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IN THE

SUPERIOR COURT OF PENNSYLVANIA

PITTSBURGH DISTRICT

NO. 769 WDA 2014

COMMONWEALTH OF PENNSYLVANIA,
Appellee

V.

CHARLES GOLDBLUM,
Appellant

BRIEF FOR APPELLEE

Appeal from an Order of Court entered April 14, 2014 by the Honorable Donna Jo McDaniel, Court of Common Pleas of Allegheny County, Criminal Division, at Nos. CC 197601267; CC 197603198; CC 197604826 and CC 197604830.

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COUNTER-STATEMENT OF SCOPE AND STANDARD OF REVIEW

Your Honorable Court has stated:

> We review an order dismissing a petition under the PCRA in the light most favorable to the prevailing party at the PCRA level. This review is limited to the findings of the PCRA court and the evidence of record. We will not disturb a PCRA court's ruling if it is supported by evidence of record and is free of legal error. This Court may affirm a PCRA court's decision on any grounds if the record supports it. We grant great deference to the factual findings of the PCRA court and will not disturb those findings unless they have no support in the record. However, we afford no such deference to its legal conclusions. Further, where the petitioner raises questions of law, our standard of review is de novo and our scope of review is plenary.

Commonwealth v. Ford, 44 A.3d 1190, 1194 (Pa. Super. 2012) (citations omitted).

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

I. Whether appellant's petition was untimely filed and failed to satisfy any of the statutory exceptions to the timeliness requirements of the Post Conviction Relief Act, depriving the court of jurisdiction to reach appellant's substantive claims?

Answered in the affirmative below.

II. Whether appellant's Brief and Reproduced Record fail to conform to the Rules of Appellate Procedure?

Not answered below.

COUNTER-STATEMENT OF THE CASE

This is an appeal of an Order of Court entered April 14, 2014 by the Honorable Donna Jo McDaniel, Court of Common Pleas of Allegheny County, Criminal Division, at Nos. CC 197601267, CC 197603198, CC 197604826, and CC 197604830.

A. Circumstances of the Criminal Conviction[1]

Appellant, Charles J. Goldblum, was indicted by Grand Jury in the Court of Common Pleas of Allegheny County, Criminal Division and charged at No. CC 197601267 with Murder, 18 Pa. C.S.A. §2502 and Voluntary Manslaughter, 18 Pa. C.S.A. §2503 and at No. CC 197603198 with Criminal Conspiracy (to commit Theft by Deception), 18 Pa. C.S.A. §903. He also was charged by Criminal Informations filed at No. CC 197604826 with Arson, 18 Pa. C.S.A. §3301, and at No. CC 197604830 with Criminal Solicitation, 18 Pa. C.S.A. §902.

On April 5, 1976, appellant, through H. David Rothman, Esquire

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[1] This procedural history is derived from the Commonwealth's Answer to Petition for Writ of Habeas Corpus filed at No. 04-0520 in the United States District Court on November 8, 2004 and the Commonwealth's Brief for Appellee filed January 24, 2007 in the United States Court of Appeals for the Third Circuit at No. 06-1138. *See Goldblum v. Klem,* 510 F.3d 204 (3d Cir. 2007) for a comprehensive summary of the facts of the case and the procedural history up to 2007.

and Louis Kwall, Esquire, filed an Application for Discovery and Preliminary Pretrial Conference, followed, on May 17, 1976, by a Supplemental Application for Discovery.

On June 3, 1976, appellant, with Mr. Rothman and Mr. Kwall, and co-defendant Clarence Miller, with Vincent C. Murovich, Esquire, appeared before the Honorable Donald E. Ziegler regarding the discovery motions. On June 7, 1976, Judge Ziegler issued an Order that certain discovery items be disclosed, but dismissed the Supplemental Application for Discovery.

On September 9, 1976, Mr. Rothman filed a Supplemental Application for Discovery which was denied on September 29, 1976.

On May 13, 1977, Mr. Rothman filed an Application to Include Charges of Accessory After the Fact to Murder and Involuntary Manslaughter, an Application to Suppress the Statement of Clarence Miller, and an Application to Suppress.

On June 6, 1977, appellant, with Mr. Rothman, appeared before Judge Ziegler for a Suppression Hearing. Assistant District Attorney Edward E. Fagan represented the Commonwealth. Appellant's Motion to Suppress Statement was denied.

On August 18, 1977, appellant, with Mr. Rothman, appeared before Judge Zeigler and proceeded to a capital jury trial. Assistant District

Attorneys F. Peter Dixon and Visilas C. Katsafanas represented the Commonwealth. On August 30, 1977, the jury found appellant guilty of the crimes charged, including First Degree Murder, and fixed the penalty on the conviction of First Degree Murder at life imprisonment.

On September 6, 1977, Mr. Rothman filed an Application in Arrest of Judgment or In the Alternative for a New Trial, raising these claims:

> 1. This honorable court erred in declining to suppress the testimony of Clarence Miller and in failing to approve the private prosecution of Clarence Miller for reasons already appearing of record in the Application to Suppress and the proceedings to approve a private prosecution of Miller for perjury, which proceedings are incorporated herein by reference.
>
> 2. This honorable court erred in failing to suppress the statements of Mr. Goldblum to the police on February 10, 1976 for the reasons already appearing of record.
>
> 3. This honorable court erred in failing to approve various questions submitted for voir dire, which rulings appear of record.
>
> 4. This honorable court erred in allowing voir dire on the death penalty. The facts of the case did not warrant an inquiry into the guidelines propounded by the legislature. It is immaterial that the death penalty was not ultimately the jury's verdict. The inquiry denied the defendant a jury of his peers.
>
> 5. The court erred in receiving hearsay statements of the deceased, particularly those statements purportedly made to William Hill, President of the Fraternal Association of Steel

Haulers, wherein the deceased allegedly indicated he knew the accused prior to February 8, 1976, and wherein he allegedly indicated that the accused was an attorney involved in the victim's purchase of land in North Carolina.

6. The court erred in receiving evidence of defendant's solicitation of Officer Mook to kill Clarence Miller for reasons which already appear of record.

7. This honorable court erred in denying defendant's demurrer to the evidence because the prosecution's case rested upon the uncorroborated testimony of the accomplice Miller, an admitted perjurer. The arguments in support of the demurrer are a matter of record.

8. The court erred in failing to receive all of the testimony of the witness William Ronald Held pursuant to the offer which is a matter of record.

9. The court erred in allowing cross examination of defendant's reputation witness, Mr. Orsatti, relative to defendant's present reputation, in view of certain admitted wrong-doings in the instant case.

10. The court erred in declining to give immunity to the witness Dedo so that he could be examined by the defense. The reasons in support of according immunity to Mr. Dedo are a matter of record.

11. The court erred in receiving the testimony of Ms. Williams in rebuttal.

12. This honorable court erred in its charge to the jury as follows:

> a. In failing to give the requested instruction on entrapment relative to the alleged solicitation of Officer Mook;

b. In declining to give the requested instruction enlarging on the legal significance of a dying declaration as a reliable statement;

c. In declining to instruct the jury to disregard the testimony of Clarence Miller if they determined that he had in fact committed perjury;

d. In declining to give the requested instruction that the existence of corroboration of Miller's and Dedo's complicity could not be construed as any corroboration of Goldblum's complicity in Miller's scheme to defraud Wilhelm;

e. The court erred in failing to elaborate on instructions as to the significance of the good reputation of the deceased.

13. The court erred in failing to submit to the jury a special verdict on the issue of Miller's perjury.

14. The court erred in failing to require the Commonwealth to disclose the identity of the informant alleged to be involved in arranging the meeting with Officer Mook. In the alternative, the court erred in declining to interview the informant in Chambers so that the court was satisfied of the existence of an informant and of his reliability.

15. Despite the fact that defendant waived counsel's previous request to permit the jury to consider verdicts of involuntary manslaughter and hindering apprehension, the court improperly restricted counsel's closing argument by directing counsel to refrain from referring to the clear possibility of defendant's guilt of these particular offenses.

16. Despite the court's ruling declining to instruct the jury on entrapment, the court improperly limited

counsel's closing argument by precluding counsel from referring to that defense in connection with the meeting with Officer Mook.

17. Each verdict returned by the jury was contrary to law and against the weight of the evidence.

18. The court erred in denying defendant's motion for judgment of acquittal and in submitting the case to the jury. The evidence as to each charge submitted to the jury and as to each verdict returned by the jury was insufficient as a matter of law.

19. As to each verdict returned by the jury, the evidence rested upon the uncorroborated testimony of Clarence Miller, an admitted perjurer to facts critical and material to the cases in question.

20. Defendant's statements to the police on February 10, 1976, and the alleged solicitation to kill Clarence Miller are no substitute for the Commonwealth's burden to prove defendant's guilt beyond a reasonable doubt, which burden the Commonwealth did not meet.

21. Defendant was deprived of a fair trial because of the Commonwealth's negligence in failing to photograph and examine the blood inside the victim's car and the physical condition of Clarence Miller observed by the police the morning after the homicide.

On September 14, 1977, Judge Ziegler denied appellant's post-trial motions.

On October 3, 1977, appellant, with Mr. Rothman, appeared for sentencing; Mr. Dixon represented the Commonwealth. At No. CC 197601267, First Degree Murder, appellant was sentenced to life imprisonment. At No. CC 197603198, Criminal Conspiracy, appellant

received a suspended sentence, but was ordered to pay restitution to the estate of the victim in the amount of $20,000. At No. CC 197604826, Arson, appellant was sentenced to not less than ten (10) nor more than twenty (20) years of imprisonment, consecutive to the sentence of life imprisonment, and at No. CC 197604830, Criminal Solicitation, he received a consecutive term of imprisonment of not less than five (5) nor more than ten (10) years.

On October 24, 1977, John H. Corbett, Esquire, of the Office of Public Defender, filed appellant's Notice of Appeal, which was docketed in the Supreme Court of Pennsylvania at No. 249 March Term, 1977. A second Notice of Appeal was docketed in Superior Court at No. 306 April Term, 1977. Superior Court certified its appeal to the Supreme Court at No. 45 March Term, 1978, and consolidated it with the prior appeal. On March 7, 1978, Judge Ziegler filed his Opinion.

On July 13, 1978, Mr. Corbett filed a Petition to Withdraw as Counsel, because the law firm of Arent, Fox, Kintner, Plotkin, & Kahn and Charles F. Scarlata, Esquire has been retained to represent appellant. The petition was granted on July 17, 1978.

On December 12, 1978, Mr. Scarlata and Rodney F. Page, Esquire, filed a Petition for Remand to Consider After Discovered Evidence and to Suspend Briefing Schedule and a Memorandum of Points and

Authorities in Support of Appellant's Petition to Remand. On January 9, 1979, Assistant District Attorney Charles W. Johns filed the Commonwealth's Answer, to which Mr. Scarlata and Mr. Page filed a Reply on January 16, 1979. On January 30, 1979, the Supreme Court denied the petition.

On June 22, 1979, Mr. Scarlata and Howard Sinclair, Esquire filed a Motion to Supplement the Record and a Brief for Appellant and Supplemental Record in the Supreme Court of Pennsylvania at No. 249 March Term, 1977 and No. 45 March Term, 1978, presenting these claims:

> I. Is appellant entitled to a new trial when after discovered evidence establishes that the key witness against him suffers from a mental defect materially affecting his capacity to know and appreciate the truth?
>
> II. Did this court violate appellant's due process rights by depriving him of the opportunity to submit this after discovered evidence of the key witness' mental defect to the trial court?
>
> III. Did the trial court err in admitting highly prejudicial hearsay statements under the state of mind exception?
>
> IV. Did the trial court violate appellant's Confrontation Rights by admitting out of court declarations implicating appellant, with no opportunity for cross-examination of the declarant?
>
> V. Was appellant deprived of the effective assistance of counsel by, inter alia, trial counsel's failure to move to quash a defective indictment, failure to request proper instructions limiting the jury's consideration of hearsay evidence, and failure

to object to repeated improper remarks of the prosecutor during closing argument?

VI. Did the court err in declining to permit the private prosecution of an admitted perjurer who subsequently testified at appellant's trial?

VII. Did the trial court err in receiving inflammatory, nonprobative evidence that appellant had committed a subsequent, uncharged crime?

VIII. Did the trial court err in restricting cross-examination of one of the Commonwealth's witnesses, thereby bolstering her credibility in the eye of the jury?

IX. Was the evidence legally insufficient to support the verdict?

On June 27, 1979, Assistant District Attorney Kemal Alexander Mericli filed the Commonwealth's Answer to Motion to Supplement the Record. On July 6, 1979, Superior Court issued an Order that reserved a decision on the motion to supplement the record until after oral argument. On July 10, 1979, Mr. Scarlata and Mr. Sinclair filed Appellant's Reply to the Commonwealth's Answer.

On July 12, 1979, the Supreme Court of Pennsylvania transferred jurisdiction to Superior Court and the matter was docketed at No. 25 and 26 Special Transfer Docket. On August 9, 1979, Mr. Mericli filed the Commonwealth's Brief for Appellee. On August 14, 1979, Mr. Scarlata and Mr. Sinclair filed a Motion to File Reply Brief, to which Mr. Mericli filed an

Answer on August 21, 1979. On August 24, 1979, Superior Court granted the Motion to File Reply Brief, and counsel filed that brief on August 27, 1979. On September 4, 1979, Mr. Mericli filed the Commonwealth's Answer to Appellant's Reply Brief. On May 23, 1980, Superior Court affirmed the convictions of First Degree Murder, Arson and Solicitation to Commit Arson and reversed the conviction for Criminal Conspiracy to commit Theft by Deception, granting a new trial on that count. On June 5, 1980, Mr. Scarlata and Mr. Sinclair filed an Application for Reargument, which application was denied on August 4, 1980. On August 11, 1980, Superior Court denied the Motion to Supplement the Record filed on June 22, 1979.

On June 20, 1980, Mr. Scarlata and Mr. Sinclair filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania, which was docketed at No. 185 W.D. Misc. Dkt. 1980. These claims were raised:

> 1. Whether the Supreme Court should allow an appeal from an order of a special panel of the Superior Court affirming a conviction for murder when the only member of the panel who is a member of the Supreme Court did not participate in the decision.
>
> 2. Whether the right to due process of law under the Fourteenth Amendment is violated by denying a petition for remand to the trial court of receipt of newly discovered evidence establishing that the key prosecution witness suffers from a mental defect materially affecting his capacity to known and appreciate the truth.

3. Whether such newly discovered evidence requires the granting of a new trial.

4. Whether post-trial motions which refer to all hearsay statements of the deceased and place particular emphasis on those statements testified to by one individual are sufficient to preserve an assignment of error based on hearsay statements of the victim testified to by another individual.

5. Whether the trial court erred in admitting highly prejudicial hearsay statements of the deceased victim under the state of mind exception.

6. Whether the Superior Court may decline to consider an assignment of error based on admission of hearsay statements incriminating a defendant in all crimes for which he is convicted, on the ground that the statements were relevant only to the count reversed by the Court.

7. Whether the failure to request instructions limiting the jury's consideration of hearsay statements constitutes ineffective assistance of counsel, and whether the Superior Court must order an evidentiary hearing when the record is inadequate to allow a determination of whether such failure to request instructions had any reasonable basis—designed to effectuate the best interests of the client.

8. Whether failure to object to statements by the prosecutor disclosing his personal opinion of the credibility of witnesses and of the defendant, constitutes ineffective assistance of counsel.

9. Whether the arbitrary refusal of the Commonwealth to prosecute an admitted perjurer after a private criminal complaint has been properly filed under Rule 113 (B) who subsequently testifies at a defendant's trial deprives that defendant of due

process of law in violation of the Fourteenth Amendment.

10. Whether the ineffectiveness of trial counsel may be raised for the first time in a reply brief when the Commonwealth is given leave to answer the reply, when the issue appears to have been properly preserved and when the Commonwealth raises in its brief for the first time the possible failure of trial counsel to take proper steps to preserve the issue for appeal.

11. Whether the failure to preserve properly, in post-trial motions, assignments of error based on admission of hearsay statements objected to during trial, constitutes ineffective assistance of counsel.

12. Whether admission of evidence of a subsequent, uncharged crime, on the ground that such evidence shows consciousness of guilt, is erroneous when the evidence is actually used to prove defendant's disposition to commit a crime with which he is charged.

13. Whether the evidence was legally insufficient to support the verdict in the trial court.

Mr. Mericli also filed a Petition for Allowance of Appeal, which was docketed at No. 186 W.D. Misc. Dkt. 1980; Mr. Scarlata and Mr. Sinclair filed Respondent's Opposition to that Petition on July 7, 1980. Mr. Mericli filed a similar Brief in Opposition. On September 9, 1980, Mr. Rothman filed a Petition for Leave to File Affidavit in Defense of Allegation of Ineffective Assistance, which was granted on September 12, 1980; he filed that Affidavit on September 23, 1980. On October 13, 1980, the Supreme Court

granted the Petition for Allowance of Appeal for both parties as a single appeal and docketed it at No. 80-1-183.

On November 21, 1980, Mr. Scarlata and Mr. Sinclair filed a Second Petition for Remand to Consider After Discovered Evidence and to Suspend the Briefing Schedule, to which Mr. Mericli filed an Answer on December 2, 1980.

On December 5, 1980, Mr. Scarlata and Mr. Sinclair filed the Brief for Appellant at No. 80-1-183, raising these claims:

> Did this court violate appellant's due process rights by depriving him of the opportunity to submit significant after-discovered evidence to the trial court which establishes that the key witness against him suffers from a mental defect materially affecting his capacity to know and appreciate the truth?
>
> Did the Superior Court err in refusing to rule on the merits as to whether appellant is entitled to a new trial based upon the after-discovered evidence, and is appellant in fact so entitled?
>
> Did the Superior Court err in ruling that objections based upon particularly prejudicial hearsay statements were waived by trial counsel's failure to preserve those issues properly in his post-trial motion and were those statements erroneously admitted by the trial court?
>
> Did the Superior Court err in declining to consider whether admission of hearsay statements of the deceased, testified to by William Hill, were erroneously admitted by the trial court, and were those statements erroneously admitted?

Was appellant deprived of the effective assistance of counsel by trial counsel's failure to request instructions limiting the jury's consideration of hearsay statements made by the prosecutor which disclosed his personal opinions as to the credibility of witnesses, and failure to preserve properly objections to admission of hearsay statements of the deceased?

Did the trial court err in declining to permit the private prosecution of an admitted perjurer who subsequently testified at appellant's trial?

Did the trial court err in receiving inflammatory, non-probative evidence that appellant had committed a subsequent, uncharged crime?

Was the evidence legally insufficient to support the verdict?

On December 12, 1980, Mr. Scarlata and Mr. Sinclair filed Appellant's Reply to Commonwealth's Answer to Second Petition for Remand to Consider After-Discovered Evidence. On January 19, 1981, the Supreme Court entered an Order granting a remand to the court below for the limited purpose of conducting an evidentiary hearing on appellant's after-discovered evidence claim. On January 22, 1981, Mr. Mericli filed the Commonwealth's Brief for Appellee. On February 5, 1981, Mr. Scarlata and Mr. Sinclair filed a Brief for Cross-Appellee. On February 24, 1981, Mr. Sinclair filed a Counter-Affidavit in Support of Allegation of Ineffective Assistance of Counsel.

On remand, the proceedings were assigned to the Honorable

John W. O'Brien, because Judge Ziegler had joined the federal bench. On January 11, 1982, Mr. Scarlata filed a Motion for Disclosure. Evidentiary hearings were held on January 28 and 29, 1982 and February 16, 1982, during which appellant offered testimony of Dr. Arthur Van Cara and Dr. James R. Merikangas relative to the testimonial competency of Clarence Miller. At these proceedings, Mr. Scarlata and Mr. Sinclair represented appellant. Assistant District Attorneys Joseph B. Steele, Patrick J. Thomassey, and Mr. Mericli represented the Commonwealth.

On April 12, 1982, Mr. Scarlata and Mr. Sinclair filed a Motion for New Trial and a Memorandum in Support of Motion for New Trial Based on After-Discovered Evidence. On April 12, 1982, Mr. Mericli filed the Commonwealth's Brief in Opposition to After Discovered Evidence Claim Advanced at Evidentiary Hearing. On May 3, 1982, Judge O'Brien, by Order and supporting Opinion, denied the motion.

On May 14, 1982, Mr. Scarlata and Mr. Sinclair filed a Supplemental Brief for Appellant in the Supreme Court of Pennsylvania, raising these claims:

> A. The trial court abused its discretion in failing to grant a new trial to Goldblum.
>
> B. The after-discovered evidence could not have been obtained in Goldblum's trial.

C. The after-discovered evidence goes to the very basis upon which Goldblum was convicted.

On May 14, 1982, Mr. Mericli filed a Supplemental Brief for Appellee. On July 2, 1982, the Supreme Court reversed Superior Court's reversal of the Conspiracy charge and affirmed the judgment of sentence on all other charges. *Commonwealth v. Goldblum*, 498 Pa. 455, 447 A.2d 234 (1982). On November 8, 1982, appellant, through counsel, filed an Application for Reargument which was denied on December 9, 1982.

On March 7, 1986, appellant, through Robert L. Potter, Esquire, filed Petition Under Post-Conviction Hearing Act raising these claims:

1. My rights to Due Process under U.S. Constitution and the Constitution of Pennsylvania were violated when the courts of Pennsylvania denied my motion for a new trial on the basis of after discovered evidence which demonstrated that Clarence Miller, the chief prosecution witness who testified against me, suffered from brain damage which rendered him unable to distinguish between truth and falsity and which caused him to fabricate or confabulate his testimony.

2. My rights to Due Process under the U.S. Constitution and the Constitution of Pennsylvania were violated by the joint operation of two rules of state criminal procedure.

3. The Supreme Court of Pennsylvania denied me Equal Protection and Due Process under the 14th Amendment of the U.S. Constitution and under the Pennsylvania Constitution when it held that the alleged out-of-court statements of George Wilhelm were not inadmissible hearsay when in prior and

subsequent decisions that same Court has held such statements to be inadmissible hearsay.

4. My rights under the Confrontation Clause of the U.S. Constitution and of the Pennsylvania Constitution were violated repeatedly at trial when the Commonwealth introduced testimony of an out-of-court declarant, George Wilhelm, to the effect that I had participated in the conspiracy to obtain Wilhelm's money by deception and to the effect that Wilhelm, at my request, had burned down a restaurant which I was operating.

5. My Due Process Rights under the U.S. Constitution and the Pennsylvania Constitution were violated when the trial court ordered that I make restitution in the amount of $20,000 at CC7603918 without first making any inquiry into financial capabilities and when in fact I have no capability whatever to make a payment of $20,000.

6. My conviction by the Jury of first degree murder is inconsistent with the incontrovertible physical facts and evidence introduced at trial.

7. The Commonwealth deprived me of Due Process under the U.S. Constitution and the Pennsylvania Constitution when it asserted inconsistent positions in judicial proceedings with respect to the testimony of its chief witness, Clarence Miller.

8. I was deprived of my right to effective assistance of counsel by my trial attorney who failed to file a motion for reconsideration of sentences imposed on October 73, 1977.

On June 11, 1986, Assistant District Attorney Eric J. Woltshock filed the Commonwealth's Answer to Post-Conviction Petition. On June 23, 1986,

Judge O'Brien denied the petition without an evidentiary hearing, relying on the evidentiary hearings which had been held in 1982 on remand pending appeal.

On June 23, 1986, Mr. Potter filed a Notice of Appeal. On November 12, 1986, Judge O'Brien filed his Opinion.

On August 17, 1987, Mr. Potter filed a Brief for Appellant in the Superior Court at No. 1032 Pittsburgh 1986, raising these claims:

> 1. Whether the denial of Defendant's pretrial application for psychiatric examination of the prosecution's only eyewitness, coupled with the denial of Defendant's motion for new trial based on after discovered evidence showing a substantial medical basis for attacking the credibility of that witness, together deny Defendant Due Process under the Pennsylvania Constitution and the 14th Amendment of the U.S. Constitution.
>
> 2. Whether the admission of the out-of-court declarations of Wilhelm with respect to Appellant's alleged involvement in the land fraud and Wilhelm's alleged participation in arson violated Appellant's constitutional right to confront witnesses against him guaranteed by the U.S. Constitution and the Pennsylvania Constitution.
>
> 3. Whether the imposition of a sentence of restitution, in the absence of required findings of fact relating to the Defendant's ability to pay, deprived defendant of Due Process and Equal Protection of the laws.
>
> 4. Whether the issues in this brief were either finally litigated or waived.

On September 15, 1987, Mr. Mericli filed the Commonwealth's Brief for Appellee. On February 2, 1988, Superior Court affirmed the Order entered below.

On March 3, 1988, Mr. Potter filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania, which was docketed at No. 125 W.D. Allocatur Docket 1988, raising these claims:

> I. Whether the denial of Defendant's pretrial application for psychiatric examination of the prosecutions only eyewitness, coupled with the denial of Defendant's Motion for New Trial based on after discovered evidence showing a substantial medical basis for attacking the credibility of that witness, together deny Defendant due process under the Pa. Constitution and the 14th Amendment of the U.S. Constitution.
>
> II. Whether the admission of the out-of-court declarations of Wilhelm with respect to the Appellant's alleged involvement in the land fraud and Wilhelm's alleged participation in arson violated Appellant's Constitutional right to confront witnesses against him guaranteed by the U.S. Constitution and the Pennsylvania Constitution.

On July 27, 1988, the Supreme Court denied the petition.

On July 14, 1989, Mr. Potter filed a Petition for Writ of Habeas Corpus in the United States District for the Western District of Pennsylvania, which was docketed at Civil Action No. 89-1493, raising these claims:

> 1. Whether the denial of Defendant's pretrial application for psychiatric examination of the

prosecution's only eyewitness, coupled with the denial of Defendant's Motion for New Trial based on after discovered evidence showing substantial medical basis for attacking the credibility of that witness, together deny Defendant due process under the 14th Amendment of the U.S. Constitution?

2. Whether the admission of the out-of-court declarations of Wilhelm with respect to the Appellant's alleged involvement in the land fraud deal and Wilhelm's alleged participation in arson violated Goldblum's Constitutional right to confront witnesses against him guaranteed by the U.S. Constitution?

On September 24, 1989, the Commonwealth, through Assistant District Attorney Maria V. Copetas, filed its Answer. On October 30, 1989, appellant, through Mr. Potter and Frank Arcuri, Esquire, filed a Brief in Support of Petition for Writ of Habeas Corpus. On November 13, 1989, Ms. Copetas filed a Supplemental Answer.

On August 31, 1990, after a May 10, 1990 oral argument, Magistrate Judge Ila Jeanne Sensenich issued her Report and Recommendation that the petition be dismissed and the certificate of probable cause be denied. On September 18, 1990, Mr. Arcuri filed Objections. On October 31, 1990, District Judge Gustave Diamond dismissed the petition and denied the certificate of probable cause.

On November 29, 1990, Mr. Potter and Mr. Arcuri filed a Notice of Appeal and an Application for a Certificate of Probable Cause. The appeal

was docketed in the United States Court of Appeals for the Third Circuit at C.A. No. 90-3815. On May 31, 1991, the Third Circuit Court granted appellant's application and a certificate of probable cause was issued.

On July 9, 1991, Mr. Potter and Mr. Arcuri filed the brief at C.A. No. 90-3815, presenting these claims:

> I. Whether admission of the out-of-court statements of the victim with respect to defendant's alleged participation in an arson violated defendant's constitutional right of confrontation guaranteed by the 6th and 14th Amendments of the U.S. Constitution?
>
> II. Whether the denial of a defense pretrial application for psychiatric examination of the prosecution's only eyewitness coupled with denial of a motion for a new trial based on after discovered evidence showing a substantial medical basis for attacking the credibility of that witness worked together a denial of due process under the 14th Amendment of the U.S. Constitution where it is undisputed that the key witness perjured himself at trial and thereby blocked defense counsel from discovering history of brain damage?

On August 8, 1991, Ms. Copetas filed the Brief for Appellee, to which Mr. Potter and Mr. Arcuri filed a Reply Brief on September 9, 1991. On November 26, 1991, the Third Circuit Court affirmed the judgment of the District Court. Counsel filed a Petition for Writ of Certiorari in the Supreme Court of the United States at No. 91-1375, which was denied on April 22, 1992.

On September 28, 1995, appellant, through Rhoda Shear Neft, Esquire, filed a Petition to Request Information from the Allegheny County Coroner's Office and a Petition to Request Information from the Allegheny County Department of Laboratories' Crime Lab. On October 6, 1995, Assistant District Attorney Russell K. Broman filed the Commonwealth's Motion to Vacate Hearing and Reassign Case and/or Dismiss Discovery Petition.

On January 12, 1996, appellant filed a *pro se* Motion for Post Conviction Collateral Relief. On January 16, 1996, Jon Pushinsky, Esquire, Ms. Neft and Lyn C. Ackerman, Esquire, filed an Amended Post Conviction Relief Act Petition and Petitioner's Motion for Discovery. In his petition, appellant raised ten claims, which can be stated as follows:

> 1. Were all prior defense counsel ineffective for failing to object or claim that the prosecutor ignored evidence and improperly relied on the testimony of eyewitness Clarence Miller for the purpose of convicting petitioner Goldblum?
>
> 2. Were all prior counsel ineffective for failing to object to the prosecution's alleged failure to "take and/or preserve" crime scene evidence to show that petitioner did not commit the crime?
>
> 3. Was prior counsel ineffective in failing to object to the prosecutor's alleged "prosecutorial misconduct" in use of Clarence Miller's testimony which the prosecution should have known was false, unreliable, and inconsistent?

4. Was prior counsel ineffective in failing to object to the prosecutor's alleged "prosecutorial misconduct" of "death qualifying" the jury to allegedly enhance the prosecution's conviction ability?

5. In a related question to number four, did the prosecution improperly fail to predict a change in the law, *i.e.,* the eventual ruling by the Pennsylvania Supreme Court in *Moody* that the 1974 Pennsylvania death statute was unconstitutional, and thereby improperly pursue a death penalty in this case?

6. Was prior counsel ineffective for failing to claim that the prosecution improperly sought a death sentence on the grounds that petitioner was allegedly not a proper candidate for capital punishment under the existing statute?

7. Was prior counsel ineffective for failing to obtain at the time of trial what petitioner now improperly characterizes as "after-discovered" evidence, in the form of an expert opinion by then coroner Dr. Cyril Wecht, that petitioner believes exculpates him from the murder?

8. Was prior counsel ineffective for failing to object to the trial court's imposition of restitution without first making a determination of petitioner's ability to pay?

9. Was prior counsel ineffective for not questioning Clarence Miller about his psychiatric history?

10. Does the cumulative effect of these alleged claims of ineffective assistance of counsel act to require a new trial as a matter of law?

On February 8, 1996, counsel filed an Affidavit of Cyril H. Wecht. On

February 15, 1996, Mr. Broman filed a Commonwealth's Answer in Opposition to Discovery Motion and Request for Immediate Hearing on the Discovery Motion and the Court Order of February 8, 1996. On March 18, 1996, counsel filed an Affidavit of John Balshy, followed on April 9, 1996, by a Response to the Commonwealth's Opposition to Discovery Motion and on April 18, 1996, by a Revised Response.

On April 18, 1996, an oral argument regarding appellant's discovery motion occurred before Judge O'Brien. Ms. Neft, Mr. Pushinsky, and Ms. Ackerman represented appellant; Mr. Broman and Assistant District Attorney James R. Gilmore represented the Commonwealth.

On July 9, 1996, the Commonwealth filed copies of police reports and supplemental reports, including photographs, that were in possession of the District Attorney's Office.

On November 12, 1996, Mr. Gilmore filed the Commonwealth's Answer to Amended Post-Conviction Petition. On December 2, 1996, counsel filed an Affidavit of Michael Baden, M.D. and Barbara C. Wolf, M.D. On December 9, 1996, Mr. Broman filed the Commonwealth's Answer in Opposition to these affidavits. On December 12, 1996, Judge O'Brien issued a Notice of Intention to Dismiss Pursuant to Pa. R.Crim. P. 1507. On December 16, 1996, counsel filed a Motion to Strike, to which Mr. Gilmore

filed an Answer in Opposition on December 18, 1996. On December 18, 1996, counsel filed a number of "deposition" transcripts.

On January 6, 1997, Mr. Gilmore filed a Motion to Strike Deposition Transcripts. On January 15, 1997, counsel filed Petitioner's Response to Notice of Intention to Dismiss Pursuant to Pa.R.Crim.P. 1507 and Petitioner's Motion for Leave to Amend Petition Pursuant to Post Conviction Relief Act. On February 12, 1997, Judge O'Brien dismissed the petition. On March 5, 1997, Ms. Neft and Mr. Pushinsky (Ms. Ackerman having withdrawn on January 23, 1997) filed a Motion for Reconsideration of Order.

On March 14, 1997, counsel filed a Notice of Appeal. On March 25, 1997, Judge O'Brien filed a Memorandum order stating that reasons for dismissing the petition were contained in his Notice of Intention to Dismiss. Subsequently, Chris Rand Eyster, Esquire and Lee Markovitz, Esquire entered their appearance and Ms. Neft and Mr. Pushinsky withdrew.

On March 6, 1998, Mr. Eyster and Mr. Markovitz filed the Brief for Appellant in the Superior Court of Pennsylvania, docketed at No. 585 Pittsburgh 1997, raising these claims:

> I. Whether the PCRA court erred in denying Goldblum's PCRA petition without an evidentiary hearing?

II. Whether Goldblum is entitled to relief under the PCRA on the basis of ineffective assistance of counsel for the following reasons: (A) Counsel's failure to adequately investigate the murder and call expert witnesses at trial who would have established that Goldblum was not the killer of Wilhelm; (B) Counsel's failure to request evidence under Brady v. Maryland; and, (C) Counsel's failure to request a missing evidence instruction?

III. Whether Goldblum is entitled to relief under the PCRA on the basis of ineffective assistance of trial counsel for failing to object to an improper and prejudicial accomplice charge?

IV. Whether Goldblum is entitled to relief under the PCRA on the basis of after-discovered evidence?

V. Whether Goldblum is entitled to relief under the PCRA due to prosecutorial misconduct which consists of the following: (1) Police failure to preserve evidence; (2) Police destruction of the evidence; (3) the Commonwealth's death-qualifying the jury; (4) the Commonwealth's knowing use of perjured testimony; and (5) post-trial destruction of evidence?

VI. Whether the claims presented by Goldblum below and on appeal are not waived because he is innocent of first-degree murder and because counsel was ineffective for failing to properly raise those claims previously?

On March 11, 1998, Mr. Eyster and Mr. Markovitz filed a Motion to File an Amended Brief. On March 13, 1998, Mr. Gilmore filed an Answer in Opposition to Motion to File an Amended Brief. On March 13, 1998, Superior Court granted the motion, but on March 16, 1998, Mr. Gilmore

sought reconsideration. On March 20, 1998, the Superior Court amended its Order in that appellant was not permitted to file a *pro se* brief. On March 23, 1998, Mr. Eyster and Mr. Markovitz filed an Amended Brief for Appellant and an Appendix to Brief, raising the claims outlined above. On August 28, 1998, Mr. Gilmore filed a Brief for Appellee, to which Mr. Eyster and Mr. Markovitz filed a Reply on October 23, 1998.

On November 4, 1998, Mr. Eyster and Mr. Markovitz filed a Motion for Oral Argument, to which Mr. Gilmore filed an Answer in Opposition on November 5, 1998. On November 17, 1998, Superior Court denied the motion.

While the appeal was pending, on January 7, 1999, Mr. Eyster filed a Motion to Examine Coroner's Records. On January 11, 1999, Mr. Gilmore filed a Motion to Vacate Hearing and Dismiss "Motion to Examine Coroner's Records" for Lack of Jurisdiction. On January 13, 1999, Judge O'Brien denied appellant's motion.

On August 13, 1999, Superior Court reversed the PCRA court on one issue and found all other issues previously litigated, waived or meritless under the Act, remanding for an evidentiary hearing on the single issue of trial counsel's ineffectiveness for failure to present the expert testimony of Dr. Cyril Wecht.

Gilmore filed a Motion Regarding Presentation of Rebuttal Expert, which was granted on September 29, 2004.

On October 16, 2000, appellant, through counsel, filed a Petition For Leave to Amend PCRA Petition Caption. Mr. Gilmore filed an answer in opposition on October 17, 2000.

The remand hearing was held on October 18 and 19 and December 18, 2000. Mr. Eyster, Mr. Markovitz and Mr. Levenson represented appellant; Mr. Broman and Mr. Gilmore represented the Commonwealth. At the beginning of the hearing, Judge McDaniel denied the outstanding defense motions to amend the caption and to file an amended PCRA petition. The court recessed at the conclusion of the hearing and took the matter under advisement. On December 21, 2000, Judge McDaniel entered an order dismissing the petition.

On January 19, 2001, appellant, through counsel, filed a Notice of Appeal. On May 17, 2001, appellant's Concise Statement was filed, followed by a Brief in Support on June 19, 2001. On August 22, 2001, Judge McDaniel filed her Opinion.

On January 29, 2002, Mr. Eyster and Mr. Markovitz filed the Brief for Appellant and Appendix to Brief in the Superior Court of Pennsylvania, docketed at No. 174 WDA 2001 and presenting these claims:

I. Did the PCRA court err in denying relief in this case?

II. Is Charles Goldblum entitled to relief under the PCRA on the basis of ineffective assistance of trial counsel for trial counsel's failure to adequately investigate the murder and consult with and call expert witnesses at trial who would have established that Goldblum was not the killer of Wilhelm?

III. Did the PCRA court err in refusing to allow Goldblum to call his expert witnesses (other than Dr. Cyril Wecht), or to present his case?

IV. Did the PCRA court err in allowing the Commonwealth to present the testimony of their expert, Toby Wolson, because his testimony was not relevant and was not available at the time of trial?

V. Did the PCRA court err in refusing to allow Goldblum to call witnesses in surrebuttal, including Dr. Henry Lee, Dr. Michael Baden, Dr. Barbara Wolfe, John Balshy, F. Peter Dixon, Esquire, and Herbert Leon MacDonell?

VI. Did the PCRA court err in refusing to allow petitioner to amend his petition, or the caption thereof, to include the other charges tried with the homicide?

VII. Did the PCRA court err in refusing to allow Goldblum to present his claims for relief based on after-discovered evidence and refusing to hold a hearing thereon?

On May 1, 2002, Mr. Gilmore filed the Brief for Appellee, to which Mr. Eyster and Mr. Markovitz filed a Reply Brief on June 13, 2002. On October 24, 2002, Superior Court affirmed the Order of the Court of Common Pleas.

On November 25, 2002, counsel filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, docketed at No. 656 WAL 2002 and raising these claims:

> I. Whether the Superior Court erred in affirming the PCRA Court's misapplication of state and federal constitutional law?
>
> > A. Whether the PCRA court erred in finding that Goldblum failed to prove by a preponderance of the evidence that trial counsel was ineffective under the Pennsylvania and United States Constitutions in failing to conduct an adequate forensic investigation of the murder and failing to call expert witnesses to establish that Mr. Goldblum was not the killer of George Wilhelm?
>
> II. Whether the Superior Court erred by not remanding the case for a full and fair evidentiary hearing in violation of state and federal due process?
>
> > A. Whether the PCRA Court erred in refusing to allow Goldblum to call his expert witnesses (other than Dr. Cyril Wecht) or present his entire case?
> >
> > B. Whether the PCRA Court erred in allowing the Commonwealth to present the testimony of Toby Wolson, because his testimony was not relevant and was not available at time of trial?
> >
> > C. Whether the PCRA Court erred in refusing to allow Goldblum to call witnesses in surrebuttal. Said witness included Dr. Henry Lee, Dr. Michael Baden, Dr. Barbara Wolfe,

John Balshy, F. Peter Dixon, Esquire, Herbert Leon MacDonell, and an attorney expert?

D. Whether the PCRA Court erred in refusing to allow Goldblum to amend his petition, or the caption thereof, to include the other charges tried with the murder?

E. Whether the PCRA Court erred in refusing to allow Goldblum to present his claims for relief based on after-discovered evidence, and for refusing to hold a hearing thereon?

III. Whether Goldblum is entitled to relief under the PCRA as well as the Sixth Amendment and the due process clause of the United States Constitution on the basis of ineffective assistance of trial counsel for failing to object to an improper and prejudicial accomplice charge?

On May 20, 2003, the Supreme Court denied the petition.

On August 14, 2003, Mr. Eyster and Mr. Markovitz filed a Petition for Writ of Certiorari in the Supreme Court of the United States, which was docketed at No. 03-7179. On January 12, 2004, the Supreme Court denied the petition.

On February 26, 2004, appellant, through Mr. Eyster, Mr. Markovitz, and David Rudovsky, Esquire, filed a Motion Under 28 U.S.C. §2244 for Order Authorizing District Court to Consider Second or Successive Application for Relief under 28 U.S.C. §2254 or §2255 and a Brief in Support in the United States Court of Appeals for the Third Circuit, which was

docketed at No. 04-1494. On March 4, 2004, Assistant District Attorney Ronald M. Wabby, Jr., filed the Commonwealth's Memorandum in Opposition. On March 29, 2004, the Third Circuit granted the motion.

On April 2, 2004, Mr. Eyster and Mr. Markovitz filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Pennsylvania, docketed at Civil Action No. 04-520. On July 8, 2004, Mr. Wabby filed an Answer.

On October 12, 2004, appellant filed a Motion for an Evidentiary Hearing and a Motion to Compel the Commonwealth to Produce Certain Critical Records, which was denied on October 14, 2004 by Magistrate Judge Lisa Pupo Lenihan. On October 19, 2004, Mr. Wabby filed an Answer to Motion for an Evidentiary Hearing; the motion was denied on October 19, 2004.

On October 20, 2004, appellant filed a Motion for Leave of Court to Serve Respondents with Request for Production of Documents; the Commonwealth filed a response on October 29, 2004. On November 1, 2004, appellant filed a Motion for Leave to File Reply Brief and Motion for Leave of Court to Expand the Record Pursuant to Rule 7 of the Rules Governing §2254 Cases. Magistrate Judge Lenihangranted the Motion for Leave to File Reply Brief and denied the Motion for Leave of Court to

Expand the Record on November 15, 2004.

On February 3, 2005, Magistrate Judge Lenihan denied the Motion for Leave to Serve Request for Production.

On April 28, 2005, appellant filed a Motion for Reconsideration of Court's Denial of an Evidentiary Hearing and on May 3, 2005, the Commonwealth filed a response. On May 11, 2005, Magistrate Judge Lenihan denied reconsideration.

Appellant filed objections on May 23, 2005 and amended objections on May 27, 2005. On May 31, 2005, appellant filed a reply to the Commonwealth's answer.

On October 28, 2005, Magistrate Judge Lenihan issued a Report and Recommendation, to which appellant filed objections on November 25, 2005. On December 13, 2005, United States District Judge Arthur J. Schwab dismissed the petition.

On January 6, 2006, appellant filed a Notice of Appeal. He filed a Petition for Certificate of Appealability on February 9, 2006 and the Commonwealth filed a response on February 15, 2006. On February 27, 2006, appellant filed a reply. On November 6, 2006, the Third Circuit Court granted a certificate of appealability. At No. 06-1138, the Third Circuit Court denied relief on November 30, 2007.

No action was taken in the case until July 1, 2013, when appellant filed his third petition for post-conviction relief. Scott Coffey, Esquire was appointed to represent him in connection with this petition and filed, on October 22, 2013, a "no merit" letter and petition to withdraw as counsel. The following day, Judge McDaniel entered an Order granting the motion to withdraw and giving Notice of Intent to Dismiss. On November 6, 2013, new counsel, Alexander H. Lindsay, Esquire, sought an extension of time to respond to the Notice of Intent to Dismiss, which was granted. After several more extensions, a Response was filed on April 7, 2014. On April 14, 2014, Judge McDaniel dismissed the petition.

Mr. Lindsay filed a Notice of Appeal on May 13, 2014, and a Concise Statement on June 3, 2014. Judge McDaniel's Opinion followed on August 19, 2014. The matter has been briefed by counsel for appellant and the Commonwealth responds.

The Supreme Court of Pennsylvania summarized the facts as follows:

> Goldblum and Clarence Miller conspired to defraud George Wilhelm by selling him land in North Carolina owned by the United States Government. The fraud was made plausible by the facts that Miller and Wilhelm were friends and Wilhelm believed that Miller had political connections which might make such a sale of government land possible. Wilhelm paid the conspirators twenty

thousand dollars in cash for this land, but later discovered that he had been defrauded and told the FBI that a fraud had been perpetrated by a person posing as the aide of United States Senator Schweiker of Pennsylvania. Goldblum and Miller persuaded Wilhelm to withdraw the statement he made to the FBI, telling Wilhelm to claim that his complaint was a political ruse, and promised to return the money paid for the land in North Carolina. Wilhelm and Miller thereafter submitted an affidavit to the FBI claiming that Wilhelm's complaint was a ruse. The money to repay Wilhelm, however, was not readily available, and in order to raise money, Wilhelm agreed with Goldblum to participate in a scheme to defraud an insurance company which insured a restaurant owned by Goldblum. The plan was for Wilhelm to set fire to Goldblum's restaurant, for which he was to be paid $3,500.00 in addition to the money taken from him on the land scheme. Subsequently, the restaurant was totally destroyed by fire. However, Goldblum paid Wilhelm only $100.00 of the money owed, and Miller told Goldblum that Wilhelm was threatening to go to the authorities if he was not paid. Goldblum then arranged for Miller to bring Wilhelm to a restaurant in downtown Pittsburgh, where Goldblum told Wilhelm that if Wilhelm would drive them to the roof of the Seventh Street parking garage, Wilhelm would get his money. When they arrived on the roof of the parking garage, Goldblum struck Wilhelm on the head with a wrench, and then stabbed him repeatedly. When police found Wilhelm bleeding to death, he told them, "Clarence...Clarence Miller did this to me." As a result of this statement, Miller was arrested and he in turn implicated Goldblum.

Commonwealth v. Goldblum, 498 Pa. 455, 447 A.2d 234 (1982).

SUMMARY OF THE ARGUMENT

Appellant has failed to demonstrate that he can qualify for any of the statutory exceptions to the timeliness requirements of the Post-Conviction Relief Act as to his third petition for post-conviction relief, filed in July of 2013, more than thirty years after his judgment of sentence became final.

While he claims the "newly discovered facts" exception to time-bar, appellant has failed to plead and prove due diligence, has failed to demonstrate that his petition was filed within sixty days of his receipt of the report upon which he relies, and has failed to demonstrate that the report actually contains any "newly discovered facts" forming the basis of his claim.

While he claims the "governmental interference" exception, he is unable to point to any specific substantive claim that he was prevented from earlier pursuing due to the acts of the Commonwealth. Appellant's substantive issues repeatedly have been litigated.

Appellant's Brief and Reproduced Record fail to conform to the requirements set forth in the Rules of Appellate Procedure.

ARGUMENT

I. THE PCRA COURT PROPERLY DISMISSED APPELLANT'S PETITION BECAUSE IT IS UNTIMELY AND DOES NOT QUALIFY FOR ANY OF THE STATUTORY EXCEPTIONS TO THE TIMELINESS REQUIREMENTS OF THE POST CONVICTION RELIEF ACT.

Appellant was convicted of First Degree Murder and various other charges and was sentenced on October 3, 1977 to life imprisonment plus 15 to 30 years. His judgment of sentence was affirmed by the Supreme Court of Pennsylvania on July 2, 1982, and reargument was denied by that Court on December 9, 1982. He is presently before the Court after his third petition for post-conviction relief was dismissed on the grounds that it was untimely filed and not eligible for any of the statutory exceptions to the timeliness requirements of the Post Conviction Relief Act (PCRA) which would have provided the court below with jurisdiction to reach his substantive claims.

In *Commonwealth v. Monaco,* 996 A.2d 1076 (Pa. Super. 2010), the Court outlined the legal principles applicable here as follows:

> Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition. The most recent amendments to the PCRA, effective January 16, 1996, provide a PCRA petition, including a second or subsequent petition, shall be filed within one year of the date the underlying

judgment becomes final. 42 Pa.C.S.A. § 9545(b)(1); A judgment is deemed final "at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." 42 Pa.C.S.A. § 9545(b)(3).

The three statutory exceptions to the timeliness provisions in the PCRA allow for very limited circumstances under which the late filing of a petition will be excused. 42 Pa.C.S.A. § 9545(b)(1). To invoke an exception, a petition must allege and prove:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S.A. § 9545(b)(1)(i)-(iii). "As such, when a PCRA petition is not filed within one year of the expiration of direct review, or not eligible for one of the three limited exceptions, or entitled to one of the exceptions, but not filed within 60 days of the date that the claim could have been first brought, the trial court has no power to address the substantive merits of a petitioner's PCRA claims." 42 Pa.C.S.A. § 9545(b)(2).

> The timeliness exception set forth in Section 9545(b)(1)(ii) requires a petitioner to demonstrate he did not know the facts upon which he based his petition and could not have learned those facts earlier by the exercise of due diligence. Due diligence demands that the petitioner take reasonable steps to protect his own interests. A petitioner must explain why he could not have obtained the new fact(s) earlier with the exercise of due diligence. This rule is strictly enforced.

Monaco, supra, 996 A.2d at 1079-1080 (case citations omitted). In *Commonwealth v. Howard,* 567 Pa. 481, 788 A.2d 351 (2002), the Court emphasized that "a petitioner seeking to establish that he qualifies for one of these exceptions to the timeliness requirements must file his petition within 60 days of the date that the claim could have been presented." *Howard, supra,* 788 A.2d at 354, citing 42 Pa. C.S.A. §9545(b)(2).

In *Commonwealth v. Hoffman,* 780 A.2d 700 (Pa. Super. 2001), your Honorable Court explained that the timeliness provisions

> ... apply to all PCRA petitions filed after January 16, 1996. Moreover, the timeliness requirements of the PCRA are "mandatory and jurisdictional in nature." Thus, "no court may properly disregard or alter them in order to reach the merits of the claims raised in a PCRA petition that is filed in an untimely manner."

Id., 780 A.2d at 702 (citation omitted). *See also Commonwealth v. Jackson,* 30 A.3d 516, 518-519 (Pa. Super. 2011) (citation omitted) ("If the petition is determined to be untimely, and no exception has been pled and

proven, the petition must be dismissed without a hearing because Pennsylvania courts are without jurisdiction to consider the merits of the petition.").

Here, appellant's conviction became final ninety days after December 9, 1982 (when his petition for reargument was denied by the Supreme Court of Pennsylvania), at the expiration of the period within which he could have sought *certiorari*. *Commonwealth v. Fahy,* 558 Pa. 313, 737 A.2d 214 (1999). The instant petition, filed July 1, 2013 (Docket Entry 154), is manifestly untimely on its face.

In the PCRA court, appointed counsel, Scott Coffey, Esquire, filed a "no merit" letter under *Commonwealth v. Turner,* 518 Pa. 491, 544 A.2d 927 (1988) and *Commonwealth v. Finley,* 550 A.2d 213 (Pa. Super. 1988) after concluding that appellant's petition was untimely filed and not eligible for any of the statutory exceptions. After Judge McDaniel sent Notice of Intent to Dismiss the petition, present counsel entered the case and filed a Response in which it was urged that both the "governmental interference" exception of 42 Pa. C.S.A. §9545(b)(1)(i) and the "newly discovered facts" exception of 42 Pa. C.S.A. §9545(b)(1)(ii) applied, and substantive review should have been granted. Counsel so argues here.

In *Commonwealth v. Edmiston,* 619 Pa. 549, 65 A.3d 339

(2013), our Supreme Court noted:

> Appellant relies on the exceptions for governmental interference and previously unknown facts. See 42 Pa.C.S. § 9545(b)(1)(i) & (ii). The proper questions with respect to these timeliness exceptions are whether the government interfered with Appellant's ability to present his claim and whether Appellant was duly diligent in seeking the facts on which his claims are based. *Commonwealth v. Stokes,* 598 Pa. 574, 959 A.2d 306, 310 (2008); *Commonwealth v. Abu-Jamal,* 596 Pa. 219, 941 A.2d 1263 (2008) (concluding that not only must a petitioner assert that the facts upon which the claim is predicated were not previously known to the petitioner, but also that they could not have been ascertained through due diligence); *Commonwealth v. Hawkins,* 598 Pa. 85, 953 A.2d 1248 (2006) ("although a *Brady* claim may fall within the governmental interference exception, the petitioner must plead and prove that the failure to previously raise these claims was the result of interference by governmental officials, and that the information could not have been obtained earlier with the exercise of due diligence.").
>
> In the case of both exceptions on which Appellant relies, there is the requirement that he filed his claims within 60 days of the date the claim could have been presented. 42 Pa.C.S. § 9545(b)(2). We have established that this 60–day rule requires a petitioner to plead and prove that the information on which his claims are based could not have been obtained earlier despite the exercise of due diligence.
>
> The time requirements established by the PCRA are jurisdictional in nature; consequently, Pennsylvania courts may not entertain untimely PCRA petitions. We have repeatedly stated it is the appellant's burden to allege and prove that one of the

> timeliness exceptions applies. Whether Appellant has carried his burden is a threshold inquiry prior to considering the merits of any claim.

Edmiston, supra, 65 A.3d at 345-346.

Turning first to the "newly discovered facts" exception, the Commonwealth first submits that appellant cannot demonstrate that he met the 60-day requirement of 42 Pa. C.S.A. §9545(b)(2).

Appellant attached to his *pro se* PCRA petition a report prepared by Dr. Joshua Perper, the forensic pathologist who conducted the autopsy of the victim in 1976, indicating, essentially, that if certain additional information had been provided to him he would have offered the opinion, "within a reasonable degree of medical certainty," that appellant did not commit the murder for which he was convicted and that, consequently, his conviction constituted "a clear 'miscarriage of justice'" (Docket Entry 154 at Exhibit page 56). The report was dated May 22, 2013, and was addressed to James Villanova, Esquire. Appellant's petition was filed on July 1, 2013, arguably, therefore, within 60 days of his "discovery" of this information.

The Commonwealth notes, however, that a copy of Dr. Perper's report, addressed to Mr. Villanova at the same address, identical in content except for a correction of a misnumbering of the documents reviewed but

different in format, and dated April 22, 2013 appears in the Reproduced Record for Appellant at 628a (the page bearing the date is RR 631a). The July 1, 2013 petition was not filed within 60 days of April 22, 2013. On this basis alone, dismissal of any claim founded in the premise that Dr. Perper's report constituted a "newly discovered fact" would be appropriate.

More to the point, however, as Judge McDaniel observed in her Opinion, Dr. Perper's report "contains no new information" but is based on a cumulation of materials available from the date of trial until 2012 (Opinion at 4). Our Supreme Court has explained:

> Exception (b)(1)(ii) "requires petitioner to allege and prove that there were *'facts'* that were 'unknown' to him" and that he could not have ascertained those *facts* by the exercise of "due diligence." *Commonwealth v. Bennett,* 593 Pa. 382, 930 A.2d 1264, 1270–72 (2007) (emphasis added). The focus of the exception is "on [the] newly discovered *facts,* not on a newly discovered or newly willing source for previously known facts." *Commonwealth v. Johnson,* 580 Pa. 594, 863 A.2d 423, 427 (2004) (emphasis in original).

Commonwealth v. Marshall, 596 Pa. 587, 947 A.2d 714, 720 (2008). *See also Commonwealth v. Edmiston*, 610 Pa. 549, 65 A.3d 339, 352 (2013); *Commonwealth v. Gamboa-Taylor*, 562 Pa. 70, 753 A.2d 780 (2000) ("a medical expert's change of opinion from that given at trial, which is based merely on the examination of additional information that was available at

the time the initial opinion was proffered, does not constitute after-discovered evidence"). Thus, Dr. Perper's expert report cannot be a "newly discovered fact," because it relies on facts that have been readily available well prior to April 22, 2013. This is made apparent by Dr. Perper's list of the documentary evidence he consulted in issuing his report, the latest piece of which, an interview with Dr. Cyril Wecht, dated from November of 2012, but the majority of which was available at the time of trial in 1976 (RR 631a-633a). Moreover, examination of appellant's prior pleadings reveals that variations of these underlying facts provided the foundation for appellant's 1998 PCRA petition.

In addition, appellant does not attempt to demonstrate why he was unable to contact Dr. Perper earlier, in the exercise of due diligence. Dr. Perper states in his report:

> For more than 40 years I was continuously engaged in the practice of forensic pathology, and performed thousands of autopsies. In the past I served as a Chief Forensic Pathologist and Coroner in Allegheny County for 22 years and for the next 16 years as Chief Medical Examiner of Broward County, Florida. During this period I was also active as a forensic and medico-legal consultant in civil and criminal cases.
>
> During those periods I also served as a Clinical Professor in Pathology, Forensic Pathology and Epidemiology Public Health at the University of Pittsburgh, University of Miami, and SE Nova

> University. For a number of years I was an adjunct professor of law at Duquesne University and an adjunct professor of psychiatry at the University of Pittsburgh.

(RR 633a). Plainly, Dr. Perper, known since the time of trial as having been the testifying forensic pathologist, could have been located during the intervening time period. Appellant fails to explain why he did not seek Dr. Perper's opinion at an earlier time, and this failure prevents him from demonstrating the "due diligence" necessary under 42 Pa. C.S.A. §9545(b)(1)(ii).

For all of these reasons, the Commonwealth submits that appellant has failed to demonstrate that Dr. Perper's report constitutes a "newly discovered fact" providing the court with jurisdiction to review appellant's facially untimely petition.

The other exception which appellant seeks to invoke is the "governmental interference" exception of 42 Pa. C.S.A. §9545(b)(1)(i).

In *Howard, supra,* the Court stated:

> We have previously stated that where a petitioner alleges that a District Attorney's failure to produce documents amounts to governmental interference, then that petitioner must identify a specific claim that he was unable to discover or develop due to the District Attorney's conduct. *Commonwealth v. Yarris,* 557 Pa. 12, 731 A.2d 581, 588 (1999). Appellant, however, has failed to explain how the District Attorney's conduct hobbled his development

> or prevented his discovery of any particular claim. Thus, he has not established the existence of governmental interference such that this PCRA petition is excused from the timeliness requirements.

Howard, supra, 788 A.2d at 355. *See also Commonwealth v. Hawkins,* 598 Pa. 85, 953 A.2d 1248, 1253 (2006) (citations omitted) ("although a *Brady* claim may fall within the governmental interference exception, the petitioner must plead and prove that the failure to previously raise these claims was the result of interference by governmental officials, and that the information could not have been obtained earlier with the exercise of due diligence.").

Here, similarly, appellant does not articulate what claim could not previously have been advanced because of the allegedly mishandled or missing materials; in fact, through the history of the case he has been able to contact experts who, without access to these materials, have been willing to offer the opinion that he did not commit this murder (*see* RR 613a617a, November 25, 1996 affidavit; RR 618a-622a, June 15, 2001 affidavit; RR 623a-627A, December 13, 2000 affidavit; RR 688a-693a, February 7, 1996 affidavit). Moreover, while counsel states at that:

> This interference provides an exception to PCRA time-bar, as Appellant had just recently (within 60 days of filing his PCRA Petition) been apprised of the circumstances under which the foregoing files disappeared (RR – 628a, 660a-661a).

(Brief for Appellant at 24), reference to those pages of the Reproduced Record reveal the "April 2013" cover page to Dr. Perper's report (dated more than 60 days before the filing of the petition), and a discussion of a report prepared on June 14, 2011 and an interview with Dr. Wecht from November 22, 2011, neither of which contains an "appraisal" to appellant of these alleged "circumstances" and the latter of which contains information from Dr. Wecht that he was contacted in January of 1996 concerning the fact that records were missing (RR 661a). Dr. Perper's "confirmation of theses missing records" (Brief for Appellant at 25) is nothing more than an additional individual again noting what has been repeatedly alleged, and plainly known since at least 1996. Nothing has interfered with the presentation of these claims; they repeatedly have been presented, most particularly in the litigation of appellant's 1996 PCRA petition. *See* Docket Entry 153 (No. 174 WDA 2001 Memorandum, filed 10/24/2002).

Appellant has failed to demonstrate that he was unable to discover or develop any as-yet-unexplored substantive claim prior to July of 2013 due to governmental interference. Consequently, he cannot obtain the Court's jurisdiction by means of the exception contained in 42 Pa. C.S.A. §9545(b)(1)(i).

Judge McDaniel did not err in determining that she had no

jurisdiction to review appellant's substantive claims, and Mr. Coffey's conclusion, in the "no merit" letter that appellant's petition was time-barred was correct. Your Honorable Court similarly must conclude that there is no jurisdiction to proceed, and must affirm. As our Supreme Court noted in *Commonwealth v. Peterkin,* 554 Pa. 547, 722 A.2d 638 (1998), "At some point litigation must come to an end." *Id.*, 722 A.2d at 643.

Finally, the Commonwealth notes that counsel advances an "actual innocence" claim in contending that the court below erred in dismissing the petition (Brief for Appellant at 34). In "Petitioner's Response to Notice of Intent to Dismiss PCRA Petition and Amended PCRA" (Docket Entry 167), counsel presented this claim in the following terms: "The Petitioner is entitled to relief in the form of a Federal Writ of Habeas Corpus as the Petitioner has presented an actual claim of innocence ...". *Id.* at 37. Neither Judge McDaniel, a judge of the Court of Common Pleas of Allegheny County, nor your Honorable Court may grant appellant relief in the form of a Federal Writ of Habeas Corpus. If this is the relief he seeks, he must turn to the appropriate forum.[2]

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[2] Appellant made it clear in his correspondence with Mr. Coffey, attached as Exhibits to Docket Entry 167, that his purpose in filing the 2013 PCRA petition was to set the stage for another effort to obtain federal habeas (continued ...)

II. THE BRIEF AND REPRODUCED RECORD FOR APPELLANT DO NOT CONFORM TO THE RULES OF APPELLATE PROCEDURE.

The Brief for Appellant herein is forty-two pages in length. Rule 2135 of the Pennsylvania Rules of Appellate Procedure governs the length of briefs, providing that "a principal brief shall not exceed 14,000 words," and that a principal brief will be deemed to meet this limitation if it does not exceed 30 pages in length. Pa. R.A.P. 2135. "In all other cases, the attorney ... shall include a certification that the brief complies with the word count limits." Pa. R.A.P. 2135(d). The Brief for Appellant herein contains no such certification.

Moreover, Rule 124 of the Pennsylvania Rules of Appellate Procedure provides that, for all papers filed in the appellate court, "[l]ettering shall be clear and legible and no smaller than 14 point in the text and 12 point in footnotes." Pa. R.A.P. 124. The lettering of the text in the Brief for Appellant is 12 point.

As for the Reproduced Record for Appellant, many of the

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corpus review. *But see Goldblum v. Klem, supra,* 510 A.2d at 240 (finding that "actual innocence" had not been demonstrated).

documents contained therein are not part of the certified record, and thus cannot be considered. *Commonwealth v. Preston,* 904 A.2d 1, 6 (Pa. Super. 2006).

Specifically, the Commonwealth, after review, was unable to locate the following documents in the certified record: Deposition of Clarence Miller, September 9, 2004, RR000200a; Board of Pardons Hearing Transcript, RR000277a; Ramsey Memo on Conversation with Joe Modispatcher, 11, 2011, RR000400a; Affidavit of Herbert Leon McDonnell, December 13, 2000, RR000623a (the Commonwealth notes that attached to Docket Entry 148 is a different affidavit from McDonnell dated June 14, 2001); Affidavit of Cyril H. Wecht, September 14, 2001, RR 000696a; Interview of Cyril H. Wecht, November 22, 2012, RR000698a; Deposition Transcript, Ronald Freeman, April 24, 2008, RR000718A; Letters from Judge Donald Ziegler, various, RR000823a.

Forensic Report on George Wilhelm's Death, Perper, J., MD, LLB, MSc, RR000628a, also is not part of the original record. This report, however, dated April 22, 2013, has provided the basis for the Commonwealth's contention, *supra* at 44-45, that the report attached to the PCRA petition, dated May 22, 2013 and identical in content although different in format, had been in appellant's possession a month earlier, and

that therefore his July 1, 2013 PCRA petition was untimely filed.

The Commonwealth commends the matter to the Court.

CONCLUSION

WHEREFORE, the Commonwealth respectfully requests that the Order of Court entered below be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that although the Brief for Appellee exceeds 35 pages, it is in compliance with the word count limits set forth in Pa. R.A.P. 2135(a).

/s/ Sandra Preuhs
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PROOF OF SERVICE

I hereby certify that I am this day serving two (2) copies of the within Brief for Appellee upon Counsel for Appellant in the manner indicated below which service satisfies the requirements of Pa. R.A.P 121:

Service by First Class Mail addressed as follows:

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