FAYETTE COUNTY COMMON PLEAS COURT
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	
Respondent-Plaintiff,	)	
v.	)	**CP-26-CR-0001323-2009**
	)	**PCRA Court: Wagner, J.**
RONALD HIGINBOTHAM	)	
Petitioner-Defendant.	)	

Counseled Amended PCRA Petition

Petitioner-Defendant, Ronald Higinbotham, by and through counsel, Craig M. Cooley, respectfully submits his *Counseled Amended PCRA Petition*, which is presented in good faith and based on the forgoing facts and authorities.

PROCEDURAL HISTORY

On June 21, 2009, the Pennsylvania State Police arrested Ronald Higinbotham in connection with his wife, Carmen's, June 20, 2009 death. On October 13, 2009, the Commonwealth filed an *Information* charging Mr. Higinbotham with murder. Mr. Higinbotham pled not guilty and proceeded to a jury trial before the Honorable John F. Wagner ("Court"). Samuel J. Davis initially represented Mr. Higinbotham, but Davis withdrew in October 2010. In April 2011, Peter J. Daley entered his appearance and

represented Mr. Higinbotham at trial. Trial began on November 7, 2011 and on November 15, 2011 a jury convicted Mr. Higinbotham of third-degree murder. On November 28, 2011, the trial court sentenced Mr. Higinbotham to 20 to 40 years in prison.

Mr. Higinbotham appealed (32 WDA 2012), but on July 17, 2012 the Superior Court affirmed, and the Pennsylvania Supreme Court denied his *Petition for Allowance of Appeal* (348 WAL 2012) on November 12, 2012. Jeffery W. Whiteko of the Fayette County Public Defender's Office served as direct appeal counsel. Mr. Higinbotham didn't petition the U.S. Supreme Court, making his conviction final on February 10, 2013. Shortly thereafter, on April 29, 2013, Mr. Higinbotham filed a timely PCRA.

PCRA CLAIMS RAISED

Claim #1: Appellate counsel was ineffective for failing to raise the following preserved and meritorious direct appeal claim: the trial court abused its discretion when it permitted Trp. Weaver to discuss his dummy experiment and opine that the law of physics proved Mr. Higinbotham's narrative impossible. U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

Claim #2: Trial counsel was ineffective for failing to object when Trp. Weaver gave an improper and extremely prejudicial opinion as to how Carmen allegedly ended up on the ground before Mr. Higinbotham ran her over in a fit of rage. U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

Claim #3a: Trial counsel was ineffective for failing to object on Sixth Amendment grounds regarding Dr. Bruce Wright's testimony about his October 13, 2010 interview of Mr. Higinbotham because the prosecutor and Dr. Wright never notified trial counsel of the October 13, 2010 interview, thereby depriving Mr. Higinbotham of his Sixth Amendment right to the assistance of counsel by not giving him a prior opportunity to consult with trial counsel before Dr. Wright's interview in violation of *Estelle v. Smith*, 451 U.S. 454 (1981). U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

Claim #3b: Assuming trial counsel properly preserved the *Estelle* claim, direct appeal counsel was ineffective for failing to raise the *Estelle* claim. U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

Claim #4: Trial counsel was ineffective for failing to object on Fifth and Sixth Amendment grounds when the prosecutor presented Dr. Bruce Wright during its case-in-chief, and Dr. Wright only testified about the statements Mr. Higinbotham made to him during the October 13, 2010 interview, and when Dr. Wright gave opinions as to Mr. Higinbotham's ability to form specific intent during the prosecutor's rebuttal case, Dr. Wright didn't base his opinion on Mr. Higinbotham's statements from the October 13, 2010 interview. U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

Claim #5: Trial counsel was ineffective for disregarding Mr. Higinbotham's insistence on not admitting guilt via a diminished capacity defense and proceeding with a diminished capacity defense in violation of *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018). U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

Claim #6: Direct appeal counsel was ineffective for failing to adequately brief the following preserved and meritorious record-based claim: the trial court abused its discretion when it refused to allow Kyle Higinbotham to testify about an earlier incident where Carmen Higinbotham had exited a moving car during an argument. U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

Claim #7: The cumulative impact of the trial court's and trial counsel's errors rendered Mr. Higinbotham's trial fundamentally unfair under the Pennsylvania and Federal Constitutions. U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

INTRODUCTION

On the evening of June 20, 2009, Mr. Higinbotham and his wife, Carmen, went to a luau party where both drank much alcohol. They left the luau between 11:30 p.m. and 11:45 p.m. and headed westbound on Route 40 towards Brownsville. Shortly after 11:50 p.m. Mr. Higinbotham's Hyundai ran over Carmen – resulting in her death.

The Pennsylvania State Police ("PSP") identified Carmen's blood on the underbelly of Mr. Higinbotham's Hyundai.[1] Dr. Cyril Wecht performed Carmen's autopsy and opined her injuries were consistent with being run over by a car.[2] Consequently, the fundamental question at Mr. Higinbotham's trial was how Carmen got to the point where Mr. Higinbotham's Hyundai ran her over?

[1] NT, Trial, pp. 392-397.
[2] NT, Trial, pp. 493-494.

According to the Commonwealth, Mr. Higinbotham purposely ran over Carmen with the specific intent to kill her. Mr. Higinbotham, on the other hand, said Carmen opened the front passenger door and exited the car as it was moving. He said they were having an argument when she exited the car. Once she exited the car, Carmen got pulled under the car and runover.

For instance, when Mr. Higinbotham called 911 to report the accident, he told the 911 operator – Craig Soltis – Carmen exited the vehicle and that it felt like he'd run her over once she exited.[3] Also, when Mr. Higinbotham spoke with Trp. Stenson less than an hour after the incident, Mr. Higinbotham told Trp. Stenson that once Carmen exited the car, it felt like he'd run over a deer.[4]

Accordingly, the jury had to decide which of these two narratives was more credible. The case, therefore, turned on credibility, which is critically important because both narratives presented with strengths and weaknesses. Due to trial court errors and trial counsel's ineffectiveness, however, the Commonwealth was permitted to introduce unreliable, invalid, inadmissible and prejudicial testimony that cast considerable doubt on the veracity and validity of Mr. Higinbotham's narrative.

First, the Commonwealth's accident reconstruction expert, Trp. John Weaver, testified to facts not in the record and offered an opinion well outside the scope of his expertise. Specifically, Trp. Weaver told jurors Mr. Higinbotham had to have stopped

[3] NT, Trial, pp. 208-212.
[4] NT, Trial, pp. 226-228.

the car due to a domestic dispute, that both then exited the car where they continued their domestic dispute, that Mr. Higinbotham punched and kicked Carmen to the point where she fell into the westbound lane of Route 40, and that Mr. Higinbotham got back into the car and ran Carmen over in a fit of rage. None of these facts, however, are in the record and Trp. Weaver's qualifications were limited to accident reconstruction not criminal profiling or behavioral analysis.[5]

Second, trial counsel filed a pre-trial motion raising diminished capacity as a defense. The Commonwealth, therefore, had Mr. Higinbotham interviewed by its own psychiatrist – Dr. Bruce Wright. The prosecutor and Dr. Wright, however, both failed to inform trial counsel of the interview's date and time (October 13, 2010). Thus, Mr. Higinbotham was unable to consult with trial counsel before Dr. Wright unexpectedly showed up at the Fayette County Prison on October 13, 2010. Before interviewing Mr. Higinbotham, moreover, Dr. Wright informed him their conversation wouldn't be confidential, but Dr. Wright never *Mirandized* him, nor asked him if he wanted to speak with trial counsel before the interview started. While trial counsel filed a post-interview suppression motion based on the lack of notice,[6] trial counsel failed to base his objection on Mr. Higinbotham's Sixth Amendment right to consult with counsel before all critical stages of his criminal prosecution.

[5] NT, Trial, p. 595.
[6] Rpp. 50-65.

Third, at trial Dr. Wright testified as a lay witness during the Commonwealth's case-in-chief for the sole purpose of introducing Mr. Higinbotham's statements to him regarding the incident. Dr. Wright, however, testified as an expert witness during the Commonwealth's rebuttal where he opined Mr. Higinbotham had the capacity to form specific intent on June 20, 2009. Dr. Wright, though, based his opinion on Mr. Higinbotham's adaptive functioning skills and the statements he made to people at the luau and the PSP the night of June 20, 2009. Dr. Wright didn't base his opinion on the statements Mr. Higinbotham had made to him on October 13, 2010 regarding the events of June 20, 2009. Although trial counsel objected to Dr. Wright's lay witness testimony, he based his objection on the hearsay rules, not Mr. Higinbotham's Fifth Amendment right against self-incrimination.

Fourth, before trial Mr. Higinbotham never admitted guilt. He told the PSP Carmen had exited the car while they argued, and he accidentally ran her over once she exited the car. Before trial, over Mr. Higinbotham's objection, trial counsel filed a motion informing the trial court and the Commonwealth of trial counsel's intent to present a diminished capacity defense. To present a diminished capacity defense, the defendant must admit guilt to the underlying charge, *e.g.*, homicide, but challenge the degree of culpability, *e.g.*, first-degree vs. third-degree murder v. manslaughter. Mr. Higinbotham, however, didn't want to admit guilt. Trial counsel, though, disregarded Mr. Higinbotham's Sixth Amendment right to decide the objective of his defense and presented a diminished capacity defense.

Individually and collectively, this inadmissible and prejudicial evidence and testimony undermines confidence in the jury's verdict because it went to the fundamental jury question: who had the more persuasive and credible narrative regarding how Carmen suffered her fatal injuries? Had trial counsel performed effectively, and properly objected to the above inadmissible evidence and testimony, it's reasonably probable at least one juror would've had reasonable doubt about whether Mr. Higinbotham (a) killed Carmen, and if he did, (b) killed her with malice (third-degree murder).

Even when trial counsel timely objected and preserved meritorious appellate claims, Mr. Higinbotham's direct appeal counsel failed to adequately raise, present, and argue these claims before the Superior Court.

First, trial counsel filed a suppression motion to suppress the results of Trp. Weaver's dummy test.[7] After the suppression hearing, trial counsel filed a post-hearing brief arguing why – based on Trp. Weaver's own testimony – the results of his dummy test must be suppressed, *i.e.*, numerous variables in the dummy test were substantially dissimilar to how Mr. Higinbotham described Carmen exiting the car.[8] Trial counsel also made a *Frye* objection, arguing the Commonwealth presented no evidence indicating that the relevant scientific community, *i.e.*, the physics/engineering community, generally accepted the way Trp. Weaver carried out his dummy test, *i.e.*, his

[7] Rpp. 40-49.
[8] Rpp. 50-65.

methodology. The trial court denied the suppression motion. At trial, therefore, Trp. Weaver was permitted to tell jurors about his dummy test and how the laws of physics supposedly proved Mr. Higinbotham's narrative, *i.e.*, Carmen exited the car while it was moving, was impossible. Direct appeal counsel never raised these meritorious claims before the Superior Court.

Second, trial counsel presented Kyle Higinbotham, Mr. Higinbotham's son, during the defense's case-in-chief to discuss how Carmen had exited a moving car ten years earlier. The trial court, though, prohibited Kyle from mentioning the prior incident. Direct appeal counsel raised this claim but briefed it so woefully and incoherently the Superior Court considered it waived under the appellate rules.[9]

Like the trial counsel ineffectiveness claims, these trial error claims, individually and collectively, undermine confidence in the jury's verdict because the inadmissible, unreliable, and improperly admitted evidence and testimony went to the fundamental jury question: who had the more persuasive and credible narrative regarding how Carmen suffered her fatal injuries? Had direct appeal counsel properly raised and briefed these claims on direct appeal, it's reasonably probable the Superior Court would've granted Mr. Higinbotham a new trial.

[9] Rpp. 1-25.

Lastly, the cumulative impact of the trial court's and trial counsel's errors rendered Mr. Higinbotham's trial fundamentally unfair under the Pennsylvania and Federal Constitutions.

Mr. Higinbotham, consequently, is entitled to a new trial.

THE COMMONWEALTH'S NARRATIVE, THE RELEVANT PHYSICAL EVIDENCE, AND THE AUTOPSY RESULTS

This isn't a "whodunit" case. It's a "howdunit case," meaning how did Carmen suffer her fatal injuries. Mr. Higinbotham and the Commonwealth presented two plausible narratives, but each had its weaknesses. To understand both narratives, the Court must see the car and its dimensions, and it must understand the physical evidence and Carmen's fatal injuries.

A. The car

Here are post-incident photographs of the car Mr. Higinbotham was driving:

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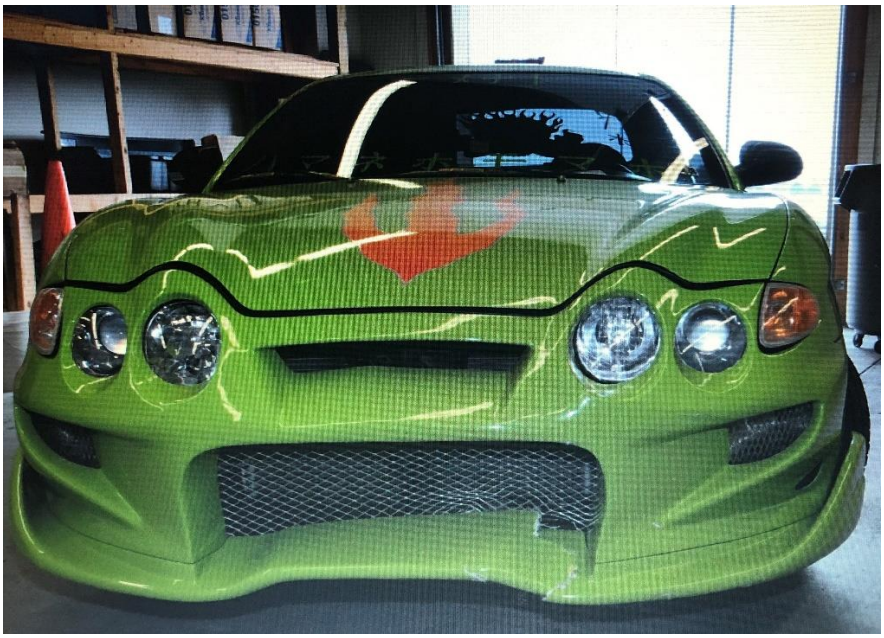

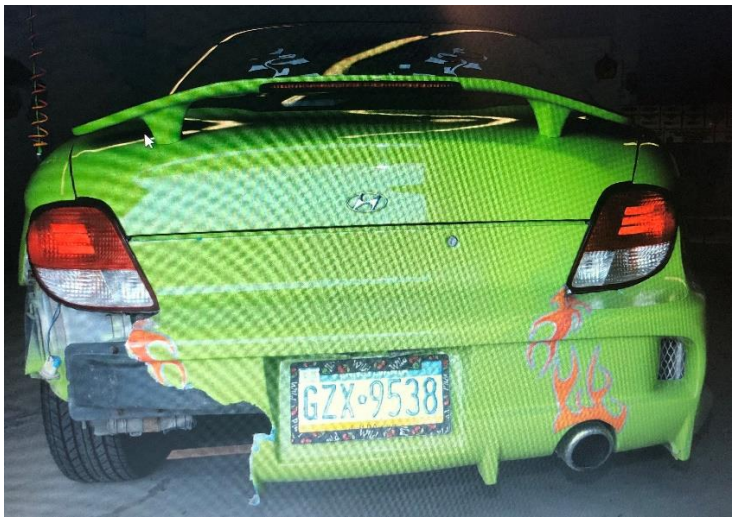
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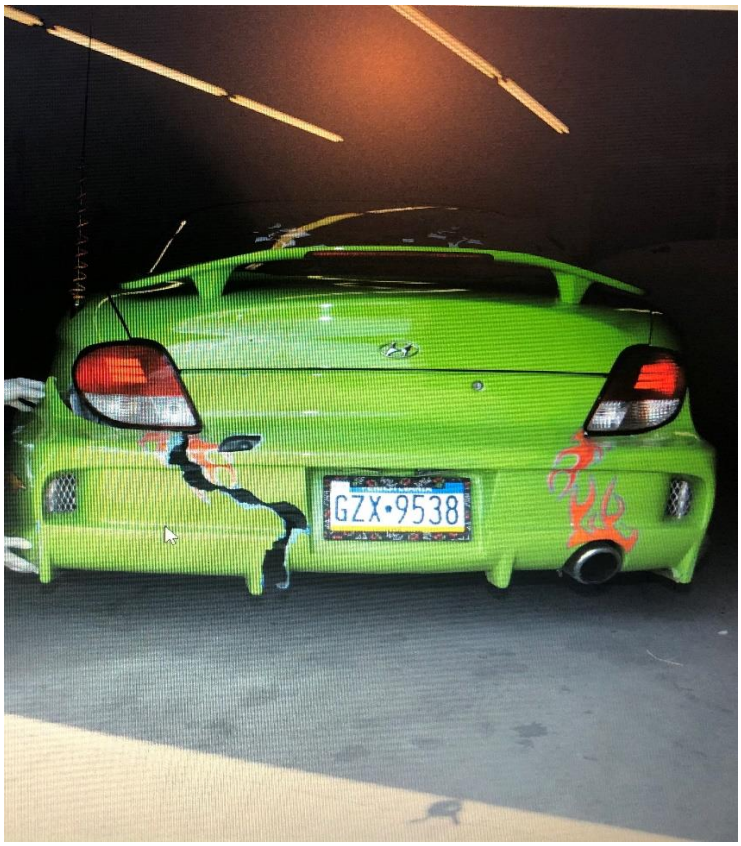
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The car, as can be seen, rides very close to the ground. The front bumper displayed minor damage, while the back-left bumper fell off entirely.

B. Carmen's autopsy results

Dr. Cyril Wecht performed Carmen's autopsy on June 21, 2009. Dr. Wecht identified two areas of injuries that proved fatal: (1) blunt force trauma to the head; and (2) crushing injuries to her thorax. In terms of the thorax, Dr. Wecht said Carmen suffered significant crushing injuries to her front and back ribs. Her anterior ribs 1 through 6 near the midline were fractured, while her posterior right ribs 6 through 11 were fractured, as were her posterior left ribs 2 through 6. The fractured ribs lacerated Carmen's lungs.[10] In terms of the blunt force injuries, Dr. Wecht identified a significant skull fracture at the skull's left posterior base.[11] Based on these findings, Dr. Wecht opined that Carmen's "injuries were sustained when [she] was struck and run over by a

[10] Rpp. 88-107.
[11] Rpp. 88-107.

vehicle."[12] Based on Dr. Wecht's opinion, consequently, Carmen's body had to have been able to go under the car, despite the fact the car road quite close to the ground.

At trial, Dr. Wecht told jurors Carmen was likely sitting or lying on the road when the front of a car struck her and ran her over. He based this opinion, in significant part, on the fact Carmen showed no significant injuries to her legs and lower extremities.[13] Moreover, because Mr. Higinbotham's car drove quite close to the ground, Dr. Wecht said Carmen "would have" had "to be lying down" on the ground when struck by the car:

> A The answer is yes. The person what have to be lying down. I see the way that I envision this is a quite low slung vehicle, so obviously this person could not have been standing or even stooping to get injuries to the head being struck by this part of the vehicle. If the person were lying down and the vehicle struck the head, yes, this could produce those kind of injuries that I have described.[14]

Furthermore, based on the severity of her injuries, Dr. Wecht opined that the car that struck her was traveling at a high rate of speed – between 50 and 55 mph.[15]

[12] Rp. 89.
[13] NT, Trial, pp. 491-492, 493-494.
[14] NT, Trial, pp. 492-493.
[15] NT, Trial, p. 497.

C. Evidence from car

PSP technicians identified minute dark spots on certain areas of the car. The technicians swabbed these locations believing they may be human blood. The technicians collected 12 swabs from the car and submitted them to the PSP crime lab to determine if the dark spots were, in fact, human blood, and if so, whose blood.[16]

A PSP serologist identified human blood on 9 of the 12 swabs.

Blood Sample Test Results		
Item #	**Location**	**DNA Testing**
4.1	Front bumper/driver's side/ near headlight	Yes
5.1	Front bumper/midway driver's side	
6.1	Front bumper/midway driver's side	
7.1	Bottom/driver's side/front bumper	Yes
8.1	Driver's side/front bumper	
11.1	Front/undercarriage	
12.1	Front/undercarriage	Yes
14.1	Midway/undercarriage	
15.1	Front/driver's side/wheel well	Yes[17]

[16] NT, Trial, pp. 370-371.
[17] NT, Trial, pp. 376-379.

Of these 9 swabs, the PSP subjected the following 4 to DNA testing, which linked the blood to Carmen:

DNA Testing Results	
Q1 = Item 4.1	Carmen's DNA
Q2 = Item 7.1	Carmen's DNA
Q3 = Item 12.1	Carmen's DNA
Q4 = Item 15.1	Carmen's DNA[18]

D. The Commonwealth's narrative

The Commonwealth believed Mr. Higinbotham purposely ran over Carmen with malice and the specific intent to kill her. However, for this to be true, each of the following must've happened, even though no one saw or heard any of them.

According to Dr. Wecht and Trp. Weaver, Carmen had to have been lying on the ground when the car struck her at a high rate of speed, *i.e.*, 50 to 55 mph.[19] If Carmen didn't voluntarily exit the car while it was moving, the following – or something similar to it – had to have occurred: (1) Mr. Higinbotham had to have stopped the car for some reason near the point of impact on Route 40; (2) once stopped, Carmen had to have exited the car for some reason; (3) after exiting, she had to have sat or laid down in the middle of Route 40's westbound lane, or she had to have tripped or been pushed

[18] NT, Trial, pp. 394-396.
[19] NT, Trial, pp. 492, 493, 497, 644, 672.

down to the ground; (4) she had to have been far enough away from Mr. Higinbotham's car so that Mr. Higinbotham could put the car into drive and accelerate at a high rate of speed so he could strike her at a high rate of speed with the intent of killing her.

Trp. Weaver articulated this theory at trial.[20] According to Trp. Weaver, he *believed* once Carmen and Mr. Higinbotham began arguing, Mr. Higinbotham pulled over and stopped on the side of westbound Route 40. Once stopped, they both exited the car and continued their domestic dispute. As they argued, Trp. Weaver *believed* Mr. Higinbotham physically attacked Carmen, by punching and kicking her. The attack not only caused Carmen to fall to the ground, the injuries she sustained as a result of the attack prevented her from moving out of the westbound lane. As an injured and disoriented Carmen laid in the westbound lane, Mr. Higinbotham got back into the car and ran her over "in a fit of rage."[21] Trp. Weaver, though, admitted the PSP spoke to no one who'd heard or seen this type of verbal argument and physical assault before Scott Waugman heard a "crunching" noise shortly after 11:50 p.m.[22] Waugman, notably, didn't hear two people arguing before he heard the "crunching" sound. In fact, Waugman heard nothing on Route 40 the ten minutes before hearing the "crunching" sound.[23]

[20] NT, Trial, p. 655.
[21] NT, Trial, p. 656.
[22] NT, Trial, p. 658.
[23] NT, Trial, pp. 154, 158.

Furthermore, based on Carmen's injuries, Dr. Wecht said the car had to have been traveling at a high rate of speed when it struck her. If this is true, one of the following had to have occurred. If Carmen exited Mr. Higinbotham's car and sat or was pushed to the ground directly in front of the car, there's no way Mr. Higinbotham could've struck her at a high rate of speed because she was directly in front of the car. Thus, one of two situations had to have happened:

Carmen walked westbound on Route 40: Once she exited the car, Carmen – for whatever reason – walked west bound a certain distance, stopped, and either sat in the westbound lane or was pushed to the ground; once on the ground, Carmen – for whatever reason – decided to stay on the ground. Moreover, if Mr. Higinbotham followed Carmen as she walked westbound, he would've had to walk or run back to his car where he would've had to start the car, rev the engine, accelerate quickly, and strike her while traveling at a high rate of speed. Again, Carmen, mind you, would've – for some reason – chosen not to move or stand up as Mr. Higinbotham returned to the car, started it, and accelerated toward her.

Mr. Higinbotham put the car in reverse: Once Carmen sat down or was pushed directly in front of the car, Mr. Higinbotham walked back to the car, entered the car, started the car, put it reverse, and backed up far enough where he could then quickly accelerate to a speed of 50 to 55 mph. Again, Carmen, mind you, would've – for some reason – not moved or stood up as Mr. Higinbotham did all these things.

Both situations are very hard to believe.

First, both situations require an argument/domestic dispute between Mr. Higinbotham and Carmen. Scott Waugman, though, never heard or saw two people arguing or fighting on Route 40 shortly or immediately before he heard the "crunching" sound.

Second, both situations require Carmen to not move or stand up as Mr. Higinbotham accelerated towards her. Moreover, Dr. Wecht found no injuries suggesting Mr. Higinbotham punched or kicked Carmen in the face or thorax with such force that it left her temporarily woozy or incapacitated on the ground, which would've prevented her from moving out of the car's way.

Third, in both situations Mr. Higinbotham would've had to have accelerated from zero to 50 or 55 mph over a short distance. Had Mr. Higinbotham done so, Scott Waugman would've heard the revving of the car's engine – RMPs – and its acceleration immediately before hearing the "crunching" sound. He didn't. He simply heard the "crunching" sound – but nothing before it.[24]

Waugman, however, heard this exact RPM sound *after* the "crunching" sound.[25] After hearing the "crunching" sound, Waugman saw and heard the car "pause," *i.e.*, come to a stop, in Route 40's westbound lane, before slowly pulling off to the side of westbound Route 40.[26] He said the car sat on the side of Route 40 momentarily before

[24] NT, Trial, pp. 158, 164-165.
[25] NT, Trial, p. 160.
[26] NT, Trial, pp. 158, 164-165.

accelerating quickly and speeding away. When the car sped away, Waugman *heard* the "RPMs of the engine increase significantly[.]"[27] Waugman guestimated the car was traveling 70 mph when it sped through the nearby westbound interaction.[28]

Fourth, if Mr. Higinbotham had revved the car's RPMs and accelerated to a high rate of speed before striking and running over Carmen, how'd he stop so easily immediately after Waugman heard the "crunching" sound? Waugman, as mentioned, heard the "crunching" sound and saw the car "pause," *i.e.*, come to a stop, in the westbound lane, before slowly pulling off to the side of road.[29] Waugman, notably, didn't describe the car as coming to a loud screeching halt. This is noteworthy because if Mr. Higinbotham had struck Carmen at a high rate of speed, *e.g.*, 50 to 55 mph, he would've had to have slammed on his breaks to stop where Waugman saw him stop. Had he slammed on his breaks, Waugman would've heard the screeching tires. He didn't.[30] Moreover, first responders and PSP evidence technicians would've seen the skid marks created by such a halting stop. They didn't.[31]

Fifth, if Mr. Higinbotham accelerated at a high rate of speed with malice and the specific intent to kill Carmen, why would he then (1) stop momentarily in the westbound lane and then (2) pull over to the roadside momentarily? If Mr. Higinbotham's intent was to kill or significantly injure Carmen, once he struck and ran

[27] NT, Trial, p. 160.
[28] NT, Trial, p. 160.
[29] NT, Trial, pp. 158, 164-165.
[30] NT, Trial, p. 153.
[31] NT, Trial, p. 641.

her over at a high rate of speed, he would've, presumably, kept accelerating westbound to evade detection and apprehension. Why *stop twice* and *pull off onto the side of the road*? These actions only increased, greatly, the likelihood of being seen by someone – like Scott Waugman. In short, these actions are more indicative of someone who was unsure of what just happened and unsure of how to react to what just happened, *e.g.*, my wife just exited my moving car, I ran her over, what do I do?

Sixth, if Mr. Higinbotham struck Carmen, who weighed 210 pounds, with the front of the car, why does the front bumper present with such little damage?

Seventh, if the car struck a 210-pound object head-on, while traveling at a high rate of speed, why didn't the car's airbag deploy?

E. Mr. Higinbotham's narrative

Like the Commonwealth's narrative, Mr. Higinbotham's narrative also presents with difficulties.

First, we must believe Carmen – for whatever reason – opened the front passenger door and exited the car while it was moving at a certain rate of speed.

Second, once she exited the car, Carmen somehow got swept under the passenger side of the car and ultimately runover by the car.

Third, if Carmen got swept under the car on the passenger side of the car, how did Carmen's blood get on the underpart of the front bumper, or better yet, how did the front bumper become slightly fractured? The significant damage to the back-left bumper is understandable because Carmen's body could've caused this damage when

the car ran her over. The damage to the front bumper, though, is harder to explain. A possibility is that when the back end of the car traveled over Carmen's body, the width and/or height of Carmen's body caused the back end of the car to elevate, which caused the front end to lower just enough to strike the ground.

Fourth, if Carmen voluntarily exited the car and her death was truly an accident, Mr. Higinbotham's post-accident behavior is difficult to explain. Instead of staying at the scene, and helping his wife, he drove home and called 911. While Mr. Higinbotham explained to Trp. Stenson why he reacted the way he reacted, his post-accident actions would've been problematic in the jury's eyes.

F. The point being made: This is a credibility case

Mr. Higinbotham highlights the strengths and weaknesses of both narratives to emphasize the fundamental point raised in his PCRA claims: this case came down to *credibility*, namely who presented the more credible – or, better yet – plausible narrative. This is important because the errors made by the trial court and trial counsel unfairly, prejudicially, and overwhelmingly skewed the jury's credibility assessments to the Commonwealth's advantage.

First, the errors allowed the jury to hear inadmissible evidence that effectively destroyed Mr. Higinbotham's narrative, *i.e.*, Trp. Weaver's dummy testimony and Dr. Wright's testimony regarding Mr. Higinbotham's October 13, 2010 non-*Mirandized* statement.

Second, the errors allowed to jury to hear an inadmissible, non-fact-based, and extremely prejudicial opinion from Trp. Weaver where Mr. Higinbotham not only ran over his wife in a "fit of rage," but before running her over, he physically assaulted her on Route 40, and the physical assault is what caused her to end up on the ground helpless and incapacitated.

Third, the errors deprived the jury of relevant testimony regarding another incident where Carmen exited a moving car, *i.e.*, the exclusion of Kyle Higinbotham's testimony. This testimony, without question, would've impacted how the jury viewed and weighed Mr. Higinbotham's claim that Carmen exited the car that night.

Fourth, the diminished capacity defense, evidence, and testimony forced the jury to find that Mr. Higinbotham killed Carmen and cabin its deliberations to the degree of culpability, *e.g.*, first-degree murder vs. third-degree murder v. manslaughter.

Fifth, trial counsel's irreconcilable defense strategies, *e.g.*, Mr. Higinbotham didn't kill Carmen vs. Mr. Higinbotham killed Carmen, but lacked the mental facilities to form specific intent, destroyed Mr. Higinbotham's credibility and desired objective of presenting a straightforward "I didn't kill Carmen" defense.

In the end, this case is about whether Mr. Higinbotham received a fair trial. He didn't and he's entitled to a new trial for that reason.

PCRA REQUIREMENTS

Mr. Higinbotham must meet the following conditions to be eligible for PCRA relief. 42 Pa. C.S. § 9543(a)(1)-(a)(4).

First, Mr. Higinbotham must show he has been convicted of a crime under the laws of this Commonwealth and is serving a prison sentence. 42 Pa. C.S. § 9543(a)(1). Mr. Higinbotham stands convicted of third-degree murder and is serving a 20- to 40-year prison sentence.

Second, Mr. Higinbotham must present cognizable claims under 42 Pa. C.S. § 9543(a)(2). Mr. Higinbotham alleges state and federal claims that: (1) undermine the truth-determining process; and (2) establish ineffective assistance of counsel. 42 Pa. C.S. §§ 9543(a)(2)(i & ii).

Third, Mr. Higinbotham's claims can't be previously litigated or waived. 42 Pa. C.S. §9543(a)(3). Mr. Higinbotham's claims focus on trial and appellate counsel's ineffectiveness – or claims that couldn't have been raised until PCRA proceedings. *E.g.*, *Commonwealth v. Grant*, 813 A.2d 726, 738 (Pa. 2002). Consequently, Mr. Higinbotham's claims haven't been previously litigated or waived.

Fourth, Mr. Higinbotham must've filed his PCRA petition within one year of when his conviction became final. 42 Pa. C.S.§ 9545(b)(1). Mr. Higinbotham's conviction became final on February 10, 2013 and he filed his PCRA petition on April 29, 2013, making it timely.

CLAIMS FOR RELIEF

Trial and appellate counsel ineffectiveness claims

Mr. Higinbotham has a right to effective trial counsel. *Strickland v. Washington*, 468 U.S. 668, 688 (1984). Trial counsel's purpose is to "test[] the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged." *Martinez v. Ryan*, 566 U.S. 1, 12 (2012). The right to effective representation, consequently, is "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984). Trial counsel, as a result, "has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, 468 U.S. at 688. Thus, unless a defendant receives effective representation, "a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan*, 446 U.S. 330, 343 (1980). In short, the right to effective representation is the "great engine by which an innocent man can make the truth of his innocence visible[.]" *Luis v. United States*, 136 S. Ct. 1083, 1089 (2016).

To prevail on an ineffectiveness claim, Mr. Higinbotham must demonstrate that trial counsel performed deficiently, and the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. at 687. 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.* 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. A reasonable probability "is a probability sufficient to undermine confidence in the outcome," *id*, which it is "not a stringent" standard to satisfy because it is "less demanding than the preponderance standard." *Hall v. Kyler*, 190 F.3d 88, 110 (3d Cir. 1999).

Under state law, a petitioner must show (1) the underlying legal claim is of arguable merit, (2) trial counsel's action or inaction lacked any objectively reasonable basis designed to effectuate his interest(s), and (3) prejudice. *Commonwealth v. Pierce*, 527 A.2d 973, 975–976 (Pa. 1987). *Pierce* and *Strickland* represent the same standard: deficient performance and prejudice. *Commonwealth v. Spotz*, 870 A.2d 822, 829 (Pa. 2005).

When assessing whether trial counsel had a "reasonable basis" for a particular act or omission, the question is not whether there were other courses of action available, but "whether counsel's decision had any basis reasonably designed to effectuate his client's interest." *Commonwealth v. Williams*, 141 A.3d 440, 463 (Pa. 2016). Put differently, the issue is "whether counsel made an informed choice, which at the time the decision was made reasonably could have been considered *to advance and protect [the] defendant's interests*." *Commonwealth v. Dunbar*, 470 A.2d 74, 77 (Pa. 1983) (emphasis added). Trial counsel's action or omission will be considered unreasonable if the petitioner establishes "that an alternative not chosen offered a potential for success substantially

greater than the course actually pursued." *Commonwealth v. Howard*, 719 A.2d 233, 237 (Pa. 1998).

Regarding the "reasonable basis" in the appellate context, "[i]t is well settled that appellate counsel is entitled, as a matter of strategy, to forego even meritorious issues in favor of issues he believes pose a greater likelihood of success." *Commonwealth v. Jette*, 23 A.3d 1032, 1043 (Pa. 2012); *Commonwealth v. Robinson*, 864 A.2d 460, 479 n.28 (Pa. 2004). To establish *Strickland/Pierce* prejudice "in the appellate representation context, the petitioner must show that there is a reasonable probability that the outcome of the direct appeal proceeding would have been different but for counsel's deficient performance." *Commonwealth v. Blakeney*, 108 A.3d 739, 750 (2014).

<u>Claim #1</u>: Appellate counsel was ineffective for failing to raise the following preserved and meritorious direct appeal issue: the trial court abused its discretion when it permitted Trp. Weaver to discuss his dummy experiment and opine that the law of physics proved Mr. Higinbotham's narrative impossible. U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

A. Suppression motion

On November 12, 2009, trial counsel filed an *Ominbus Pretrial Motion* wherein he moved to suppress the results of Trp. Weaver's dummy test.[32] Trial counsel argued:

MOTION TO SUPPRESS SCIENTIFIC EVIDENCE

27. Upon information and belief, the Commonwealth, pursuant to a search warrant, performed several "tests" on Defendant's vehicle in which a "dummy" was thrown from the passenger compartment of the vehicle while the car was being driven.

28. As addressed below, the Commonwealth has failed to provide the Defendant with information regarding the methodology, results, or records from these "tests."

29. Upon information and belief, such tests fail to follow any generally accepted scientific methodology. *See Commonwealth v. Puskar*, 951 A.2d 267, 274-5 (Pa. 2008)

WHEREFORE, the Defendant prays this Honorable Court declare the above-mentioned tests improper scientific evidence and suppress the tests and their results.

[33]

B. March 29, 2010 suppression hearing

1. Trp. Weaver's July 7, 2009 report

Before the suppression hearing, Tpr. Weaver described the dummy experiment in his July 7, 2009 report. Trp. Weaver said this about the dummy test's purpose:

On 07/07/09 at approximately 1230 hours, Joby's Towing of Uniontown, towed the vehicle from the Uniontown Barracks to the Connellsville Airport via Flatbed wrecker. The purpose of the move was to conduct various tests with the vehicle in order to examine braking efficiency and the possibility of the victim jumping from the vehicle at the reported speed of 55 mph. The tests were conducted on a dead runway at the airport. The runway is constructed of Asphalt, is level and is in good condition.

[34]

[32] Rpp. 40-49.
[33] Rp. 47.
[34] Rp. 87.

The dummy test, consequently, had one purpose: to determine whether a person who exited a moving car from the front passenger's seat, *while the car was traveling at a speed of 55 mph*, could hit the ground in time to be runover by said car.

Trp. Weaver tersely described how he and other male PSP troopers performed the dummy test:

> The tests were videotaped by Tpr Dale BROWN, and the tests were observed by TPR John MARSHAL, and Cpl Gregory HAMBORSKY. The Dummy was thrown from the vehicle in an attempt to show the various ways the victim could have exited, and received the type and severity of injuries noted during autopsy. All tests involving the dummy were conducted at a speed of 55mph, which was the speed the defendant claimed to have been driving when the victim exited the vehicle. [35]

Unsurprisingly, none of the dummies *forcibly thrown from the car* were run over by the car. Each dummy "slid" a certain distance once it impacted the pavement. Trp. Weaver documented these distances:

> Dummy Test 1: The dummy impacted the pavement and slid a distance of 90 feet.
> Dummy Test 2: The dummy impacted the pavement and slid a distance of 148 feet.
> Dummy Test 3: The dummy impacted the pavement and slid a distance of 125.1 feet
> Dummy Test 4: The dummy impacted the pavement and slid a distance of 132.6 feet.
> Dummy Test 5: The dummy impacted the pavement and slid a distance of 139.6 feet.
> Dummy Test 6: The dummy impacted the pavement and slid a distance of 123 feet. [36]

3. Trp. Weaver's very limited education in physics

When trial counsel objected to Trp. Weaver's qualifications to accurately draw inferences based on complicated physics principles, Trp. Weaver said he was qualified to do so for the following reasons:

[35] Rp. 87.
[36] Rp. 87.

-He had an undergraduate degree in secondary education from California University of Pennsylvania.[37] The substantive emphasis of his secondary education degree, however, wasn't physics or another hard science.

-At California University, he "attended… a basic physics class[.]"[38] Trp. Weaver said he received an "A" in the class.[39]

-As a PSP trooper, he "attended… [an accident] reconstruction course" that "cover[ed] the general principles of motion as laid down by Sir Isaac Newton[.]"[40] Trp. Weaver didn't identify the number of hours involved to complete this course or whether he had to take an exam at the end of the course to demonstrate he possessed an adequate understanding of Newton's laws of physics to accurately apply them in the field.

-As a PSP trooper, he attended a "kinematics class."[41] Trp. Weaver didn't identify the number of hours involved to complete this course or whether he had to take an exam at the end of the course to demonstrate he possessed an adequate understanding of kinematics to correctly apply kinematics in the field.

When trial counsel asked if he'd "ever conducted" the dummy test before, Trp. Weaver said, "No. This was the first time that I conducted this test."[42]

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[37] NT, Supp. Hrg., p. 45.
[38] NT, Supp. Hrg., p. 43.
[39] NT, Supp. Hrg., p. 46.
[40] NT, Supp. Hrg., p. 43.
[41] NT, Supp. Hrg., p. 44.
[42] NT, Supp. Hrg., p. 46.

3. Trp. Weaver already had a pre-determined conclusion in mind before he conducted the dummy test

Trp. Weaver showed his bias and unscientific approach to the dummy test when the prosecutor asked him why he'd conducted the dummy test:

> Q First of all, why were you going to conduct the tests?
>
> A The statement of the defendant was that the victim jumped from the vehicle and was subsequently sucked underneath the vehicle, causing her death and the damage to the car. That is not possible according to the law of physics; therefore, we decided that I had access to a dummy, crash dummy, commonly used in reconstructing -- [43]

Thus, even before he conducted the dummy test, Trp. Weaver believed the "law of physics" made Mr. Higinbotham's narrative "not possible." Trp. Weaver and his PSP colleagues, therefore, set out to prove what Trp. Weaver believed. This is the antithesis of science.

4. Opening the passenger door and the lack of replication

The PSP forcibly threw the dummy from the front passenger seat six times. Based on Trp. Weaver's terse report, one would think the male trooper in the front passenger seat had to open the front passenger door before launching the dummy from the car. This, however, is wrong.

At the suppression hearing, Trp. Weaver said the male trooper positioned in the front passenger seat didn't always open the front passenger door while the car was traveling at 55 mph. Instead, Trp. Weaver tied the front passenger door open before

[43] NT, Supp. Hrg., pp. 40-41.

starting the experiment, thereby making it much easier for the male trooper in the front passenger seat to forcibly throw the dummy from the car.[44] Moreover, of the six dummy throws – each of which used different variables according to Trp. Weaver – the PSP never attempted to replicate each throw, meaning each throw was done once and whatever results were produced from that throw were considered accurate and valid.[45]

At the suppression hearing, Trp. Weaver explained:

> Q Why the number of tests?
>
> A We -- we didn't want to do it just one time. We wanted to see if there were any significant changes throughout the testing process that would indicate that this test -- what we were you doing was invalid. We had some issue first was being able to keep the passenger door open at fifty-five miles per hour. Would somebody of reasonable strength be able to hold that door open with the wind resistance coming at it and successfully exit the vehicle.
>
> We conducted tests opening the door ourselves and pushing the dummy out. We conducted tests with the door held open and, tied open. We tried as many different scenarios that we could come up with, in getting the dummy out of the vehicle to cause it to be sucked under. Not going to happen. Laws the physics do not permit it.[46]

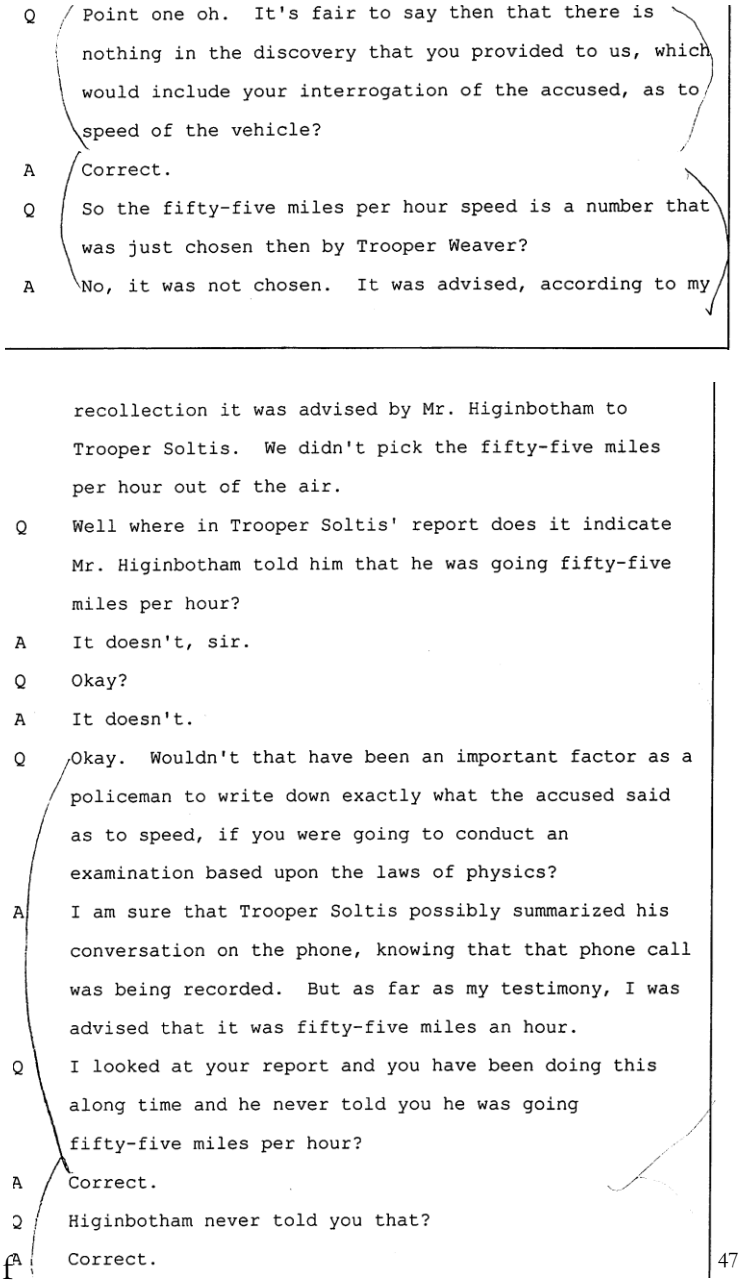
5. Assuming the car's velocity

As Trp. Weaver's July 7, 2009 report indicates, he and the other PSP troopers chose to accelerate the car to a speed of 55 mph. At the suppression hearing, though, Trp. Weaver and Trp. John Marshall both conceded there was no evidence in the record

[44] NT, Supp. Hrg., p. 53.
[45] NT, Supp. Hrg., pp. 53-54.
[46] NT, Supp. Hrg., p. 53.

indicating how fast or slow the car was traveling when Carmen exited the car. Trp. Weaver and the PSP, therefore, simply *assumed* a speed of 55 mph.

Trp. Marshall, for instance, had this Q/A with trial counsel:



Q Point one oh. It's fair to say then that there is nothing in the discovery that you provided to us, which would include your interrogation of the accused, as to speed of the vehicle?
A Correct.
Q So the fifty-five miles per hour speed is a number that was just chosen then by Trooper Weaver?
A No, it was not chosen. It was advised, according to my recollection it was advised by Mr. Higinbotham to Trooper Soltis. We didn't pick the fifty-five miles per hour out of the air.
Q Well where in Trooper Soltis' report does it indicate Mr. Higinbotham told him that he was going fifty-five miles per hour?
A It doesn't, sir.
Q Okay?
A It doesn't.
Q Okay. Wouldn't that have been an important factor as a policeman to write down exactly what the accused said as to speed, if you were going to conduct an examination based upon the laws of physics?
A I am sure that Trooper Soltis possibly summarized his conversation on the phone, knowing that that phone call was being recorded. But as far as my testimony, I was advised that it was fifty-five miles an hour.
Q I looked at your report and you have been doing this along time and he never told you he was going fifty-five miles per hour?
A Correct.
Q Higinbotham never told you that?
A Correct.

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[47] NT, Supp. Hrg., pp. 89-90.

Once Trp. Marshall conceded the PSP didn't know the car's speed, the prosecutor recalled Trp. Weaver and asked him whether the car's speed played a role in whether the dummy would or wouldn't have been run over by the car. Trp. Weaver, remarkably, said no:

> Q Trooper, you have heard the testimony in this case that there may not be an exact number in Trooper Soltis' report as far as the speed limit. Would that factor make any difference in your determinations or in your testimony?
>
> A No, sir. It would not.
>
> Q Why not?
>
> A It would not matter at what speed the vehicle is moving in this direction. When she exited the vehicle, she has a velocity going away from the vehicle and it doesn't matter how fast in this vehicle in this direction (indicating) we are going, what we were talking about is some force that would stop her momentum from going that way (indicating) and bring her back under the vehicle. The velocity of the vehicle has nothing to do with the validity of the test or whether the object would act differently. Again an object in motion remains in motion until acted upon by an outside force.
>
> She is in motion that way (indicating) and there has to be a force acting on her to bring her
>
> back and it doesn't matters the speed that we are traveling. It is irrelevant. [48]

Trp. Weaver's testimony, however, contradicts his report and prior testimony. Trp. Weaver's report clearly links the car's speed to the dummy test's purpose:

[48] NT, Supp. Hrg., pp. 93-94.

The tests were videotaped by Tpr Dale BROWN, and the tests were observed by TPR John MARSHAL, and Cpl Gregory HAMBORSKY. The Dummy was thrown from the vehicle in an attempt to show the various ways the victim could have exited, and received the type and severity of injuries noted during autopsy. All tests involving the dummy were conducted at a speed of 55mph, which was the speed the defendant claimed to have been driving when the victim exited the vehicle.

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Also, Trp. Weaver said the exact opposite when he first testified at the suppression hearing: "The test was to see if an *object exiting a vehicle at fifty-five miles per hour* will stop in mid-air, reverse direction, [and] somehow get sucked underneath [that vehicle]." Here's his exact testimony:

weight. What we are looking at here is when the body exits the vehicle, the body is coming out at a speed and the body is striking the pavement and body is interacting then with the pavement.

What we are looking at and what my test was designed to do is say, are there forces outside of this vehicle which will stop this object from moving out of the vehicle, push it back to the vehicle and then underneath the vehicle? I could have used a baseball to simulate an object; however, I used an object that is anatomically similar in structure and weight distribution to a human body. Why because that is a more accurate test. The test is not to see -- was not for injury. The test was to see if an object exiting a vehicle at fifty-five miles per hour will stop in mid-air, reverse direction, somehow get sucked underneath of the vehicle and cause damage to the front of the vehicle. My test showed that no, that cannot happen.

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[49] Rp. 87.
[50] NT, Supp. Hrg., pp. 51-52.

6. The dummy's size and weight versus Carmen's size and weight

Carmen weighed 210 pounds.[51] The dummy weighed 95 pounds.[52] Trial counsel objected to the dummy test's admissibility, in part, because of the extreme dissimilarity between Carmen's and the dummy's weight:

> Now, Your Honor, even not being physicist, you have to think to yourself, can a ninety-five pound dummy replicate a two hundred ten pound victim, number one. That is the first thing and if that leg doesn't fit, then the whole table has to fall.[53]

Before ruling on the objection, the trial court rephrased the question: "The question is how did a ninety-five pound versus two hundred ten pound affect the test."[54] Trp. Weaver answered the trial court's question this way, which prompted another objection from trial counsel:

[51] Rp. 90; NT, Trial, p. 481.
[52] Rp. 89; NT, Trial, p. 637.
[53] NT, Supp. Hrg., p. 49.
[54] NT, Supp. Hrg., p. 50.

A The dummy is as anatomically similar to a human as can be reasonably used in an experiment. The next best thing to the dummy would be a cadaver and the next best thing to the cadaver, would be the cadaver of the victim, being that that is the absolutely impossible and unreasonable and my budget doesn't allow me to get an actual cadaver, we used the dummy that is commonly used in analysis of crash investigation.

MR. DAVIS: Not responsive. Objection, not responsive to it question. How does the ninety-five pound dummy replicate a two hundred and ten pound human and there's no where in his answer that he answered that question.

THE WITNESS: That question was not asked.

THE COURT: The real question is does the weight difference affect the test results?

THE WITNESS: No, sir. The weight difference does not affect the test results.

THE COURT: Now why? [55]

Trp. Weaver answered the trial court's "now why" question this way:

A Because the dummy is anatomically similar to a human; therefore, that dummy is going to react the same way when it is pushed out of a vehicle regardless of

[55] NT, Supp. Hrg., p. 51

weight. What we are looking at here is when the body exits the vehicle, the body is coming out at a speed and the body is striking the pavement and body is interacting then with the pavement.

What we are looking at and what my test was designed to do is say, are there forces outside of this vehicle which will stop this object from moving out of the vehicle, push it back to the vehicle and then underneath the vehicle? I could have used a baseball to simulate an object; however, I used an object that is anatomically similar in structure and weight distribution to a human body. Why because that is a more accurate test. The test is not to see -- was not for injury. The test was to see if an object exiting a vehicle at fifty-five miles per hour will stop in mid-air, reverse direction, somehow get sucked underneath of the vehicle and cause damage to the front of the vehicle. My test showed that no, that cannot happen. [56]

Trp. Weaver reiterated this claim shortly thereafter when questioned by the prosecutor:

Q Okay. And just to go back to Mr. Davis' question, the laws in physics wouldn't change whether it is a ninety-five pound or a two hundred ten pound dummy or human?

A No, sir. It could have been any object. Whatever force was out there on this night to magically make this body stop and go back underneath the car -- [57]

7. The dummy's dimensions were irrelevant to Trp. Weaver

While Trp. Weaver knew the dummy's weight, he didn't measure or know the width and circumference of the dummy's chest, the circumference of the dummy's waist, the length of the dummy's arms and legs, the dummy's height from head to toe,

[56] NT, Supp. Hrg., pp. 51-52.
[57] NT, Supp. Hrg., pp. 53-54.

the dummy's foot length, and the dummy's mass. When questioned about these variables, particularly the absence of data regarding these variable, Trp. Weaver told trial counsel these variables were irrelevant when applying the laws of physics.[58]

According to Trp. Weaver, the fact the dummy was "anatomically similar" to *any* human body was all that was relevant. When trial counsel asked him what he meant by "anatomically similar," Trp. Weaver said:

> A As I stated, it has joints that move similar to human. It's center of mass is very close to that and similar to where a human's center of mass is so that when struck by a vehicle or used inside of the vehicle, it will react in a similar manner to human body.[59]

8. Trial counsel's *Frye* objection

After *voir diring* Trp. Weaver, trial counsel made a *Frye* objection:

> MR. DAVIS: I don't have any other questions. I renew my objection. He cannot give an opinion as to the test that he had never conducted in the past, an experiment that he never conducted in the past -- similar to the rules of evidence, they incorporate the Frey standard. And the Frey standard, Judge -- Frey versus United States is 293

[58] NT, Supp. Hrg., pp. 61-62.
[59] NT, Supp. Hrg., pp. 62-63.

> Federal 1013, 1923 case, commonly used to determine whether expert testimony may before offered on a particular scientific subject. This standard is referred to as the general acceptance test and provide an expert opinion based upon a scientific technique is admissible only where the technique is generally accepted as reliable in known scientific community.
>
> Now, Your Honor, even not being physicist, you have to think to yourself, can a ninety-five pound dummy replicate a two hundred ten pound victim, number one. That is the first thing and if that leg doesn't fit, then the whole table has to fall. [60]

The trial court denied the motion.[61]

C. Post-hearing brief

On April 20, 2010, trial counsel filed a post-hearing brief renewing his *Frye* objections.[62]

First, trial counsel argued the dummy test results were inadmissible because the variables Trp. Weaver used to assess Mr. Higinbotham's narrative were substantially *dissimilar* to the actual incident being assessed, *i.e.*, Carmen opening the front door and exiting the vehicle while it was moving at an unknown speed. As trial counsel correctly noted, for experimental test results to be admissible, the experiment must use variables/conditions "substantially similar" to the actual incident or condition being assessed/measured. *Commonwealth v. Smith*, 808 A.2d 215, 232 (Pa. Super. 2002).

[60] NT, Supp. Hrg., pp. 48-49.
[61] NT, Supp. Hrg., p. 49.
[62] Rpp. 50-65.

Trial counsel identified two critical variables that differed significantly from the actual incident: (1) the car's speed and (2) the dummy's weight. In terms of speed, trial counsel highlighted the fact Trp. Weaver and Trp. Marshall both conceded the record contained no statements from Mr. Higinbotham indicating the car's speed when Carmen opened the front passenger door and exited the car. Thus, the PSP simply *assumed* a speed – 55 mph. In terms of weight, trial counsel highlighted the 115-pound difference between Carmen and the dummy.[63]

Second, trial counsel argued Trp. Weaver was unqualified to apply, discuss, and opine about complex physics principles:

> The Defendant contends that nothing Trooper Weaver testified to is "beyond that possessed by a layperson," as required by Pa.R.E. 702. The Trooper offered, respectfully, an opinion, without any scientific basis or training. The Commonwealth wants to dress up that opinion and display it as an opinion of an expert. Trooper Weaver presented no scientific basis for his opinion. Trooper Weaver only stated generally that "the laws of physics" and "Newton's theories" would agree with his conclusions. His expertise, (he never conducted a scientific test grounded in physics or the movement of objects ejected from vehicles in the past), his education,(two undergraduate courses in college), or his training, (essentially none), do not support, even by the most minimal standards, Trooper Weaver being qualified as an expert. [64]

Third, because Trp. Weaver's dummy test was novel, the Commonwealth had the burden of proving Trp. Weaver's *methodology* was generally accepted by the relevant scientific community. Trial counsel argued the Commonwealth presented no evidence regarding the "relevant scientific community" and whether this "scientific community"

[63] Rp. 55.
[64] Rp. 56.

generally accepted the methods Trp. Weaver used to answer the question presented, *i.e.*, whether Carmen could've landed quickly enough to be run over by the car.

Specifically, trial counsel argued that physicists, *i.e.*, the relevant scientific community, wouldn't have found Trp. Weaver's methodology generally accepted for an obvious reason: the conditions described in Mr. Higinbotham's narrative were substantially different than the conditions present in the dummy test, *e.g.*, the car's unknown speed and the substantial weight differences between Carmen (210 pounds) and the dummy (95 pounds).[65]

On June 15, 2010, the trial court denied the suppression motion and allowed Trp. Weaver to testify about the dummy test at Mr. Higinbotham's trial.

D. Trial

At trial, Trp. Weaver explained why he conducted the dummy test:

> Q And can you tell us was there something or an event that was planned for that particular date relative to this investigation?
>
> A Yes, ma'am. I had learned through the course of this investigation that the statements were made that the victim had jumped from the car and been sucked back underneath of the car. I planned and executed and experiment on that date to determine whether that could have happened. [66]

Trp. Weaver then explained his "plan" for the dummy test, emphasizing the speed variable of 55 mph:

[65] Rpp. 56-57.
[66] NT, Trial, p. 637.

Q When you say experiment, what was the plan?
A The plan was to accelerate the vehicle to fifty-five miles per hour and then take a dummy which, is used in pedestrian crashes and throw it --
Q A crash test dummy?
A Basically, it's a little different than the ones that you see on television, it's a pedestrian crash test dummy. Drop that out of passenger side of the car and see what happens. [67]

Trp. Weaver emphasized the speed variable of 55 mph again:

A I don't recall the exact speed, but the purpose or the test was to have the dummy exit the vehicle when the speedometer in the car stated fifty-five miles per hour. So once I had a steady fifty-five miles per hour I alerted Trooper Morrison and the dummy was then let go from the vehicle. So we were doing this on dead runway at the Connellsville Airport and once I hit fifty-five, I let him know and paid close attention to exactly where we were. [68]

Trp. Weaver said the substantial weight difference between the dummy and Carmen didn't affected the "validity" of the dummy test results:

Q How much does it weigh?
A Dummy weighed ninety-five pounds.
Q Did that affect the validity of the results of the tests, the weight?
A No, ma'am.
Q Why not?
A As far as falling objects, regardless of weight, they

[67] NT, Trial, pp. 636-637
[68] NT, Trial, p. 638.

fall at thirty-two feet per second per second. Objects sliding on a surface, two materials interact kind of independent of weight.

Q Okay?

A All of the forces, weight is not the a factor in this experiment. [69]

Trp. Weaver then explained the results of the six times the male PSP trooper forcibly threw the 95-pound dummy out the front passenger side. Because the dummy never landed near the car and wasn't run over or sucked under the car, Trp. Weaver said he was "absolutely" certain – based on the laws of physics – that Mr. Higinbotham's narrative couldn't have happened:

Q Okay. Did she jump out then?

A No, sir.

Q Like the other reports that you viewed said?

A Absolutely not in my opinion did she jump out. [70]

Not only did the dummy test supposedly invalidate Mr. Higinbotham's narrative, it gave Trp. Weaver the remarkable ability to decipher how and where exactly the car struck Carmen, how Carmen's body reacted when the car struck her, how Carmen's body interacted with the car's underbelly, and what happened to Carmen's body once the car ran her over. In short, based on the remarkable minutia in Trp. Weaver's testimony, it was as if God transported him back in time to Route 40 at the exact moment on June 20, 2009 when this incident occurred and allowed him to watch the incident in slow motion:

[69] NT, Trial, pp. 637-638.
[70] NT, Trial, p. 655.

A In my opinion, if you would remember back to the diagram and what I had marked as a starting point. At that point it is my opinion that Carmen was either lying on the ground or very close to the ground at that point for a small period of time, that is how the spot, I believe, was created. As she was lying there or kneeling there, this car was accelerated into her, striking her in the head, causing a semi somewhat circular almost half moon in shape --

....

A After that impact, the vehicle -- she is lying there at a certain height and the vehicle comes along and strikes her. There is nothing on a human body that would cause it to dig into a road, when you strike a body, it begins to move in the direction that it is being struck. The body begins to move and as the car continues to travel, it begins to rotate her and she goes underneath of that car and as the car changes direction moving left and then right, her head comes out just before, in my opinion, the left rear wheel and that left rear wheel then as the car goes back to the right comes over top of her chest and continues down the road as is -- as you can see as the debris continues as was in my diagram. [71]

Trp. Weaver even opined as to what way Carmen's head was facing when struck by the car:

[71] NT, Trial, pp. 644-645.

Q I got Carmen Higinbotham and you're saying she's kneeling on the road, and kneeling down on the road --

A I said either kneeling or lying.

Q Okay. So it could been one or the other?

A Or somewhere in between.

Q Somewhere in between. And her head is facing the car?

A No, sir, I believe that her head is facing away from the car.

Q I thought that your testimony was that she --

A I apologize, I meant her face. When you asked the question, I thought that you meant was she looking at the car, I believe that her face was turned away from the car and her body was somewhat perpendicular.

Q How do you get to the conclusion that her face was turned away from the car, explain that to me?

A The evidence that I observed at the scene that night on the body of the victim.

A The half moon impact depression on the back of her skull.

Q What part of the car caused that particular half moon -- created that half moon incision in the head?

A In my opinion, the first part of the car that contacted that is the front valance that is somewhat rounded in two directions, rounded this way (indicating) and this way (indicating) and directly behind that would be the actual bumper of the car. If you are familiar with your car these days, they have a plastic cover and once you take that plastic covering off, there's a steel beam usually behind that, sometimes there's some styrofoam in between. On this car there's no styrofoam, plastic and then metal bumper.[72]

....

[72] NT, Trial, pp. 647-648.

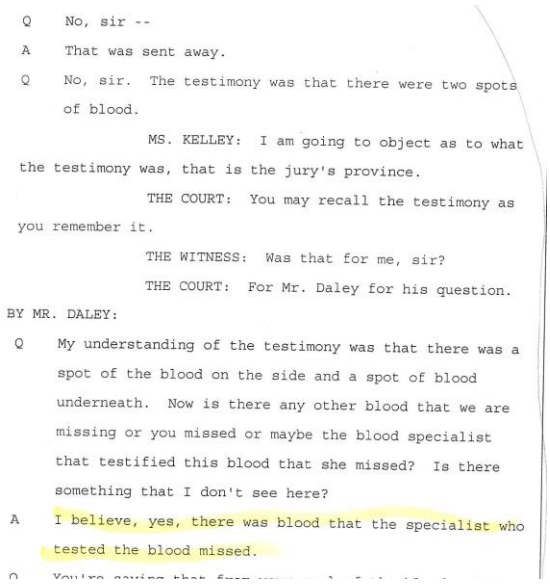
Q Now your testimony -- and I don't want to misstate it. It's your testimony that Carmen Higinbotham was lying on the ground, facing the vehicle, came under the front of the car; am I correct?
A No, sir.
Q Well -- what was your testimony?
A My testimony is that she was either on the ground laying or kneeling or some where in between and that she was not facing the vehicle.
Q Okay.
A The back of her head was toward the vehicle and her body was perpendicular to the vehicle, closer to perpendicular --
Q Her head was toward the vehicle?
A Her body would have been perpendicular, body (indicating) car (indicating).
Q Okay.
A Closer, not exactly, but closer to perpendicular. [73]

Although Trp. Weaver claimed to have based his remarkably detailed reconstruction on the physical evidence and the dummy test results, Trp. Weaver saw things no one else saw at the scene, on the car, or on Carmen's body. For instance, when trial counsel questioned the validity of Trp. Weaver's claim that the front of the car struck Carmen in the head, trial counsel asked him to explain why none of the forensic specialists identified blood on the front of the car. Trp. Weaver answered by claiming his PSP colleagues had "missed" the blood evidence he saw when he examined the car:

Q Okay. Then why was there not any blood or hair on that metal bumper? If it split her head open to a four inch gash and it's split open, there would be hair or blood on the front of that car.
MS. KELLEY: Objection, argumentative.
THE COURT: This is cross examination.
A There was blood on the front of the car, sir.
BY MR. DALEY:
Q There was?
A It was testified to and analyzed and there was blood on the front bumper and there was blood on the

[73] NT, Trial, p. 672.

....



Q No, sir --
A That was sent away.
Q No, sir. The testimony was that there were two spots of blood.
MS. KELLEY: I am going to object as to what the testimony was, that is the jury's province.
THE COURT: You may recall the testimony as you remember it.
THE WITNESS: Was that for me, sir?
THE COURT: For Mr. Daley for his question.
BY MR. DALEY:
Q My understanding of the testimony was that there was a spot of the blood on the side and a spot of blood underneath. Now is there any other blood that we are missing or you missed or maybe the blood specialist that testified this blood that she missed? Is there something that I don't see here?
A I believe, yes, there was blood that the specialist who tested the blood missed.

[74]

After displaying his God-like ability to exactly reconstruct every movement of Carmen's body during the incident, Trp. Weaver made another highly prejudicial opinion that had no basis in fact. Trp. Weaver's theory, as mentioned, required Carmen to have exited the car at some point before being run over, so trial counsel asked him this rhetorical question, "You're contention is that she got out of the car, walked in front of the car and laid down on the road and said, run me over?"[75] This was a simple "yes" or "no" rhetorical question, as trial counsel didn't ask him to elaborate on the reason why Carmen may've exited the car. Despite the question's narrowness and simplicity, Trp. Weaver took it upon himself to inform the jury of his highly prejudicial, speculative, and non-fact-based opinion as to (a) why Carmen had exited the car and (b) how she ended up on the ground:

[74] NT, Trial, pp. 648-649.
[75] NT, Trial, p. 656.

A No, I believe that she exited the car because of a domestic disturbance and got knocked to the ground and then was run over in a fit of rage. [76]

To justify his speculative opinion, Trp. Weaver again saw things other people didn't see, namely Dr. Wecht, *i.e.*, one of the foremost medical examiners in the United States. According to Trp. Weaver, the autopsy photographs suggested to him that Mr. Higinbotham had physically assaulted Carmen with his hands and feet, and this was (a) *how* and *why* she fell to the ground and (b) *why* she was unable to move out of the car's way at it approached her.[77] Dr. Wecht, however, didn't see what Trp. Weaver supposedly saw because his autopsy report said the injuries to Carmen's head, thorax, and abdomen were caused by blunt force trauma from a car – not from human feet or fists.[78] Likewise, during his trial testimony, Dr. Wecht never said – or even suggested – that any of Carmen's injuries were or could've been caused by Mr. Higinbotham punching or kicking her before the incident.

Furthermore, Trp. Weaver conceded his theory was purely speculative because the PSP interviewed no one who described seeing and/or hearing a violent, physical altercation between two people near a car on Route 40 before Scott Waugman heard the "crunching" sound.

[76] NT, Trial, p. 656.
[77] NT, Trial, pp. 656-657.
[78] Rpp. 88-107.

Q It's your belief -- you are telling this jury here that now all of the sudden, from you reading a report and from that nine one one call didn't say anything about them standing outside; did it?

A No, sir. I don't believe that it did.

Q Did anyone say or anyone report or did any witness that rode by see --

MS. KELLEY: Objection, hearsay.

THE COURT: Yes. There's well -- there's is hearsay, because no one did. Go ahead.

BY MR. DALEY:

Q Did you see any other report or any other information that would indicate that there was these people standing outside?

A Not to my knowledge, sir.

[79]

E. Direct appeal

Trial counsel preserved the following appellate claim that had two sub-claims:

> **The trial court abused its discretion when it permitted Trp. Weaver to discuss, explain, and introduce the dummy tests results because: (a) the conditions/variables present in the dummy test were substantially dissimilar to the narrative Mr. Higinbotham described; and (b) the Commonwealth failed to present evidence that the manner in which Trp. Weaver conducted the dummy test, *i.e.*, his methodology, was generally accepted by the relevant scientific community.**

Direct appeal counsel didn't raise this preserved and meritorious claim or its sub-claims. Direct appeal counsel was ineffective for not doing so because the claim and its sub-claims had arguable merit and direct appeal counsel didn't have a reasonable basis for not raising and arguing this arguably meritorious claim and its sub-claims.

[79] NT, Trial, p. 658.

The admissibility of evidence is a matter left to the trial court's sound discretion and may only be reversed upon a showing that the trial court abused its discretion. *Commonwealth v. Osborn*, 528 A.2d 623, 629 (Pa. Super. 1987). An abuse of discretion "is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will as shown on the record, discretion is abused." *Commonwealth v. Grove*, 526 A.2d 369, 378 (Pa. Super. 1987).

The trial court abused its discretion for the following reasons.

1. **<u>Sub-claim(a)</u>: The conditions/variables present in the dummy test were substantially dissimilar to the narrative Mr. Higinbotham described**

This claim has (and had) arguable merit based on the following case law. The "law is clear that experimental evidence is admissible only if the conditions under which the experiment was conducted are substantially similar to those at the time of the event in question." *Commonwealth v. Henry*, 569 A.2d 929, 936 (Pa. 1990); *Commonwealth v. Sero*, 387 A.2d 63, 68 (Pa. 1978).

> If there is an exact correspondence of such conditions, the experiments will amount to a demonstration, and be conclusive upon the issue; but as such exact correspondence is ordinarily unattainable, allowance must be made for the dissimilarity of conditions in determining the probative force of the experiments. Such dissimilarity, however, may affect not merely the weight of the evidence, but its admissibility[.]

Commonwealth v. Craven, 11 A.2d 191, 194-195 (Pa. Super. 1940).

The dummy test's variables were substantially *dissimilar* to multiple variables present in Mr. Higinbotham's narrative. These weren't irrelevant variables, they were variables that would've significantly influenced the very laws of physics Trp. Weaver claimed to have known and applied so well. Consequently, Trp. Weaver should've never been permitted to discuss the dummy test and its results, nor rely on them to inform the jury that the laws of physics proved Mr. Higinbotham's narrative impossible.

In a nutshell, the critical question regarding Mr. Higinbotham's narrative is whether Carmen could've hit the ground very near the car where the car could've run her over. Consequently, to recreate Mr. Higinbotham's narrative, under "substantially similar" circumstances, Trp. Weaver – at the very least – had to know the car's speed and the velocity (which is speed with directionality) of Carmen's body when she exited the moving car. Moreover, to accurately recreate the velocity of Carmen's body upon exiting the car, Trp. Weaver had to know Carmen's weight and mass. Unfortunately, Trp. Weaver didn't know the car's speed, never accounted for the velocity issue, used a dummy that weighed 115 pounds less than Carmen, and had a healthy and strong male PSP trooper *launch* or *throw* the dummy from the car.

Speed of the car: To recreate Mr. Higinbotham's narrative, Trp. Weaver had to know the car's speed when Carmen exited the car. There's no evidence in the record indicating how fast or slow the car was traveling when Carmen exited the car. The PSP, as mentioned, simply *assumed* a speed of 55 mph. This speed, however, had no basis in fact and Trp. Weaver and Trp. Marshall both conceded this fact during the suppression

hearing.[80] Once Trp. Marshall conceded the PSP didn't know the car's speed, the prosecutor recalled Trp. Weaver and asked whether the car's speed was a pivotal variable in the dummy test. Trp. Weaver, remarkably, said no.[81] Trp. Weaver isn't only wrong, his testimony contradicted his prior testimony where he said the exact opposite: "The *test was to see* if an object exiting a vehicle at *fifty-five miles per hour* will stop in mid-air, reverse direction, [and] somehow get sucked underneath [that vehicle]."[82] Thus, the car's speed was fundamental to the dummy test's purpose.

The dummy test couldn't accurately assess Mr. Higinbotham's narrative if the Trp. Weaver didn't know the car's speed when Carmen exited it. The car's speed would've impacted the wind resistance – *and wind resistance is a critical variable when determining an object's rate of acceleration as it falls.*[83] The sooner an object or person hits the ground once exiting a moving car, the more likely it is it can be run over by the car, and this was the fundamental question Trp. Weaver tried to answer, but he didn't understand even the most basic physics principles.

In short, because Trp. Weaver didn't know the car's speed, the dummy test wasn't and couldn't have been *valid.* Validity refers to how well a scientific test or piece of research measures what it sets out to measure, or how well it reflects the reality it claims to represent.[84] Here, because Trp. Weaver didn't know the car's speed the

[80] NT, Supp. Hrg., pp. 89-90.
[81] NT, Supp. Hrg., pp. 93-94.
[82] NT, Supp. Hrg., pp. 51-52.
[83] PHYSICS: PRINCIPLES AND PROBLEMS, Chs. 3, 7.
[84] https://www.aqr.org.uk/glossary/validity (last visited May 31, 2019).

dummy test didn't and couldn't answer the question it was supposedly designed to answer, thus rendering the dummy test and its results invalid and inadmissible.

Weight, mass, acceleration, and wind resistance: Carmen weighed 210 pounds.[85] The dummy weighed only 95 pounds.[86] During the suppression hearing, trial counsel objected to the dummy test's admissibility, in part, because of the extreme dissimilarity between Carmen's and the dummy's weight.[87] Trp. Weaver, though, repeatedly claimed Carmen's and the dummy's weight were irrelevant.[88] Trp. Weaver went so far as to say, he "could have" used "any object" and the results would've been valid because an object's weight doesn't impact the laws of physics.[89]

Trp. Weaver's weight discussion is right, but only partially because he's referring to free fall, but this isn't a free fall situation. Free fall is a special type of motion in which the only force acting upon an object is gravity. Objects undergoing free fall, *aren't encountering a significant force of air resistance*; they're falling under the sole influence of gravity. Under free fall conditions, consequently, all objects fall with the same rate of acceleration, regardless of their weight and *mass*.[90] For instance, in a free fall situation, a 2-ton elephant and feather will fall at the same speed and hit the ground at the same time. In real life, though, where air resistance is a factor, the 2-ton elephant will fall at

[85] Rp. 90; NT, Trial, p. 481.
[86] Rp. 87; NT, Trial, p. 637.
[87] NT, Supp. Hrg., p. 49.
[88] NT, Supp. Hrg., p. 51-52, 53-54.
[89] NT, Supp. Hrg., pp. 53-54.
[90] PHYSICS: PRINCIPLES AND PROBLEMS, Chs. 3, 7.

a greater speed and hit the ground well before the feather because the feather will be slowed considerably by wind resistance.

This brings us to the concepts of *mass*, *cross-sectional area*, and *acceleration* which are physics variables Trp. Weaver never mentioned during his suppression hearing and trial testimony. Weight and mass are critically important, yet quite distinct, concepts in physics. *Mass* refers to the quantity of matter in a body regardless of its volume or of any forces acting on it.[91] It shouldn't be confused with *weight*, which is the measure of the force of gravity acting on a body. *Acceleration* is the rate of change of *velocity* of an object with respect to time. Velocity is a measure of how fast something moves in one direction, *i.e.*, speed with direction.

What Trp. Weaver was, presumably, trying to explain, but did so incorrectly and incoherently, was the following. Objects with greater mass have stronger gravitational forces, but the rate at which they accelerate is slower than objects with less mass. For instance, take a 25-pound bowling ball and a 4-pound basketball. *Also, assume both balls have the same circumference and surface area.* Thus, the balls are technically the same size, but one is a solid 25-pound object, while the other is an air-filed 4-pound object. In real life, if a person dropped both balls at the same time from the same height, they'd hit the ground at the same time.

[91] PHYSICS: PRINCIPLES AND PROBLEMS, Chs. 3, 7.

The reason for this is simple. The bowling ball's *mass* is far greater than the 4-pound basketball's *mass*, making its *gravitational force* far greater than the basketball's gravitational. However, the bowling ball's greater mass adversely impacts its ability to accelerate quickly, meaning its *acceleration* is much slower than the basketball's acceleration. On the other hand, because the basketball has considerably less mass than the bowling ball, its gravitational force is much weaker than bowling ball's. However, its significantly lesser mass positively impacts its ability to accelerate more quickly, meaning it can accelerate faster than the bowling ball. In the end, the difference in mass, gravitational forces, and acceleration cancel out, meaning the bowling ball's greater gravitational force makes up for its slower acceleration, whereas the basketball's quicker acceleration makes up for its weaker gravitational force.[92]

The critical fact in the above scenario is both balls had the same circumference and surface air. As an object falls through air, it encounters air resistance, which results from the object's leading surface colliding with air molecules. The actual amount of air resistance is dependent upon several factors, the two most common being the object's velocity and cross-sectional area. Increasing an object's velocity, increases the amount of air resistance the object faces. Likewise, the larger an object's cross-sectional area, the more air resistance it'll face.[93]

[92] PHYSICS: PRINCIPLES AND PROBLEMS, Chs. 3, 7.
[93] PHYSICS: PRINCIPLES AND PROBLEMS, Chs. 3, 7.

Based on these rudimentary physics principles, the only way the dummy could've *possibly* fallen at the same speed and acceleration as Carmen's body, is if the dummy's cross-sectional surface area mirrored Carmen's cross-sectional surface area when she exited the car. For instance, take two identical 12" by 12" pieces of Styrofoam. Both pieces, moreover, have a width of 1". Hold one piece vertically and the other piece horizontally at the same height and drop them at the same time. Both pieces, obviously, have the same mass and gravitational force. However, the vertically held piece will continue accelerating because the surface area colliding with the air is only 1". The horizontally held piece, though, will face much more wind resistance because its surface area is 12 times larger than the vertically held piece (12" compared to 1"). The increased wind resistance, furthermore, will make the horizontally held piece reach *terminal velocity* much sooner, meaning it won't be able to accelerate for as long as the vertically held piece accelerates. Terminal velocity simply means the point at which an object's gravitational force is equal to the force created by air resistance, meaning the object can no longer accelerate.

Based on these facts, there are two substantial problems with the dummy test and Trp. Weaver's weight testimony:

First, while the dummy is anatomically constructed like a human, there's nothing in the record identifying the dummy's height or width and whether it mirrored or didn't mirror Carmen's height and width. Trp. Weaver, in fact, said these variables were irrelevant. Trp. Weaver is wrong.

Second, Trp. Weaver had to know the exact position of Carmen's body when she exited the car. This goes back to the Styrofoam example because the object's positioning at the time it starts its falls directly impacts the amount of air resistance, which in turn impacts the object's acceleration and its ultimate velocity. Here, Trp. Weaver didn't account for this variable. He simply had a male trooper throw the dummy out the car and didn't control for how the male trooper threw the dummy from the car. In other words, the dummy's positioning upon ejection was different every time.

The horizontal ejection force, velocity, and distance from the car: Another substantial shortcoming of the dummy test concerns the force with which the male trooper threw the 95-pound dummy from the car. According to Mr. Higinbotham, Carmen opened the front passenger door and exited the car. She didn't jump from the car, nor did someone forcibly push or throw her from the car. Consequently, the horizontal velocity with which she exited the car was quite minimal. Trp. Weaver, however, made the dummy's horizontal velocity much greater. A male trooper, as mentioned, sat in the car's front seat with the dummy positioned in his lap. Once the car reached 55 mph, the male trooper forcibly threw the dummy from the car:

> The tests were videotaped by Tpr Dale BROWN, and the tests were observed by TPR John MARSHAL, and Cpl Gregory HAMBORSKY. The Dummy was thrown from the vehicle in an attempt to show the various ways the victim could have exited, and received the type and severity of injuries noted during autopsy. All tests involving the dummy were conducted at a speed of 55mph, which was the speed the defendant claimed to have been driving when the victim exited the vehicle. [94]

[94] Rp. 87.

Forcibly throwing the dummy from the car dramatically changed the dummy's horizontal velocity, which in turn impacted how close or far the dummy landed from the car and whether it would've been caught underneath or run over by the car. Put in the simplest physics terms, an object's horizontal velocity will impact the distance it travels horizontally over time. Moreover, the dummy weighed 115 pounds less than Carmen, making it that much easier to throw the dummy at a greater velocity and ergo a great distance from the car.

Tying open the car door: Another substantial difference concerns the car's front passenger door. Mr. Higinbotham said Carmen opened the front passenger door and exited the car, meaning she had to hold open the door long enough to exit the car. The task of opening the door, and keeping it open, would've negatively impacted Carmen's horizontal velocity upon exiting the car, *i.e.*, it would've slowed down her horizontal velocity.

In the dummy test, though, at least for some of the tests, Trp. Weaver tied open the front door so the male trooper who had to launch the dummy could focus all his energy on doing just that – launching the dummy from the car. This, unquestionably, would've made it even easier for the male trooper to forcibly launch the dummy from the car, which in turn would've increased the dummy's horizontal velocity and the horizontal distance it landed from the car.

Collectively, these differences are substantial not only legally, but scientifically because even the smallest difference in these variables can, will, and did produce substantially different results. The results, more importantly, substantially benefited the Commonwealth because Trp. Weaver was permitted to use the dummy test's invalid and unreliable findings to tell jurors the laws of physics proved Mr. Higinbotham's narrative impossible.

The trial court, therefore, abused its discretion and direct appeal counsel was ineffective for not raising and litigating this claim.

2. <u>Subclaim(b)</u>: The Commonwealth failed to present evidence that the way Trp. Weaver conducted the dummy test, *i.e.*, his methodology, was generally accepted by the relevant scientific community

This claim had arguable merit based on the following case law. Pennsylvania is a *Frye* state. Under *Frye*, novel scientific evidence is admissible "if the methodology that underlies the evidence has general acceptance in the relevant scientific community." *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038, 1044 (Pa. 2003). The *Frye* test is a two-step process. *First*, the party opposing the scientific evidence must show that the scientific evidence is "novel" by demonstrating "there is a legitimate dispute regarding the reliability of the expert's conclusions." *Commonwealth v. Foley*, 38 A.3d 882, 888 (Pa. Super. 2012). *Second*, if the moving party has identified novel scientific evidence, the proponent of the scientific evidence must show "the expert's methodology has general acceptance in the relevant scientific community" despite the legitimate dispute

regarding the expert's conclusions. *Id.* Consequently, *Frye* "applies only to proffered expert testimony involving novel science," *Commonwealth v. Dengler*, 890 A.2d 372, 382 (Pa. 2005), or to scientific methods applied in a novel way. *Grady v. Frito-Lay, Inc.*, 839 A.2d at 1045.

The "novelty" of scientific evidence "turns on whether there is a legitimate dispute regarding the reliability of the expert's conclusions, which is not necessarily related to the newness of the technology used in developing the conclusions." *Commonwealth v. Foley*, 38 A.3d at 888. Put differently, "any scientific principle, even those once considered unassailable, may be subject to a potential *Frye* challenge as novel scientific evidence if the challenging party demonstrates to the trial court that a *legitimate dispute* exists among experts in the relevant scientific field regarding the reliability of the expert's conclusions." *Betz v. Pneumo Abex LLC*, 998 A.2d 962, 974 (Pa. Super. 2010) (emphasis added). Consequently, the term "novel" must be given "a reasonably broad meaning" and *Frye* must apply "when a trial judge has articulable grounds to believe… an expert witness has not applied accepted scientific methodology in a conventional fashion in reaching his or her conclusions." *Commonwealth v. Walker*, 92 A.3d 766, 789-790 (Pa. 2014).

The dummy test was novel for at least two reasons.

First, Trp. Weaver said he'd never applied his limited knowledge of physics in such a way in any previous accidents he'd investigated or reconstructed.[95] While the laws of physics are set in stone and not novel, the way Trp. Weaver applied them to Mr. Higinbotham's case was truly novel.

Second, trial counsel's argument regarding the dummy test's substantially different variables/conditions raised a legitimate dispute whether physicists/engineers, *i.e.*, the relevant scientific community, would find Trp. Weaver's methodology valid, *i.e.*, the dummy test was so poorly conceived and premised on erroneous assumptions regarding the laws of physics it didn't and couldn't measure what Trp. Weaver claimed it measured.

The relevant scientific community is the physics/engineering community, not the very small number of law enforcement trained accident reconstructionists who lack substantial education, training, and experience in physics and engineering. According to the Pennsylvania Supreme Court, *Frye's* general acceptance requirement "assures that those most qualified to assess the general validity of a scientific method will have the determinative voice." *Commonwealth v. Topa*, 1277, 1281 (Pa. 1977). Here, the "most qualified" people who understand and can correctly apply the laws of physics to the

[95] NT, Supp. Hrg., pp. 46, 48.

facts at hand are physicists and engineers, not cops who took one or two forty-hour short courses – that had no proficiency components – on accident reconstruction.[96]

The first issue, therefore, is this: *Whether it's generally accepted in the physics/engineering community that the car's speed is an irrelevant consideration when trying to determine whether a person – who exited the car's front passenger door while the car was moving – can be swept under or run over by said car.* The issue can be put this way: *Whether it's generally accepted in the physics/engineering community that people in Trp. Weaver's position can simply assume the car's speed when trying to determine whether a person – who exited the car's front passenger door while the car was moving – can be swept under or run over by said car.*

The answer to both issues is no. One doesn't need a Ph.D. in physics or a certificate of *attendance* from a 40-hour law enforcement short course in accident reconstruction to understand why experts can't simply assume or make up critical variables/conditions when trying to *replicate* a specific event. The definition of replicate is "to make or do something again in exactly the same way."[97] Thus, you can't replicate – *or come closing to replicating* – an event if you don't know a key condition of the event, *e.g.*, the car's speed when a person exited from it.

Another issue would be this: *Whether it's generally accepted in the physics/engineering community that an object's weight has no bearing on its falling speed in a non-free fall situation.* The

[96] If one or two forty-hour short courses is all that's needed to become an expert in anything, then undersigned counsel is a "psychologist" because he has a four-year college degree from the University of Pittsburgh in psychology. The Court, though, would never permit counsel to testify as a "psychologist" and offer expert mental health testimony in a criminal or civil case.

[97] https://dictionary.cambridge.org/dictionary/english/replicate.

answer is no for one simple reason: wind resistance. In a free fall situation, the only force acting upon the object is gravity. In real life, though, an object must travel through – and therefore collide with – air molecules. Colliding with air molecules impacts the speed at which the object falls.

In short, because the dummy test's variables differed so substantially from Mr. Higinbotham's narrative, the relevant scientific community wouldn't have generally accepted the notion it could accurately replicate Mr. Higinbotham's narrative. The Commonwealth's own evidence and testimony proves this point because it presented no evidence or testimony – outside of Trp. Weaver's testimony – that the relevant scientific community believed the dummy test's methodology represented a reliable and valid way to replicate Mr. Higinbotham's narrative.

The trial court, therefore, abused its discretion and direct appeal counsel was ineffective for not raising and litigating this claim.

3. Prejudice

To establish *Strickland/Pierce* prejudice, Mr. Higinbotham must demonstrate that it's reasonably probable the Superior Court would've granted relief one this claim had direct appeal counsel raised it. *Commonwealth v. Blakeney*, 108 A.3d at 750. Mr. Higinbotham meets this standard and is entitled to a new trial.

To grant a new trial based on the introduction of inadmissible evidence, Mr. Higinbotham must actual prejudice. *Commonwealth v. Bruder*, 528 A.2d 1385, 1388 (1987). Prejudice is established if the absence of the tainted evidence might've resulted in a

different verdict. *Id.; accord Commonwealth v. Muniz*, 547 A.2d 419, 423-424 (1988). Put differently, prejudice is established if the tainted/inadmissible evidence may have affected the jury's verdict(s). *Cf. United States v. Bagley*, 473 U.S. 667, 679 n.9 (1985).

Tainted scientific evidence provided by a witness the jury believes to be an expert is far more problematic than inadmissible evidence or testimony from a lay person. As the U.S. Supreme Court noted, "[t]estimony emanating from the depth and scope of specialized knowledge is very impressive to a jury. The same testimony from another source can have less effect." *Ake v. Oklahoma*, 470 U.S. 68, 71 n.7 (1985). Thus, the Court must start with the premise that jurors gave more weight to Trp. Weaver's testimony because he testified as a "scientific" expert.

The Court must start with the premise that jurors find expert testimony "very impressive[.]" *Ake v. Oklahoma*, 470 U.S. 68, 71 n.7 (1985). "Testimony emanating from the depth and scope of specialized knowledge is very impressive to a jury. The same testimony from another source can have less effect." *Id.; accord Cooper v. Schoffstall*, 905 A.2d 482, 497 (Pa. 2006) (noting that "expert testimony adds an aura of reliability to the theories and claims proffered by the parties") (Newman, J., concurring); *Commonwealth v. Williams*, 433 A.2d 505, 508 (Pa. Super. 1981) ("Scientific or expert testimony is especially likely to mislead the jury because of its aura of special reliability and trustworthiness") (Brosky, J., concurring).

In *Buck*, for instance, the U.S. Supreme Court said the defendant had satisfied the *Strickland* standard, in part, because the inadmissible testimony came from an expert:

> This effect was heightened due to the source of the testimony. Dr. Quijano took the stand as a medical expert bearing the court's imprimatur. The jury learned at the outset of his testimony that he held a doctorate in clinical psychology, had conducted evaluations in some 70 capital murder cases, and had been appointed by the trial judge (at public expense) to evaluate Buck. Reasonable jurors might well have valued his opinion concerning the central question before them.

Buck v. Davis, 137 S. Ct. at 777; *accord Satterwhite v. Texas*, 486 U. S. 249, 259 (1988) (testimony from "a medical doctor specializing in psychiatry" on the question of future dangerousness may have influenced the jury).

When Trp. Weaver testified, he told jurors he was 1 of only 36 PSP troopers who were certified accident reconstruction specialists, that he'd taken courses at the PSP in accident reconstruction, and that he'd reconstructed "more than twenty" accidents since March 2009.[98] The trial court also told jurors Trp. Weaver "was an expert in the field of accident reconstruction."[99] Likewise, Trp. Weaver repeatedly mentioned Newton's laws of physics in a way that plainly suggested to the jury he understood and correctly applied these laws to the facts in Mr. Higinbotham's case, particularly the dummy test. Furthermore, Trp. Weaver told jurors the law of physics proved Mr. Higinbotham's narrative impossible.

[98] NT, Trial, pp. 590-593.
[99] NT, Trial, pp. 593-594.

Trp. Weaver's inadmissible dummy test evidence and testimony may have impacted the jury's third-degree murder verdict for an obvious reason. According to Trp. Weaver, he used the dummy test to prove what he already knew, *i.e.*, the laws of physics made Mr. Higinbotham's narrative impossible. Consequently, in one fell swoop, Trp. Weaver destroyed – in the jury's eyes – Mr. Higinbotham's entire defense. Trp. Weaver's inadmissible testimony, therefore, may very well have impacted the jury's decision to find Mr. Higinbotham guilty of third-degree murder. Put differently, "[t]he absence of such evidence may very well have led to a different verdict." *Commonwealth v. Muniz*, 547 A.2d at 423. Mr. Higinbotham, therefore, is entitled to a new trial.

<u>Claim #2</u>: Trial counsel was ineffective for failing to object when Trp. Weaver gave an improper and extremely prejudicial opinion as to how – he believed – Carmen allegedly ended up on the ground before Mr. Higinbotham ran her over in "a fit of rage." U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

A. Introduction

Trp. Weaver, as mentioned, told jurors Mr. Higinbotham had to have stopped the car due to a domestic dispute, that both then exited the car where they continued their domestic dispute, that Mr. Higinbotham, at some point, punched and kicked Carmen in the head and thorax causing her to fall to the ground, at which point Mr. Higinbotham got back into the car and ran her over in a "fit of rage" while she was still on the ground.

Trp. Weaver's opinion was inadmissible for multiple reasons: (1) he based his opinion on facts not in the record, (2) the opinion's substance fell well outside the scope of his expertise, and (3) his fact-less opinion went to the "ultimate issue" in the case which confused the jury and prejudiced Mr. Higinbotham. Trial counsel, therefore, should've immediately objected and requested a mistrial. Trial counsel didn't. Trial counsel, therefore, was ineffective.

B. Arguable merit

1. The case law

This claim has arguable merit based on the following case law.

Lay or fact witnesses: Opinions by lay or fact witnesses are normally excluded because these "witnesses generally must give facts and not their inferences, conclusions or opinions." *Lewis v. Mellor*, 393 A.2d 941, 946 (Pa. Super. 1978); *accord Graham v. Penna. R. Co.*, 21 A. 151 (Pa. 1891). This generally means the "lay witness must speak from personal knowledge (the witness must describe what he saw, heard, felt, tasted, smelled)." *Id. accord Brodie v. Phila. Trans. Co.*, 203 A.2d 657 (Pa. 1964) (lack of personal observation of incident by witness makes testimony excludible as opinion). However, if the fact witness observed an incident, like a car accident, he or she can opine on such things as how fast or slow a car was traveling at the time of the accident. Pa.R.Evid. 701 (lay witness opinions are limited to those "rationally based on the witness's perception").

For instance, Scott Waugman said the car he saw fleeing the scene probably fled the scene at a speed of 70 mph.[100] Waugman obviously didn't know the car's exact speed, but because he observed the car fleeing the scene, he could reasonably guestimate its speed. Waugman, though, couldn't have opined on what *he believed happened* between Mr. Higinbotham and Carmen immediately before he heard the

[100] NT, Trial, p. 161.

"crunching" sound. The reasoning is simple: Waugman didn't observe what happened before the "crunching" sound and therefore couldn't speculate as to what happened.

Expert testimony: An expert, obviously, can offer opinions to the jury. However, his or her opinion (1) must fall within his or her area of expertise, (2) must generally be based on *facts* in the case, and (3) can't confusion the jury or prejudice the defendant, especially if he or she opines about an ultimate issue in the case.

Regarding the first requirement, an expert may testify in the form of an opinion or otherwise if "the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson[.]" Pa.R.Evid. 702(a). Rule 702(a), consequently, limits the scope of the expert's opinion.

Regarding the second requirement, the basis of an expert's opinion must generally be limited to the "facts or data in the case that the expert has been made aware of or personally observed." Pa.R.Evid. 703. Rule 703, therefore, further limits the scope of an expert's opinion. *Kozak v. Struth*, 531 A.2d 420, 422 (Pa. 1987) ("Traditionally, the opinion testimony of an expert must be narrowly limited to evidence of which he has personal knowledge, which is uncontradicted on the record or which is proffered on an assumed state of facts reasonably shown by the record."). Consequently, "experts are subject to the usual rules of relevance in giving their opinions and cannot base them on *extraneous irrelevant factors not properly in evidence*." *Id.* (emphasis added).

Yes, an expert may base his or her opinion on "inadmissible facts or facts not in evidence," *Commonwealth v. Towles*, 106 A.3d 591, 605 (Pa. 2014), but two things must be true: (1) the term "fact" means someone or something, *e.g.*, security camera, observed, recorded, heard, tasted, or smelled an event, action, sound, food, or aroma; and (2) the "fact" must be one that experts in the relevant field "reasonably rely on" in forming an opinion. *Id.* Accordingly, based on the definition of "fact" – a "fact" can't be something assumed or speculated.

Regarding the third requirement, an expert's opinion "is not objectionable just because it embraces an ultimate issue." Pa.R.Evid. 704. Rule 704, however, isn't absolute. For instance, "experts have not been permitted to speak generally to the ultimate issue nor to give an opinion based on conflicting evidence without specifying which version they accept. These principles have been designed to permit the expert to enlighten the jury with his special skill and knowledge but leave the determination of the ultimate issue for the jury after it evaluates credibility." *Kozak v. Struth*, 531 A.2d at 422.

Moreover, the Supreme Court has "consistently held that an expert's comment on the totality of the evidence, where the evidence is in conflict, improperly impinges upon the jury's exclusive province." *Id.* at 422. In 1885, for example, the Supreme Court said an expert witness "cannot be asked to state his opinion upon the whole case, because that necessarily includes the determination of what are the facts, and this can only be done by the jury." *Yardley v. Cuthbertson*, 1 A. 765, 773 (Pa. 1885). Following

Yardley, "a litany of decisions [has] reiterated the principle that an expert cannot *weigh contradictory evidence* and *place his imprimatur upon a particular version*." *Kozak v. Struth*, 531 A.2d at 422-423.

Furthermore, while *Lewis v. Mellor*, 393 A.2d 941 (Pa. Super. 1987) approved Rule 704's principles, and *Swartz v. General Electric Co.*, 474 A.2d 1172 (Pa. Super. 1984) extended these principles to expert witnesses, these rulings are "limited to those instances where the admission will not cause confusion or prejudice." *Kozak v. Struth*, 531 A.2d 420 at 424.

2. Application of the law to the facts

Trp. Weaver's testimony regarding how he believed Carmen ended up in the middle of the westbound lane of Route 40, and his opinion that Mr. Higinbotham ran her over "in a fit of rage," violated all the above-mentioned evidentiary rules.

a. Facts not in evidence and opinions outside the scope of expertise

There are no "facts" in the record (1) that Mr. Higinbotham stopped the car, (2) that Mr. Higinbotham and Carmen exited the car, (3) that they had a domestic dispute outside the car, (4) that during this domestic dispute, Mr. Higinbotham struck Carmen with his hands and feet, (5) causing Carmen to fall into the middle of the westbound lane, (6) that Mr. Higinbotham's physical assault on Carmen prevented her from moving out of the way as the car approached her, and that (7) Mr. Higinbotham ran her over in a "fit of rage."

Trp. Weaver conceded his opinion had no basis in fact. Thus, because Trp. Weaver's opinion had no basis in "fact," the Commonwealth can't rely on Rule 703 to justify the opinion's admissibility. Moreover, Trp. Weaver's alleged expertise was in "accident reconstruction." Pontificating about why he believed Mr. Higinbotham stopped the car, why he believed Carmen exited the car, and how he believed she ended up in the middle of the westbound lane had nothing do to with accident reconstruction because these alleged actions occurred *before* the accident he was trying to reconstruct. An accident reconstructionist, in other words, can't possibly opine on the actions and behaviors of a driver and passenger *before* the accident even occurred, especially when there's no facts – in or outside the record – identifying the driver's and passenger's pre-accident actions and behaviors.

Trp. Weaver's opinion, therefore, represented nothing more than a speculative and unsubstantiated *personal* opinion as to why Carmen exited the car and how she ended up in the middle of the westbound lane. These types of personal opinions are prohibited under Pa.R.Evid. 701 because they're limited to those "rationally based on the witness's perception." Trp. Weaver didn't witness the accident and he only examined the car and the evidence at the scene – none of which gave him the remarkable ability to decipher – with exactness – Mr. Higinbotham's and Carmen's actions, words, and behaviors *before* the accident.

b. The ultimate issue

Trp. Weaver's opinion also violated the ultimate issue rule. How Carmen exited the car was the ultimate issue at trial. If she voluntarily exited the car while it was moving, as Mr. Higinbotham claims, Mr. Higinbotham couldn't be guilty of homicide. Conversely, if Mr. Higinbotham purposely ran her over after she'd exited the *stopped* car (for whatever reason), he could be guilty of homicide. Again, though, it was up to the jury to make this ultimate determination and to make it based on real facts – not hearsay, speculation, or assumptions.

Rule 704 permits an opinion on the ultimate issue, but these types of opinions can't be confusing or prejudicial. Trp. Weaver's opinion was confusing and prejudicial.

First, Trp. Weaver's opinion was confusing for at least two reasons: (1) it was a fact-less opinion, meaning Trp. Weaver assumed all the facts in the opinion; and (2) it represented nothing more than a *personal* opinion, not an expert opinion, but jurors very likely – and most likely did – view his opinion as an *expert opinion* based on his law enforcement training.

Second, Trp. Weaver's opinion was prejudicial – and the prejudice speaks for itself. With no facts whatsoever to support his opinion, Trp. Weaver still told jurors that not only did Mr. Higinbotham run over Carmen in a fit of rage, he beat and kicked her to the ground before running her over in a fit of rage.

Trial counsel didn't have a reasonable basis not to object to Trp. Weaver's inadmissible and prejudicial opinion testimony. The benefit of objecting, moreover, outweighed any perceived drawbacks to objecting, but again, counsel can think of no drawbacks of timely objecting to these inadmissible and prejudicial statements.

C. Prejudice

To prove prejudice, Mr. Higinbotham must prove the following: it's reasonably probable that, without Trp. Weaver's inadmissible opinion, at least one juror would've harbored a reasonable doubt about whether Mr. Higinbotham killed Carmen with malice. *Buck v. Davis*, 137 S.Ct. 759, 776 (2017). Mr. Higinbotham satisfies this standard.

Again, the Court must start with the premise that jurors find expert testimony "very impressive" and more impactful than lay witness testimony. *Ake v. Oklahoma*, 470 U.S. at 71 n.7 (1985). Based on this reality and the facts in the record, therefore, had Trp. Weaver's inadmissible opinion been struck from the record based on trial counsel's timely objection, it's reasonably probable at least one juror would've had reasonable doubt regarding whether Mr. Higinbotham (a) purposely ran over Carmen (b) with malice. Outside of Trp. Weaver's inadmissible pontification regarding why he believed Carmen exited the car and how she ended up on the ground, the Commonwealth presented no evidence regarding Mr. Higinbotham's and Carmen's actions, words, and behaviors immediately before the accident.

Mr. Higinbotham, therefore, is entitled to a new trial.

Claim #3a: Trial counsel was ineffective for failing to object on Sixth Amendment grounds regarding Dr. Bruce Wright's testimony about his October 13, 2010 interview of Mr. Higinbotham because the prosecutor and Dr. Wright never notified trial counsel of the October 13, 2010 interview, thereby depriving Mr. Higinbotham of his Sixth Amendment right to the assistance of counsel by not giving him a prior opportunity to consult with trial counsel before Dr. Wright's interview in violation of *Estelle v. Smith*, 451 U.S. 454 (1981). U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

Claim #3b: Assuming trial counsel properly preserved the *Estelle* claim, direct appeal counsel was ineffective for failing to raise the *Estelle* claim. U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

Claim #4: Trial counsel was ineffective for failing to object on Fifth and Sixth Amendment grounds when the prosecutor presented Dr. Bruce Wright during its case-in-chief, and Dr. Wright only testified about the statements Mr. Higinbotham made to him during the October 13, 2010 interview, and when Dr. Wright gave opinions as to Mr. Higinbotham's ability to form specific intent during the prosecutor's rebuttal case, Dr. Wright didn't base his opinion on Mr. Higinbotham's statements from the October 13, 2010 interview. U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

A. Introduction

Claims #3a and #3b and Claim #4 are based on the following facts.

On September 3, 2010, trial counsel filed a motion informing the Commonwealth of his intent to present a diminished capacity defense.[101]

[101] Rpp. ____ (notice of diminished capacity)

On September 27, 2010, the Commonwealth orally requested a court order permitting it to have Mr. Higinbotham independently examined by its own psychiatrist, Dr. Bruce Wright.[102] The trial court orally granted the order and instructed the Commonwealth to give notice to the defense when it and Dr. Wright agreed on an evaluation date.[103] On September 29, 2010, the trial court entered a written order granting the Commonwealth's request.[104]

On October 13, 2010, Dr. Wright interviewed Mr. Higinbotham at the Fayette County Prison. Neither the prosecutors nor Dr. Wright informed trial counsel of the October 13, 2010 interview.[105] Thus, Mr. Higinbotham couldn't consult with trial counsel before the interview. Dr. Wright, moreover, never *Mirandized* Mr. Higinbotham before interviewing him. On October 15, 2010, trial counsel filed a suppression motion asking the trial court to disqualify Dr. Wright and to suppress all statements Mr. Higinbotham made to Dr. Wright because the prosecution failed to notify him of the October 13, 2010 interview.[106] On October 18, 2010, the trial court denied the suppression motion.

[102] Rpp. 76-80.
[103] Rpp. 76-80.
[104] Rp. 81.
[105] Rp. 69.
[106] Rpp. 66-72.

On September 16, 2011, nearly a year after he'd interviewed Mr. Higinbotham, Dr. Wright sent ADA Michelle Kelly a letter summarizing his interview.[107] In his letter, Dr. Wright said he reviewed the following material – either before or after he interviewed Mr. Higinbotham: police reports, autopsy report, various court pleadings, and Dr. Antoinette Petrazzi-Woods's September 24, 2009 report.

Dr. Wright's letter regurgitated much of the social and educational history presented in Dr. Petrazzi-Woods's report. During the interview, Dr. Wright asked Mr. Higinbotham questions regarding the events of June 20, 2009. Thus, the other part of Dr. Wright's letter dealt with summarizing Mr. Higinbotham's statements regarding the events of June 20, 2009. Dr. Wright summarized Mr. Higinbotham's statements accordingly:

The defendant denied any previous history of legal problems with the exception of receiving a "fine" after he "took off after the cops shined a light on me."

With respect to the events that led to the death of his wife, Mr. Higinbotham provided the following account during my examination. He reported that he and his wife went to a party at 8:30 pm that evening. He claims that, prior to leaving their house, he had "a half case of beer." At the party, Mr. Higinbotham drank an "entire fifth" of Captain Morgan,[9] "a few beers," and "a few" Jell-O shots. He also had an "adult Brownie," but does not know what was in it.[10] Of note, at the time of his interview with the police on June 21, 2009, at 0325 hours, Mr Higinbotham "stated that he did not feel that he was under the influence of alcohol at the time of this interview." The police commented that his speech was "coherent" and that he "understood all questions directed towards him." The records document "a slight odor of alcoholic beverage emanating from his person" and that "his eyes were bloodshot;" the defendant had a "steady gait," and he "did not appear to have any trouble maintaining his balance and coordination."

Mr. Higinbotham left the party with his wife around 11:45 pm. He claimed that they were getting along when they left the party and that they had a "good time" that night. According to the defendant, while driving home, his wife "flipped out." He reported that she did this "out of the blue," and that there was no provocation.[11] Mr. Higinbotham claimed that his wife "punched" him over 10 times on the side of his

[107] Rpp. 82-86.

face, that she said she "hated my guts," and that she then "jumped out of the car." He tried to "grab he keep her from getting out of the car." He was driving "50 or 60 mph" when she left the car. M Higinbotham "backed up to see where she was." He saw a reflection in his rearview mirror of his wif standing behind his car; she was then, according to his report, hit by another car:

> *I seen the Volkswagen hit her (referring to his wife). She (referring to the driver of the Volkswagen) hit me in the ass end of the bumper. That's when I took off. I didn't want to be hit in the face no more.*[12]

The defendant left the scene because "I panicked, I was scared to death." Mr. Higinbotham is certain that he did not hit his wife as his car had a "low profile . . . if you hit somebody you will drag them a long time."[13] Mr. Higinbotham claimed that this "ain't the first time she jumped out of the vehicle;" he reported that she did this several months prior. With respect to the blood stains at the scene, Mr. Higinbotham explained that he was in the "other lane" when his wife left the car, and this accounted for the blood stain near the yellow/middle line. According to his report, she was then hit by the second car while she was near the white line on the side of the road. He claimed that the only damage to his car is from the impact when the Volkswagen ran into him.

Mr. Higinbotham returned home and called 911. He claimed that the police "threw questions at me" and "had me confused." He added:

> *I'm not good at explaining stuff to people. I don't understand too good. I'm not good at understanding things.*

Mr. Higinbotham is convinced that the police are "trying to pin" the crime on him because "the person who hit my wife is related to Nancy Vernon."[14] He alleges that evidence has been "planted" on his car:

> *They illegally took my car. I didn't get a warrant. He (referring to the police officer) was in such a hurry to get my car. He had to plant his evidence."*

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According to Dr. Wright, Mr. Higinbotham said he saw a Volkswagen strike Carmen after she exited the car, and that the Volkswagen then struck his back bumper, which prompted him to speed away from the scene. This narrative differed from the narrative he'd told PSP troopers the night of the incident, *e.g.*, Carmen exited the car and the car ran her over. Dr. Wright only interviewed Mr. Higinbotham. He didn't have him perform any mental or intellectual assessments. Dr. Wright, notably, didn't *Mirandize* Mr. Higinbotham either.

At the end of his letter, Dr. Wright opined that Mr. Higinbotham didn't lack the ability to form specific intent, but he didn't connect his opinion to the statements Mr. Higinbotham's made to him regarding the events of June 20, 2009:

> There is no evidence to suggest that Mr. Higninbotham had any type of psychiatric disorder or mental disturbance at the time of this event that would render him incapable of knowing the nature and quality of his acts or of knowing that what he was doing was wrong. Similarly, Mr. Higninbotham did not have a mental illness that adversely affected his cognition to the point that he was unable to form the intent to kill or to be fully conscious of that intent. Despite the defendant's below average intelligence, there is no indication that he lacked the capacity to understand his rights at the time of this offense or that he was unable to voluntarily, knowingly, and intelligently waive his rights.

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[108] Rpp. 84-85.
[109] Rp. 86.

At trial, the Commonwealth called Dr. Wright during its case-in-chief, but never had him qualified as an expert. Thus, Dr. Wright testified as a lay witness and his testimony focused solely on the statements Mr. Higinbotham made to him regarding the events of June 20, 2009. Dr. Wright said he "spoke" with Mr. Higinbotham on October 13, 2010. At the beginning of the interview, Dr. Wright said he told Mr. Higinbotham the contents of their conversation wouldn't be confidential.[110] The prosecutor asked a few cursory questions regarding Mr. Higinbotham's educational background, work history, home life, and marriages,[111] before getting to the primary reason he'd called Dr. Wright to testify: to introduce Mr. Higinbotham's statements regarding the events of June 20, 2009.

The prosecutor asked, "Did you then have occasion to discuss with [Mr. Higinbotham], the events that gave rise to the charge in this case." Dr. Wright replied, "I did," prompting the prosecutor to ask, "What did he tell you the events were that lead to the death of Carmen?" Trial counsel objected, but only on hearsay grounds:

> MR. DALEY: I would raise an objection that this is hearsay. This witness is not qualified as an expert witness and he is not offering any evidence as to his evaluation of him and, I believe, that it would be hearsay on that particular -- [112]

[110] NT, Trial, p. 126.
[111] NT, Trial, p. 126-128.
[112] NT, Trial, p 129.

The trial court overruled the objection.[113] The prosecutor then asked Dr. Wright several questions regarding Mr. Higinbotham's statements to him regarding June 20, 2009. The prosecutor then asked, "Did [Mr. Higinbotham] tell you what happened after they left [the luau party]?" Dr. Wright replied:

> A He said that he had a good time at the party and they were getting along and then quote out of the -- while in the car out of the blue quote his wife quote flipped out and he said that he specifically said that there was no provocation to her doing this and she punched him ten times on the side of the face and quote hated my guts and she then jumped out of the car. He was driving fifty or sixty miles per hour when she left the car and he tried to grab her to keep her from getting out of the car and he then backed up to see where she was and as he did this he saw her reflection in the rear view mirror -- [114]

Trial counsel objected because Dr. Wright was reading from his September 16, 2011 letter. After the prosecutor refreshed Dr. Wright's recollection with his letter, Dr. Wright continued and had the following Q/A with the prosecutor regarding Mr. Higinbotham's statements:

[113] NT, Trial, p. 129-130.
[114] NT, Trial, p. 131.

A I seen the Volkswagen hit her. She hit in the ass end of the bumper. That is when I took off. I didn't want to be hit in the face no more.

BY MR. SEPIC:

Q Did he indicate to you who it was that hit him in the quote ass end of the bumper?

A He told me that the person was related to Judge Vernon. I don't recall the exact name of the person, if he told me. So when he, said she hit me, the woman driving that car and that woman, he said, was related to Judge Vernon.

Q Did he -- did the defendant tell you why it was that he did not stay at the scene?

A He left the scene, he panicked.

Q Did he tell you whether or not he knew if he hit his wife, struck his wife with the car?

A He told me that he was certain that he did not do that. And that he would not have been able to drag her under the car, he had what he called a low profile, his car was low to the ground. [115]

When the prosecutor asked whether Mr. Higinbotham had mentioned any damage to his car, Dr. Wright said, "He told me that there was damage to his car and that damage was done by the Volkswagen that hit him."[116] The prosecutor then asked whether Mr. Higinbotham "knew what he was charged with?" Dr. Wright said, "I would have asked him what are you charged with and he said first degree murder."[117] The prosecutor then asked whether Mr. Higinbotham made "any statement" regarding "police involvement in this case?" Dr. Wright replied:

A He said that evidence was planted on his car. And he, specifically said to me, they illegally took my car and I didn't get a warrant. He, and this was referring to the police officer, was in such a hurry to get my car, he had to plant his evidence.

MR. SEPIC: No other questions, Your Honor. [118]

[115] NT, Trial, p. 135.
[116] NT, Trial, p. 136.
[117] NT, Trial, p. 137.
[118] NT, Trial p. 137.

The prosecutor ended his direct-examination at this point.

On cross-examination, trial counsel asked, "You're not issuing any opinion with any degree of medical certainty today, are you?"[119] Dr. Wright replied, "Today, I told you the information [Mr. Higinbotham] provided to me, there was no opinion about diagnosis or treatment or anything like that."[120] Trial counsel then asked, "You didn't test Mr. Higinbotham?" Dr. Wright replied, "I am not sure what you mean by testing. When I saw him I didn't do an intelligence scale test."[121] Trial counsel then asked how he could opine on Mr. Higinbotham's ability to form specific intent if he didn't test him on October 13, 2010:

> Q In absence of any testing, formal testing, how can you ask questions and illicit opinions without knowing the capacity of the patient to answer these questions?
> A How can I ask opinions of the patient? I am not sure what you mean.
> Q How can you solicit opinions when you don't know his ability to understand?
> A I don't need to do testing to know whether an individual understands me or not. [122]

After trial counsel presented Dr. Petrazzi-Woods in support of Mr. Higinbotham's diminished capacity defense, the Commonwealth recalled Dr. Wright during rebuttal. This time, though, the prosecutor proffered him as an "expert in the field of psychiatry."[123] When trial counsel *voir dired* him, Dr. Wright said he interviewed Mr. Higinbotham for little more than an hour on October 13, 2010. Notably, Dr.

[119] NT, Trial, pp. 138-139.
[120] NT, Trial, p. 139.
[121] NT, Trial, p. 139.
[122] NT, Trial, p. 139.
[123] NT, Trial, p. 889.

Wright admitted he "didn't" have Mr. Higinbotham do any "paper and pencil" intelligence exams. Trial counsel then asked, "What type of tests did you give him?" Dr. Wright replied, "I didn't give him any specific standardized test." Trial counsel then asked, "You just talked to him?" Dr. Wright replied, "That's correct."[124]

On direct-examination, the prosecutor asked, "And what did your examination consist of?" Dr. Wright replied,

> A Well, as we heard it was sitting down at a table as I told him. The examination consisted of a review of pretty much everything, of his early childhood and school years; his medical history; family history and psychiatric history; substance abuse history; and of the event, itself, and it is very important -- and here I disagree with Doctor Woods' opinion, it's very important, in fact, crucial to talk about the event. You can't give an opinion regarding someone's mental state at the time of the event if you don't ask them about their mental state at the time of event. [125]

The prosecutor then asked, "And does [Mr. Higinbotham] have any mental disease or mental illness?" Dr. Wright replied:

> A It is my opinion that he has low average intelligence, he's below the norm on the Belle curve that we saw this morning. He is on the left side of the peak, so he's below average. It is my opinion though that he does not have a psychiatric diagnosis in that respect. He does not have mental retardation and Doctor Woods agreed with that. My diagnosis was that he had no diagnosis. I'm sorry, my opinion was that he had no diagnosis. He does not have a primary psychiatric diagnosis. [126]

[124] NT, Trial, p. 890.
[125] NT, Trial, p. 894.
[126] NT, Trial, p. 895.

The prosecutor then asked, "What does that mean when someone does not have primary psychiatric diagnosis, what are you telling us?" Dr. Wright replied:

> A He wasn't -- with respect specifically to diminished capacity, he did not have a psychiatric illness or mental disorder that would be necessary to assign or to call him or to say that he had a diminished capacity. [127]

When the prosecutor asked if Mr. Higinbotham had "mild mental retardation," Dr. Wright said:

> A At this point, no. The step off from that would be borderline intellectual functioning. He is in that borderline intellectual functioning range, but that is very different than mental retardation. Mr. Higinbotham in my opinion and Doctor Woods's opinion does not have mental retardation. [128]

The prosecutor then asked if he believed Mr. Higinbotham "had impaired cognitive function on June 20, 2009?" Dr. Wright said no, but based his opinion on the statements Mr. Higinbotham made to the PSP troopers and other people at the luau party *that night* – not on the statements Mr. Higinbotham made to him regarding the events of June 20, 2009:

[127] NT, Trial, p. 895.
[128] NT, Trial, p. 896.

A No. It is very important to differentiate someone's ability to function from their diagnosis. And we see that all of the time, somebody, might say this man is demented and because of that, he cannot complete a Will. You can't go from A to B in that respect. You need to look at how they are functioning at that point in time. Do they understand what it means to sign a Will. Do they know who their beneficiaries are and things like that.

In this case, specifically, you can't say that because Mr. Higinbotham had low average intelligence, he wasn't able to understand what the word waive meant or didn't have the capacity to inform the intent to kill. You need to look at how he's functioning prior to that, after that and at the time. And we know from the state police that he functioned well at the time. He understood what was said to him and was able to give demographic information, his name and social security number, I think, address, date of birth and I forget exactly what all the state police officer said that we was able to give. More importantly he was able to coherently answer questions and there was no indication from the state policeman that he didn't understand what was being said. Everything that he said was and I think the exact quote was able to give coherent answers.[129]

When the prosecutor asked if Mr. Higinbotham understood the "natural consequences of his actions" on June 20, 2009, Dr. Wright said no, but he again based his opinion on the statements Mr. Higinbotham made to people at the luau party and the PSP trooper *that night*, not the statements Mr. Higinbotham made to him regarding the events of June 20, 2009:

[129] NT, Trial, pp. 899-900.

A Yes. There is no indication that he did not understand his behavior. We heard from the -- I don't know the name of the woman, the woman that saw them at the party and he was able to carry on a conversation. He was able to talk to her about his relationship. He told this woman that they were having trouble in the relationship and she suggested that they see a therapist. He was able to drive a car without getting into an accident; he was able to make the decision to go to the party; to leave the party; to the call police when he got home; and call his mother; and he was able to carry out very specific actions at the time. There is not a part of the brain that affects or controls someone's ability to form the intent to kill. Globally he was able to carry out very specific actions. [130]

The prosecutor ended his direct-examination by asking whether Mr. Higinbotham had the ability to form specific intent on June 20, 2009. Dr. Wright said no, but didn't connect his opinion to the statements Mr. Higinbotham made to him regarding the events of June 20, 2009:

A It's my opinion that despite his low average intelligence and despite the alcohol at the time, he had the cognitive capacity to carry out very deliberate and specific actions including that he had the capacity to form the intent to kill. [131]

On cross-examination, re-direct, and re-cross, the parties argued over whether Dr. Wright relied on Dr. Petrazzi-Woods's report.

[130] NT, Trial, pp. 900-901.
[131] NT, Trial, p. 901.

B. Arguable merit

1. Claims #3a and #3b

a. Introduction

Trial counsel objected to the lack of notification regarding Dr. Wright's October 13, 2010 interview of Mr. Higinbotham but based his objection on the fact *he wasn't present* during the interview. A defendant, however, doesn't have a Sixth Amendment or state constitutional right to have counsel present during a psychiatric interview when the interview is in response to the defendant placing his mental state at issue. *Estelle v. Smith*, 451 U.S. 454, 470 n.14 (1981). A defendant does, however, have a Sixth Amendment "right to consult with his attorney before participating in the psychiatric examination." *Satterwhite v. Texas*, 486 U.S. 249, 255 (1988) ("The State does not contest the lower court's finding that Satterwhite did not waive his right to consult with his attorney before participating in the psychiatric examination."); *accord Estelle v. Smith*, 451 U.S. at 469-471.

Thus, if trial counsel didn't properly preserve the Sixth Amendment claim, Claim #3a (trial counsel was ineffective) is applicable. If trial counsel, though, properly preserved the Sixth Amendment claim, Claim #3b (appellate counsel was ineffective) is applicable.

b. The Sixth Amendment right to consult with counsel

(a). The case law

Estelle v. Smith, 451 U.S. 454 (1981) is on point. Before Smith's trial, once the prosecution announced its intent to seek the death penalty, the trial court ordered the prosecution to scheduled a psychiatric examination of Smith by a court-appointed psychiatrist. The trial court ordered the examination "to determine Smith's competency to stand trial." *Id.* at 457 & n.1. After the psychiatrist determined Smith was competent, the case proceeded to trial, resulting in Smith's murder conviction.

During the penalty phase, the prosecution presented testimony from the psychiatrist as proof of Smith's future dangerousness, an aggravating circumstance under the Texas statute. The psychiatrist represented the prosecution's only penalty phase witness, and he based his testimony on information derived from his examination of Smith. The jury imposed the death sentence. *Id.* at 458-460.

After the state courts affirmed Smith's death sentence, his case made it to the U.S. Supreme Court on the issue of whether his Sixth Amendment right to counsel was violated when neither the prosecutor, nor the psychiatrist informed trial counsel regarding the date and time of the psychiatric examination so that trial counsel could consult with and prepare Smith for the examination. The U.S. Supreme Court framed the issue this way: "The issue before us is whether a defendant's Sixth Amendment right to the assistance of counsel is abridged when the defendant is not given prior

opportunity to consult with counsel about his participation in the psychiatric examination." *Id.* at 470 n.14.

The Supreme Court said the "psychiatric evaluation" represented a "life or death matter" that even an attorney would find "difficult" to prepare for because adequately preparing for a psychiatric evaluation "require[d] a knowledge" of the cumulative evidence against the defendant, the "particular psychiatrist's biases and predilections," and all the "alternative" sentencing strategies. *Id.* at 471. In the end, the Supreme Court said "a defendant should not be forced to resolve such an important issue without the guiding hand of counsel." *Id.*[132]

(2). Applying the law to the facts

Smith is on point here. Mr. Higinbotham's right to counsel attached well before his October 13, 2010 interview with Dr. Wright. At the September 27, 2010 status hearing, the trial court instructed the prosecutor to provide notice to the defense once a date had been set for Dr. Wright's interview. The notice requirement, presumably, was to enable trial counsel to consult with Mr. Higinbotham *before* the interview. Trial counsel, consequently, knew of Dr. Wright's appointment based on the trial court's September 27, 2010 oral ruling, but trial counsel never told Mr. Higinbotham of Dr. Wright's appointment or the fact that Dr. Wright would be interviewing him at some point. Likewise, the prosecutor and Dr. Wright never told trial counsel of the October

[132] The U.S. Supreme Court reaffirmed *Smith* in *Satterwhite v. Texa*s, 486 U.S. at 254-256.

13, 2010 interview date. Consequently, when Dr. Wright appeared at the Fayette County Prison on October 13, 2010, Mr. Higinbotham had no idea regarding (a) Dr. Wright's appointment, (b) the purpose and *scope* of Dr. Wright's interview, and (c) whether he even had the right to consult with trial counsel before the interview.

Moreover, while Mr. Higinbotham didn't face *the* death penalty like the defendant in *Smith*, he still faced a potential death *sentence* if convicted of first-degree murder because a first-degree murder conviction carried with it an LWOP sentence and a LWOP sentence is a *de facto* death sentence. *Miller v. Alabama*, 567 U.S. 460, 740 (2012) (comparing "life without parole… to the death penalty itself[.]"). If the jury didn't believe Mr. Higinbotham's diminished capacity defense, a first-degree murder conviction represented a real possibility based on the Commonwealth's narrative of the incident, *i.e.*, Mr. Higinbotham purposely ran over Carmen in a fit of rage after punching and kicking her to the ground. Consequently, like the defendant in *Smith*, Dr. Wright's interview represented a "life or death matter."

Furthermore, because the prosecutor sought the evaluation, trial counsel knew the evaluation's purpose was to develop evidence, if possible, to undermine the diminished capacity defense. Also, based on trial counsel's suppression motion, it's apparent trial counsel knew about Dr. Wright tendencies and potential biases. For instance, trial counsel said the following in his suppression motion:

> Dr. Bruce Wright is aware that he cannot conduct a psychiatric examination of the defendant without defendant's counsel present or defense counsel having an opportunity to be present as he was present in a previous court proceedings where the court stated defense counsel's ability to be present at a psychiatric evaluation of a defendant. (Attached as Exhibit "E" is a copy of Dr. Wrights testimony from Commonwealth v. Phommayaysy, where the Court indicates defense counsel's ability to be present at the psychiatric evaluation).[133]

Based on these facts, Mr. Higinbotham needed the guiding hand of counsel to prepare for Dr. Wright's interview. Thus, his Sixth Amendment right to the assistance of counsel during all critical stages was violated. Trial counsel didn't have a reasonable basis for not extending his objection to include the Sixth Amendment right afforded to him under *Smith* and *Satterwhite*. The fundamental Sixth Amendment violation was Mr. Higinbotham's inability to consult with trial counsel before the October 13, 2010 interview. It wasn't that trial counsel couldn't be present during the interview. Had trial counsel properly objected on Sixth Amendment grounds, the trial court would've had to suppress all statements and evidence made and developed during the October 13, 2010 interview.

If the Court believes trial counsel properly preserved the Sixth Amendment objection, then direct appeal counsel was ineffective for not raising and arguing the preserved and meritorious Sixth Amendment claim. As noted above, the Sixth

[133] Rp. ___ (suppression motion).

Amendment claim has arguable merit and direct appeal counsel didn't have a reasonable basis for not raising and arguing it on direct appeal.

3. Claim #4

a. Introduction

Dr. Wright never *Mirandized* Mr. Higinbotham.

During its case-in-chief, the Commonwealth presented Dr. Wright as a lay witness for one reason: to have him testify about the statements Mr. Higinbotham made to him regarding the events of June 20, 2009, particularly his statements regarding the white Volkswagen striking Carmen and the fact he believed the PSP had planted blood evidence on his car. Dr. Wright told jurors about Mr. Higinbotham's statements regarding the white Volkswagen and the fact he believed the PSP had planted blood evidence on the car. Because he wasn't qualified as an expert, Dr. Wright gave no expert testimony regarding whether Mr. Higinbotham had the ability to form specific intent on the night of June 20, 2009.

After the defense presented Dr. Petrazzi-Woods, the prosecutor recalled Dr. Wright as a rebuttal witness. On rebuttal, though, the prosecutor qualified Dr. Wright as an expert in psychiatry. Although Dr. Wright repeatedly opined that Mr. Higinbotham had the capacity to form specific intent on June 20, 2009, he never identified or articulated a nexus between this opinion and the statements Mr. Higinbotham made regarding the white Volkswagen and the planted blood evidence theory. Dr. Wright, though, repeatedly explained how Mr. Higinbotham's statements

to the *people at the luau party and the PSP that night* proved that he had the capacity to form specific intent on June 20, 2009.

Dr. Wright's lay witness testimony violated Mr. Higinbotham's Fifth Amendment right against self-incrimination. Trial counsel, however, never made a Fifth Amendment objection during Dr. Wright's lay witness (case-in-chief) or expert witness (rebuttal) testimony. Trial counsel, moreover, didn't have a legitimate reason for not objecting on Fifth Amendment grounds because trial counsel objected on hearsay grounds, meaning all he had to do was to broaden the objection to include the Fifth Amendment violation. Trial counsel, therefore, was ineffective for not objecting.

b. The Fifth Amendment right against self-incrimination

(1) The case law

Commonwealth v. Morely, 658 A.2d 1357 (Pa. Super. 1995) is on point. In *Morley*, the defendant pled guilty to homicide generally. After pleading guilty, the trial court held a degree of guilt hearing. During the hearing, the defendant raised a diminished capacity defense and introduced her own expert who opined that she lacked the capacity to form specific intent at the time of the killing. Like here, before the degree of guilt hearing, the Commonwealth had the defendant interviewed by its own expert – Dr. Kool. Like here, when Dr. Kool interviewed the defendant, the defendant gave him a narrative of the homicide. At the degree of guilt hearing, Dr. Kool opined the defendant had the capacity to form specific intent and based his opinion, in part, on the

defendant's statements to him regarding her actions immediately before and during the homicide. The trial court found the defendant guilty of first-degree murder.

On direct appeal, the defendant argued, *inter alia*, "her statements concerning the commission of the crime which she made during [Dr. Kool's] examination were admitted as evidence of her intent to kill, thereby violating her privilege against self-incrimination, and that counsel was ineffective for failing to advise her of her right to remain silent during the examination and for failing to object to the use of her statements at the degree of guilt hearing." *Id.* at 1359. The Superior Court, however, disagreed because the defendant's "statements to Dr. Kool concerning the events surrounding the commission of the crime were admitted for the limited purpose of rebutting her assertion of diminished capacity." *Id.* at 1361.

While the Superior Court rejected the defendant's Fifth Amendment argument, it carefully "distinguished between psychiatric testimony concerning the issue of a defendant's sanity [or diminished capacity] and psychiatric testimony concerning the issue of a defendant's guilt." *Id.* at 1362. Relying on multiple federal cases, the Superior Court said there's a "sharp distinction between the use of the results of compulsory psychiatric examinations on the issue of sanity and the use of an incriminating statement made during a compulsory examination on the issue of guilt. *The former is permissible; the latter is constitutionally forbidden*." *Id.* (emphasis added). The Superior Court said this distinction struck the right balance because "the purpose of the examination is not to

determine whether a defendant did or did not do the criminal acts charged, but whether he possessed the requisite mental capacity to be criminally responsible therefor[.]" *Id.*

When it applied these principles to the defendant's case, the Superior Court said:

> By asserting the defense of diminished capacity, however, [the defendant] raised the additional issue of whether she was capable of performing a specified cognitive process. The psychiatric testimony at issue was admitted not to prove [the defendant's] guilt, which she had already conceded by entering a general plea of guilty to criminal homicide. Nor was it admitted to prove the degree or level of her guilt. Rather, it was admitted to rebut her assertion that because of her mental state at the time of the shooting, she was incapable of forming a specific intent to kill. This was entirely permissible under relevant case law.

Id. at 1362.

(2). Applying the law to the facts

Based on *Morley*, Dr. Wright's lay witness testimony violated Mr. Higinbotham's Fifth Amendment right against self-incrimination because (a) Dr. Wright never *Mirandized* him and (b) the prosecutor introduced Dr. Wright's lay witness testimony "to establish" Mr. Higinbotham's "guilt." *Id.* at 1363. On rebuttal, when Dr. Wright opined that Mr. Higinbotham had the capacity to form specific intent, he based this opinion, in part, on the statements Mr. Higinbotham made to people at the luau party and the PSP the night of June 20, 2009.

A Yes. There is no indication that he did not understand his behavior. We heard from the -- I don't know the name of the woman, the woman that saw them at the party and he was able to carry on a conversation. He was able to talk to her about his relationship. He told this woman that they were having trouble in the relationship and she suggested that they see a therapist. He was able to drive a car without getting into an accident; he was able to make the decision to go to the party; to leave the party; to the call police when he got home; and call his mother; and he was able to carry out very specific actions at the time. There is not a part of the brain that affects or controls someone's ability to form the intent to kill. Globally he was able to carry out very specific actions.[134]

Trial counsel, therefore, was ineffective for not making a Fifth Amendment objection before, during, or after trial (in his post-sentencing motion).

C. Prejudice for Claims #3a, #3b, and #4

Dr. Wright's lay and expert witness testimony should've been suppressed under the Sixth and Fifth Amendments. The Sixth Amendment violation should've excluded the entirety of Dr. Wright's testimony, while the Fifth Amendment violation should've excluded Dr. Wright's lay witness testimony. Under *Strickland*, therefore, the question becomes this: whether it's reasonably probable that, without Dr. Wright's inadmissible lay and expert testimony, at least one juror would've harbored a reasonable doubt about whether Mr. Higinbotham killed Carmen with malice. *Buck v. Davis*, 137 S.Ct. at 776. Mr. Higinbotham satisfies this standard.

[134] NT, Trial, pp. 900-901.

The prosecutor introduced Dr. Wright's lay witness testimony simply to introduce Mr. Higinbotham's white Volkswagen narrative as well as his blood planting statements. These statements, without question, substantially undercut Mr. Higinbotham's credibility, which made it significantly harder for the jury to believe anything he said, and made it appear as if he had something to hide. Likewise, it also enhanced Trp. The white Volkswagen narrative differed from the narrative he told the PSP on June 20, 2009. Moreover, the planting evidence statement was doubly prejudicial. *First*, it reinforces his inconsistent white Volkswagen narrative because he'd only make such a statement if he didn't run Carmen over once she exited the car. *Second*, it made him appear strongly anti-law enforcement.

Mr. Higinbotham, therefore, is entitled to a new trial.

<u>Claim #5</u>: Trial counsel was ineffective for disregarding Mr. Higinbotham's insistence on not admitting guilt via a diminished capacity defense and proceeding with a diminished capacity defense in violation of *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018). U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

A. Introduction

Trial counsel presented a diminished capacity defense. Under a diminished capacity defense, the defendant admits responsibility for the underlying action, but contests the degree of culpability based upon his inability to formulate the requisite mental state. Mr. Higinbotham never admitted responsibility for Carmen's death to trial counsel, the PSP, or Dr. Wright, and he privately objected to trial counsel's diminished capacity defense. Trial counsel disregarded Mr. Higinbotham's objections and presented a diminished capacity defense. Thus, trial counsel argued Mr. Higinbotham caused Carmen's death by running her over, but because Mr. Higinbotham couldn't form specific intent, he could've only committed the killing with (third-degree murder) or without (heat of passion manslaughter) malice.

The trial court gave a diminished capacity instruction:

> The defendant claims that at the time of the killing he was suffering from a mental disorder or abnormality and that as result of that condition, he is incapable of forming the specific intent to kill. I have already told you that one of the elements of first degree murder is that the defendant had this specific intent to kill.[135]

[135] NT, Trial, p. 949.

The trial court also gave a voluntary intoxication instruction:

> Alternatively, the defendant has raised the defense of voluntary intoxication as defense to first degree murder. Generally speaking intoxication is not -- a person is not allowed to claim voluntary intoxication as a defense to a crime nor is a person allowed to rely on evidence of his own intoxication to prove that he lacked an intent, knowledge or other mental state required for a particular crime. However, the general rules that I just spoke to you about do not apply to the charge of first degree murder. The defendant is permitted to claim as a defense, that he was so overpowered by alcohol that he lost control of his faculties and was incapable of forming the specific intent to kill required for first degree murder.[136]

The jury convicted Mr. Higinbotham of third-degree murder.

B. The case law

1. *McCoy v. Louisiana*

The defendant, not trial counsel, has the final say whether the defendant will admit guilt to the jury. Consequently, "[W]hen a client expressly asserts that the objective of 'his defence' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." *McCoy v. Louisiana*, 138 S.Ct. 1500, 1509 (2018). Thus, "[i]f, after consultations with [trial counsel] concerning the management of the defense, [Mr. Higinbotham] disagreed with [trial counsel's] proposal to concede [guilt]… it was not open to [trial counsel] to override [Mr. Higinbotham's] objection." *Id.* at 1509, 1510 ("counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission.").

[136] NT, Trial, p. 950.

2. Diminished capacity

The defense of diminished capacity, whether grounded in mental defect or involuntary intoxication, is an extremely limited defense available only to defendants *who admit criminal liability* but contest the degree of culpability based upon an inability to form the specific intent to kill. *Commonwealth v. Sanchez*, 82 A.3d 943, 977 (Pa. 2013). By asserting a diminished capacity defense, a defendant attempts to prove he's incapable of forming the specific intent to kill. *Commonwealth v. Saranchak*, 866 A.2d 292, 299 (Pa. 2005). If a defendant proves the defense, first-degree murder is mitigated to third-degree murder. *Commonwealth v. Saranchak*, 866 A.2d at 299. To establish a diminished capacity defense, a defendant must prove his cognitive abilities of deliberation and premeditation were so compromised, by mental defect or voluntary intoxication, that he was unable to formulate the specific intent to kill. *Commonwealth v. Hutchinson*, 25 A.3d at 312.

C. Prejudice

This type of trial counsel error is a structural error, meaning Mr. Higinbotham needn't prove prejudice, *McCoy v. Louisiana*, 138 S. Ct. at 1511, meaning he's entitled to a new trial simply based on the fundamental constitutional violation.

<u>Claim #6</u>: Appellate counsel was ineffective for failing to adequately brief the following preserved and meritorious record-based claim: the trial court abused its discretion when it refused to allow Kyle Higinbotham to testify about an earlier incident where Carmen Higinbotham had exited a moving car during an argument. U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

A. Trial

Before trial, Mr. Higinbotham told trial counsel of prior time when Carmen had jumped/exited from a moving car. According to Mr. Higinbotham, the prior incident happened while the family drove back home from a wedding in Morgantown, West Virginia in 2001. According to Mr. Higinbotham, his sons – Josh and Kyle – were two of the family members in the car when Carmen exited while it was moving. Carmen jumped/exited from the moving car while she and Mr. Higinbotham argued.

At trial, when the prosecutor called Josh as her first witness, trial counsel asked him if he recalled the time when Carmen had jumped/exited from the car as the family returned from a wedding in Morgantown. The prosecutor, importantly, never objected to this line of questioning. Josh initially said he couldn't recall the wedding. He then said he recalled the wedding but said he didn't go with the family to the wedding, meaning he could neither confirm nor deny that Carmen had jumped/exited from the car on the way home from the wedding. The clear inference from Josh's testimony is Carmen didn't jump/exit from a moving car during this trip or trip thereafter.[137]

[137] NT, Trial, pp. 31-32.

During Mr. Higinbotham's defense case, trial counsel wished to present Kyle and have him impeach Josh's testimony by stating that he and Josh were in the car when Carmen jumped/exited from the car while she and Mr. Higinbotham argued. The prosecutor objected, claiming ten years was "too remote to be considered in this matter" and, alternatively, Kyle's testimony was irrelevant.[138]

Trial counsel countered, arguing three things.

First, Kyle's testimony will impeach Josh's testimony.

Second, Kyle's testimony went to Carmen's "behavior when the car [was] moving." Trial counsel continued, "[T[here's an argument and there were kids in the car. [Kyle] is going to testify that the car was coming to a stop and her way of resolving the issue was jumping out of the vehicle.[139] Trial counsel believed Kyle's testimony would be useful to the jury in understanding the family dynamics and how Carmen, sometimes, dealt with arguments with Mr. Higinbotham while inside a car.

Third, Kyle's testimony was admissible under Pa.R.Evid. 404's "Other Acts" section, particularly the motive exception, *i.e.*, like the incident ten years ago, Carmen and Mr. Higinbotham were having an argument, and to separate herself from the argument, she opened the car door and exited the car while it was still moving.[140] Based

[138] NT, Trial, p. 832.
[139] NT, Trial, pp. 832-833.
[140] NT, Trial, p. 833.

on Mr. Higinbotham's narrative, jurors would've wanted and needed to know why Carmen would exit a moving car.

The trial court denied trial counsel's request on all three grounds.[141]

B. Direct appeal

On direct appeal, appellate counsel raised this claim, but this, literally, is the extent of appellate counsel's claim:

> **ISSUE NO. 5**: DID THE COURT ERR IN DENYING DEFENDANT TO CALL A WITNESS CONCERNING THE VICTIM "JUMPING OUT" OF VEHICLE ON ANOTHER OCCASION?
>
> **ANSWER:** YES
>
> It is the appellant's contention that the Court erred in refusing to permit him to bring testimony in concerning the victim "jumping out" of the family car on another occasion. Specifically, appellant wanted to have one of the children testify on another occasion that his wife had exited there car when they had a domestic dispute. Obviously the Court had refused this offer.
>
> In **COMMONWEALTH V. POWELL**, __ Pa. __, 956 A.2d 406 (2008) the Courts found testimony of six year old murder victim's mother that Defendant, when drunk or high, would put his hands on her was relevant and admissible to give context to the family environment.
>
> It is this appellant's contention that the testimony of the child was relevant to give the context of domestic disputes between the appellant and his wife; and that if such testimony was permitted that the testimony of appellant would have given the jury a better understanding of the parties' relationship.

142

Unsurprisingly, the Superior Court said this claim was waived because appellate counsel "fail[ed] to indicate where in the record this issue was preserved" and failed to "develop any kind of meaningful argument" for the Court to review.[143]

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[141] NT, Trial, pp. 833-834.
[142] Rp. 23.
[143] Rp. 38.

C. The trial court erred

1. Rule 404

In his opening brief, direct appeal counsel cited *Commonwealth v. Powell*, 956 A.2d 406 (Pa. 2008). *Powell* is on point and supports the argument direct appeal counsel tried to make on direct appeal. In *Powell*, the defendant was convicted of first-degree murder for the death of his 6-year-old son – Raymond. According to the forensic evidence, the child had suffered significant trauma to his entire body in the weeks and days leading up to his death, and the defendant was the person who presumably inflicted these fatal wounds.

At trial, the Commonwealth present the child's mother, Desiree Graves, who testified, *inter alia*, that the defendant "put his hands on her" when he was drunk or high. Trial counsel objected to this statement on Rule 404(b) grounds, but trial court overruled the objection. On appeal, the defendant challenged the trial court's decision, arguing that Graves's testimony made it appear as if he assaulted her each time he got drunk or high. *Id.* at 419.

The Supreme Court disagreed and said:

> The statement was offered not to show appellant's propensity to crime, but in the context of establishing the family environment and relationships among appellant, Raymond's mother, and Raymond. Considering the isolation in which appellant kept Raymond, this testimony was useful for the jury in understanding how appellant kept away Raymond's mother, the other adult most likely to have noticed the abuse and protected Raymond. Appellant's prior abuse of Raymond's mother (in addition to her testimony

> regarding her drug abuse and time in rehab) provides context for her later testimony that she took little action when appellant refused to allow her access to her son, or, on those rare occasions when she did see him, to speak with him alone.

Id. at 419-420.

Powell is instructive. Trial counsel presented Kyle's testimony to establish the family environment, Carmen's and Mr. Higinbotham's relationship, and how Carmen had dealt with arguments inside a car in the past. Kyle's testimony, moreover, would've been useful for the jury in understanding why Carmen would jump/exit from a moving vehicle, *i.e.*, because she wanted to remove herself from a family disagreement.

2. Impeachment

Josh testified he didn't attend the wedding in Morgantown with the other family members, meaning he wasn't in the car when Carmen supposedly jumped/exited from it as she argued with Mr. Higinbotham. Kyle, according to Mr. Higinbotham and trial counsel, was in the car with Carmen, Mr. Higinbotham, and Josh when the incident occurred and would've impeached Josh's testimony to the contrary. Kyle's testimony would've also impeached Josh's claim that he knew nothing about a prior incident where Carmen had jumped/exited from a moving car.

3. Right to Present a Complete Defense

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful

opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quotations and citations omitted). This right "is abridged by evidence rules that infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Id.* Consequently, "the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote[.]" *Id.* at 326.

Here, Kyle's testimony was probative to a critical issue at trial: whether Carmen had jumped/exited from a moving car on a prior occasion. This issue was critical and relevant for obvious reasons, namely if Kyle testified, in detail, to this prior incident, his testimony would've added substantial credibility to Mr. Higinbotham's narrative that he ran over Carmen when she jumped/exited the car. The trial court's ruling, moreover, was arbitrary because this type of "other act" evidence is routinely introduced and admitted against defendants in criminal cases, *i.e.*, *Powell*.

D. Prejudice

Had direct appeal counsel properly briefed and argued this claim on direct appeal, it's reasonably probable the Superior Court would've granted Mr. Higinbotham a new trial. Kyle's testimony would've answered the jury's million-dollar question: why would Carmen jump/exit from a moving vehicle? As trial counsel said, "[M]ost people

don't jump out of cars when [they're] moving with their kids in the car and leave a lasting impression on them."[144]

Mr. Higinbotham, therefore, is entitled to a new trial.

[144] NT, Trial, p. 833.

<u>Claim #7</u>: The cumulative impact of the trial court's and trial counsel's errors rendered Mr. Higinbotham's trial fundamentally unfair under the Pennsylvania and Federal Constitutions. U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 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, 318 (Pa. 2011). However, "an appellant who claims cumulative prejudice [must set] forth a specific, reasoned, and legally and factually supported argument for the claim." *Id.* at 319.

Counsel incorporates the facts and arguments raised *supra*, pp. 4-22, as if fully pled herein. Pages 4 through 22 provide a specific, reasoned, and legally and factually supported argument regarding why the cumulative impact of the trial court's and trial counsel's errors rendered Mr. Higinbotham's trial fundamentally unfair.

RIGHT TO A HEARING

The PCRA court "shall order a hearing" when the PCRA petition "raises material issues of fact." Pa.R.Crim.P. 908(A)(2). A hearing cannot be denied unless the Court is "certain" Mr. Higinbotham's 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.*

Based on this standard, Mr. Higinbotham is entitled to an evidentiary hearing or oral arguments where he can present evidence and/or argument in support of his PCRA claims.

CONCLUSION

WHEREFORE, Mr. Higinbotham requests the following relief:

1. An order granting a new trial;

2. In the alternative, an order granting a hearing and/or oral argument regarding the merits of his PCRA claims; and

3. Any other relief the Court deems necessary and just to ensure Mr. Brookins can meaningfully and effectively vindicate his state and federal rights under the post-conviction DNA testing statute.

Respectfully submitted this the 28th day of June, 2019.

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CERTIFICATE OF SERVICE

On June 29, 2019, counsel mailed (via USPS) a copy of Mr. Higinbotham's Amended PCRA Petition to the Fayette County District Attorney's Office.