Received 3/16/2018 12:40:46 PM Superior Court Eastern District

Filed 3/16/2018 12:40:00 PM Superior Court Eastern District
3465 EDA 2017

SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA **Plaintiff-Appellee,**	
v.	**3465 EDA 2017** **CP-51-CR-0008303-2009**
RAYMOND ARMSTRONG **Petitioner-Appellant.**	**Non-Homicide PCRA** **PCRA Court: McDermott, B.**

Petitioner-Appellant's Opening Brief

Appeal from the October 12, 2017 Order Dismissing Raymond Armstrong's PCRA Petition Entered by the Honorable Barbara McDermott of the Philadelphia County Common Pleas Court, Criminal Division, CP-51-CR-0008303-2009

Craig M. Cooley
COOLEY LAW OFFICE
1308 Plumdale Court
Pittsburgh, PA 15239
Pa. Bar No.: 315673
412-607-9346 (cell)
919-287-2531 (fax)
craig.m.cooley@gmail.com
www.pa-criminal-appeals.com
Counsel for Mr. Armstrong

TABLE ON CONTENTS

CASES

CODES/RULES/STATUTES

STATEMENT OF JURISDICTION

Jurisdiction for this appeal is provided for at 42 Pa. C.S. § 742, relating to this Court's exclusive appellate jurisdiction from a Common Pleas Court's final order.

ORDER OR OTHER DETERMINATION IN QUESTION

Under appeal is the October 12, 2017 order dismissing Ray Armstrong's PCRA petition entered by the Honorable Barbara McDermott of the Philadelphia County Common Pleas Court, Criminal Division, CP-51-CR-0008303-2009.[1]

On October 20, 2017, Mr. Armstrong appealed.[2]

Judge McDermott did not order counsel to file a *Concise Statement of Errors on Appeal*. Instead, when she dismissed Mr. Armstrong's PCRA petition on October 12, 2017, an opinion accompanied her dismissal order.[3] For this same reason, she did not issue a separate 1925(a) opinion; instead, she filed her October 12, 2017 opinion with this Court on February 13, 2018.

[1] Rpp. 1-13. Rp = Reproduced Record page number(s).
[2] Rp. 14.
[3] Rpp. 1-13.

PROCEDURAL HISTORY

On June 30, 2009, the Commonwealth filed an *Information* charging Raymond Armstrong with murder in connection with Anthony Williams's September 27, 2008 death. Mr. Armstrong pled not guilty and proceeded to a jury trial before the Honorable Lillian H. Ransom. Todd Henry represented Mr. Armstrong. Testimony began on June 20, 2012, ended on June 21, 2012, and the jury found Mr. Armstrong guilty of first-degree murder on June 22, 2012. The trial court sentenced him to life in prison without the possibility of parole.

Mr. Armstrong appealed (1851 EDA 2012), but this Court affirmed on September 3, 2013, and the Supreme Court denied his *Petition for Allowance of Appeal* on February 26, 2014 (520 EAL 2013). On May 20, 2014, Mr. Armstrong filed a timely *certiorari* petition with the U.S. Supreme Court (Case No. 14-5629), which the Supreme Court denied on October 6, 2014, *Armstrong v. Pennsylvania*, 135 S.Ct. 275 (2014), making his conviction final on October 6, 2014.

On August 21, 2015, Mr. Armstrong filed a timely *PCRA Petition*,[4] which he amended on April 3, 2016.[5] On February 21, 2017, the PCRA court heard oral arguments and granted Mr. Armstrong an evidentiary hearing regarding his *Brady* claim.[6] The PCRA court held evidentiary hearings on June 12, 2017 and August 29, 2017 and denied Mr. Armstrong's PCRA petition on October 12, 2017.

ISSUES PRESENTED

Mr. Armstrong respectfully submits the following claims for this Court's consideration and adjudication:

I. **The PCRA court erred by denying Mr. Armstrong's *Brady* claim because the record evidence establishes: (1) Mr. Armstrong, while at Homicide, gave two exculpatory statements to Detectives Harkins and Morton, where he explained how Anthony Williams attempted to sexually assault him and this is what precipitated the events that ultimately led to Williams's death; (2) Homicide suppressed these exculpatory statements by not disclosing them to the District Attorney's Office; and (3) the suppression of these two exculpatory statements prejudiced Mr. Armstrong, particularly in light of the prosecutor's closing arguments where he accused Mr. Armstrong of fabricating the sexual assault narrative only after reviewing the discovery and crime scene photographs. U.S. Const. Amdts. 5, 6, 8, 14; Pa. Const. art. 1, sec. 8, 9**.

[4] Rpp. 15-27.
[5] Rpp. 28-74.
[6] Rpp. 116-123.

II. The prosecutor's false argument to the jury where he told the jury Mr. Armstrong fabricated the sexual assault narrative only after he viewed the discovery and physical evidence prejudiced Mr. Armstrong warranting a new trial. U.S. Const. amdts. 5, 6, 8, 14; Pa. Const. art. 1, § § 8, 9.

III. The PCRA court erred by not granting an evidentiary hearing where Mr. Armstrong could present several witnesses in support of his claim trial counsel was ineffective for failing to present substantial testimony and evidence that corroborated Mr. Armstrong's testimony that Anthony Williams died as a result of Mr. Armstrong defending himself against Williams's attempted sexual assault. U.S. Const. amdts. 5, 6, 8, 14; Pa. Const. art. 1, § § 8, 9.

II. The PCRA court erred because trial counsel was ineffective for failing to request an involuntary manslaughter instruction. U.S. Const. amdts. 5, 6, 8, 14; Pa. Const. art. 1, § § 8, 9.

IV. The PCRA court erred because trial counsel was ineffective for not requesting a sudden provocation instruction in connection with the trial court's voluntary manslaughter instruction. U.S. Const. amdts. 5, 6, 8, 14; Pa. Const. art. 1, § § 8, 9.

V. The cumulative errors – from the *Brady* violations, to the prosecutor's false argument, to trial counsel's ineffectiveness – rendered Mr. Armstrong's trial fundamentally unfair. U.S. Const. amdts. 5, 6, 8, 14; Pa. Const. art. 1, § § 8, 9.

STANDARD AND SCOPE OF REVIEW

In reviewing the grant or denial of PCRA relief, the Court examines whether the PCRA court's findings and conclusions are supported by the record and free of legal error. *Commonwealth v. Mitchell*, 141 A.3d 1277, 1283-

1284 (Pa. 2016). The PCRA court's factual findings are entitled to deference, but its legal conclusions are reviewed *de novo*. *Commonwealth v. Hawkins*, 894 A.2d 716, 722 (Pa. 2006).

To prevail on a *Brady* claim, the petitioner must demonstrate the Commonwealth (1) suppressed (2) favorable or material evidence and (3) the suppression prejudiced the petitioner. *Youngblood v. West Virginia*, 547 U.S. 867, 869-670 (2006). Favorable evidence, therefore, must be disclosed when it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995); *accord Banks v. Dretke*, 540 U.S. 668, 698-699 (2004); *Strickler v. Greene*, 527 U.S. 263, 290 (1999). Consequently, if it is reasonably probable the suppressed evidence "would have altered at least one juror's assessment" of the Commonwealth's evidence, prejudice is established. *Cone v. Bell*, 556 U.S. 449, 452 (2009).

To prevail on an ineffectiveness claim, Mr. In must demonstrate trial counsel performed deficiently and the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The deficiency prong "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to] the defendant by the Sixth

Amendment." *Id*. at 687. The prejudice prong requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome," *Id*. at 694, which is "not a stringent" standard because it is "less demanding than the preponderance standard." *Hall v. Kyler*, 190 F.3d 88, 110 (3d Cir. 1999).

Under state law, Mr. Armstrong must show (1) his claim has arguable merit, (2) trial counsel's action or inaction lacked a reasonable basis, and (3) prejudice. *Commonwealth v. Pierce*, 527 A.2d 973, 975–976 (Pa. 1987). *Pierce* is identical to *Strickland*: deficient performance and prejudice. *Commonwealth v. Spotz*, 870 A.2d 822, 829 (Pa. 2005).

The PCRA court "shall order a hearing" when a 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" the PCRA 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*.

STATEMENT OF FACTS

A. Witnesses See Raymond Armstrong Talking With Someone On His Cell Phone

On September 27, 2008, shortly before 10 p.m., Damon Sanders sat in his parked car on the 2600 block of Wilder Street in Philadelphia – only one house down from Anthony Williams's residence at 2629 Wilder Street. Shortly thereafter, he saw Raymond Armstrong park his black SUV. Mr. Armstrong appeared upset while talking on his cell phone in the SUV. When Mr. Armstrong exited his SUV, Sanders heard him yelling into his phone. When Mr. Armstrong re-entered his SUV, Sanders said he appeared more agitated because he yelled and screamed louder than before. At this point, Sanders said Anthony Williams exited his house and approached the SUV. Williams helped Mr. Armstrong out of the SUV, but Mr. Armstrong nearly fell to the ground. Williams, Sanders said, calmed down Mr. Armstrong, stabilized him, and carried him into his house.[7]

[7] NT, Trial, 6/20/2012, pp. 46-49; Rp. 75.

Denise Comer also witnessed Mr. Armstrong's actions leading up to Williams helping him into his house. When Williams exited his house, Comer said he went into Mr. Armstrong's SUV, calmed him down, and helped him out of his SUV. Once out, though, Mr. Armstrong could barely walk. Williams assisted him and continued to tell him to calm down. When Mr. Armstrong sat on the trunk of Comer's car, his cell phone rang in his SUV. Williams grabbed the cell phone and gave it to Mr. Armstrong. Comer heard part of Mr. Armstrong's phone conversation where he said, "Come on baby, everything is set. I know I fucked up good this time, didn't I." At this point, Williams helped Mr. Armstrong into his house.[8]

Tyonia Gardner, who lived next door to Williams, also saw Mr. Armstrong yelling into his cell phone. After witnessing this, she went inside her house.[9]

Jerome Smith, who lived across the street from Williams, also saw Mr. Armstrong banging on his SUV's windows. He also saw Williams exit his house and help Mr. Armstrong into his house. Smith's wife, Takia Smith,

[8] NT, Trial, 6/21/2012, pp. 15-16, 20-22.
[9] NT, Trial, 6/20/2012, pp. 137, 139; Rp. 76.

videotaped the interaction between Williams and Mr. Armstrong before both entered Williams's house.[10]

B. Raymond Armstrong's Phone Calls

Prior to Williams's exiting his house and helping Mr. Armstrong into his house, Mr. Armstrong was on his cell phone with his fiancée, Kim Velaquez, who lived in Florida at the time.[11] Once Mr. Armstrong fell to the ground and lost reception, Velaquez felt so concerned about him she called at least three people to report her concerns: Catherine Pillay, Loticia Ganas, and Linda Armstrong.

Detectives interviewed Catherine Pillay the day after Williams's death because she went to the scene after hearing of his death. When detectives asked her why she went to Williams's house that night she said:

> I received a phone call from Kim Velazquez and she told me something happened to Ray and that she didn't know what was going on. She told me that she was talking to him over the phone and she heard him saying to someone, "You think you're slick." Then she heard someone fall and then she heard Ray saying help me. At that point I told her that I would go and check on him. That's when I went to Anthony's house.[12]

[10] NT, Trial, 6/20/2012, pp. 149-151, 152-153.
[11] NT, Trial, 6/21/2012, pp. 113-114.
[12] Rpp. 82-84.

Detectives interviewed Loticia Ganas the day after Williams's death because she also went to the scene after hearing of Williams's death. When detectives asked what she knew about Williams's death she said:

> All I know is that Ray's girlfriend called and said that something was wrong with Ray. She said that she thought that Ray was hurt or dead. She knew that he was at Anthony's house.[13]

Linda Armstrong is Mr. Armstrong's mother. On September 27, 2008, Lind received a call from Mr. Armstrong's cell phone around 10 p.m. Linda describes what happened next:

> I answered immediately and started talking. When there was no response I listened.
>
> While on my cell phone, I heard Raymond say, that he didn't have any feelings in his legs or arms and that he was done. He kept repeating "I'm done." Several times Mr. Williams said to Raymond, "Come on Ray get up." I did not know what had happened. My phone beeped [as I was listening to Raymond and Mr. Williams]. It was my son's girlfriend Kim. She was crying and said something was wrong with Raymond and that I needed to call him. I told her I was on the phone now with him and he wasn't answering and agreed something was wrong. I told her I had to go and I clicked back over to Raymond's phone line.
>
> When I came back on the line [with Raymond's phone] I heard Mr. Williams saying, "Come on Ray get up." I yelled into the phone at least [twice], "Raymond

[13] Rpp. 85-88.

> pick up the phone it's mom," [but] he never acknowledged me.
>
> Initially, I thought Mr. Williams was trying to help Raymond. I became frightened when I heard Mr. Williams tone of voice change. It became very harsh. I heard him say, "Get up here I said, get up. You're mine now." I started yelling, "Raymond, Raymond please answer me it's mom," then I listened. Next I heard a groan sound and I called to Raymond, "It's mom Raymond, I heard you, please answer me. I heard you."[14]

C. Evidence of a Struggle in Anthony Williams's House

Damon Sanders, Denise Cromer, and other witnesses did not see what happened inside Williams's house once he assisted Mr. Armstrong inside. Some, though, heard a struggle or fight inside the house.

Damon Sanders said after Williams helped Mr. Armstrong in to his house, he heard banging, screaming, and yelling coming from the house for the next fifteen to twenty minutes. He then saw Mr. Armstrong exit the house naked and state, "I killed Anthony," before dropping to the ground in the middle of the street.[15]

[14] Rpp. 89-90.
[15] NT, Trial, 6/20/2012, pp. 49, 50-51; Rp. 75.

Tyonia Gardner said she "heard banging noises" coming from the house, as if "someone was banging on [her] front door." After the initial banging, she heard "continuous" banging coming from the house, before finally hearing "something being dragged down the steps."[16] She went to bed immediately thereafter.

D. Investigation

Neighbors entered the house after Mr. Armstrong exited and called the police once they found Williams's body. At 10:30 p.m., Officer Santos Higgins responded to the scene and discovered Mr. Armstrong naked on the street and face down. Officers entered Mr. Williams's house and discovered his body. EMT personnel tried to revive him, but they declared him dead.[17]

EMT Andrew O'Hara attended to Mr. Armstrong at the scene and described him as having a decreased level of consciousness and being confused. O'Hara transported him to Methodist Hospital,[18] where Dr. Bruce Hart treated him and collected, *inter alia*, fingernail scrapings.[19] Officer William Trentworth photographed Mr. Armstrong at Methodist Hospital and

[16] NT, Trial, 6/20/2012, pp. 140-141; Rp. 76.
[17] NT, Trial, 6/20/2012, pp. 67-68, 69-70, 70-71, 76.
[18] NT, Trial, 6/20/2012, pp. 169-170.
[19] NT, Trial, 6/21/2012, pp. 40, 42, 47-48.

the photographs showed scratches to his forehead, knee, left heel, and finger.[20] After photographing him, Officer Hillary Hudson transported him to Homicide, dropping him off at 7:30 a.m. on September 28, 2008.[21]

After Trentworth photographed Mr. Armstrong, he returned to the scene and photographed Williams's house. The scene photographs showed bloodstains throughout the house.[22] Ben Levin, a DNA analyst, tested several items of evidence, including Mr. Armstrong's fingernail scrapings. Levin identified Williams's DNA from Mr. Armstrong's fingernail scrapings and Mr. Armstrong's DNA from blood recovered on (1) his heel, (2) the upper wall near the bathroom, (3) the hallway outside the middle bedroom, (4) the top of the steps, (5) the bottom of Mr. Armstrong's bed, and (6) a pillow case from Mr. Armstrong's bedroom.[23]

Dr. Dennett G. Preston conducted Williams's autopsy, identified the following wounds, and made the following conclusions in his autopsy report. Dr. Preston listed the cause of death as ligature asphyxiation based (1) a 3" x 1/8" ligature abrasion on the right side of Williams's neck, (2) extensive

[20] NT, Trial, 6/20/2012, pp. 183-186.
[21] NT, Trial, 6/20/2012, pp. 203-205.
[22] NT, Trial, 6/20/2012, pp. 189, 192-193, 198.
[23] NT, Trial, 6/21/2012, pp. 71-78, 79-87.

hemorrhaging in the anterior and lateral neck muscles, and (3) numerous petechial hemorrhages on the forehead, nose, checks, and in the right eye's conjuncitiva.[24] CSI personnel never recovered a ligature at the scene or from Mr. Armstrong's person.

Despite finding no skull fractures, Dr. Preston characterized the following head wounds as blunt force head injuries that contributed to William's death: (1) three 1/8" lacerations to his right upper eyelid; (2) four 1/8" lacerations to the right anterior temple region; (3) one 3/8" laceration to the let anterior temple region; and (4) one ¼" abrasion to the right upper scalp.[25] These injuries, Dr. Preston said, "are consistent with the subject being struck repeatedly with a blunt object such as a fist."[26]

Dr. Preston also identified (1) a 3" abrasion on the left shoulder, (2) a 2" linear bruise on the right arm, and (3) multiple abrasions on the right elbow and forearm. These wounds, according to Dr. Preston, are "consistent with a struggle," while the 2" linear bruise on the right arm "may be consistent with a defense wound."[27]

[24] Rpp. 79-80.
[25] Rpp. 79-80.
[26] Rpp. 79-80.
[27] Rpp. 79-80.

E. Raymond Armstrong's Questioning and Statement

Once at Homicide, Detective John Harkins questioned Mr. Armstrong and obtained his biographical information, which he used to complete the *Biographic Information Report*.[28] Mr. Armstrong also told him he killed Williams in self-defense after Williams attempted to sexually assault him. Detective Levi Morton and his partner then questioned Mr. Armstrong. Mr. Armstrong also told them he killed Williams in self-defense after Williams attempted to sexually assault him.

When Mr. Armstrong was arraigned on September 28, 2008, he told his attorney, Zenaida Lockard (Defenders Association), he gave a statement to detectives while at Homicide. On the *Preliminary Arraignment Report*, which Lockard completed, Lockard handwrote the following:

statement already taken[29]

The pre-trial discovery, however, did contain a report from Harkins or Morton summarizing Mr. Armstrong's custodial statement, nor did it contain a *Miranda* rights/waiver sheet indicating detectives *Mirandized* Mr.

[28] NT, Trial, 6/21/2012, pp. 95-96; Rp. 78.
[29] Rp. 91.

Armstrong and that Mr. Armstrong voluntarily waived his *Miranda* rights and agreed to give a custodial statement without an attorney.

F. Defense Investigation

Prior to trial, Mr. Armstrong's investigator, Manus MacLean, interviewed multiple people who said Williams trolled gay black men websites, *e.g.*, blackplanet.com; Adam4Adam.com, in search of young, attractive black men. Williams was gay and strongly attracted to attractive young, black men and under-aged boys. Once he identified an attractive black man, he contacted them claiming he had his own modeling agency and was in search of young male models. Some men took the bait and traveled to Philadelphia on their own dime. For those reluctant to travel to Philadelphia, Williams paid their travel expenses to Philadelphia. Williams allowed these attractive, young black men to live with him under the guise his alleged modeling company would advance their modeling careers. There was a catch, though; after paying their living expenses for a period of time, Williams used this against them by demanding sexual favors in exchange for his continued payments toward their living expenses. If the men refused, Williams quit paying their expenses and evicted them. Witnesses also told MacLean that Williams was in love and obsessed with Mr. Armstrong.

MacLean spoke with Michele Canales, Hayley Sydor, Alexander "Tayo" Afalabi, and Eric Tolbert:

Michele Canales: Canales worked with Mr. Armstrong and frequently spent the night at Williams's house with Mr. Armstrong. She nicknamed Williams's house "the orphanage" because he always had young, under-aged black men staying with him. She also said that, based on Williams's comments, behavior, and facial expressions, it was obvious to her Williams was in love and obsessed with Mr. Armstrong.[30]

Hayley Sydor: Sydor actually lived with Williams and would have testified to the frequent presence of young men and boys in his home. She also said that, based on Williams's comments to her, his behavior, and facial expressions, it was obvious to her Williams was in love and obsessed with Mr. Armstrong.[31]

Alexander "Tayo" Afalabi: Tayo is a German national. He described how, while living in Atlanta, Williams contacted him via blackplant.com under the guise he had a successful modeling company. Eager to advance his modeling

[30] Rp. 92.
[31] Rp. 92.

career, Tayo flew from Atlanta to Philadelphia and stayed with Williams, only to learn Williams did not have a modeling company.[32]

During his stay, Tayo saw Williams search the internet for men and under-aged boys, who he then flew into Philadelphia under the same ruse he used with him regarding his alleged modeling company. Tayo saw Williams manipulate these young men and under-aged boys. Specifically, if they refused to have sex with him, Williams refused to photograph them, meaning if they wanted to advance their modeling career with Williams's assistance, they had to have sex with him. When Tayo figured out Williams's alleged modeling agency was a front used to hoodwink young men and under-aged boys to coming to Philadelphia, Tayo left, but not before having a heated argument with Williams.[33]

During his time at Williams's house, Tayo befriended Williams. Based on Williams's comments to him, his behavior, and his facial expressions, it was obvious to him that Williams was in love and obsessed with Mr. Armstrong.[34]

Eric Tolbert: Before trial, the Commonwealth theorized Mr. Armstrong premeditated Williams's death because Williams intended to evict Mr.

[32] Rp. 81.
[33] Rp. 81.
[34] Rp. 92.

Armstrong. To counter this argument, MacLean interviewed Tolbert, who said Mr. Armstrong decided to leave Williams's house before Williams threatened to evict him.[35]

Before trial, Mr. Armstrong also developed psychiatric testimony indicating he lacked the capacity to form specific intent because, once Mr. Williams attempted to rape him, he had an anxiety attack. Mr. Armstrong's first trial attorney, Joseph Canuso, retained Dr. Timothy J. Michals who evaluated Mr. Armstrong. Canuso discussed Dr. Michals's findings at a May 9, 2011 pre-trial hearing:

> Mr. Armstrong was examined by… Dr. [Timothy J.] Michals, a psychiatrist. And he rendered a report which basically said that at the time of this incident Mr. Armstrong suffered an anxiety attack. And his… opinion… was that during this anxiety attack he was incapable of formulating the specific intent to kill…[.]
>
> Now, among the facts presented to Dr. Michals was that… [Williams] had tak[en] certain actions towards Mr. Armstrong which included… an attempt to have sexual relations with him…[.][36]

Mr. Armstrong's second (and actual) trial attorney, Todd Henry, had Mr. Armstrong evaluated by Dr. William L. Manion on June 1, 2012. Based on

[35] Rp. 92.
[36] NT, Pre-Trial Hrg., 5/9/2011, pp. 5-6.

his evaluation of Mr. Armstrong, the autopsy reports, and crime scene reports, Dr. Manion opined:

> It is… my opinion to a reasonable degree of medical certainty that… Mr. Williams attempted to sexually molest Mr. Armstrong and Mr. Armstrong continually fought back causing Mr. Williams to suffer many injuries. Mr. Williams continued to be the aggressor in this matter and ultimately Mr. Armstrong grabbed his shirt in an attempt to make him go unconscious. Mr. Armstrong kept urging Mr. Williams to tap out… as though they were in a wrestling match and Mr. Armstrong was asking for a submission. Therefore it is my opinion to a reasonable degree of medical certainty that there was no intent on the part of Mr. Armstrong to kill Mr. Williams. Rather after multiple assaults he was attempting to incapacitate Mr. Williams by knocking him out so he would not further be sexually assaulted by Mr. Williams. In the height of a fight or flight scenario an individual is filled with adrenalin/epinephrine and… will fight to defend themselves. After multiple assaults it is my opinion… that Mr. Armstrong was entitled to defend himself and in that defense the death of Mr. Williams took place.
>
> As Mr. Williams continued to assault Mr. Armstrong when Mr. Armstrong was in a weak and incapacitated state it is my opinion… that Mr. Armstrong was entitled to use force to defend himself and the actual manner of death in light of the repeated assaults by Mr. Williams would be justifiable homicide… [.][37]

[37] Rpp. 124-126.

G. Trial

Before trial, the Commonwealth moved to bar the defense from presenting Dr. Michals and having him testify that Williams's attempted sexual assault triggered a panic attack.[38] The trial court agreed and ruled: "[The] Defense doctor cannot make reference to any sexual assault. It must just be framed in terms of an assault."[39] Trial counsel did not object to the trial court's ruling.

The Commonwealth offered Mr. Armstrong a third-degree murder plea deal carrying a 20- to 40-year prison sentence. Mr. Armstrong rejected the deal.[40]

At trial, during opening arguments, the prosecutor told jurors Mr. Armstrong strangled Williams for over three minutes with a cord or rope and told them to focus on Dr. Gary Collins's testimony.[41] Dr. Collins, the prosecutor explained, did not perform Williams's autopsy, but because autopsies are standardized, Dr. Collins did not have to actually perform the autopsy to testify to its results in court.[42] The prosecutor repeatedly

[38] NT, Pre-Trial Hrg., 5/9/2011, pp. 1-32; NT, Pre-Trial Hrg., 5/26/2011, pp. 1-16.
[39] NT, Pre-Trial Hrg., 5/26/2011, p. 14.
[40] NT, Trial, 6/21/2012, pp. 11-14.
[41] NT, Trial, 6/20/2012, pp. 23-25.
[42] NT, Trial, 6/20/2012, pp. 25-26.

emphasized how long it took to kill someone via *ligature* strangulation and told jurors ligature strangulation is always first-degree murder.[43]

Prior to presenting Dr. Collins, the Commonwealth never admitted a cord or rope collected from Williams's residence that it claimed was used by Mr. Armstrong to strangle him. When the prosecutor presented Dr. Collins, trial counsel did not object on confrontation grounds.[44] Dr. Collins admitted he did not conduct the autopsy, but said he reviewed Dr. Preston's case file, and based on his review, he opined the cause of death was ligature strangulation.[45] Dr. Collins said Dr. Bennett did not report examining a ligature; neither did he (Collins) examine a ligature.[46] He said the ligature mark on the right side of Williams's neck could have been caused by anything long, thin, and flexible.[47]

To emphasize the mechanics, pressure, and time needed to strangle someone with a ligature, Dr. Collins placed a power cord around his neck and demonstrated.[48] He said victims lose consciousness within 30 seconds, suffer

[43] NT, Trial, 6/20/2012, pp. 25, 26.
[44] NT, Trial, 6/20/2012, pp. 85-88.
[45] NT, Trial, 6/20/2012, pp. 89-93, 105-110.
[46] NT, Trial, 6/20/2012, pp. 121-122.
[47] NT, Trial, 6/20/2012, pp. 113-114.
[48] NT, Trial, 6/20/2012, pp. 95-96.

brain damage after two minutes, and are brain dead with two to five minutes based on the lack of blood flow to the brain.[49] He said the blunt force injuries to Williams's head did not fracture the skull or produce significant subdural wounds under the skull.[50] Lastly, on cross-examination, Dr. Collins said the ligature wound and blunt force wounds are consistent with a struggle.[51]

In his opening statement, trial counsel said the evidence did not prove premeditation or malice because Mr. Armstrong killed Williams in self-defense. Trial counsel, though, never mentioned why Mr. Armstrong had to defend himself, *i.e.*, Williams saw Mr. Armstrong in a weakened physical and mental state and tried to have sex with him, even though he knew Mr. Armstrong was heterosexual and not into men. Trial counsel specifically told the jury it would be instructed on self-defense.[52]

Mr. Armstrong testified in own defense. As a model, he met Williams through a friend who said Williams was a photographer. Mr. Armstrong did a group photo shoot with Williams, liked the photographs, and developed a

[49] NT, Trial, 6/20/2012, p. 96.
[50] NT, Trial, 6/20/2012, pp. 110-114.
[51] NT, Trial, 6/20/2012, pp. 119, 123-130.
[52] NT, Trial, 6/20/2012, pp. 38-40.

model-photographer relationship with him. At the time of the incident, Mr. Armstrong house sat for Williams, but did not live with him.[53]

Prior to the incident, Mr. Armstrong was in Florida from September 9th to the 16th, 2008, and returned to Philadelphia to attend his sister's wedding.[54] On the day of the incident, like the days leading up to the incident, Mr. Armstrong had a very busy day, including a photo shoot with a New York City client, and he did not eat much throughout the day.[55] Thus, by the time he drove to Williams's house that night, he was running on empty, so he drank multiple energy drinks, which made him very jumpy and dehydrated and caused an accelerated heart rate and chest pains. When he reached Williams's house, and was arguing with his girlfriend, Kim Velazquez, he had difficulty walking.[56]

When Mr. Armstrong viewed the video Jerome Smith's wife took of him and Williams outside Williams's home, he said he was not faking, and his legs truly were not functioning properly. When Williams assisted him, Mr. Armstrong told him he was "paralyzed or something."[57] What Mr. Armstrong

[53] NT, Trial, 6/21/2012, pp. 109-113.
[54] NT, Trial, 6/21/2012, p. 139
[55] NT, Trial, 6/21/2012, pp. 113-114, 167.
[56] NT, Trial, 6/21/2012, pp. 113-116.
[57] NT, Trial, 6/21/2012, p. 116.

did not know, though, was he was suffering from pneumonia.[58] Mr. Armstrong agreed he was angry and upset while talking to Velazquez, but he was not upset with Williams.[59]

Mr. Armstrong recalled Williams assisting him into his house, but said he was disoriented. He next recalled being on the bed in the upstairs middle bedroom, and dozing off. He was still fully clothed with shoes on.[60] Shortly thereafter, he felt something tugging at his shoe and realized Williams was trying to remove his shoes. As Williams forcibly removed his shoe, he turned him onto his side and began caressing his back and thighs with his hand.[61]

Mr. Armstrong then heard Williams say something to the effect, "You're hot and burning up," before Williams began caressing his (Williams's) face against the backs of his (Armstrong's) thighs, prompting Mr. Armstrong to pop his head and shoulders up, but when he did, Williams pushed his head and shoulders back down, told Mr. Armstrong to calm down, and began kissing his thighs.[62] Mr. Armstrong repeatedly lifted his head and shoulders, only to have Williams push them both back down. Williams ultimately

[58] NT, Trial, 6/21/2012, p. 119.
[59] NT, Trial, 6/21/2012, p. 140.
[60] NT, Trial, 6/21/2012, p. 120.
[61] NT, Trial, 6/21/2012, pp. 118-120.
[62] NT, Trial, 6/21/2012, pp. 120, 121.

pushed his head into the pillow and said, "It's okay, it's okay," as he straddled his (Armstrong's) back and rubbed his (Williams's) face against his (Armstrong's) back. Mr. Armstrong felt Williams's bristles on his lower back and top part of his butt. Williams continued saying, "You're okay, just calm down little brother, you're all right, just relax."[63]

At this point, Williams rubbed his penis between Mr. Armstrong's butt cheeks, prompting Mr. Armstrong to twist his hips and "buck" Williams off him onto the floor.[64] Mr. Armstrong then reached for the bedroom door to leave, but Williams quickly got up and leaned against the door, slamming Mr. Armstrong's hand in the door in the process.[65] Mr. Armstrong eventually wrestled Williams away from the door, but as he exited the bedroom, Williams grabbed his arm creating another struggle that led to the upstairs bathroom.[66] As the struggle entered the bathroom, Williams apologized and pleaded with Mr. Armstrong not to leave.[67]

[63] NT, Trial, 6/21/2012, pp. 122, 123.
[64] NT, Trial, 6/21/2012, p. 123.
[65] NT, Trial, 6/21/2012, p. 124.
[66] NT, Trial, 6/21/2012, p. 125.
[67] NT, Trial, 6/21/2012, p. 125.

Once in the bathroom and disoriented, Mr. Armstrong quickly splashed water on his face, only to see Williams standing behind him. Williams grabbed him and tried to kiss and hug him.[68] When Mr. Armstrong pulled away, another struggle ensued, causing Mr. Armstrong to fall to the bathroom floor and hit the back of his head on the toilet. Williams fell on top of him and licked his (Armstrong's) face multiple times.[69] Mr. Armstrong pushed him off and got up, but Williams pulled him back down on top of him.[70] Williams began "grunting" and refused to let go of him for several minutes before he (Williams) tried to "choke [him] out."[71] Mr. Armstrong feared for his life: "[I]t was like he was going to kill me in the bathroom. He was going to choke me out."[72]

Mr. Armstrong eventually wrestled Williams's arm away from his neck, crawled out of the bathroom, got to his feet, and grabbed the hallway stairs banister.[73] As he did, Williams again grabbed him from behind, leading to another struggle and Williams trying to kiss him, causing their teeth to smash

[68] NT, Trial, 6/21/2012, pp. 125-126.
[69] NT, Trial, 6/21/2012, pp. 125-126, 160;
[70] NT, Trial, 6/21/2012, p. 153.
[71] NT, Trial, 6/21/2012, pp. 125-126, 153.
[72] NT, Trial, 6/21/2012, p. 132.
[73] NT, Trial, 6/21/2012, pp. 126-127, 155.

into one another's.[74] When Mr. Armstrong pushed his (Williams's) face away, his (Armstrong's) hand went into Williams's mouth, resulting in Williams biting his hand.[75] Mr. Armstrong repeatedly tried to pull his hand from his mouth, but Williams did not let go and kept grunting.[76] Mr. Armstrong continued to fear for his life: "[T]his is my last minute, like this is a wrap."[77]

Mr. Armstrong wrestled his hand from Williams's mouth, but their continuing struggle caused both to fall down the hallway stairs.[78] When they landed at the bottom of the stairs, Williams was on top of Mr. Armstrong still attempting to assault him. To fight him off, Mr. Armstrong grabbed Williams's tank top and pulled it until he was able to free himself from him.[79]

Trial counsel presented no forensic experts, *e.g.*, pathologist or reconstructionist, to corroborate and explain Mr. Armstrong's self-defense testimony and explain how his defensive pulling of Williams's shirt - after they fell down the stairs - resulted in Williams's death. Mr. Armstrong's family paid Todd Henry $5,000 to hire Dr. Manion, but Henry never called Dr. Manion.

---

[74] NT, Trial, 6/21/2012, p. 128
[75] NT, Trial, 6/21/2012, pp. 128, 130, 161.
[76] NT, Trial, 6/21/2012, pp. 130, 132.
[77] NT, Trial, 6/21/2012, p. 132.
[78] NT, Trial, 6/21/2012, pp. 133, 158, 163-164
[79] NT, Trial, 6/21/2012, p. 177.

Trial counsel did not present lay witnesses either, including Linda Armstrong or Tayo Afolabi. Mr. Armstrong's family flew Tayo to Philadelphia from Germany and paid his hotel expenses, but Henry never presented him. Instead, Henry presented two character witnesses, Eric Tolbert and Hayley Sydor. Both said Mr. Armstrong had a reputation for being peaceful.[80]

During closing arguments, trial counsel said the evidence did not prove specific intent or malice, but barely mentioned self-defense and the fact Williams's death was directly related to his attempted sexual assault of Mr. Armstrong.[81] Specifically, trial counsel repeatedly said the physical evidence, particularly the bloodstains in the bedroom, bathroom, and hallway proved a struggled occurred, but only mentioned the sexual assault in passing.[82]

When the prosecutor closed, he argued that ligature strangulation is a long, continuous application of pressure that cannot be done accidentally.[83] He also argued the physical evidence did not corroborate Mr. Armstrong's

[80] NT, Trial, 6/21/2012, pp. 102-104, 179-181.
[81] Henry mentioned self-defense *and* the fact Williams attempted to sexually assaulted Mr. Armstrong once. NT, Trial, 6/22/2012, pp. 38-39. Toward the end of his closing argument, Henry said Mr. Armstrong acted "in a justifiable manner," but did not connect the self-defense with the attempted sexual assault. NT, Trial, 6/22/2012, p. 43.
[82] NT, Trial, 6/22/2012, pp. 38-39.
[83] NT, Trial, 6/22/2012, p. 45.

testimony,[84] and specifically mentioned how the defense failed to present testimony explaining how Mr. Armstrong's actions resulted in Williams's strangulations:

> Dr. Collins said, first of all, that [Williams] was strangled, ligature strangulation for several minutes in order to cause death. And nothing [Mr. Armstrong] said about that accounts for that… First, a ligature abrasion on the right front of the throat in the area of the arteries leading to the brain, right where Dr. Collins said pressure would cause that constriction of the carotid arteries to the brain. And there's a ligature abrasion there. Well, what does [Mr. Armstrong] offer? All [Mr. Armstrong] offered was, in his testimony about what happened is, well, I pulled on his shirt from behind and, you know, then we fell down the steps.[85]

The prosecutor continued, explaining how Dr. Collins, when cross-examined by trial counsel, seriously doubted whether Mr. Armstrong could strangle Williams with his shirt alone.[86] The prosecutor also spent considerable time arguing the DNA evidence from the bloodstains did not corroborate Mr. Armstrong's testimony.[87]

---

[84] NT, Trial, 6/22/2012, p. 55 ("The injuries [to Mr. Williams] don't match up to the testimony that [Mr. Armstrong] gave about what happened that night.").
[85] NT, Trial, 6/22/2012, p. 56.
[86] NT, Trial, 6/22/2012, p. 57.
[87] NT, Trial, 6/22/2012, pp. 59-64.

The prosecutor also accused Mr. Armstrong of con his self-defense claim *after* he examined the pre-trial discovery:

> Every little piece that [Mr. Armstrong] explains; the biomechanics of the struggle, flipping [Mr. Williams] over down the stairs, trying to explain the ligature mark. All of these things are directly linked, every single little thing he remembers is directly linked to some piece of physical evidence. He looked at the file. He looked at the pictures. He knew what the evidence was going to be. He knew what you were going to hear. And he weaves this story to try and save himself.[88]

The prosecutor based his argument on the fact Mr. Armstrong never told the EMT, ER doctors, or homicide detectives about Williams's sexual assault:

> What doesn't he say during all this time? He doesn't say, hey, thank God you're here. By the way, I was just anally raped and I had to kill my best friend because he left me no choice, because afterward he tried to kill me. He doesn't say any of that. He doesn't say that to the medics when they first responded.
>
> ...
>
> I asked [Dr. Hart] if [Mr. Armstrong] made any other complaints. No. [Dr. Hart] certainly didn't say, oh, yeah, by the way, I noted here in the chart [Mr. Armstrong] reported that he was sexually assaulted.[89]

[88] NT, Trial, 6/22/2012, p. 72.
[89] NT, Trial, 6/22/2012, pp. 72, 80-81.

In terms of motive, the prosecutor admitted the Commonwealth could not prove motive because it had no idea why Mr. Armstrong strangled his good friend Williams.[90] After mocking Mr. Armstrong's testimony that Williams's shirt caused his strangulation,[91] the prosecutor admitted the Commonwealth did not know what type of ligature Mr. Armstrong supposedly used to strangle Williams.[92]

The trial court charged the jury with first- and third-degree murder and voluntary manslaughter, but not involuntary manslaughter.[93] Trial counsel, though, did not request an involuntary manslaughter instruction. The trial court also issued a self-defense instruction.[94] In regards to its manslaughter instructions, the trial court instructed on imperfect self-defense, but not serious provocation.[95] Trial counsel, though, did not request a serious provocation instruction.

[90] NT, Trial, 6/22/2012, pp. 87, 88, 89.
[91] NT, Trial, 6/22/2012, p. 57.
[92] NT, Trial, 6/22/2012, p. 89.
[93] NT, Trial, 6/22/2012, pp. 106-109, 113-115.
[94] NT, Trial, 6/22/2012, pp. 109-112.
[95] NT, Trial, 6/22/2012, pp. 113-115.

H. June 12, 2017 PCRA Hearing

On June 12, 2017, the PCRA court held an evidentiary hearing where Mr. Armstrong and detectives Brian Peters, John Harkins, and Levi Morton testified.

1. Mr. Armstrong's Testimony

Mr. Armstrong did not speak with any officers at the hospital, including Detective Brian Peters.[96] Mr. Armstrong said officers took him to Homicide from the hospital. Mr. Armstrong was wearing only hospital scrubs when he arrived at homicide.[97]

Officers placed Mr. Armstrong into a room that had a desk on the left-hand side and a "little gray silver chair." The officers handcuffed his left hand to the silver chair's right armrest, so his left hand was crossed in front of his body. Mr. Armstrong fell asleep in the silver chair. He woke up because he had to go to the bathroom. He did not see anyone, but he heard people on the other side of the two-way mirror. He tried signaling these people, but was unsuccessful. He eventually had to grab his crotch so he would not urinate himself. Once he did this, Mr. Armstrong heard someone on the other side of

[96] NT, PCRA Hrg., 7/12/2017, p. 19.
[97] NT, PCRA Hrg., 7/12/2017, pp. 8-9.

the two-way mirror say, "[L]ook at this effing pervert, he's jerking off." Mr. Armstrong yelled that he needed to use the bathroom. An officer eventually took him to the bathroom. Once done, the officer returned Mr. Armstrong to the same room and cuffed his left hand to the right armrest again. Mr. Armstrong laid on the floor, still cuffed to the silver chair, and fell asleep.[98]

Two white officers entered the room and woke him up. The officer who had a mustache said, "Hey holy man, wake up." This officer then bent down, squatted next to him, and used his pen to break the beaded crucifix necklace around his neck.[99] This officer then asked him if he knew Anthony Williams. Mr. Armstrong said he was friends with Williams. The mustached officer then told him Williams was dead and that he (Armstrong) killed him. The officer accused Mr. Armstrong of beating Williams to death. The two officers then left.[100]

Shortly thereafter Harkins entered the room and told Mr. Armstrong he wanted to question him. Harkins asked Mr. Armstrong what happened. Mr. Armstrong explained how he felt like he was having a heart attack when he was inside his Expedition and how Williams helped him out of the Expedition,

[98] NT, PCRA Hrg., 6/12/2017, pp. 9-11.
[99] NT, PCRA Hrg. 6/12/2017, p. 11.
[100] NT, PCRA Hrg., 6/12/2017, p. 12.

into his (Williams's) house, and helped him into his (Armstrong's) second floor bedroom. Mr. Armstrong said Harkins took notes as he (Armstrong) explained what happened.[101]

Mr. Armstrong told Harkins that once in bed, Williams took off his (Armstrong's) belt, pants, and clothing. Williams rubbed his face on his body before turning him (Armstrong) over onto his stomach, at which point Williams got on top of him and tried to have anal sex with him because Mr. Armstrong felt Williams's penis touch his (Armstrong's) legs and buttocks. Once he felt Williams's penis, Mr. Armstrong bucked Williams off of him.[102]

After bucking Williams off of him, Mr. Armstrong told Harkins he ran out of the bedroom into the upstairs hallway and eventually into the upstairs bathroom. Williams followed him into the bathroom and attacked him again while repeatedly kissing and licking him. Mr. Armstrong showed Harkins the bite mark Williams inflicted during the bathroom struggle, he also showed Harkins his "ripped open" heel, the scratches on his legs and hand, and the hand marks on his body left by Williams.[103]

[101] NT, PCRA Hrg., 6/12/2017, pp. 13-14.
[102] NT, PCRA Hrg., 6/12/2017, p. 14.
[103] NT, PCRA Hrg., 6/12/2017, p. 15.

Mr. Armstrong eventually fought off Williams, escaped the bathroom, and ran to the top of the second-floor staircase. Williams, though, followed and attacked him again at the top of the staircase. Mr. Armstrong told Harkins how they both fell down the staircase, how Williams continued attacking him when they landed at the foot of the stairs, and how he held onto Williams's tank top until Williams gave up.[104]

After listening to Mr. Armstrong's statement, Harkins called in two other men. Both men were black and one was Morton. Harkin introduced the two men and asked Mr. Armstrong to repeat his statement to Morton and the other man. Mr. Armstrong obliged and told Morton what he told Harkins.[105]

Morton stood up and told Mr. Armstrong he had to call the District Attorney's Office ("DAO"). Morton left, but Harkins remained in the room. Morton returned 3 to 4 minutes later and told Mr. Armstrong he was being charged with first-degree murder.[106]

[104] NT, PCRA Hrg., 6/12/2017, p. 15.
[105] NT, PCRA Hrg., 6/12/2017, pp. 16, 21.
[106] NT, PCRA Hrg., 6/12/2017, p. 17.

Mr. Armstrong said he told Harkins and Morton that Williams attempted to sexually assault him because he told both how he felt Williams's penis on his leg and buttocks.[107] Mr. Armstrong said Williams's behavior was non-consensual and said he had never been intimate with Williams.[108]

Mr. Armstrong said neither Harkins nor Morton *Mirandized* him.[109]

2. Brian Peters's Testimony

Peters went to the hospital to interview Mr. Armstrong and said he interviewed him at 12:15 a.m.[110] Peters said he took notes during the interview, but said he did not memorialize everything Mr. Armstrong told him.[111]

Peters said he *Mirandirzed* Mr. Armstrong. Mr. Armstrong acknowledged his rights and verbally waived them. Peters did not have Mr. Armstrong sign a waiver sheet.[112] Peters said he asked Mr. Armstrong to describe the incident. According to Peters, Mr. Armstrong told him his name was Adam, said "there was no fight" between him and Williams, that "it was total submission," and described the incident as "a cleansing for the revival"

[107] NT, PCRA Hrg., 6/12/2017, p. 22.
[108] NT, PCRA Hrg., 6/12/2017, p. 22.
[109] NT, PCRA Hrg., 6/12/2017, p. 20.
[110] NT, PCRA Hrg., 6/12/2017, pp. 53-54, 57.
[111] NT, PCRA Hrg., 6/12/2017, pp. 53-54, 62.
[112] NT, PCRA Hrg., 6/12/2017, pp. 56-58.

that "had to be done." Peters read these quotes from the handwritten notes he took.[113]

Peters asked Mr. Armstrong if there had been a fight. When counsel asked Peters how he knew there had been a fight, Peters said the original call he received regarding Williams's death was that Williams had been assaulted. After Mr. Armstrong made these odd statements, Peters said he did not ask follow-up questions.[114] Peters never wrote a formal report based on his handwritten notes because, according to him, it would not have been "appropriate" to write a report because their conversation was "odd."[115]

3. John Harkins's Testimony

Harkins said he *Mirandized* Mr. Armstrong, but did not have Mr. Armstrong sign a waiver sheet. Harkins believed Mr. Armstrong understood his *Miranda* rights because Mr. Armstrong waived his rights.[116]

Harkins admitted Mr. Armstrong told him Williams had tried to sexually assault him:

[113] NT, PCRA Hrg., 6/12/2017, p. 55.
[114] NT, PCRA Hrg., 6/12/2017, pp. 60, 61.
[115] NT, PCRA Hrg., 6/12/2017, p. 61.
[116] NT, PCRA Hrg., 6/12/2017, pp. 75, 101.

> When he began to tell the first version of the statement that he was getting his back rubbed, they were upstairs in the bedroom, there were sexual overtones, he objected, stating he was married, he had a wife and he wasn't gay. He tried to get out of the house, and then the decedent jumped on his back and they fell down the steps.[117]

Mr. Armstrong also told Harkin that Williams tried kissing him.[118]

Harkins also recalled Mr. Armstrong telling him this:

> That there were sexual overtones, that [Mr. Armstrong] objected, that he said, I'm not gay, I have a wife, and he tried to get out of the house, and [Williams] jumped on his back, and then they fell down the steps.[119]

Harkins said he did not take notes during interview.[120]

Harkins said he did not write a formal report memorializing Mr. Armstrong's statement because he became concerned with Mr. Armstrong's ability to understand his *Miranda* rights after spending some time with him. Harkins also said he did not take a formal statement from Mr. Armstrong because he believed there were "competency issues" with Mr. Armstrong. Although he had concerns regarding Mr. Armstrong's competency, Harkins

[117] NT, PCRA Hrg., 6/12/2017, p. 88.
[118] NT, PCRA Hrg., 6/12/2017, p. 88.
[119] NT, PCRA Hrg., 6/12/2017, p. 93.
[120] NT, PCRA Hrg., 6/12/2017, p. 75.

said he never stopped the interview because he believed Mr. Armstrong may have been faking the competency issues.[121]

Harkins, though, completed the biographical information report. The report consisted of a series of biographical questions. Mr. Armstrong, according to Harkins, understood each question. For instance, Mr. Armstrong correctly identified his height, weight, and eye color. He also correctly identified his address, occupation, birth place, his mother's and father's names, his parents' address in Allentown, and the high school and college he attended. Harkins agreed with counsel that Mr. Armstrong easily understood his questions and answered them correctly.[122]

After interviewing Mr. Armstrong, Harkins asked Morton to interview him.[123]

4. Levi Morton

Morton said he saw Mr. Armstrong handcuffed to the silver chair and saw him masturbating. When counsel asked Morton how Mr. Armstrong was able to masturbate when his left hand was handcuffed to the silver chair, Morton changed his testimony and said he did not recall if Mr. Armstrong was

[121] NT, PCRA Hrg., 6/12/2017, pp. 75, 77-79, 84.
[122] NT, PCRA Hrg., 6/12/2017, pp. 75, 77-79, 84.
[123] NT, PCRA Hrg., 6/12/2017, p. 83.

cuffed to the silver chair.[124] Morton could not recall if Mr. Armstrong's penis was erect, but he said he saw Mr. Armstrong stroking his penis. Morton said he asked Mr. Armstrong to stop masturbating.[125]

Morton said Mr. Armstrong told him that Williams attempted to sexually assault him:

> Well, basically, [Mr. Armstrong] said that when initially he goes into the bedroom with [Williams], [Williams] is undressing him and massaging him and kissing him, and he's telling [Williams] that he's not gay and to stop, and then a fight ensued. They carry it out into the hallway, carries into the bathroom, and now [Mr. Armstrong] running down the steps and the victim jumps on his back, and that's when he started choking the victim from behind. They fall down the steps, he gets up, and runs out the front door.[126]

Morton did not memorialize Mr. Armstrong's statement into a formal written statement, nor did he take notes during the interview.[127]

Morton agreed with counsel he may have called the DAO during Mr. Armstrong's interrogation.[128] Morton, though, was adamant he told the DAO about Mr. Armstrong's statement that Williams attempted to sexually assault

[124] NT, PCRA Hrg., 6/12/2017, pp. 110-112.
[125] NT, PCRA Hrg., 6/12/2017, p. 113.
[126] NT, PCRA Hrg., 6/12/2017, p. 118.
[127] NT, PCRA Hrg., 6/12/2017, pp. 122, 125.
[128] NT, PCRA Hrg., 6/12/2017, p. 122.

him and that this is what precipitated the fight that ultimately led to Williams's death. For instance, counsel asked Morton this question:

> So you told the District Attorney's Office that Mr. Armstrong told you that this death was precipitated by a fight or an attempted sexual assault where Anthony Williams got on Mr. Armstrong's back and a fight ensued? You told them that?

Morton replied, "Everything that [Mr. Armstrong] told Detective Harkins and told myself, when we conversed with each other, that is relayed to the DA's Office."[129]

I. Post-Hearing Brief and August 29, 2017 PCRA Hearing

The PCRA court permitted both parties to file post-hearing briefs. Mr. Armstrong filed his post-hearing brief on July 14, 2017.[130] Based on Morton's PCRA hearing testimony, where he adamantly said he told the DAO about Mr. Armstrong's statement, Mr. Armstrong raised the following claim:

> The Prosecutor Knowingly Presented a False Argument to the Jury During Closing Arguments When He Argued that Raymond Armstrong Had Concocted His Defense of Self-Defense Only After Reviewing the Discovery and Physical Evidence. U.S. Const. amdts. 5, 6, 8, 14; Pa. Const. art. 1, §§ 8, 9.[131]

[129] NT, PCRA Hrg., 6/12/2017, p. 125.
[130] Rpp. 93-115.
[131] Rp. 93.

Mr. Armstrong based this claim on the prosecutor's closing argument where he told the jury Mr. Armstrong had never told anyone his sexual assault narrative and that he fabricated the narrative after reading the discovery and viewing the scene photographs.

The PCRA court scheduled another hearing to address this claim and determine whether the DAO and the trial prosecutor, Mark Levenberg, knew about Mr. Armstrong's statement.

The second hearing was held on August 29, 2017. Mark Levenberg testified and said he had been with the DAO over 10 years when he was assigned Mr. Armstrong's case in the late summer of 2011.[132] Levenberg joined the DAO's Homicide Unit in June or July of 2011.[133]

According to Levenberg, when he is assigned a homicide to prosecute, he generally reviews the case file first. Levenberg could recall the first thing he did when he was assigned Mr. Armstrong's case.[134]

When counsel asked, "At any time before Mr. Armstrong's trial, which took place in June of 2012, did you speak with anybody from Homicide from the Philadelphia Police Department?" Levenberg replied, "I'm sure I did. I'm

[132] NT, PCRA Hrg., 8/29/2017, pp. 7, 15.
[133] NT, PCRA Hrg., 8/29/2017, p. 8.
[134] NT, PCRA Hrg., 8/29/2017, pp. 16-17.

sure I talked to detectives, and had witnesses subpoenaed." When counsel asked if he specifically spoke with Morton, Levenberg said, "I don't have any specific recollection, but I'm sure I did."[135] Counsel then asked, "If [Morton] was the, quote/unquote, assigned detective to the case, is it your general practice to speak with the assigned detective?" Levenberg replied, "I probably would have; yes," but said he did not "have any specific recollections of conversations directly regarding this case[.]"[136]

Counsel then asked, "Assuming you[] talked to… the detectives from Homicide… did you, in this specific case, ever ask if Mr. Armstrong gave a statement the night he was taken into custody and brought to Homicide?" Levenberg replied:

> I don't recall ever having a conversation with any of the detectives specifically about that. I [mean, I was -- I don't recall ever having knowledge that Mr. Armstrong gave any statement at Homicide. He gave a number of statements that were in the discovery regarding at the scene to officers, to, I think, medics, and at the hospital to the medical staff; but I don't have any recollection of any statement, or knowledge of any statement.[137]

[135] NT, PCRA Hrg., 8/29/2017, p. 17.
[136] NT, PCRA Hrg., 8/29/2017, pp. 17-18.
[137] NT, PCRA Hrg., 8/29/2017, p. 18.

Counsel then asked, "What do you recall that [Homicide detectives] told you occurred during the homicide? What was the narrative that they gave you?" Levenberg gave a very detailed response, recalling many details of the case. His response consumed 2 pages of transcripts.[138] Counsel then asked, "So you have a good recollection of this case?" Levenberg replied, "I have a recollection of the facts of the case." Counsel then asked, "But you don't have a recollection of what the Homicide detective told you?" Levenberg replied, "Well, I tried the case, so I do remember what the witnesses said and what the video showed."[139]

Levenberg said when he was assigned Mr. Armstrong's case, he inherited the prior ADA's "trial binder" that contained the discovery the DAO received from the Philadelphia Police Department. The trial binder and discovery did not contain a statement from Mr. Armstrong.[140] Counsel then asked a more specific question: "[D]id you receive any sort of report in the discovery indicating that when Mr. Armstrong was brought to Homicide that he gave one, if not more, statements to detectives[.]" Levenberg replied, "No."

[138] NT, PCRA Hrg., 8/29/2017, pp. 19-20.
[139] NT, PCRA Hrg., 8/29/2017, pp. 20-21.
[140] NT, PCRA Hrg., 8/29/2017, pp. 22-23.

Levenberg also said he did not see any reports indicating Mr. Armstrong was *Mirandized* or that Mr. Armstrong waived his *Miranda* rights.[141]

Counsel then asked, "Did you at that point ask the detective[s], hey, look, I reviewed the discovery, I don't see a statement, but I don't see anything in the discovery indicating that he invoked his right [to counsel or to remain silent]? Did Mr. Armstrong give a statement? Did you follow that process?" Levenberg said, "No." Counsel then asked, "[I]t never dawned on you, like, I don't see [any indication Mr. Armstrong invoked his *Miranda* rights], and you didn't call… call Detective Levi Morton, who's the assigned detective, and say, hey, Levi, did he give a statement? Did that ever happen?" Levenberg replied, "No."[142]

Counsel then asked, "Did you specifically asked any detective [if Mr. Armstrong gave a statement]… [w]as that ever specifically asked to anybody?" Levenberg replied, "I don't recall ever asking anyone."[143] Counsel then asked Levenberg if he would be surprised to learn that Morton had previously testified he "took a statement from Mr. Armstrong and that [Morton] in fact

[141] NT, PCRA Hrg., 8/29/2017, p. 23.
[142] NT, PCRA Hrg., 8/29/2017,pp. 23-24.
[143] NT, PCRA Hrg., 8/29/2017, p. 25.

testified under oath that he [Morton] told the [DAO] about that statement?" Levenberg replied, "I would be surprised."[144]

ARGUMENTS

I. The PCRA court erred by denying Mr. Armstrong's *Brady* claim because the record evidence establishes: (1) Mr. Armstrong, while at Homicide, gave two exculpatory statements to Detectives Harkins and Morton, where he explained how Anthony Williams attempted to sexually assault him and this is what precipitated the events that ultimately led to Williams's death; (2) Homicide suppressed these exculpatory statements by not disclosing them to the District Attorney's Office; and (3) the suppression of these two exculpatory statements prejudiced Mr. Armstrong, particularly in light of the prosecutor's closing arguments where he accused Mr. Armstrong of fabricating the sexual assault narrative only after reviewing the discovery and crime scene photographs. U.S. Const. Amdts. 5, 6, 8, 14; Pa. Const. art. I, sec. 8, 9.

A. Introduction

After being detained at the scene and treated at the hospital, the police transported Mr. Armstrong to Homicide. Once there, Mr. Armstrong agreed to speak with detectives, even though they never *Mirandized* him. Harkins and Morton interviewed him. During the interview, Mr. Armstrong explained how Anthony Williams attempted to sexually assault him and this is what precipitated the struggle and fight that ultimately led to Williams's death.

[144] NT, PCRA Hrg., 8/29/2017, pp. 25-26.

Harkins, Morton, and no one from Homicide disclosed Mr. Armstrong's exculpatory statements to the DAO. Thus, when trial counsel received the pre-trial discovery, it did not contain a *Miranda* waiver sheet, nor Mr. Armstrong's exculpatory statements.

Before trial, Mr. Armstrong told trial counsel he spoke with detectives and told them he acted in self-defense after Williams attempted to sexually assault him. The discovery, though, contradicted Mr. Armstrong's statement to trial counsel because, as mentioned, it did not contain his statements or evidence and/or information suggesting he gave a statement.

At trial, Mr. Armstrong obviously told the jury Williams attempted to sexually assault him and this is what precipitated the fight that ultimately led to Williams's death. Because trial counsel did not have Mr. Armstrong's statements or evidence suggesting he even gave a statement, trial counsel never called Harkins or Morton to emphasize to the fact Mr. Armstrong immediately told detectives about Williams's attempted sexual assault.

During closing arguments, the prosecutor effectively destroyed Mr. Armstrong's attempted sexual assault/self-defense narrative by telling the jury that Mr. Armstrong had never – once – mentioned this narrative before trial. The prosecutor, though, did not stop there. The prosecutor told the jury that

because Mr. Armstrong never mentioned this narrative before trial, he crafted and fabricated it only after reviewing the discovery and scene photographs. Because trial counsel did not have actual evidence of Mr. Armstrong's exculpatory statements or evidence suggesting he even gave a statement, trial counsel did not object and correct the record – even though the prosecutor's statements were false.

The Commonwealth's actions violated Mr. Armstrong's *Brady*/due process rights. *First*, Mr. Armstrong told two detectives his sexual assault/self-defense narrative. His statement, therefore, was "favorable" and potentially "exculpatory" to him and his defense at trial. *Second*, the Commonwealth suppressed these statements. Even though Homicide never disclosed the exculpatory statements to the DAO, these statements were imputed to the DAO under *Kyles*. *Third*, the suppression prejudiced Mr. Armstrong. Individually and collectively, the suppression of this evidence as well as the prosecutor's argument that Mr. Armstrong fabricated the sexual assault/self-defense narrative undermines confidence in Mr. Armstrong's first-degree murder conviction.

The Commonwealth and Mr. Armstrong presented competing narratives regarding how and why Williams died. The Commonwealth claimed Mr. Armstrong – for no apparent reason - strangled Williams with a thin ligature for several minutes. CSI personnel, though, never found a thin ligature – or any sort of ligature – inside Williams's house. What the Commonwealth lacked in terms of motive and weapons evidence, it tried to make up for with Dr. Collins's expert testimony that a thin ligature was the most likely murder weapon.

Mr. Armstrong, on the other hand, said Williams attempted to sexually assault him and this resulted in a prolonged fight where the two ultimately fell down the staircase. Mr. Armstrong explained how he defended himself once at the base of the steps, by grabbing Williams's shirt and pulling it until Williams relented. The suppression of his statement and the prosecutor's untrue arguments, however, hamstrung his defense.

First, with no formal reports/statements from Harkins or Morton, trial counsel could not introduce Mr. Armstrong's statements to prove to the jury he immediately told detectives Williams attempted to sexually assault him. Such evidence would have destroyed any argument that Mr. Armstrong

concocted his sexual assault/self-defense narrative only after viewing the discovery and scene photographs.

Second, the combination of both due process violations made it appear as if Mr. Armstrong did in fact concoct the sexual assault/self-defense narrative only after receiving the discovery and physical evidence. In other words, the suppression deprived Mr. Armstrong the ability to present corroborative evidence, while it gave the prosecutor a large and powerful bow in his quiver.

In the end, had the Commonwealth disclosed Mr. Armstrong's "favorable" and "exculpatory" statements, giving him the ability to introduce them to the jury, it is reasonably probable at least one juror would have viewed the Commonwealth's first-degree murder narrative differently and either voted to (1) acquit based on self-defense or (2) convict him of (a) third-degree murder or (b) manslaughter.

Lastly, the prejudice analysis is strictly limited to comparing the *suppressed* evidence to the *trial* evidence and asking whether it is reasonably probable at least one juror would have altered its view of the Commonwealth's case had the suppressed evidence been presented at trial. Here, though, the PCRA court incorporated non-suppressed evidence – or evidence that was in

the Commonwealth's own case file before trial, but was not presented at trial because the prosecutor strategically chose not to introduce it – into its *Brady* prejudice analysis. The PCRA court, moreover, relied significantly on this non-suppressed evidence to find that the suppression of his statements did not prejudice Mr. Armstrong. The PCRA court abused its discretion and violated Mr. Armstrong's due process rights by incorporating this non-suppressed evidence into the *Brady* prejudice analysis.

A. *Brady* Case Law

"[T]he suppression by the prosecution of evidence favorable to an accused… 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 v. Maryland*, 373 U.S. 83, 87 (1963). Evidence qualifies as "material" when there is "'any reasonable likelihood'" it could have "affected the judgment of the jury.'" *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959)). *Brady* encompasses material evidence "known only to police investigators and not to the prosecutor." *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). Thus, to comply with *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence

known to the others acting on the government's behalf in this case, including the police." *Id*., at 437.

To prevail on his *Brady* claim, Mr. Armstrong need not show that he "more likely than not" would have been acquitted or convicted of a lesser offense had the new evidence been admitted. *Smith v. Cain*, 565 U.S. 73, 75 (2012) (internal quotation marks and brackets omitted). Instead, "[h]e must show only that the new evidence is sufficient to 'undermine confidence' in the verdict." *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016).

In other words, relief is warranted when the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. at 435; *accord Banks v. Dretke*, 540 U.S. 668, 698-699 (2004); *Strickler v. Greene*, 527 U.S. 263, 290 (1999). Consequently, if it is reasonably probable the suppressed evidence "would have altered at least one juror's assessment" of the Commonwealth's first-degree murder narrative, prejudice is established and Mr. Armstrong is entitled to a new trial because the suppressed evidence may have warranted an acquittal or a finding of manslaughter or third-degree murder. *Cone v. Bell*, 556 U.S. 449, 452 (2009).

1. Application of Law to Facts

Based on John Harkins's and Levi Morton's PCRA hearing testimony, Mr. Armstrong told both that Williams had attempted to sexually assault him and that this is what precipitated the fight that ultimately resulted in Williams's death. Indeed, Harkins and Morton both testified how Mr. Armstrong described how Williams jumped on his back immediately before they both fell down the staircase. Morton also testified that Mr. Armstrong described how the fight started in Mr. Armstrong's bedroom, which is where Williams first attempted to sexually assault him, how it proceeded to the second-floor bathroom, and ultimately to the top of the second-floor staircase where Williams jumped on Mr. Armstrong's back immediately before they both fell down the stairs.

As the case law makes clear, a *Brady* claim has three components: the Commonwealth possessed (1) evidence favorable to the defendant, (2) but suppressed this favorable evidence, and the absence of the suppressed favorable evidence (3) undermines confidence in the jury's verdict(s). *Strickler v. Greene*, 527 U.S. at 281-282. The testimony at the June 12, 2017 PCRA hearing satisfies all three components.

2. Suppression of Favorable Evidence

a. Favorable Evidence

The Commonwealth charged Mr. Armstrong with premeditated first-degree murder. Based on this charge, the substance of Mr. Armstrong's statement was "favorable" because, if the jury found his sexual assault/self-defense narrative credible, such evidence exculpated him of first-degree murder. Specifically, according to Mr. Armstrong, Williams's death was not a premeditated act, but the end result of an attempted sexual assault that Mr. Armstrong repeatedly tried to thwart. In other words, the jury could have relied on his statement to acquit him based on self-defense or convict him of the lesser-included offenses of third-degree murder (malice) or manslaughter (imperfect self-defense).

b. Suppression

Harkins testified Homicide never disclosed the substance of Mr. Armstrong's statement to the DAO, while Morton said the exact opposite. Regardless of who is or is not being truthful, the DAO never disclosed the fact it had either imputed or explicit information in its case file regarding the substance of Mr. Armstrong's statement. If Harkins's testimony is truthful, the suppression component is satisfied because the substance of Mr.

Armstrong's sexual assault/self-defense statement was imputed to the DAO under *Kyles*. *Youngblood v. West Virginia*, 547 U.S. 867, 869-870 (2006). If Morton's testimony is truthful, the DAO possessed and knew about Mr. Armstrong's favorable/exculpatory statement, yet failed to disclose this fact before trial.

In other post-conviction cases regarding *Brady* claims, the DAO has argued there can be no *Brady* violation (or suppression) if trial counsel could have obtained the information by "diligently" pursuing other avenues. *E.g.*, *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263 (3d Cir. 2016). As the Third Circuit Court of Appeals recently held, there is no "diligence" component under *Brady* and its progeny.

The U.S. Supreme Court "has never recognized an affirmative due diligence duty of defense counsel as part of *Brady*, let alone an exception to the mandate of *Brady* as this would clearly be," especially when the Commonwealth represents it has disclosed all *Brady* evidence. *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d at 290; *accord Lewis v. Conn. Comm'r of Corr.*, 790 F.3d 109, 121 (2d Cir. 2015).

Brady and its progeny, therefore, "lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Banks v. Dretke*, 540 U.S. at 695. To the contrary, defense counsel is entitled to presume that prosecutors have "discharged their official duties." *Id*. at 696 (quoting *Bracy v. Gramley*, 520 U.S. 899, 909 (1997)). Thus, "[a] rule… declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id*. at 696.

Brady's focus is on fairness in criminal trials and this focus reflects the U.S. Supreme Court's concern with the government's "unquestionable advantage in criminal proceedings[.]" *Dennis v. Sec'y, Pa. Dep't of Corr*., 834 F.3d at 290. *Brady's* discovery obligation, therefore, serves as an equalizer because if due process did not require the prosecutor to disclose materially exculpatory and impeachment evidence, the search for truth in the criminal process would be unfairly skewed in the government's favor. Ample disclosure, therefore, is "as it should be" because it "tend[s] to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Kyles v. Whitely*, 514 U.S. at 439.

Interpreting *Brady* to encourage and require disclosure, therefore, reflects the prosecutor's "special status" within the criminal justice system and his unparalleled capabilities of developing facts to support the government's narrative of the crime. It also prevents the government and courts from shifting the fact-development burden to defense counsel. Requiring "an undefined quantum of diligence" on defense counsel's part would "dilute" *Brady's* "equalizing impact on prosecutorial advantage[.]" *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d at 290. It also requires "[s]ubjective speculation as to defense counsel's knowledge or access" to the suppressed evidence thus "breath[ing] uncertainty into an area that should be certain and sure." *Id*. at 293. In the end, then, "[w]hen police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State," *not* defense counsel or the defendant, "to set the record straight." *Banks v. Dretke*, 540 U.S. at 675-676.

According to Mr. Armstrong, he told trial counsel he gave a statement to detectives Morton and Harkins. The discovery provided by the DAO contradicted Mr. Armstrong's statement to trial counsel because it did not contain a single report by Morton or Harkins indicating that Mr. Armstrong gave a statement. Based on the discovery, trial counsel had every right to

conclude no statement existed because he was entitled to presume that the DAO "discharged [its] official duties." *Bracy v. Gramley*, 520 U.S. at 909; *accord Banks v. Dretk*e, 540 U.S. at 694 (commenting that defendants and trial counsel should be able to safely "assume that… prosecutors [will] not stoop to improper litigation conduct to advance prospects for gaining a conviction."); *Strickler v. Greene*, 527 U.S. at 283 n.23 ("We… note that, if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*.").

3. Prejudice

Based on the PCRA hearing testimony, as well as the post-testimony discussion between the parties and the Court, the critical component for Mr. Armstrong's *Brady* claim is the prejudice component. More specifically, the prejudice issues are: (1) whether the Court can consider detective Brian Peters's PCRA testimony when adjudicating Mr. Armstrong's *Brady* claim; (2) if so, whether Mr. Armstrong can establish prejudice; or (3) if not, whether Mr. Armstrong can prove prejudice.

Before addressing the prejudice question, the Court must consider whether the Commonwealth waived its ability to use Peters's testimony and handwritten notes during Mr. Armstrong's PCRA proceedings. Peters testified Mr. Armstrong made potentially incriminating statements in front of other officers and medical personal.[145] Remarkably, however, there are no other notes or reports documenting these alleged statements from Mr. Armstrong. Likewise, the Commonwealth presented none of these officers or medical personnel at trial to testify that Mr. Armstrong made these statements.

More importantly, ADA Ritterman (the PCRA prosecutor) obtained Peters' notes from the DAO's case file. ADA Levenberg, therefore, had these notes before trial and knew about them. ADA Levenberg, however, strategically chose not to present Peters at trial or introduce his handwritten notes. The Commonwealth, therefore, waived any use of these notes during Mr. Armstrong's PCRA proceedings because ADA Levenberg knowingly and strategically decided not to use them at trial. If trial counsel makes a strategic decision not to present a certain witness, the defendant cannot obtain a new trial because trial counsel never called the witness. The same is true here. The Commonwealth cannot incorporate this type of evidence into a post-

[145] NT, PCRA Hrg., 6/12/2017, pp. 53-61.

conviction *Brady* analysis when the prosecutor purposely and strategically chose not to call the witness and present his notes at trial.

Next, the answer to the first question is no. The Court's prejudice analysis under *Brady* is confined to examining how the suppressed evidence would have interacted with and impacted the evidence presented *at trial* and how these interactions and impacts would have affected the jury's perception of the *trial* evidence, not the evidence in the prosecutor's case file that the prosecutor strategically chose not to present at trial. *Turner v. United States*, 198 L.Ed.2d 443, 452 (2017); *Wearry v. Cain*, 136 S. Ct. at 1006; *Smith v. Cain*, 565 U.S. at 75; *Cone v. Bell*, 556 U.S. at 469-470; *Banks v. Dretke*, 540 U.S. at 698-699; *Kyles v. Whitley*, 514 U.S. at 434-435.

The reason why *Brady* is confined to the *trial* evidence is simple: if not confined to the *trial* evidence, the prosecution and defendant could both introduce after-discovered or non-suppressed evidence during the post-conviction process and then argue that the after-discovered or non-suppressed evidence, plus the suppressed evidence, does or does not prove prejudice under *Brady*. Taken to its logical extent, then, *if* the *Brady* analysis is not confined to the *trial* evidence, post-conviction courts would be required,

in many instances, to hold "mini-trials" to determine the *Brady* prejudice analysis.

For instance, if PCRA courts are permitted to consider non-suppressed evidence like Peters's handwritten note regarding Mr. Armstrong's alleged statement, which ADA Levenberg purposely chose not to introduce at trial, fundamental fairness and logic dictate it must also hear and consider the testimony of the defense witnesses trial counsel failed to present at trial, like Dr. Manion and Linda Armstrong. The situations are identical. ADA Levenberg knew of Peters and his handwritten notes, yet decided not call him as a witness at trial. The Commonwealth, however, was permitted to introduce Peters as a witness at the PCRA hearing over counsel's objections.

Trial counsel, on the other hand, knew of Dr. Manion and his report as well as Linda Armstrong's statement regarding her phone conversation with Mr. Armstrong immediately before the incident, yet trial counsel decided not to call either as defense witnesses. Like Peters's testimony did for the Commonwealth, Manion's and Linda Armstrong's testimony would have strengthened Mr. Armstrong's prejudice argument.

After the June 12, 2017 PCRA hearing, however, the PCRA court had yet to hear from Dr. Manion and Linda Armstrong or the other defense witnesses trial counsel failed to present at trial. Based on this asymmetry, where the PCRA court heard from Peters, but none of Mr. Armstrong's defense witnesses, Mr. Armstrong, in his post-hearing brief, argued that if the PCRA court incorporated Peters's testimony into its prejudice analysis, he was entitled to another PCRA hearing where Dr. Manion, Linda Armstrong, and the other defense witnesses could testify. Pa.R.Crim.P. 908(A)(2).[146]

The PCRA court denied this request. The PCRA court's denial was an abuse of discretion and violated Mr. Armstrong's due process rights. It was fundamentally unfair to consider evidence the Commonwealth strategically refused to present at trial, but not evidence trial counsel failed to present at trial when evaluating *Brady's* prejudice prong.

Had counsel been permitted to present Dr. Manion at another PCRA hearing, Dr. Manion would have testified that the autopsy findings supported Mr. Armstrong's version of events, particularly his description of how he used Williams's shirt to stop his attempted sexual assault and how the shirt was the

[146] Rpp. 93-115.

mechanism that led to Williams's strangulation.[147] Dr. Manion's expert testimony, therefore, would have significantly undercut the Commonwealth's position, which it presented through Dr. Collins,[148] that Mr. Armstrong had to have sought out and used a thin ligature, like a power cord, to strangle Williams. Seeking out a ligature to strangle someone is powerful evidence in support of a first-degree murder conviction. However, causing the decedent's death with the very shirt the decedent is wearing at the time of his death, while the defendant is fending off the decedent's attempted sexual assault, significantly undermines the Commonwealth's premeditation and specific intent arguments for first-degree murder.

Likewise, had counsel been permitted to call Linda Armstrong at another PCRA hearing, she would have discussed the phone call she had with Mr. Armstrong as Williams helped him into the house that night shortly before the incident. Linda's trial testimony would have mirrored her PCRA statement:

[147] Rpp. 124-126.
[148] NT, Trial, 6/20/2012, pp. 95-96, 110-114.

> I answered immediately and started talking. When there was no response I listened.
>
> While on my cell phone, I heard Raymond say, that he didn't have any feelings in his legs or arms and that he was done. He kept repeating "I'm done." Several times Mr. Williams said to Raymond, "Come on Ray get up." I did not know what had happened. My phone beeped [as I was listening to Raymond and Mr. Williams]. It was my son's girlfriend Kim... I told her I was on the phone now with him and he wasn't answering... I told her I had to go and I clicked back over to Raymond's phone line.
>
> When I came back on the line [with Raymond's phone] I heard Mr. Williams saying, "Come on Ray get up." I yelled into the phone at least [twice], "Raymond pick up the phone it's mom," [but] he never acknowledged me.
>
> Initially, I thought Mr. Williams was trying to help Raymond. I became frightened when I heard Mr. Williams tone of voice change. It became very harsh. I heard him say, "Get up here I said, get up. You're mine now." I started yelling, "Raymond, Raymond please answer me it's mom," then I listened. Next I heard a groan sound and I called to Raymond, "It's mom Raymond, I heard you, please answer me. I heard you."[149]

Linda's testimony would be admissible under the state of mind hearsay exception. Pa.R.Evid. 803(3). Pursuant to the state of mind hearsay exception,

[149] Rpp. 89-90.

where a declarant's out-of-court statements demonstrate his state of mind, are made in a natural manner, and are material and relevant, they are admissible. *Commonwealth v. Laich*, 777 A.2d 1057, 1060-1061 (2001); *Commonwealth v. Riggins*, 386 A.2d 520, 525 (Pa. 1978). Out-of-court declarations that fall within the state of mind hearsay exception are still subject to general evidentiary rules governing competency and relevancy. *Commonwealth v. Auker*, 681 A.2d 1305, 1319 (Pa. 1996). Accordingly, whatever purpose the statement is offered for, be it to show the declarant's intention, familiarity, or sanity, that purpose must be a "factor in issue," that is, relevant. *Commonwealth v. Wright*, 317 A.2d 271, 274 (Pa. 1974). Evidence is relevant if it logically tends to establish a material fact in the case, if it tends to make a fact at issue more or less probable, or if it supports a reasonable inference or presumption regarding the existence of a material fact. *Commonwealth v. Johnson*, 727 A.2d 1089, 1102 (Pa. 1999).

The statement, "You're mine now," made in a sinister tone of voice, is clearly relevant to Williams's "intention" with Mr. Armstrong. Indeed, because Mr. Armstrong argued self-defense, it was imperative for him to present some evidence that Williams intended to harm him. In other words,

Williams's state of mind immediately before the incident was relevant to a material issue at Mr. Armstrong's trial. Pa.R.Evid. 402.

Linda's testimony regarding the "You're mine now" statement is also admissible as non-hearsay offered to show Williams's state of mind. *See generally* PACKEL & POULIN, PENNSYLVANIA EVIDENCE, § 803(3)-1(a) (3rd ed. 2007); OHLBAUM ON THE PENNSYLVANIA RULES OF EVIDENCE, §§ 801.12, 803.3 (2007-2008 ed.). Non-hearsay state of mind statements are those that "do not directly assert a declarant's state of mind but are circumstantially probative of it, *e.g.*, demonstrating fear, knowledge, or motive." OHLBAUM ON THE PENNSYLVANIA RULES OF EVIDENCE, §§ 801.12[1]. For example, "a child's statement about how his father punishes him is admissible to explain why he feared going home," but that statement cannot be used to prove how punishment is administered. *Id*. Of course, for such statements to be admissible, the declarant's state of mind must be relevant. Pa.R.E. 402. *Commonwealth v. Moore*, 937 A.2d 1062, 1079-1080 (Pa. 2007).

Again, under the non-hearsay evidentiary rule, Linda's statement can be used to circumstantially prove the motive behind the altercation between Mr. Armstrong and Williams that ultimately led to Williams's death. The motive being that Williams wanted to be with Mr. Armstrong sexually, so he

attempted to sexually assault him when Mr. Armstrong was weak and sick, but Mr. Armstrong thwarted the attempted sexual assault by fighting back.

As these examples make clear, expanding *Brady's* prejudice analysis to evidence *not presented at trial*, but known to either or both parties before trial, is rife with complications and inconsistent with the clearly-establish *Brady* case law. Thus, the PCRA court erred when it incorporated Peters's testimony and handwritten statement into its *Brady's* prejudice analysis.

Under a straightforward *Brady* analysis, had jurors known Mr. Armstrong immediately told detectives Williams attempted to sexually assault him and that this was what precipitated the altercation that ultimately led to Williams's death, there is a reasonable probability this evidence would have altered at least one juror's view of the Commonwealth's first-degree murder narrative. Stated differently, there is a reasonable probability at least one juror would have found Mr. Armstrong's sexual assault/self-defense narrative credible or more credible and used this finding to (1) acquit him of all charges based on self-defense or (2) convicted him of (a) voluntary manslaughter under an imperfect self-defense theory, 18 Pa. C.S. § 2503(b), or (b) third-degree murder under a malice, but no specific intent theory.

Mr. Armstrong is entitled to a new trial.

II. The prosecutor's false argument to the jury where he told the jury Mr. Armstrong fabricated the sexual assault narrative only after he viewed the discovery and physical evidence prejudiced Mr. Armstrong warranting a new trial. U.S. Const. amdts. 5, 6, 8, 14, Pa. Const. art. 1, § § 8, 9.

During closing arguments, ADA Levenberg called Mr. Armstrong a liar and argued to the jury that Mr. Armstrong had concocted the sexual assault narrative only *after* reviewing the discovery and scene photographs. For instance, ADA Levenberg argued:

> Every little piece that [Mr. Armstrong] explains; the biomechanics of the struggle, flipping [Mr. Williams] over down the stairs, trying to explain the ligature mark. All of these things are directly linked, every single little thing he remembers is directly linked to some piece of physical evidence. He looked at the file. He looked at the pictures. He knew what the evidence was going to be. He knew what you were going to hear. And he weaves this story to try and save himself.[150]

ADA Levenberg based his argument on the fact Mr. Armstrong never told the EMT and ER doctors about Williams's attempted sexual assault:

[150] NT, Trial, 6/22/2012, p. 72.

> What doesn't he say during all this time? He doesn't say, hey, thank God you're here. By the way, I was just anally raped and I had to kill my best friend because he left me no choice, because afterward he tried to kill me. He doesn't say any of that. He doesn't say that to the medics when they first responded.
>
> …
>
> I asked [Dr. Hart] if [Mr. Armstrong] made any other complaints. No. [Dr. Hart] certainly didn't say, oh, yeah, by the way, I noted here in the chart [Mr. Armstrong] reported that he was sexually assaulted.[151]

Based on Morton's and Harkin's PCRA hearing testimony, ADA Levenberg's closing arguments were false – Mr. Armstrong told Morton and Harkins about the attempted sexual assault only hours after being taken into custody.

More than eighty years ago, the U.S. Supreme Court urged prosecutors "to refrain from improper methods calculated to produce a wrongful conviction[.]" *Berger v. United States*, 295 U.S. 78, 88 (1935). Making false arguments, whether knowingly false or not, is one such "method[] calculated to produce a wrongful conviction." *Id.* The "relevant question is whether [ADA Levenberg's] comments so infected [Mr. Armstrong's] trial with unfairness as to make the resulting conviction a denial of due process." *Darden*

[151] NT, Trial, 6/22/2012, pp. 72, 80-81.

v. Wainwright, 477 U.S. 168, 181 (1986) (internal quotations and citation omitted). Stated differently, a "prosecutor's arguments to the jury are not a basis for the granting of a new trial unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility towards the accused which would prevent them from properly weighing the evidence and rendering a true verdict." *Commonwealth v. May*, 898 A.2d 559, 567 (Pa. 2006). To answer this question, the Court "must consider the probable effect the prosecutor's [statements had]… on the jury's ability to judge the evidence fairly." *United States v. Young*, 470 U.S. 1, 11-12 (1985).

The prejudice here is clear. ADA Levenberg's false argument created a false and hostile perception of Mr. Armstrong. Based on ADA Levenberg's false argument, the jury was led to believe Mr. Armstrong not only murdered his good friend Anthony Williams, he then went to great lengths to escape responsibility for the murder by fabricating a false sexual assault/self-defense narrative after viewing the discovery and scene photographs.

Once this hostile perception formed, the likelihood the jury fairly judged the evidence was minimal at best. The lack of evidence supporting the Commonwealth's first-degree murder charge proves this point. At trial, ADA

Levenberg argued Mr. Armstrong had to have strangled Williams with a ligature. ADA Levenberg, however, admitted the Commonwealth could not prove motive.[152] Likewise, when CSI personnel searched Williams's home and found no ligature, ADA Levenberg argued Mr. Armstrong had to have flushed the ligature down the toilet after strangling Williams. Thus, based on ADA Levenberg's theory, Mr. Armstrong strangled Williams for no apparent reason with an unknown ligature, which he then disposed in a toilet, and then Mr. Armstrong stripped naked and ran outside to profess to the world he had just strangled Williams for no apparent reason. Keep in mind, the toxicology results on Mr. Armstrong were negative, meaning he was not under the influence of any controlled substances at the time of the incident.

Despite this lack of motive evidence and ADA Levenberg's absurd sequencing of events, the jury still convicted Mr. Armstrong of first-degree murder. The jury's guilty verdict strongly suggests the hostile perception it formed of Mr. Armstrong, in light of ADA Levenberg's false argument, prevented it from fairly judging the evidence thus warranting a new trial.

[152] The was evidence of motive. Mr. Armstrong testified his actions led to Williams's death, but said he was merely defending himself from Williams's repeated attempts to sexually assault him. ADA Levenberg simply refused to acknowledge the self-defense motive.

Moreover, had the jury known Mr. Armstrong immediately told detectives how Williams attempted to sexually assault him, the odds of a first-degree murder conviction diminished significantly. That Mr. Armstrong immediately told detective about the attempted sexual assault would have impacted how the jury viewed Mr. Armstrong's testimony at trial–*to Mr. Armstrong's benefit*. This evidence would have undermined any argument Mr. Armstrong concocted the sexual assault/self-defense narrative after reviewing the discovery and physical evidence. The narrative's immediate telling, in other words, would have probably resulted in the jury finding Mr. Armstrong's sexual assault/self-defense narrative more credible.

If the jury found Mr. Armstrong's sexual assault/self-defense narrative credible or more credible, this would have impacted its verdict. For instance, if the jury found the sexual assault/self-defense narrative credible or more credible, it could have (1) acquitted Mr. Armstrong based on self-defense or (2) convicted him of either (a) voluntary manslaughter under an imperfect self-defense theory or (b) third-degree murder.

Mr. Armstrong is entitled to a new trial.

III. The PCRA court erred by not granting an evidentiary hearing where Mr. Armstrong could present several witnesses in support of his claim trial counsel was ineffective for failing to present substantial testimony and evidence that corroborated Mr. Armstrong's testimony that Anthony Williams died as a result of Mr. Armstrong defending himself against Williams's attempted sexual assault. U.S. Const. amdts. 5, 6, 8, 14, Pa. Const. art. 1, § § 8, 9.

A. Introduction

Mr. Armstrong's primary defenses at trial were self-defense and to a lesser extent imperfect self-defense. Specifically, his actions, which ultimately led to William's death, were triggered by Williams's attempted sexual assault. The assault started in his bedroom, spilled over into the upstairs bathroom and hallway, and continued when Williams jumped on his back at the top of the second-floor staircase causing both to stumble down the stairs, and ended when Mr. Armstrong grabbed Williams's shirt and yanked it until Williams stopped his non-consensual attempts to have sex with him.

Based on this narrative, it was critical for Mr. Armstrong to present evidence in support of his claim Williams attempted to sexually assault him. Here, trial counsel's investigator, Manus MacLean, interviewed several witnesses before trial who saw and heard Williams when he was around Mr.

Armstrong. It was their lay opinions, based on Williams's statements and behaviors, that Williams was sexually obsessed with Mr. Armstrong.

These lay opinions would have been admissible under Rule 701: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness, and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue[.]" Pa.R.Evid. 701.

This type of opinion testimony would have been "helpful to a clear understanding" of why Williams attacked Mr. Armstrong. In other words, just as prosecutors believe it critical to establish a crime's motive, it was critical for Mr. Armstrong to explain to the jury *why* Williams attacked him. Simply saying Williams attempted to sexually assault him is a start, but to ensure Mr. Armstrong raised reasonable doubt regarding the murder charge, trial counsel needed to present this type of evidence to corroborate Mr. Armstrong's testimony that Williams was sexually attracted to and obsessed with him.

Trial counsel also failed to interview Harold Richardson before trial. Trial counsel knew or should have known of Richardson before trial because the prosecutor and his investigator interviewed him before trial. Richardson

lived with Williams for a time period. On multiple occasions, Richardson awoke in the morning to find Williams performing oral sex on him or attempting to have anal sex with him. Richardson never consented to these acts. Richardson also mentioned a time when Williams walked up to his friend, Jerome, and grabbed his crotch without Jerome's consent.

Richardson's testimony would be admissible under Rules 404(a)(2)(B) and 405(b)(2). In a criminal case, the accused may offer evidence of a pertinent character trait of the alleged victim. Under Rule 405(b)(2), the trait may be proven by specific instances of conduct without regard to whether the trait is an essential element of the charge or defense. *Commonwealth v. Dillon*, 598 A.2d 963 (Pa. 1991) (citing Pa.R.Evid. 405(b)(2)). To be admissible under Rule 404(a)(2)(B), the character trait must be "pertinent." A "pertinent" character trait "is limited to a character trait of the victim that is relevant to the crime or defense at issue in the case." *Commonwealth v. Minich*, 4 A.3d 1063, 1072 (Pa. Super. 2010). Based on these rules, therefore, "[c]riminal defendants asserting self-defense may introduce evidence of a victim's prior conduct tending to establish the victim's [relevant] propensities." *Id.*; *see also Commonwealth v. Miller*, 634 A.2d 614, 622 (Pa. Super. 1993) (where self-defense was properly at issue in the case, then expert testimony regarding

"battered woman syndrome" was relevant to prove the defendant's state of mind as it relates to an element of a theory of self-defense).

Here, Richardson's testimony would have constituted evidence tending to establish Williams's propensity to make unwanted and non-consensual sexual advances toward men he finds sexually attractive. Like the lay opinion testimony regarding Williams's sexual fascination with Mr. Armstrong, Robinson's "trait" testimony would have constituted powerful corroborative evidence regarding Mr. Armstrong's sexual assault/self-defense narrative.

B. Witnesses Not Presented

During closing arguments, the prosecutor described Williams in the following manner:

> What about the sexual assault, the rape? [Mr. Armstrong] comes in here and accuses his best friend in Philadelphia... of raping him, raping him... I mean it's ridiculous. Shame on him for coming in here and making accusations like that to save himself from a situation that he created. *A generous person who had let him live in his house, a generous person [who] put a roof over his head whenever he needed one, who... introduced him to his son, a person who was raising a son, who worked two jobs to support [his son].*[153]

[153] NT, Trial, 6/22/2012, p. 73.

This is an incomplete and inaccurate caricature of Williams. Yes, Williams allowed Mr. Armstrong to live with him, but he did not do this out of the goodness of his heart; he did it with the hopes of one day manipulating a young, muscular, attractive black man to be intimate with him. Williams trolled the internet, particularly the gay black websites, *e.g.*, blackplanet.com; Adam4Adam.com, in search of young, attractive black men. Yes, Williams had a son, but he was gay and strongly attracted to attractive young, black men, even under-aged boys. Once he identified an attractive black man, he contacted them claiming he had his own modeling agency and was in search of young male models. Some men took the bait and traveled to Philadelphia on their own dime. For those reluctant to travel to Philadelphia, Williams paid their travel expenses. Williams allowed these men to live with him under the guise he had a modeling company that would advance their modeling careers. There was a catch, though. After paying their living expenses for a period of time, Williams used this against them by demanding sexual favors in exchange for his continued financial support. If the men refused, Williams quit paying their expenses and evicted them.

Likewise, contrary to the Commonwealth's claim at trial, Williams was infatuated and in love with Mr. Armstrong. It was his long-standing desire to be with Mr. Armstrong sexually and romantically that led him to sexually assault Mr. Armstrong in his (Armstrong's) bedroom once he helped him inside his house the night of the incident.

Manus MacLean, trial counsel's investigator, interviewed several witnesses before trial who provided this narrative of Williams's life and described his infatuation with Mr. Armstrong. Trial counsel, though, presented none of these witnesses at trial.

1. Tayo Afolabi

MacLean communicated with Tayo before trial. On May 28, 2012, Tayo emailed MacLean explaining how he knew Williams.[154] Mr. Armstrong's family flew Tayo from German to Philadelphia for the trial because he was willing and prepared to testify.[155] Trial counsel, though, never presented him.

According to his May 28, 2012 email, Tayo said Williams contacted him via blackplant.com under the guise he had a successful modeling company. Eager to advance his modeling career, Tayo flew from Atlanta and stayed with

[154] Rp. 81.
[155] Rp. 81.

Williams only to learn he did not have a modeling company. During his stay, Tayo saw Williams search the internet for men and under-aged boys, who he flew to Philadelphia under the same guise he used with him regarding his alleged modeling company.

Tayo saw Williams manipulate these young men and under-aged boys. If they refused to have sex with him, Williams refused to photograph them, meaning if they wanted to advance their modeling career, they had to have sex with him. When Tayo figured out Williams's fictiious modeling agency was a front used to hoodwink young men and under-aged boys to coming to Philadelphia, Tayo left, but not before having a heated argument with Mr. Williams.

Tayo met Mr. Armstrong while he was staying at Williams's and immediately saw the fascination Mr. Williams had towards Mr. Armstrong.

2. Michele Canales

MacLean interviewed Canales before trial. Canales was willing to testify, but trial counsel never presented her. Canales worked with Mr. Armstrong and frequently spent the night the at Williams's house with Mr. Armstrong. She nicknamed Williams's house "the orphanage" because he always had young and under-aged black men staying with him. She also said that, based

on Williams's comments to her, his behavior, and facial expressions that she heard and observed, it was her lay opinion Williams was in love and sexually obsessed with Mr. Armstrong.[156]

3. Hayley Sydor

MacLean interviewed Sydor before trial. Sydor was willing to testify, and in fact testified as a character witness at trial, but trial counsel never elicited the following testimony from her. Sydor lived with Williams and would have testified to the frequent presence of young men and boys in his home. She also said that, based on Williams's comments, his behavior, and his facial expressions that she heard and observed, it was her lay opinion Williams was in love and sexually obsessed with Mr. Armstrong.[157]

4. Eric Tolbert

MacLean interviewed Eric Tolbert. Tolbert was willing to testify, and in fact testified as a character witness at trial, but trial counsel never elicited the following testimony from him. Tolbert said Mr. Armstrong decided to move out of Williams's house before Williams threatened to evict him, assuming Williams made such a threat.[158]

---

[156] Rp. 92.
[157] Rp. 92.
[158] Rp. 92.

5. Linda Armstrong

Linda spoke with trial counsel numerous times before trial, particularly about her phone calls with Mr. Armstrong immediately before and during the incident. Trial counsel subpoenaed Mr. Armstrong's cell phone records, which confirmed her statement regarding her phone call with her son. Linda was willing to testify, but trial counsel did not presented her.

Linda would have testified regarding Williams's then existing state-of-mind, motive, and intent when he assisted a weak Mr. Armstrong into his house:

> I heard Mr. Williams yell, "*Give me that [God] damn phone[.*]" I yelled in to my phone, "Raymond, Raymond it's mom." I heard Mr. Williams yelling, "*You're mine now, oh yea, you're mine now and I'm turning this [God] damn cell phone off!*" The call ended and I tried over and over again to reach Raymond, but there was no answer. I knew my son was in danger.[159]

6. Dr. Michals and Dr. Manion

Trial counsel knew about Dr. Michal's and Dr. Manion's reports, both of which went directly to Mr. Armstrong's state-of-mind, *e.g.*, specific intent and malice, and the self-defense claim. Trial counsel, though, presented neither at trial.

---

[159] Rpp. 89-90.

7. Harold Robinson

Trial counsel never interviewed Harold Robinson, despite the fact the Commonwealth provided Robinson's contact information to him as early as May 2011.[160] The prosecutor interviewed Robinson and made it clear Robinson lived with Williams for quite some time. A competent trial attorney would have interviewed Robinson for the simple purpose of determining whether Williams had a sexual interest in Mr. Armstrong.

Counsel (Cooley) interviewed Robinson on February 10th and 12th of 2015. Robinson discussed his pre-trial interview with the prosecutor. He said the prosecutor and his investigator interviewed him at school and asked several regarding Williams and Mr. Armstrong. Robinson said the investigator took notes during the interview. At the end of the hour-long interview, the investigator hand-wrote a statement, which he asked Robinson to read. Robinson read the statement, but when he identified errors, the investigator rewrote the statement. Robinson's statement was not part of the discovery.

Robinson described how Williams flew him to Philadelphia from North Carolina, paid his room and board, and allowed him to sleep in his (Williams's) bedroom. On multiple occasions, though, Robinson awoke in the

[160] NT, Pre-Trial Hrg., 5/26/2011, pp. 7-8.

morning to find Williams giving him or attempting to give him oral sex. On another occasion, he awoke as Williams was attempting to have anal sex with him. Robinson, who is gay, rejected Williams's nonconsensual and inappropriate sexual attempts each time.

When Robinson began dating his now ex-boyfriend, Williams told him he had to move his belongings to his (Williams's) office because he could no longer stay in his bedroom. Williams also quit paying his living expenses. Robinson said Williams had no boundaries. Robinson not only referenced Williams's inappropriate sexual attempts toward him, he also described another incident where Williams grabbed his friend's crotch without consent. His friend's name is Jerome.

Robinson described what he saw and heard during the time he stayed with Williams. Each weekend Williams flew in attractive, young black men from all over the country. Many times he heard Williams having sex with these men.

Robinson said Williams had more photographs of Mr. Armstrong in his house than any other male model he photographed. As time went on, Williams always added more photographs of Mr. Armstrong, many of which

had Mr. Armstrong posing in provocative positions. Based on his lay opinion, Robinson was certain Williams was sexually obsessed with Mr. Armstrong.

C. Trial Counsel Did Not Have a Reasonable Basis For Not Interviewing and/or Presenting These Witnesses

Trial counsel did not have a reasonable basis not to present these witnesses. Without them, the only evidence trial counsel presented regarding Mr. Armstrong's sexual assault/self-defense narrative was Mr. Armstrong's own testimony. The testimony these witnesses could have offered was not only admissible, but extremely probative to the issue of whether Williams attempted to sexually assault Mr. Armstrong. According to these witnesses, Williams was not only sexually obsessed with Mr. Armstrong, he had a proclivity to engage in non-consensual sexual acts with other men. The combination of these two facts represented powerful corroborative evidence regarding Mr. Armstrong's sexual assault/self-defense testimony.

Outside of having Mr. Armstrong testify, trial counsel did nothing in terms of persuading the jury that Mr. Armstrong's narrative of the incident was true. This was objectively unreasonable because presenting these witnesses "offered a potential for success substantially greater than the tactics actually utilized." *Commonwealth v. Badger*, 393 A.2d 642, 644 (Pa. 1978).

D. Prejudice

Trial counsel's failure to interview and/or present these witnesses prejudiced Mr. Armstrong. Individually and collectively, had trial counsel presented any or all these witnesses, it is reasonably probable "at least one juror would have harbored a reasonable doubt," *Buck v. Davis*, 137 S.Ct. 759, 776 (2017); *Wiggins v. Smith*, 539 U.S. 510, 537 (2003), regarding the Commonwealth's first-degree murder count. In other words, the jury could have acquitted Mr. Armstrong of all counts based on self-defense or convicted him of these lesser offenses: (1) third-degree murder, (2) voluntary manslaughter, or (3) involuntary manslaughter.

E. Right to a Hearing

A PCRA court "shall order a hearing" when a PCRA petition "raises material issues of fact." Pa.R.Crim.P. 908(A)(2); *accord Commonwealth v. Williams*, 732 A.2d at 1189-1190. A hearing cannot be denied unless the PCRA court is "certain" the PCRA petition lacks "total" merit. *Commonwealth v. Bennett*, 462 A.2d at 773. 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 at 173. 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*.

Mr. Armstrong pled the abovementioned facts in his PCRA petition and argued them at the February 21, 2017 oral arguments before the PCRA court.[161] These facts, as explained, entitle Mr. Armstrong to relief. At the very least, more importantly, they raise material issues of fact regarding trial counsel's decision-making and whether the jury would have convicted Mr. Armstrong of first-degree murder had these witnesses testified.

Mr. Armstrong, therefore, is entitled to new trial or a PCRA hearing where these witnesses can testify and the PCRA court can make findings and conclusions.

[161] Rpp. 116-123.

IV. The PCRA court erred because trial counsel was ineffective for failing to request an involuntary manslaughter instruction. U.S. Const. amdts. 5, 6, 8, 14, Pa. Const. art. 1, § § 8, 9.

Under 18 Pa. C.S. § 2504(a), a person is guilty of involuntary manslaughter "when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner, he causes the death of another person." *Commonwealth v. McCloskey*, 656 A.2d 1369, 1375 (Pa. Super. 1995). Involuntary manslaughter is a lesser-included offense of murder. *Commonwealth v. Garcia*, 378 A.2d 1199, 1208, 1209-1210 (Pa. 1977).

Criminal defendants are entitled to a lesser-included offense instruction if the trial evidence reasonably supports a verdict for the lesser-included offense. A trial court, therefore, "must charge on a lesser included offense," like involuntary manslaughter, "if there is some disputed evidence concerning an element of the greater charge or if the undisputed evidence is capable of more than one rational inference." *Commonwealth v. Hawkins*, 614 A.2d 1198, 1202 (Pa. Super. 1992). Thus, "[i]t is the presence of any quantum of evidence countering the prosecution's [case-in-chief] which will activate the need for the charge on the lesser included offense; no matter how improbable that evidence may be." *Commonwealth v. Channell*, 484 A.2d 783, 787 (Pa. Super.

1984) (quotations and citations omitted) (emphasis added). When reviewing whether the trial evidence was sufficient to reasonably support a verdict, the Court is "required to view the evidence in the light most favorable to the defendant." *Commonwealth v. McCloskey*, 656 A.2d at 1372 n.1 (emphasis added).

Based on the trial evidence, an involuntary manslaughter verdict would have been reasonably supported. The jury could have reasonably concluded Mr. Armstrong was lawfully defending himself as he fought off Williams's attempted sexually assault. The jury could have also reasonably concluded the manner in which Mr. Armstrong defended himself, *i.e.*, pulling Williams's shirt from behind until he (Williams) tapped out, was reckless or grossly negligent. Negligence is about foresseeability and the jury could have reasonably concluded that, while Mr. Armstrong did not specifically, intentionally, or wantonly kill Williams, it should have been fairly foreseeable to him that his actions could result in Williams's death.

Mr. Armstrong, therefore, was entitled to have the jury instructed on involuntary manslaughter. *Commonwealth v. McCloskey*, 656 A.2d at 1372; *accord Commonwealth v. Draxinger*, 498 A.2d 963, 965 (Pa. Super. 1985) ("If any version of the evidence in a homicide trial, from whatever source, supports

a verdict of involuntary manslaughter, then the offense has been made an issue in the case, and a charge on involuntary manslaughter must be given if requested.").

To vindicate Mr. Armstrong's right to an involuntary manslaughter instruction, however, trial counsel had to timely request such an instruction. *Commonwealth v. McCloskey*, 656 A.2d at 1372. Trial counsel did not request an involuntary manslaughter instruction. Trial counsel did not have a reasonable basis for not requesting an involuntary manslaughter instruction. Trial counsel's failure was objectively reasonable because there was sufficient evidence in the record to warrant the instruction.

Had trial counsel requested an involuntary manslaughter instruction and the trial court denied his request, such an error would have been considered prejudicial, not harmless:

> We hold that where sufficient evidence is presented at trial to entitle a defendant to an instruction on a criminal offense, and, upon timely request, the jury is so instructed, the failure to afford the jury an opportunity to return a verdict on the charge is not harmless error beyond a reasonable doubt.

Commonwealth v. McCloskey, 656 A.2d at 1378.

Consequently, if trial counsel failed to request an involuntary manslaughter instruction, when the evidence reasonably supported such a verdict, trial counsel's error must too be considered prejudicial and not harmless.

Mr. Armstrong is entitled to a new trial.

V. The PCRA court erred because trial counsel was ineffective for not requesting a sudden provocation instruction in connection with the trial court's voluntary manslaughter instruction. U.S. Const. amdts. 5, 6, 8, 14, Pa. Const. art. 1, § § 8, 9.

Voluntary manslaughter is a lesser-included offense of murder. *Commonwealth v. Schaller*, 426 A.2d 1090, 1095 (Pa. 1981). In Pennsylvania, two fact patterns support a finding of voluntary manslaughter. *First*, a person who "kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by… the individual killed[.]" 18 Pa. C.S. § 2503(a)(1). *Second*, a person who "intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify the killing…., but his belief is unreasonable." 18 Pa. C.S. § 2503(a)(1). This is referred to as imperfect self-defense.

Trial counsel requested and received an imperfect self-defense instruction,[162] but he did not request a sudden provocation instruction. The evidence, though, reasonably supported such a verdict.

[162] NT, Trial, 6/22/2012, pp. 113-115.

The test for provocation is "whether a reasonable [person] confronted by the same series of events, would become impassioned to the extent that his mind would be incapable of cool reflection." *Commonwealth v. Kim*, 888 A.2d 847, 853 (Pa. Super. 2005). Passion "means any of the emotions of the mind such as anger, rage, sudden resentment or terror, rendering the mind incapable of cool reflection." *Commonwealth v. Gay*, 413 A.2d 675, 678 (Pa. 1980).

A reasonable person in Mr. Armstrong's position would have reacted as he did when Williams attempted to sexually assault him. His mind, in other words, was "incapable of cool reflection" while Williams continually attempted to subdue him with an eye toward sexually assaulting him. This is true even after they fell down the second-floor stairs because, according to Mr. Armstrong, Williams did not relent after falling down the stairs. Consequently, there was some evidence in the record to warrant a serious provocation instruction.

Trial counsel, though, did not request a serious provocation instruction and he did not have a reasonable basis for not requesting one. Mr. Armstrong's sexual assault/self-defense narrative, however, should have made this instruction foreseeable, relevant, and available. Mr. Armstrong had to

continually fight off Williams's sexual advances and assaults. Fending off an attempted sexual assault makes it nearly impossible to rationally reflect on the manner in which one is defending him or herself.

Trial counsel's objectively unreasonable decision prejudiced Mr. Armstrong and cannot be considered harmless because trial counsel's actions deprived the jury of potentially returning a voluntary manslaughter verdict based on serious provocation.

Mr. Armstrong is entitled to a new trial.

VI. The cumulative errors – from the *Brady* violations, to the prosecutor's false argument, to trial counsel's ineffectiveness – rendered Mr. Armstrong's trial fundamentally unfair. U.S. Const. amdts. 5, 6, 8, 14, Pa. Const. art. 1, § § 8, 9.

"[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). 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).

The jury knew Mr. Armstrong's actions resulted in William's death. The jury, therefore, had to decide whether: (1) Mr. Armstrong killed Williams with premeditation and deliberateness, making him guilty of first-degree murder; (2) Mr. Armstrong acted in self-defense, making Williams's death justifiable and Mr. Armstrong innocent of all charges; (3) Mr. Armstrong's subjective perception of imminent bodily harm or death, based on Williams's attempted

sexual assault, was objectively unreasonable, *i.e.*, imperfect self-defense, making him guilty of either voluntary or involuntary manslaughter; or (4) Williams's attempted sexual assault caused Mr. Armstrong to defend himself in the heat of passion, making him guilty of voluntary or involuntary manslaughter.

The only evidence that Williams attempted to sexually assault Mr. Armstrong came from Mr. Armstrong's trial testimony. The witnesses trial counsel failed to present and Mr. Armstrong's suppressed custodial statements would have provided impactful and admissible evidence regarding self-defense, sudden provocation, and imperfect self-defense–each of which undermine confidence in the jury's first-degree murder verdict.

Several of the witnesses who did not testify described Williams's infatuation with Mr. Armstrong. This goes directly to Mr. Armstrong's self-defense claim. The jury needed to hear evidence and testimony as to why Williams would have tried to sexually assault Mr. Armstrong. In many respects, then, the testimony of these witnesses constitutes motive evidence, *i.e.*, Williams attacked Mr. Armstrong because he long desired him, but Mr. Armstrong was now moving out of his house, so he had to act quickly before he left.

Tayo and Robinson would have described Williams's proclivity to touch men inappropriately and make unwanted sexual advances toward them. This goes directly to the issue of whether Williams would have acted on his desire to be with Mr. Armstrong, even if Mr. Armstrong had no desire to be with him physically or romantically. It supports the belief that, yes, Williams would have tried to, and in fact did, force himself onto Mr. Armstrong because Mr. Armstrong was physically and emotionally weak when he entered his house.

The jury also needed to hear evidence and testimony supporting Mr. Armstrong's claim that Williams attempted to sexually assault him. Linda Armstrong's statement would have hammered home this point because she heard Williams say, in an angry voice, "You're mine now, oh yea, you're mine now." This testimony, perhaps more than any other testimony, proves that Williams did in fact attempt to sexually assault Mr. Armstrong because it goes to Williams's then existing state of mind, motive, and intent. Linda's testimony, therefore, would have been admissible under Pa.R.Evid. 803(3).

The jury also needed to hear evidence and testimony proving Mr. Armstrong did not concoct his self-defense claim after reviewing the discovery and physical evidence. In other words, if the jury was to believe Williams attempted to sexually assault Mr. Armstrong, it needed to know Mr.

Armstrong told this to detectives immediately after the incident and not for the first time at trial. Mr. Armstrong's custodial statements, consequently, would have bolstered not only his credibility, but the validity of his claim that Williams attempted to sexually assault him.

The jury also needed to hear evidence and testimony regarding Mr. Armstrong's state-of-mind during the attempted sexual assault. Drs. Michals and Manion would have provided such testimony. Psychiatric testimony, for instance, is both competent and relevant to demonstrate that the defendant's statement of mind was such that he acted in a state of passion sufficient to reduce murder to manslaughter. *Commonwealth v. Henderson*, 416 A.2d 1084, 1085 (Pa. Super. 1979); *Commonwealth v. McCusker*, 292 A.2d 286 (Pa. 1972).

Collectively, had the jury heard from these witnesses and about Mr. Armstrong's custodial statements, it is reasonably probable this evidence would have altered at least one juror's perception of the first-degree murder count.

Mr. Armstrong is entitled to a new trial.

CONCLUSION

WHEREFORE, based on the forgoing facts and authorities, Mr. Armstrong respectfully requests this Court to reverse the PCRA court's dismissal and grant him a new trial or in the alternative an evidentiary hearing.

Respectfully submitted this the 16th day of March, 2018.

/s/Craig M. Cooley
COOLEY LAW OFFICE
1308 Plumdale Court
Pittsburgh, PA 15239
412-607-9346 (cell)
919-228-6333 (office)
craig.m.cooley@gmail.com
www.pa-criminal-appeals.com

CERTIFICATE OF SERVICE

On March 16, 2018, counsel e-filed this pleading on PAC-File. By e-filing the pleading, the Philadelphia District Attorney's Office received email notification of its filing allowing it to access a PDF copy of this pleading.

CERTIFICATE OF COMPLIANCE

Mr. Armstrong's brief is over 14,000. Counsel has filed a motion requesting permission to exceed the word limit.