WANG,)	Woods-Skipper, J.
Petitioner-Appellant.)	

Concise Statement of Errors on Appeal

1. Petitioner-Appellant, **Bin Wang**, by and through counsel, **Craig M. Cooley**, respectfully submits his *Concise Statement of Errors on Appeal* for the Court's consideration and adjudication.

CONCISE STATEMENT OF ERRORS ON APPEAL

Claim #1: Trial counsel was ineffective for not expanding the scope of his forensic investigation by consulting with and retaining a crime scene expert or reconstructionist to conduct a holistic examination of all the physical evidence at the scene. Trial counsel did not have a reasonable basis for not expanding the scope of his forensic investigation, especially after Dr. Paul Hoyer clearly informed trial counsel that his "entrance wound" testimony would not prove terribly helpful to the jury because he, *i.e.*, Dr. Hoyer, could not rule out homicide based on the entrance wound alone. Trial counsel's ineffectiveness prejudiced Mr. Wang because had trial counsel consulted with and retained a crime scene expert or reconstructionist, like Brent Turvey, there is a reasonable probability the outcome of Mr. Wang's trial would have been different because the physical evidence supported Mr. Wang's suicide narrative far more than the Commonwealth's homicide narrative. The PCRA record supported these findings. The PCRA court, therefore, erred when it rejected Mr. Wang's trial counsel ineffectiveness claim. U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 9, 23.

Fair Presentation

2. Mr. Wang raised and fairly presented the legal and factual basis of this state and federal trial counsel ineffectiveness claim to the PCRA court in his *2nd Supplemental Amended PCRA Petition*, which undersigned counsel e-filed on May 21, 2016.

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3. Based on trial counsel's pre-trial conversations with Dr. Paul Hoyer, the *scope* of trial counsel's forensic investigation was objectively unreasonable. Dr. Hoyer specifically informed trial counsel that trial counsel's "contact wound" suicide theory was not only weak, it would confuse the jury. In terms of weakness, Dr. Hoyer specifically told trial counsel that the entrance wound's configuration supported trial counsel's suicide narrative, but also the Commonwealth's homicide narrative. Despite Dr. Hoyer's pre-trial advice, trial counsel did not expand the *scope* of his forensic investigation and therefore did not consult with or retain a crime scene expert or reconstructionist to consider and assess, *inter alia*, the fired cartridge casing's location, the bullet strike mark's location, the location and positioning of Sharon Lin's body after the shooting, the bloodstains on the walls to the left of the bed, the knocked over night stand to the left of the bed, and the firearm's location. As Brent Turvey's 35-page affidavit explains, had trial counsel consulted with and retained a reconstructionist like himself, an examination of these items of physical evidence as well as others would have supported Mr. Wang's suicide narrative *far more* than the Commonwealth's homicide narrative.

4. Under state law, success on a trial counsel ineffectiveness claim requires the petitioner to prove, by a preponderance of the evidence, that (1) the claim has arguable merit, (2) trial counsel's action or inaction was not based upon a reasonable trial strategy and (3) petitioner suffered prejudice because of counsel's act or omission. *Commonwealth v. Williams*, 141 A.3d 440, 454 (Pa. 2016).

a. To satisfy the "arguable merit" prong "based upon trial counsel's failure to call an expert witness, the petitioner must prove that an expert witness was willing and available to testify on the subject of the testimony at trial, counsel knew or should have known about the witness and the defendant was prejudiced by the absence of the testimony." *Commonwealth v. Williams*, 141 A.3d at 460; *accord Commonwealth v. Chmiel*, 30 A.3d 1111, 1143 (Pa. 2011); *Commonwealth v. Gibson*, 951 A.2d 1110, 1133 (Pa. 2008). Prejudice in this respect requires the petitioner to "show how the uncalled witnesses' testimony would have been

beneficial under the circumstances of the case.” *Commonwealth v. Sneed*, 45 A.3d 1096, 1109 (Pa. 2012) (quoting *Commonwealth v. Gibson*, 951 A.2d at 1134). Therefore, the petitioner’s burden is to show that testimony provided by the uncalled expert witness or witnesses “would have been helpful to the defense.” *Id.* (quoting *Commonwealth v. Aukey*, 681 A.2d 1305, 1319 (Pa. 1996)).

i. In his 35-page affidavit, Mr. Turvey said his findings, opinions, and analyses could have been presented in 2007 and 2008, either before or during Mr. Wang’s trial.

ii. Also, Mr. Turvey’s testimony would have been “helpful” to Mr. Wang’s defense because Mr. Turvey’s findings and conclusions would have differed significantly from that of the Commonwealth’s forensic experts.

b. When assessing whether trial counsel had a “reasonable basis” for his act or omission, the question is not whether there were other courses of action that counsel could have taken, but “whether counsel’s decision had any basis reasonably designed to effectuate his client’s interest.” *Commonwealth v. Williams*, 141 A.3d at 463; accord *Commonwealth v. Eichinger*, 108 A.3d 821, 848 (Pa. 2014) (citing *Commonwealth v. Williams*, 899 A.2d 1060, 1063-1064 (Pa. 2006)). Trial counsel’s strategy will be considered unreasonable if the petitioner establishes “that an alternative not chosen offered a potential for success substantially greater than the course actually pursued.” *Commonwealth v. Howard*, 719 A.2d 233, 237 (1998).

i. To determine whether trial counsel made an informed decision regarding a particular issue, *e.g.*, consulting with and retaining a crime scene expert or reconstructionist, the Court must evaluate trial counsel’s investigation leading to this decision. *Commonwealth v. Williams*, 141 A.3d at 463. As the U.S. Supreme Court emphasized, “In assessing the reasonableness of an attorney’s investigation... a court must consider... whether the known evidence would lead a reasonable attorney to investigate further.... [because] *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision[.]” *Wiggins v. Smith*, 539 U.S. 510, 527 (2003).

ii. Based on trial counsel’s pre-trial consultations with Dr. Hoyer and trial counsel’s awareness that the jury would have a “very difficult” time understanding and conceptualizing Mr. Wang’s suicide narrative based solely on Dr. Hoyer’s entrance wound testimony, trial counsel had a constitutional duty to

expand the scope of his forensic investigation to consider and evaluate the entire scene, including those items of physical evidence outside the entrance wound.

iii. There was no harm in consulting with a crime scene expert or reconstructionist to consider and evaluate the entire scene and all the physical evidence. All trial counsel had heading into trial was a very weak opinion from Dr. Hoyer, *i.e.*, the entrance wound is consistent with a suicide and homicide. No harm could have come from examining the entire scene and all the physical evidence to determine if the physical evidence and scene characteristics bolstered Mr. Wang's suicide narrative and/or discredited the Commonwealth's homicide narrative. Indeed, examining the entire scene and all the physical evidence would have been *consistent with* trial counsel's initial reason for retaining Dr. Hoyer, *i.e.*, to develop and present forensic evidence supporting Mr. Wang's suicide narrative.

iv. If trial counsel's decision not to consult with and retain a particular forensic expert was based on trial counsel's belief he could effectively cross-examine the prosecution's forensic experts, then trial counsel is not required to retain and present a forensic expert on his client's behalf. Here, as Mr. Wang and counsel thoroughly demonstrated in the *907 Objections*, it was *painfully obvious* trial counsel did little to no preparation preparing for his cross-examination of Dr. McDonald and Officer Stott. Several of trial counsel's questions were so poorly worded and incoherent that Dr. McDonald and Officer Stott had to ask trial counsel to repeat his question more than once.

c. Turning to the "prejudice" determination, the question is whether "there is a reasonable probability that, but for trial counsel's errors, the result of the proceeding would have been different." *Commonwealth v. Bomar*, 104 A.3d 1179, 1202 (Pa. 2014) (citing *Commonwealth v. Koehler*, 36 A.3d 121, 150 (Pa. 2012)). As Mr. Turvey's 35-page affidavit thoroughly explains, trial counsel's ineffectiveness prejudiced Mr. Wang.

Claim #2: Trial counsel failed to present the testimony of Mr. Wang's three neighbors—Troy Davis, Timothy Flemings, and Rick Kern—each of whom would have corroborated salient aspects of Mr. Wang's trial testimony and version of events, thereby bolstering Mr. Wang's defense that Sharon Lin committed suicide and creating reasonable doubt regarding the Commonwealth's homicide narrative. Trial counsel did not have a reasonable basis for not subpoenaing and presenting Mr. Davis, Mr. Flemings, and Mr. Kern, especially after trial counsel specifically told Mr. Wang that the outcome of his trial depended predominately on how the jury viewed and weighed his trial testimony and version of events. Trial counsel's ineffectiveness prejudiced Mr. Wang because there is a reasonable probability that had trial counsel subpoenaed and presented Mr. Davis, Mr. Flemings, and Mr. Kern the outcome of Mr. Wang's trial would have been different. The PCRA record supported these findings. The PCRA court, therefore, erred when it rejected Mr. Wang's trial counsel ineffectiveness claim. U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 9, 23.

Fair Presentation

5. Mr. Wang raised and fairly presented the legal and factual basis of this state and federal trial counsel ineffectiveness claim to the PCRA court in his *Supplemental Amended PCRA Petition*, which Daniel Silverman filed on September 28, 2012.

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6. The pre-trial discovery included statements from three of Mr. Wang's neighbors—Troy Davis, Timothy Fleming, and Rick Kern.¹ In their statements, all three said that immediately after they heard a single gunshot they saw and heard Mr. Wang frantically cry out for help and ask for someone to call the police because his wife had just shot herself. During his interrogation with detectives, Mr. Wang said his wife shot herself. At trial, Mr. Wang testified that his wife shot herself. The fact Mr. Wang—with no time to fabricate a defense or other exculpatory explanation for what happened—simultaneously asked others to help his wife and call the police and an ambulance tends to prove lack of criminal intent and lack of malice and is generally exculpatory.

¹ Mr. Wang's initial appointed attorney, Daniel Silverman, attached these statements (as Exhibit A) to the *Supplemental Amended PCRA Petition* he filed on Mr. Wang's behalf on September 28, 2012.

7. Trial counsel, though, never subpoenaed or called Mr. Davis, Mr. Flemings, and Mr. Kern, in support of Mr. Wang's suicide defense. This despite the fact trial counsel recognized pre-trial that the outcome of Mr. Wang's trial rested largely on whether the jury would accept Mr. Wang's trial testimony and version of events.²

8. Based on the PCRA record, it is apparent trial counsel's decision not to subpoena and present Mr. Davis, Mr. Flemings, and Mr. Kern was premised on absolutely no pre-trial investigation. Trial counsel's decision not to call these three witnesses, therefore, cannot be considered reasonable or strategic.

9. Trial counsel's ineffectiveness prejudiced Mr. Wang and the prejudice is self-evident. These three witnesses would have corroborated Mr. Wang's version of events and hammered home the fact Mr. Wang had absolutely no time to hide the firearm in the drawer beside the bed and no time to fabricate a defense. In the absence of Mr. Davis's, Mr. Flemings's, and Mr. Kern's trial testimony, the Court can have no confidence in Mr. Wang's conviction warranting a new trial where these three witnesses can testify on Mr. Wang's behalf.

² Mr. Wang's initial appointed attorney, Daniel Silverman, attached two letters from trial counsel to Mr. Wang (as Exhibit B) to the *Supplemental Amended PCRA Petition* he filed on Mr. Wang's behalf on September 28, 2012. These two letters clearly prove that trial counsel's defense strategy was to leave the outcome of Mr. Wang's trial in Mr. Wang's lap by specifically telling Mr. Wang that his testimony was the most critical evidence.

Claim #3: Trial counsel failed to object to inadmissible and prejudicial hearsay and “other crimes/bad acts” testimony that Mr. Wang assaulted and otherwise mistreated Sharon Lin in the past. Assuming the probative value of this evidence outweighed its prejudicial impact, trial counsel failed to request a cautionary instruction directing the jury to consider this evidence solely for the limited purpose for which it was admitted. Trial counsel did not have a reasonable basis for not objecting to this inadmissible and prejudicial hearsay and other crimes/bad acts testimony. Trial counsel’s ineffectiveness prejudiced Mr. Wang because had trial counsel timely objected, the trial court would have excluded this evidence and testimony, and had it done so, there is a reasonable probability the outcome of Mr. Wang’s trial would have been different. Likewise, if timely objected to and timely requested, the trial court would have issued a cautionary instruction prohibiting the jury from considering this evidence for propensity purposes. The PCRA record supported these findings. The PCRA court, therefore, erred when it rejected Mr. Wang’s trial counsel ineffectiveness claim. U.S. Const. amdts. 5, 6, 8, 14; Pa. Const. art. I, §§ 9, 23.

Fair Presentation

10. Mr. Wang raised and fairly presented the legal and factual basis of this state and federal trial counsel ineffectiveness claim to the PCRA court in his *Amended PCRA Petition*, which Daniel Silverman filed on August 14, 2012.

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11. Commonwealth witness Denise Weber testified that she was Mr. Wang’s neighbor and often saw Sharon Lin crying alone at night, and on several occasions saw Ms. Lin with swelling and bruises.³ Trial counsel did not object to Ms. Weber’s testimony on the basis that her testimony constituted impermissible “other crimes” or “bad acts” testimony.

12. Officer Anthony Magsam testified on re-direct examination that he had previously responded to a domestic dispute at Mr. Wang’s residence, where Mr. Wang physically abused Ms. Lin. Officer Magsam testified that on this occasion he heard Mr. Wang yelling at Ms. Lin because Ms. Lin did not order him dinner.⁴ Trial counsel objected on the basis that he did not “open the door” when his first question on cross-examination was whether the officer had seen Mr. Wang

³ NT, Trial, 11/4/2008, pp. 16-17.

⁴ NT, Trial, 11/4/2008, pp. 52-53.

before.⁵ Trial counsel did not object on the basis that Officer's Magsam's testimony constituted inadmissible "other crimes" and "bad acts."

13. Officer Magsam also testified that Mr. Wang's residence "was a common address" to which police frequented.⁶ Trial counsel did not object to this testimony on the basis it constituted inadmissible "other crimes" and "bad acts."

14. Officer Ashley Johnson testified she had also previously responded to Mr. Wang's residence for a domestic disturbance. When Officer Johnson responded, Sharon Lin complained that Mr. Wang had been communicating with another woman on the Internet. Ms. Lin also complained she felt "alone... in this country." After Officer Johnson quelled the disturbance and left the Wang residence, Officer Johnson testified that she received another domestic disturbance call that same night for the Wang residence.

15. Officer Esteban Roche testified he read electronic communications (emails and chats) between "Elaine," who was the alleged "other woman", and Sharon Lin that established Mr. Wang communicated regularly with Elaine, that Ms. Lin called Mr. Wang a "lazy" and a "liar," and that Ms. Lin viewed her life as very difficult.⁷

16. The Commonwealth's evidence that Mr. Wang (1) physically abused Ms. Lin by inflicting bruises and swelling sufficient for a neighbor to call the police on one occasion and for the police to intervene on another, (2) verbally abused his wife by yelling at her as though she were his slave, (3) regularly caused domestic disturbances sufficient for the police to intervene on a number of occasions, (4) yelled at the police on a prior occasion, (5) was unfaithful in his marriage, (6) was a liar, and (7) was lazy all constituted "other crimes" and "bad acts" for which Mr. Wang was not on trial.

17. Trial counsel never objected to any of this evidence on the basis it constituted impermissible "other crimes" or "bad acts." To the extent some of this evidence was relevant and that its relevance outweighed its prejudicial impact, trial counsel never requested a cautionary jury instruction directing the jury not to consider this as propensity evidence.

⁵ NT, Trial, 11/4/2008, p. 41.

⁶ NT, Trial, 11/4/2008, p. 54.

⁷ NT, Trial, 11/4/2008, pp. 122-127.

Claim #4: Trial counsel failed to request a “missing evidence” instruction based on the Commonwealth’s admitted negligence in failing to preserve evidence from Sharon Lin’s hands that would have enabled forensic examiners to perform gunshot residue testing on Ms. Lin’s hands. The Commonwealth’s negligence deprived Mr. Wang of his due process right to potentially exculpatory evidence. Trial counsel did not have a reasonable basis for not requesting a “missing evidence” instruction, especially after trial counsel mentioned this very fact during trial and closing arguments. Trial counsel’s ineffectiveness prejudiced Mr. Wang because had the trial court issued a “missing evidence” instruction, it is reasonably probable the outcome of Mr. Wang’s trial would have been different. The PCRA record supported these findings. The PCRA court, therefore, erred when it rejected Mr. Wang’s trial counsel ineffectiveness claim. U.S. Const. amdts. 5, 6, 8, 14; Pa. Const. art. I, §§ 9, 23.

Fair Presentation

18. Mr. Wang raised and fairly presented the legal and factual basis of this state and federal trial counsel ineffectiveness claim to the PCRA court in his *Amended PCRA Petition*, which Daniel Silverman filed on August 14, 2012.

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19. Detective Timothy Bass acknowledged that initial responders, scene detectives, and the Medical Examiner’s Office negligently failed to swab Sharon Lin’s hands for the sole purpose of determining whether Ms. Lin’s hands contained gunshot residue (“GSR”). Det. Bass testified, “A [GSR] test wasn’t done on Sharon Lin because there was an oversight. Her hands weren’t bagged upon arrival at the scene by the crime scene unit and the detectives.”⁸ A positive GSR test on Ms. Lin’s hands would have bolstered Mr. Wang’s suicide narrative because the presence of GSR is probative evidence that Ms. Lin recently fired a gun. Stated differently, the larger the amount of GSR on Ms. Lin’s hands, the stronger Mr. Wang’s suicide defense.

20. “Due process requires the full opportunity to defend against the charges.” *Commonwealth v. Deans*, 610 A.2d 32, 34 (Pa. 1992). Thus, the Commonwealth has an obligation to refrain from destroying potentially exculpatory evidence that prevents the accused from fully defending himself against the Commonwealth’s charges. *Commonwealth v. Chapman*, 386 A.2d 994, 1000-1003 (Pa. 1978). If the missing, lost, or destroyed evidence “is such that the lower court cannot say with

⁸ NT, Trial, 11/4/2008, p. 217.

assurance that the [items] would not have been favorable for [the defendant],” the “appropriate remedy is to grant [the defendant] a new trial” with “a missing-evidence instruction.” *Id.* at 1005; accord *Commonwealth v. Deans*, 610 A.2d at 34. The focus under *Chapman*, must be on whether the Commonwealth’s conduct impeded the defendant’s ability to adequately and meaningfully defend himself. In Mr. Wang’s case, the Commonwealth’s negligence most certainly impeded his ability to defend himself against the Commonwealth’s homicide charge.

21. Had trial counsel lodged a proper objection and made the proper request, citing the law outlined here, the trial court would have been obligated to issue a “missing-evidence” instruction that the jury could draw a negative inference from the fact scene personnel and detectives negligently failed to properly preserve the potentially exculpatory evidence on Ms. Lin’s hands. Trial counsel did not have a reasonable basis for not objecting and requesting a missing evidence instruction, especially after trial counsel criticized the detectives for not properly preserving Ms. Lin’s hands at trial and during closing arguments. Prejudice, again, is self-evident. Had the detectives properly preserved Ms. Lin’s hands and had subsequent GSR testing on her hands revealed the presence of GSR, such results would have been powerful evidence in support of Mr. Wang’s suicide narrative. The jury, therefore, should have been informed it could draw an adverse inference from the Commonwealth’s negligence. There is a reasonable probability the jury would have drawn an adverse inference and had it done so there is a reasonable probability the outcome of Mr. Wang’s trial would have been different.

Claim #6: During the charge conference, when the trial court gave no mention of issuing an instruction regarding Mr. Wang’s theory of defense, *i.e.*, Sharon Lin’s death was a suicide, trial counsel failed to object and failed to request the trial court to properly instruct the jury on Mr. Wang’s suicide theory of defense. Trial counsel did not have a reasonable basis for not requesting a specific jury instruction informing the jury if Mr. Wang’s evidence of suicide raised a reasonable doubt it had to find Mr. Wang not guilty. Trial counsel’s ineffectiveness prejudiced Mr. Wang because had the jury been properly and specifically instructed regarding Mr. Wang’s suicide defense, there is a reasonable probability Mr. Wang’s trial would have turned out differently. The PCRA record supported these findings. The PCRA court, therefore, erred when it rejected Mr. Wang’s trial counsel ineffectiveness claim. U.S. Const. amdts. 5, 6, 8, 14; Pa. Const. art. I, §§ 9, 23.

Fair Presentation

23. Mr. Wang raised and fairly presented the legal and factual basis of this state and federal trial counsel ineffectiveness claim to the PCRA court in his *Amended PCRA Petition*, which Daniel Silverman filed on August 14, 2012.

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24. Mr. Wang presented a suicide defense. The trial court never instructed the jury at all regarding Mr. Wang’s suicide defense—what it was or how the jury should consider it. Trial counsel failed to object or otherwise request an instruction such as, “The defendant presented a defense of suicide. If you find that the victim killed herself, or that the evidence of suicide creates a reasonable doubt on any one of the elements of the charged offenses, then you must find the defendant not guilty.” Trial counsel failed to object or otherwise request this instruction or a similar instruction.

25. As a general matter, “[t]he trial court is required to instruct the jury in order to clarify the issues so that they understand the questions involved. The court must also instruct on the law applicable to the issues which arise out of the evidence and the arguments presented.” *Commonwealth v. Birch*, 644 A.2d 759, 762 (Pa. Super. 1994). It is black letter law that where there is evidence introduced at trial to support a particular defense, the trial court is required to instruct on it irrespective of how unpersuasive it may seem. *Commonwealth v. Borgella*, 611 A.2d 699, 700 (Pa. 1992). A defendant’s due process rights are violated where the omission of an instruction on the defense theory, when viewed in light of the

totality of the circumstances, renders the trial unfair. *United States ex rel. Means v. Solem*, 646 F.2d 322, 332 (8th Cir. 1980) (citing *Kentucky v. Wharton*, 441 U.S. 786, 789 (1979)).

26. Here, Mr. Wang's theory of defense was suicide. Mr. Wang testified it was suicide. Mr. Wang told detectives it was suicide. Dr. Hoyer testified that while it would have been difficult for Sharon Lin to shoot herself, it was still physically possible for her to do so. There was some evidence Sharon Lin was depressed at the time of the shooting. Although trial counsel's inartful and sometimes indecipherable cross-examination of Dr. McDonald and Officer Stott clearly demonstrated trial was unprepared to effectively cross-examine them on significant forensic issues, trial counsel's cross-examination questions were nonetheless aimed at raising doubt regarding the Commonwealth's homicide narrative. Despite all this evidence, the trial court said nothing, at any time, about suicide during its jury instructions. Consequently, the trial court's failure to instruct on the theory of defense was not harmless error and trial counsel should have objected and requested a proper "theory of defense" instruction.

27. Based on trial counsel's statements to Mr. Wang before trial and Mr. Wang's suicide defense at trial, there simply can be no legitimate reason for trial counsel to have failed to object to the omission of an instruction regarding Mr. Wang's suicide defense. Prejudice, therefore, is again self-evident, as Mr. Wang was deprived of having his theory of defense presented by the trial court to the jury as a viable option in its deliberations.

Claim #6: The cumulative impact of trial counsel’s objectively unreasonable decisions before and during trial undermines confidence in the jury’s first-degree murder conviction entitling Mr. Wang to a new trial. The PCRA record supported these findings. The PCRA court, therefore, erred when it rejected Mr. Wang’s cumulative prejudice claim. U.S. Const. amdts. 5, 6, 8, 14; Pa. Const., art. 1 § 9.

Fair Presentation

28. Mr. Wang raised and fairly presented the legal and factual basis of this state and federal cumulative error/prejudice claim to the PCRA court in his 2nd *Supplemental Amended PCRA Petition*, which undersigned counsel e-filed on May 21, 2016.

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29. “[C]umulative prejudice from individual claims may be properly assessed in the aggregate when the individual claims have failed due to lack of prejudice[.]” *Commonwealth v. Hutchinson*, 25 A.3d 277, 319 (Pa. 2011). Where a defendant “has failed to prove prejudice as the result of any individual errors, he cannot prevail on a cumulative effect claim unless he demonstrates how the particular cumulation requires a different analysis.” *Commonwealth v. Wright*, 961 A.2d 119, 158 (Pa. 2008); accord *Commonwealth v. Small*, 980 A.2d 549, 579 (Pa. 2009). A “bald averment of cumulative prejudice does not constitute a claim.” *Commonwealth v. Hutchinson*, 25 A.3d at 319. Thus, defendants must “set[] forth a specific, reasoned, and legally and factually supported argument for [his cumulative prejudice] claim.” *Id.*; accord *Commonwealth v. Johnson*, 966 A.2d 523, 532 (Pa. 2009).

30. Mr. Wang’s initial appointed PCRA attorney, Daniel Silverman, raised several trial counsel ineffectiveness claims in Mr. Wang’s *Amended PCRA Petition* and *Supplemental Amended PCRA Petition*.

a. Trial counsel failed to present the testimony of Mr. Wang’s three neighbors—Troy Davis, Timothy Flemings, and Rick Kern—each of whom would have corroborated salient aspects of Mr. Wang’s trial testimony, thereby bolstering Mr. Wang’s defense that Ms. Lin committed suicide and creating reasonable doubt regarding the Commonwealth’s homicide charge.

b. Trial counsel failed to object to inadmissible and prejudicial hearsay and “other crimes/bad acts” testimony that Mr. Wang assaulted and otherwise mistreated Ms. Lin in the past. Assuming this probative value of this evidence outweighed its prejudicial impact, trial counsel failed to request a cautionary instruction directing the jury to consider this evidence solely for the limited purpose for which it was admitted.

c. Trial counsel failed to request a “missing evidence” instruction based on the Commonwealth’s admitted negligence in failing to preserve the potentially exculpatory GSR evidence on Sharon Lin’s hands.

d. During the charge conference, when the trial court gave no mention of issuing an instruction regarding Mr. Wang’s suicide defense, trial counsel failed to object and failed to request that the trial court properly instruct the jury on Mr. Wang’s suicide defense.

31. Based on trial counsel’s constellation of prejudicial errors, the jury was not only deprived of critical eyewitness and reconstructive forensic evidence supporting Mr. Wang’s suicide narrative, the jury was not properly instructed on how to consider much of the Commonwealth’s and defense’s evidence. The collective impact of these errors speaks for itself.

e. The jury heard from *two* Commonwealth experts who repeatedly said the physical evidence supported the Commonwealth’s homicide narrative. The jury heard from *one* defense expert who did *not* rebut the Commonwealth’s homicide narrative and who merely said it was *possible* for Ms. Lin to shoot herself in the back of the head. The defense expert, however, also said it was *possible* Ms. Lin’s death was, in fact, a homicide as the Commonwealth claimed and charged.

f. The jury heard from several hearsay witnesses who painted a damning picture of Mr. Wang. The jury did *not* hear from three eyewitnesses who would have said that immediately after hearing the gunshot they saw Mr. Wang yelling out the window for help, the police, and an ambulance.

g. The jury was not instructed on how it had to consider the numerous hearsay statements regarding how Mr. Wang allegedly abused and mistreated Ms. Lin. By not instructing the jury that it could only consider this evidence and testimony for a specific purpose and it could not rely on this evidence to make propensity inferences, it is reasonably likely the jury did, in fact, make impermissible propensity inferences, *i.e.*, if Mr. Wang had a history of abusing and

mistreating Ms. Lin, it is not a huge leap to conclude Mr. Wang had the propensity to kill Ms. Lin.

h. The jury was not instructed that it could draw an adverse inference based on the fact detectives and scene personnel negligently failed to preserve the potentially exculpatory evidence on Sharon Lin's hands.

i. Collectively, then, it is reasonably likely the jury combined the *impermissible* propensity inference with the *unrebutted* testimony of the Commonwealth's two forensic experts. The combination of these two led to the obvious conclusion, *i.e.*, if Mr. Wang had the propensity to kill Ms. Lin and the physical evidence supported the homicide narrative more than the suicide narrative, Mr. Wang must have killed Ms. Lin and Mr. Wang must be guilty of first-degree murder.

32. Mr. Wang is entitled to a new trial based on the cumulative impact of trial counsel's numerous errors.

Claim #7: The PCRA court erred by not granting an evidentiary hearing where trial counsel, Troy Davis, Timothy Flemings, Rick Kerns, and Brent Turvey could testify and present evidence in support of Mr. Wang's trial counsel ineffectiveness claims. The PCRA record supported Mr. Wang's evidentiary hearing request. The PCRA court, therefore, erred when it refused to grant Mr. Wang an evidentiary hearing. U.S. Const. amds. 5, 6, 8, 14; Pa. Const., art. 1 § 9.

Fair Presentation

33. Mr. Wang raised and fairly presented the legal and factual basis of this state and federal evidentiary hearing claim to the PCRA court in his *Amended PCRA Petition*, which Daniel Silverman filed on August 14, 2012, and in his 2nd *Supplemental Amended PCRA Petition*, which undersigned counsel e-filed on May 21, 2016.

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34. Mr. Wang is entitled to summary relief where there are not disputes to material facts. Pa.R.Crim.P. 907(2). However, the PCRA court "shall order a hearing" when the PCRA petition "raises material issues of fact." Pa.R.Crim.P. 908(A)(2); accord *Commonwealth v. Williams*, 732 A.2d 1167, 1189-1190 (Pa. 1999). A hearing cannot be denied unless the Court is "certain" Mr. Wang's petition lacks "total" merit. *Commonwealth v. Bennett*, 462 A.2d 772, 773 (Pa. Super. 1983); accord *Commonwealth v. Rhodes*, 416 A.2d 1031, 1035-1036 (Pa. Super. 1979). Even in "borderline cases Petitioners are to be given every conceivable legitimate benefit in the disposition of their claims for an evidentiary hearing." *Commonwealth v. Pulling*, 470 A.2d 170, 173 (Pa. Super. 1983). Thus, an "evidentiary hearing should... be conducted where the record does not clearly refute the claim of an accused that his plea was unlawfully induced." *Id.* (citing numerous guilty plea cases).

35. If the evidence presented in support of the abovementioned trial counsel ineffectiveness claims did not warrant summary relief for Mr. Wang, it surely "raise[d] material issues of fact" regarding each ineffectiveness claim, warranting an evidentiary hearing for each and every ineffectiveness claim.

a. *First*, Mr. Turvey's 35-page affidavit, without question, raised material issues of fact because Mr. Turvey systematically deconstructed Dr. McDonald's and Officer Stott's trial testimony and thoroughly and validly demonstrated why the physical evidence favored suicide far more than homicide. In other words, Mr.

Turvey's findings are different than Dr. McDonald's and Officer Stott's findings. Thus, there are obvious material factual disputes regarding the forensic evidence warranting an evidentiary hearing.

b. *Second*, at trial the Commonwealth alleged Mr. Wang fabricated his suicide narrative in an attempt to hide the fact he murdered his wife by shooting her in the head. However, Troy Davis's, Timothy Flemings's, and Rick Kerns's statements significantly undercut this aspect of the Commonwealth's case. Their statements, therefore, created material factual disputes warranting an evidentiary hearing.

c. *Third*, all of Mr. Wang's claims focus on trial counsel's ineffectiveness. It is Mr. Wang's position that trial counsel did not have a reasonable basis (1) not to make timely objections, (2) not to make timely jury instruction requests, and (3) not to expand the scope of his forensic investigation once Dr. Hoyer informed him that the entrance wound's configuration supported a suicide finding *as well as* a homicide finding. If Mr. Wang's position is not substantiated by the PCRA record, his trial counsel ineffectiveness allegations created, at the very least, material issues of disputed fact, *i.e.*, whether trial counsel had a reasonable basis for not doing these things before and during trial. These material factual disputes warranted an evidentiary hearing where Mr. Wang could call trial counsel and question him regarding his pre-trial and trial decision-making.

Respectfully submitted this the 28th day of November, 2016.

/s/Craig M. Cooley
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CERTIFICATE OF SERVICE

On November 28, 2016, counsel served the foregoing pleading on the Commonwealth by e-filing the pleading with Philadelphia County's Electronic Filing System.