Received 6/25/2020 12:36:00 PM Supreme Court Eastern District

Filed 6/25/2020 12:36:00 PM Supreme Court Eastern District
786 CAP

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

NO. 786 CAP

COMMONWEALTH OF PENNSYLVANIA,
Appellee

V.

KENNETH HAIRSTON,
Appellant

BRIEF FOR APPELLEE

Appeal from the Order denying post-conviction relief entered on August 27, 2019, in the Court of Common Pleas, Criminal Division, Allegheny County, at No. CC 200109056.

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COUNTERSTATEMENT OF THE CASE

This is a timely appeal from the Order denying post-conviction relief entered on August 27, 2019, in the Court of Common Pleas, Criminal Division, Allegheny County, at No. CC 200109056.

A. Factual History

When C.H. was five years old, Kenneth Hairston, the appellant in this matter, began dating her mother, Katherine (*see* TT1, 34).[1] Hairston and Katherine would eventually marry and have a son, Sean, who was diagnosed at birth with acute autism (TT1, 34, 36, 38). The four of them, as well as C.H.'s grandmother (and Katherine's mother), Goldie, all lived together on Rosetta Street in Pittsburgh's Garfield section until C.H., after turning 21, moved into a one-bedroom apartment in the Squirrel Hill section of the city (TT1, 36-39; TT2, 36).[2] On the evening of May 20, 2000, C.H. and her boyfriend, Jeffrey Johnson, went to the movies, and when they returned to C.H.'s apartment, there were approximately 10 messages on her answering

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[1] Numbers in parentheses preceded by the designation "TT1" refer to the pages of Volume I of the appellant's jury-trial transcript, dated April 15, 2002.

[2] Numbers in parentheses preceded by the designation "TT2" refer to the pages of Volume II of the appellant's jury-trial transcript, dated April 16, 2002.

machine from Hairston, asking her who she was with and saying that she should have been home by now (TT1, 41-42, 77-78). Such behavior was characteristic of how C.H. had always been treated by Hairston, who had prohibited her from socializing with boys during her junior-high and high-school years and beyond (TT1, 40-41). Upset by Hairston's numerous messages and fearful that something bad would happen involving him, C.H. was able to get Johnson to agree to spend the night in her apartment (TT1, 43-44, 78).

The following morning, May 21, 2000, there was banging on the door of C.H.'s apartment, and she heard Hairston yelling for her to open up (TT1, 45, 78). C.H. jumped up and hid in a closet, saying, "He's going to kill me," but Johnson nevertheless went to the front door (TT1, 45-46, 79-80). He opened the door and Hairston entered, asking what was going on (TT1, 80). Johnson tried to calm Hairston down, as he was very agitated, but Hairston demanded that C.H., who had emerged from the closet by this point, tell Johnson to leave (TT1, 47, 80). C.H. refused, and Hairston removed a gun from his waistband, pointing it at both C.H. and Johnson (TT1, 47-48, 80, 82). He said, "We can all die," and that he was not going to jail (TT1, 48, 81-82). Hairston's words were reminiscent of threats that C.H. had heard him make multiple times in the past; namely, that he would "take us all out of

here," which she interpreted as Hairston saying that he would kill her and her entire family (TT1, 49-50, 68, 72).

Against C.H.'s wishes, Johnson told her that he was leaving, and he exited the apartment (TT1, 51, 82). C.H. began sobbing uncontrollably, and after Johnson had gone, Hairston pointed the gun at her face and said, "If you're going to be F'ing anybody, it's going to be me" (TT1, 51-52). C.H. pleaded with Hairston, but he pushed her into the bedroom and removed all of his clothes; he then tried to take off C.H.'s shirt while she attempted to fight him off (TT1, 52-53). Meanwhile, Johnson flagged down a police car outside the building and detailed what was happening to Officer William Gorman (TT1, 82, 85). Pittsburgh Police subsequently surrounded C.H.'s apartment, with one officer knocking on the bedroom window and identifying himself (TT1, 53, 86-87). At that point, Hairston removed the clip from his firearm and proceeded to throw the clip behind the door and the gun under the bed (TT1, 53). He then put his pants back on and told C.H. to tell the police that everything was ok and that they should leave (TT1, 54). C.H. instead fled the apartment and told Officer Gorman, who observed her to be ashen and shaking uncontrollably, that her stepfather was inside with a gun (TT1, 54-55, 87).

Officer Gorman entered the apartment and encountered Hairston, who

was shirtless; Hairston said that he was C.H.'s father, that he resided in that apartment, and that he had come home to find a man there (TT1, 88-89). Despite Hairston's claims of residency, Officer Gorman observed only female clothing in the apartment (TT1, 89). He also recovered a firearm from the floor of the bedroom, and a live bullet about a foot away from it (TT1, 90). Hairston was taken into custody, and as a result of the aforementioned events, charges were filed against him with C.H. as the key witness (TT1, 56, 90).[3]

Approximately one year later, at 7:15 on the morning of June 11, 2011, Bonnie Poremski, the dispatcher for the City of Pittsburgh School District's school bus company, received a call from a man who told her that he would be driving his son Sean to school himself that day and, for that reason, the bus did not need to come by and pick him up; the man then provided his address (TT1, 148-50). Henrietta Hardy, a neighbor of the Hairstons who was familiar with Kenneth Hairston, his wife, and their son, confirmed that Sean's bus never arrived and also that she had not seen either Katherine or

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[3] At the penalty phase of the instant proceeding, C.H. would be allowed to elaborate on other instances of sexual abuse endured by her at the hands of the appellant throughout her life (*see* TT4, 30-43). [Numbers in parentheses preceded by the designation "TT4" refer to the pages of Volume IV of the appellant's jury-trial transcript, dated April 18, 2002.]

Sean that morning, which was rather unusual (TT1, 131, 136-37). At around 8:20 a.m., Hardy was outside and encountered Hairston, who had come over to her side of Rosetta Street; his eyes were red, he smelled of alcohol, and he appeared very agitated and angry, asking Hardy whether she had heard the "bullshit" that C.H. had been saying regarding how, after Hairston's sexual-assault trial was over, she would get custody of Sean and would get Katherine the help that she needed (TT1, 132-34, 144-45). Hairston told Hardy that C.H. was not going to get custody of his son, and he then stormed back across the street toward his house (TT1, 135).

Another neighbor, Angelo Morsillo, noticed Hairston talking to Hardy that morning when Morsillo went outside to retrieve his newspaper (TT1, 104). The previous night, Morsillo had spoken with Hairston, who told him that C.H. had been attempting to take Sean away from Katherine and himself because she did not think that they were good parents, and Hairston said that if the sexual-assault case caused him to lose Sean and go back to jail, he would kill himself (TT1, 101-02, 112). On the morning in question, Morsillo went back inside to make breakfast after getting his paper, but about 20 minutes later, he noticed—as did Hardy—that smoke was coming out of the Hairston residence (TT1, 106-08, 145). Morsillo proceeded to call 911 (TT1, 107, 110).

At approximately 8:50 a.m., Pittsburgh firefighters and paramedics responded to a reported structure fire at 5447 Rosetta Street (TT2, 47, 57, 65, 72-73). Battalion Commander Roger Short attempted to enter the house through the front door, but the door was barricaded by two mattresses that had been placed horizontally behind it (TT2, 51). The back entrance was also blocked (TT2, 52). Captain James Holtz and firefighter Mike Karczewski were finally able to gain access through the front door and, upon entering the living room, the two men heard a boy's moaning sounds coming from the couch (TT2, 58-60, 74). Holtz and Karczewski, in a room filled with smoke, were able to discover Sean Hairston on the couch with bags of clothing and garbage on top of his body and a blanket over his face; the boy was bleeding and having a hard time breathing (TT2, 58, 60, 75). They carried Sean outside to paramedic Jason Romano, who placed him on a stretcher (TT2, 60-61, 66). Romano observed that Sean was in critical condition, with no verbal or motor response and blood near his right nostril and right ear canal (TT2, 67). The boy's arm posturing indicated some type of blunt force trauma to the head (TT2, 68). Although Sean was still breathing, the breathing was inadequate, and Romano ultimately transported him to Children's Hospital, where he was intubated (TT2, 68-70).

Meanwhile, Holtz and Karczewski re-entered the house and went into

the kitchen, where Karczewski could feel heat coming up from the basement (TT2, 61-62, 76). They found Kenneth Hairston, bleeding from the chest, on the floor of the kitchen near the top of the basement steps (TT2, 61-62, 76). Karczewski carried Hairston outside, placed him on the ground in front of the house, and then entered the house a third time (TT2, 62, 77, 81). Karczewski found Katherine Hairston on the floor of the kitchen with a hole in the side of her head (TT2, 77).[4] From her appearance, Karczewski assumed that she had been shot (TT2, 77). He carried her outside—she felt like "dead weight" to him—and placed her next to her husband on the sidewalk (TT1, 158; TT2, 78, 81). There, she was attended to by Pittsburgh paramedic Jeffrey LaBella, who, in addition to the holes in her head, observed what he believed to be puncture wounds to her chest (TT2, 81). After checking her pulse and determining that chest compressions were having no effect, LaBella pronounced Katherine dead at the scene (TT2, 81).[5]

LaBella then focused his attention on Kenneth Hairston, who became extremely combative with LaBella and his partner, necessitating the use of a

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[4] Battalion Commander Short, who observed Katherine being taken out of the house, actually observed two puncture wounds to her temple areas (TT2, 54).

[5] Katherine's mother, Goldie, would ultimately be rescued by firefighters from her second-floor bedroom (TT2, 36, 44, 88).

police officer's handcuffs and the efforts of several other people to place him on a stretcher (TT2, 82, 85). Paralytic drugs were administered at the scene so that Hairston could be transported to Presbyterian Hospital for treatment for his chest wounds and a laceration to his neck (TT2, 83-85). Later that day, Pittsburgh homicide detectives Dennis Logan and Richard McDonald proceeded to Presbyterian Hospital to talk to Hairston about the day's events (TT3, 11).[6] Hairston agreed to speak to the detectives at the hospital without an attorney present, and he acknowledged killing his wife; he also acknowledged that the motivation for the killing, as well as for the fire, were the sexual-assault charges brought against him by C.H. (TT3, 13). Hairston denied the accuracy of those charges (TT3, 13).[7]

An autopsy was performed on the body of Katherine Hairston on the date of her death by Dr. Shaun Ladham of the Allegheny County Coroner's Office (TT3, 67). Dr. Ladham detected multiple depressed fractures to

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6 Numbers in parentheses preceded by the designation "TT3" refer to the pages of Volume III of the appellant's jury-trial transcript, dated April 17, 2002.

7 With regard to the fire itself, firefighters had smelled a strong odor of gasoline in the house and, after proceeding to the basement, discovered a gas can floating in water at the bottom of the basement steps (TT2, 56, 89-91). William Hardy, a fire investigator with the City of Pittsburgh, concluded that the fire had been deliberately set in the basement of the home with the use of some sort of flame, such as a match or lighter (TT2, 110-11, 115).

Katherine's skull and trauma to the brain brought about by a total of six separate impacts to the head; given the size of the wounds, he believed that the blows had been inflicted by a sledgehammer, and he conveyed as much to the police (TT3, 73-76, 85). Dr. Ladham concluded that the cause of death was blunt force trauma to the head and that the manner of death was homicide (TT3, 85).

Sean Hairston, unlike his mother, was still alive after being transported by paramedics from Rosetta Street to Children's Hospital (TT2, 70). Sean, however, suffered two cardiac arrests while being treated at the hospital—one while being operated on and the other while in intensive care—resulting in him entering a brain-dead state (TT2, 138, 144). He would die a few days later (TT2, 145). On June 15, 2001, an autopsy was performed by Dr. Abdulrezak Shakir, who determined that Sean had endured multiple incidents of blunt force trauma to his head, possibly inflicted by a sledgehammer (TT2, 129, 138). Dr. Shakir concluded that this blunt force trauma was the cause of Sean's death and that the manner of death was homicide (TT2, 138-39).

On June 19, 2001, Detectives Logan and McDonald again spoke with Kenneth Hairston (TT3, 14). During the interview, which was conducted at the homicide offices, Hairston said that he had woken up at 6:30 on the

morning of June 11 and was worried about his upcoming trial stemming from the sexual allegations made against him by his stepdaughter C.H. (TT3, 14, 20-21). Hairston told the detectives that after getting out of the bed that he shared with Katherine, he sat in a chair next to the bed contemplating what to do for about 15 minutes before arriving at the decision that he would kill his wife and son and then kill himself (TT3, 21-22, 43-44, 58). He said that while his wife was asleep, he wrapped a pillow case around a 10-pound sledgehammer, and that after she woke up and sat on the edge of the bed, he came up behind her and hit her with the sledgehammer, using a two-hand grip when he swung (TT3, 23-24, 48). The blow caused his wife to fall to the floor, but because he did not want her looking at him, Hairston said that he hit her with the sledgehammer a second time (TT3, 23-24). Hairston then dragged her into the kitchen by her feet (TT3, 24).[8]

After finishing with his wife, Hairston said that he went upstairs and woke up his son Sean (TT3, 24). Sean went downstairs and proceeded to fall back to sleep on the couch, at which point Hairston took the sledgehammer and struck Sean in the side of the head (TT3, 24). Sean was

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[8] Hairston and his wife slept in a bed in the living room (TT3, 21).

still moving after the first blow, and because he did not want him stumbling out of the house, Hairston struck him a second time (TT3, 24).[9] Hairston said that at that point he heard Katherine moaning in the kitchen, which resulted in him hitting her with the sledgehammer again as she lay on the floor (TT3, 26).

Believing that both his wife and son were dead, Hairston, with the sledgehammer in tow, drove to a bar, got two shots of alcohol and two bottles of Heineken, and then drove to a wooded field on North Evaline Street, where he disposed of the sledgehammer (TT3, 25). Upon returning home, he poured gasoline on the basement floor, but Hairston claimed that the gas ignited before he had intended it to, causing him to leave the basement and come back up to the kitchen (TT3, 25). There, he got a knife, stabbed himself in the chest, and laid down next to his wife, waiting, according to him, to die (TT3, 25-26).

Hairston agreed to put his confession on tape, following which he agreed to show Detectives Logan and McDonald where he had hidden the sledgehammer (TT3, 30-31, 35-37). The detectives, with Hairston's

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9 Hairston said that he swung with a two-handed grip both times (TT3, 26).

assistance, located the sledgehammer in six-foot tall weeds in a field on North Evaline, about two blocks away from Rosetta Street (TT1, 109; TT3, 31-32).[10]

B. Procedural History

Kenneth Hairston was charged at Criminal Information No. CC 200109056 with two counts of criminal homicide, in violation of 18 Pa. C.S. §2501, for the deaths of his wife, Katherine, and his son, Sean (*see* Docket Entry No. 3).

On March 14, 2002, the Commonwealth, through Assistant District Attorney Mark V. Tranquilli, filed a Notice of Intention to Seek Death Penalty and of Aggravating Circumstances, with the aggravating circumstances being the two set forth at 42 Pa. C.S. §9711(d)(9) and (d)(11) (*see* Docket Entry No. 11). On March 26, 2002, Hairston, through Robert L. Foreman, Esquire, of the Allegheny County Office of the Public Defender, filed a motion to quash in which he sought to preclude the Commonwealth from seeking the aggravating circumstance at §9711(d)(9), which states that "[t]he defendant has a significant history of felony convictions involving the use or

[10] The knife that Hairston used to stab himself was found in the kitchen by police, as was a bottle of Heineken (TT1, 165, 167; TT2, 35).

threat of violence…," and from introducing evidence in support of it (*see* Docket Entry No. 16). The Commonwealth, through ADA Tranquilli, filed a motion and memorandum of law on April 1, 2002, requesting the denial of Hairston's motion to quash (Docket Entry No. 17).[11]

On April 15, 2002, Hairston proceeded to a trial by jury before the Honorable Jeffrey A. Manning (*see* TT1, 7). Hairston was represented during the guilt phase by appointed counsel, Michael Deriso, Esquire (*see* Docket Entry No. 21), and the Commonwealth was represented by ADA Tranquilli. At the conclusion of that portion of the proceeding, the jury, on April 17, 2002, convicted him of two counts of murder in the first degree (*see* TT3, 166-67; *see also* Docket Entries Nos. 3 and 23).

The following day, the penalty phase commenced, with Hairston represented by Assistant Public Defender Foreman, and the Commonwealth by ADA Tranquilli. Later that same day, April 18, 2002, the jury returned a verdict of death at each of the two counts of first-degree murder, finding both aggravating circumstances sought by the Commonwealth (*see* TT4, 251; *see also* Docket Entries Nos. 23 and 24).[12] Judge Manning would formally

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[11] The trial court ultimately permitted the Commonwealth to pursue both aggravating factors (*see* TT4, 10).

[12] The jury also found certain mitigating factors (*see* Docket Entry No. 23).

impose sentence on Hairston on July 11, 2002 (*see* Docket Entry No. 26).

On July 31 and August 2, 2002, Attorney Foreman filed petitions for leave to withdraw as counsel and to appoint post-sentence counsel (*see* Docket Entries Nos. 27 and 28). Following the appointment of a different attorney, the court, on August 4, 2005, ultimately appointed Kenneth Snarey, Esquire, to represent Hairston (*see* Docket Entries Nos. 33 and 35). On May 8, 2006, Hairston, through Attorney Snarey, filed post-sentence motions in which he alleged eight separate claims of error or ineffectiveness (Docket Entry No. 45). The Commonwealth, through Assistant District Attorney James R. Gilmore, filed its answer in opposition to Hairston's post-sentence motions on September 27, 2007 (Docket Entry No. 51). Judge Manning denied the post-sentence motions in an opinion and order entered on the record on June 2, 2008 (Docket Entry No. 52).

On June 6, 2008, Hairston, through Attorney Snarey, filed a Notice of Appeal to this Honorable Court (Docket Entry No. 53). The appeal was docketed at No. 566 CAP. In his brief, Hairston raised four claims, but this Court, in its opinion issued on December 28, 2009, concluded that because Hairston had not filed timely post-sentence motions, his appeal was not timely filed and, therefore, his claims had not been properly reserved for review; as a result, the specific claims were not addressed. *See*

Commonwealth v. Hairston, 985 A.2d 804, 808 (Pa. 2009). The Court did, however, review the record to determine whether the evidence presented at trial was sufficient to sustain the first-degree murder convictions, and it concluded that it was. *Id.* at 809. The Court also determined that both aggravating circumstances were amply supported by the record and that, therefore, the jury's verdict had not resulted from an improper factor. *Id.* at 809-10. Hairston's petition for writ of certiorari was then denied by the United States Supreme Court on May 17, 2010. *See* 560 U.S. 913, 130 S.Ct. 3295.

On June 22, 2010, newly appointed counsel, Michael Healey, Esquire, entered his appearance on behalf of Hairston (Docket Entry No. 66). On February 1, 2011, Hairston, through Attorney Healey, filed a petition pursuant to the Post Conviction Relief Act (PCRA) in which he sought the reinstatement of his post-sentence and direct appeal rights *nunc pro tunc* (Docket Entry No. 69). In an order entered on the record on November 15, 2011, Judge Manning granted Hairston's petition and permitted him to file a Notice of Appeal *nunc pro tunc* from the judgment of sentence (Docket Entry No. 74).

Hairston, through Attorney Snarey, thereupon filed a Notice of Appeal to this Court on December 5, 2011 (Docket Entry No. 76). That appeal was docketed at 643 CAP. Hairston raised eight issues in his brief, and in an

opinion entered on January 21, 2014, this Court affirmed his judgment of sentence. *See Commonwealth v. Hairston*, 84 A.3d 657 (Pa. 2014). His petition for writ of certiorari was denied by the U.S. Supreme Court on October 6, 2014. *See* 574 U.S. 863, 135 S.Ct. 164.

On January 21, 2015, Judge Manning appointed current counsel Thomas N. Farrell, Esquire, to represent Hairston further (*see* Docket Entry No. 91). On January 26, 2015, Hairston, through Attorney Farrell, filed a petition pursuant to the PCRA in which he sought leave to file an amended petition and also requested that the court stay his execution (Docket Entry No. 92). On February 9, 2015, Judge Manning entered an order staying the execution pending final disposition of the PCRA and, the following day, granted Hairston permission to file an amended petition (*see* Docket Entries Nos. 94 and 95).

On January 30, 2017, Hairston, through Attorney Farrell, filed an Amended PCRA Petition (Docket Entry No. 104). Hairston, through Attorney Farrell, filed a Brief in Support of the Amended Petition on August 29, 2017 (Docket Entry No. 109). The Commonwealth, through Assistant District Attorney Rusheen Pettit, filed its Answer on May 30, 2018 (Docket Entry No. 116).

On October 30, 2018, Judge Manning issued a Notice of Intention to

Dismiss in which he set forth his reasons that Hairston was not entitled to relief (Docket Entry No. 117). On February 19, 2019, Hairston, through Attorney Farrell, filed a response to the notice to dismiss, which included a motion for leave to file a supplemental PCRA petition (Docket Entry No. 118). Hairston, through Attorney Farrell, also filed the supplemental petition that same day; the petition dealt only with the general viability of the death penalty and, in particular, a report on the subject that had been issued by the Joint State Government Commission (Docket Entry No. 119). The Commonwealth, through ADA Pettit, filed an Answer on May 24, 2019 in which it addressed the matter contained in Hairston's supplemental petition (Docket Entry No. 121).

On June 19, 2019, Judge Manning issued a Supplemental Notice of Intention to Dismiss (Docket Entry No. 122). Then, on August 26, 2019, he issued an order denying Hairston post-conviction relief for the reasons set forth in his two previous Notices of Intention to Dismiss (Docket Entry No. 123).

On September 25, 2019, Hairston, through Attorney Farrell, filed a Notice of Appeal to this Honorable Court from the denial of post-conviction relief (Docket Entry No. 124).

SUMMARY OF THE ARGUMENT

The appellant contends that the death penalty should be abolished as applied to all current death-row inmates because, according to him, an analysis conducted pursuant to *Commonwealth v. Edmunds*, *infra*, demonstrates that Article I, Section 13 of the state constitution, which prohibits "cruel punishments inflicted," affords greater protection to the citizens of Pennsylvania than does the Eighth Amendment of the federal constitution. But because the appellant failed to offer an *Edmunds* analysis in the court below, the claim is waived. Regardless, this Honorable Court has consistently held that the death penalty is constitutional, and the appellant has not offered sufficient reasons for this Court to reverse its prior course and intercede when the state legislature has not seen fit to end the practice.

The appellant has also waived his challenge to the verdict slip, as he failed to raise such a challenge before the trial court. In any event, contrary to the appellant's contention, the jury did not sentence him to death based on a non-statutory aggravating factor, as both the court's instructions to the jury and the verdict slip itself make clear that the Commonwealth sought to prove, pursuant to 42 Pa. C.S. §9711(d)(9), that the appellant had a significant history of violent felony convictions; the parties stipulated to four felony convictions stemming from the appellant's prior sexual abuse of his

stepdaughter; and the jury, on the verdict slip, indicated that those convictions were the basis for its finding of the aggravating circumstance.

Relatedly, because it is clear that the jury did not impose death based on a non-statutory aggravating factor, the appellant's claim that the prosecutor's penalty-phase closing argument led the jury to find a non-statutory reason for imposing sentence—and, therefore, his trial counsel was ineffective for failing to object to it—was properly dismissed by the PCRA court, as the appellant cannot establish the requisite prejudice. Additionally, the Commonwealth would submit that the at-issue comment, wherein the prosecutor said that what the appellant's stepdaughter had endured was a significant aggravating factor, was not even improper, given that the actions of the appellant and the damage suffered by his victim were inextricably linked to one another; thus, an objection to the comment would not likely have been sustained. Lastly, because there is no merit to the appellant's assertion that the jury sentenced him based on a non-statutory aggravating factor, prior appellate counsel was not ineffective for failing to raise it.

The PCRA court did not err in denying the appellant's claim that his trial counsel was ineffective for failing to object to the prosecutor's reference during his closing argument to the "pain" and "guilt" experienced by the appellant's stepdaughter as a result of the murders of her mother and

brother. The law permitted the admission of evidence as to the impact that the deaths had on the murder victims' family, and the prosecutor's argument was a fair comment on that evidence; thus, there is no merit to the appellant's claim. In addition, the jury had been instructed on how to properly consider any victim-impact evidence, and jurors are presumed to follow instructions.

The PCRA court also did not err in finding that trial counsel was not ineffective for failing to object to the prosecution's psychiatric expert's testimony that he did not believe that the appellant was being truthful when he had told another psychiatrist that he had been acting under command hallucinations when he killed his wife and son. Contrary to the appellant's assertion, such a comment on the appellant's veracity did not invade the province of the jury—the appellant was not even a witness at trial—but, rather, was proper testimony made in support of the expert's ultimate diagnosis of the appellant's mental state at the time of the murders.

Finally, the PCRA court did not err in denying the claim that counsel was ineffective for failing to object to the expert's reference to the appellant having been arrested as a teenager for his involvement in a hit-and-run accident. The testimony was proper because it supported the expert's diagnosis of the appellant's mental state, and, moreover, reference to a minor crime could not have affected the jury's determination as to sentence.

ARGUMENT

I. THE APPELLANT'S CONTENTION THAT AN ANALYSIS PURSUANT TO *COMMONWEALTH V. EDMUNDS*, *INFRA*, DEMONSTRATES THAT THE DEATH PENALTY VIOLATES THE PENNSYLVANIA CONSTITUTION IS WAIVED, AS SUCH AN ANALYSIS WAS NEVER OFFERED BY HIM IN THE COURT BELOW. IN ANY EVENT, THIS HONORABLE COURT HAS CONSISTENTLY HELD THAT CAPITAL PUNISHMENT IS INDEED CONSTITUTIONAL.

Appellant Kenneth Hairston, sentenced to death for the first-degree murders of his wife and son, argues that the death penalty is violative of both the Eighth Amendment of the federal constitution and Article I, Section 13 of the state constitution and, therefore, this Honorable Court should declare it unconstitutional as applied to all of Pennsylvania's current death-row inmates (*see* Brief for Appellant, at pp. 21-52). With regard to the federal constitution, however, Hairston concedes that "the United States Supreme Court has ruled that the death penalty is constitutional pursuant to the Eighth Amendment," and, with regard to the Pennsylvania Constitution, he concedes that "this Honorable Court has ruled that the death penalty is constitutional pursuant to Article I, Section 13" (*see* Brief for Appellant, at p. 23, citing *Commonwealth v. Crews*, 717 A.2d 487, 489 (Pa. 1998)). Furthermore, Hairston acknowledges that the rights secured under Article I, Section 13, which prohibits "cruel punishment inflicted," are co-extensive to the Eighth Amendment's prohibition against "cruel and unusual"

punishments and, as stated by this Court, offer the citizens of Pennsylvania no greater protection than do the rights stemming from its federal counterpart (*see* Brief for Appellant, at p. 23, citing *Commonwealth v. Zettlemoyer*, 454 A.2d 937, 967 (Pa. 1982)). Nevertheless, Hairston contends that the Court should formally abolish the death penalty because, after having conducted an analysis pursuant to *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), he believes that "it is now clear that the death penalty violates the Pennsylvania Constitution" (*see* Brief for Appellant, at p. 18). The Commonwealth respectfully submits that the death penalty does not so violate the constitution, and, for that reason, the appellant's claim would fail, but such a ruling is not even necessary here, as the specific claim raised by Hairston was not raised in the court below and, as a result, is waived.

This is evident by a brief review of the procedural history. Hairston, in his Amended PCRA Petition filed on January 30, 2017, asserted that the imposition of the death penalty was unconstitutional, relying solely upon a blanket contention that "[a] large amount [of], if not most, states have banned the imposition of the death penalty in some form or another [and] [a]ll civilized countries have banned the death penalty" (*see* Docket Entry No. 104, at

unnumbered page 7).[13] Subsequently, following the PCRA court's issuance of its notice of intent to dismiss the petition, Hairston filed a supplement to his petition in which he relied strictly on a report issued on June 26, 2018 by the Joint State Government Commission (JSGC), which Hairston maintained "identifies unconscionable defects in Pennsylvania's practices and procedures of capital punishment" (*see* Docket Entry No. 119, at unnumbered page 3). As mentioned above, Hairston, in his brief to this Court, now claims that an *Edmunds* analysis—that is, an analysis in which the defendant, in an attempt to show that a provision of the Pennsylvania Constitution gives greater protection than does the federal constitution, reviews: 1) the text of the state-constitutional provision; 2) the history of the provision; 3) the related case law from other states; and 4) the policy considerations and applicability of the provision within modern Pennsylvania jurisprudence—demonstrates that Article I, Section 13 offers greater protection than the Eighth Amendment does (*see* Brief for Appellant, at pp. 22-23). Unfortunately for Hairston, however, nowhere in his prior filings does he mention *Edmunds* or its four-pronged test, and that failure results in the

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[13] Hairston offered literally the same argument in his brief in support of his amended petition, filed on August 29, 2017 (*see* Docket Entry No. 109, at pp. 46-47).

waiver of the instant claim pursuant to this Court's recent decision in *Commonwealth v. Le*, 208 A.3d 960 (Pa. 2019).

In *Le*, the defendant, sentenced to death for the two first-degree murders that he had committed, argued in his direct capital appeal that our state's administration of the death penalty was arbitrary and capricious and largely imposed on defendants who refused to plead to a life sentence; as support for his contentions, he relied on numerous surveys from other states, as well as various newspaper, magazine and law review articles. *Id.* at 968, 981. The Commonwealth countered that the defendant had waived his claim because he had failed to present to the trial court any of the authority on which the claim was based and, furthermore, he had failed to demonstrate how any of the arguments or information offered by him was relevant to his particular conviction or sentence. *Id.* at 981-82. This Court, despite the defendant having filed, prior to sentencing, a motion to declare Pennsylvania's death-penalty statute unconstitutional, agreed with the position taken by the Commonwealth and held that the defendant's challenge to the death penalty was indeed waived. *Id.* at 982.

In the instant case, Hairston, as mentioned above, did not undertake an *Edmunds* analysis previously, nor did he ever set forth any of the data pertaining to the death-penalty practices of the 49 other states or several

other countries around the world that he relies on so heavily in his brief to this Court (*see* Brief for Appellant, at pp. 28-34, 51). Moreover, although he did previously cite the JSGC's report, he, like the defendant in *Le*, does not even attempt to establish how much of the information contained therein relates to his particular situation (*see* Brief for Appellant, at pp. 37-51). Thus, the Commonwealth submits that, under the authority of *Le*, Hairston's challenge to the death penalty is waived and need not be addressed further.

In any event, as even the appellant admits, this Court has rejected constitutional challenges to the death penalty, and it has done so as recently as five years ago in *Commonwealth v. Walter*, 119 A.3d 255 (Pa. 2015). There, the defendant argued that the death penalty violated the Eighth Amendment and Article I, Section 13 because it "no longer comports with our sense of decency." *Id.* at 292. She noted a line of U.S. Supreme Court cases that she believed had diminished the constitutionally permissible applications of the death penalty and urged that the "conclusion is inescapable; the death penalty…has now reached the point where it is no longer constitutionally sustainable." *Id.*[14] In further support of her position, the defendant asserted

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[14] As this Court noted, however, the defendant did not claim that any of the U.S. Supreme Court cases that she cited barred the imposition of the death penalty against her specifically, as she did not claim to be insane or mentally

that 17 states had no death penalty for murder—with four states having abandoned the imposition of the death penalty since 2004—and that the death penalty had been condemned internationally. *Id.* at 292-93. Nevertheless, despite the defendant's claim that contemporary standards of decency had evolved to such a degree that there was now a consensus against the death penalty *per se*, this Court viewed the defendant's argument, relying as it did "on a minority of states which have abolished the death penalty and a few select international legal documents condemning or calling for restrictions on the death penalty," as insufficient to warrant review of the constitutionality of the death penalty in and of itself.

In the instant matter, Hairston suggests that, since the time that *Walter* was decided, five more states—including Connecticut and Washington—have expressly disallowed the death penalty, bringing the total to 22 (*see* Brief for Appellant, at pp. 29-32). He also, like the defendant in that case, points to a document indicating that capital punishment is looked on with disfavor by the United Nations and many of its member countries (*see id.*, at

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retarded or under the age of 18 when she committed the murder. *Id.* at 293-94. Hairston, citing some of the same cases as did the defendant in *Walter*, also does not contend that any of the cases pertained to his situation, as he does not maintain that he is mentally challenged or that he was a juvenile at the time that he killed his wife and son.

p. 34). But it is still the case, as it was in 2015, that a majority of states formally permit the death penalty, and neither the fact that a few have reversed course in recent years, or that certain nations continue to oppose its imposition, should be enough to warrant intervention by this Court when the state legislature has not seen fit to end the practice.[15] For these reasons, the appellant's claim would fail.

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[15] Nor does the aforementioned JSGC report. The Pennsylvania District Attorney's Association (PDAA) addressed the JSGC report in a 29-page response that detailed the significant factual omissions, material misrepresentations, flawed reasoning and questionable methodologies utilized in the report, and the Commonwealth would rely on that submission here. (A copy of the PDAA's response was attached as Exhibit 1 of the Commonwealth's Answer to Hairston's amended PCRA petition, filed May 24, 2019. That document can be found at Docket Entry No. 121 of the certified record.)

II. THE APPELLANT HAS WAIVED HIS CHALLENGE TO THE VERDICT SLIP BECAUSE NO OBJECTION TO IT WAS RAISED AT THE PROPER TIME. REGARDLESS, THE PCRA COURT DID NOT ERR IN DENYING THE APPELLANT RELIEF ON HIS CLAIM THAT THE JURY SENTENCED HIM TO DEATH ON A NON-STATUTORY AGGRAVATING FACTOR, AS THE RECORD MAKES CLEAR THAT THE JURY FOUND AS AN AGGRAVATING FACTOR THE ONE SET FORTH AT 42 PA. C.S. §9711(D)(9).

Hairston argues next that while the prosecution, in pursuing the death penalty, sought to prove the aggravating circumstance set forth at 42 Pa. C.S. §9711(d)(9), "that is not the aggravating factor that was found by the jury as demonstrated by the verdict slip" and, therefore, his death sentence is illegal (*see* Brief for Appellant, at pp. 53-54). Initially, the Commonwealth would submit that the claim is waived, as this Court has previously held, in the death-penalty setting, that a challenge involving the verdict slip is waived where it is not raised before the trial court. *See Commonwealth v. Ramtahal*, 33 A.3d 602, 611 (Pa. 2011). In any event, even if waiver were to be put aside, Hairston's contention is very clearly belied by the record, and, for that reason, the Honorable Jeffrey A. Manning cannot be said to have erred in denying his post-conviction claim.[16]

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[16] On appeal from the denial of PCRA relief, this Court's standard of review is limited to determining whether the PCRA court's findings are supported by the record and without legal error. *Commonwealth v. Edmiston*, 65 A.3d 339, 345 (Pa. 2013).

At the guilt phase of Hairston's trial, his stepdaughter, C.H., testified regarding the circumstances of his attempted rape of her, which had taken place approximately one year prior to his having killed her mother and brother (*see* TT1, 39-56).[17] C.H.'s testimony was incorporated into the penalty phase of the proceeding (*see* TT4, 88), at which she also testified to prior instances, beginning at age 14, in which Hairston would sexually abuse her (*see* TT4, 30-43). The parties then stipulated that as a result of the actions testified to by C.H., Hairston was convicted of one count of attempted rape occurring on May 21, 2000; one count of rape occurring between May 30, 1995 and May 21, 2000; one count of involuntary deviate sexual intercourse occurring between those same dates; and an additional count of involuntary deviate sexual intercourse occurring between 1993 and May 29, 1995 (*see* TT4, 52-53).

As noted above, one of the two aggravating circumstances sought by the Commonwealth in this matter was the one set forth at §9711(d)(9), which states that "[t]he defendant has a significant history of felony convictions involving the use or threat of violence to the person."[18] The aggravating

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[17] The victims, as stated previously, were Hairston's wife and biological son.

[18] The other aggravating factor was the one set forth at §9711(d)(11), stating

circumstances being presented by the prosecution had been made clear to the jurors right from the outset of the penalty-phase proceeding, with Judge Manning, after explaining the concept of aggravating and mitigating factors, informing the jurors that two aggravating factors would be submitted to them in this matter, the first being that "the defendant has a significant history of felony convictions involving the use or threat of violence to a person" (TT4, 9-10). Later, during his penalty-phase closing argument, Assistant District Attorney Mark Tranquilli contended that the prosecution had established both aggravating factors beyond a reasonable doubt and that with regard to the one dealing with a defendant's significant history of felonies involving the threat or use of violence, it had done so through the evidence pertaining to C.H. (*see* TT4, 196-97). The trial court subsequently instructed the jury again about the two aggravating circumstances and stated that the four prior convictions upon which the first aggravating circumstance was based had been placed in the record via a stipulation by the parties, those convictions being the rape, the attempted rape, and the two involuntary deviate sexual intercourse convictions, all of which involved C.H. as the victim (*see* TT4,

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that "[t]he defendant has been convicted of another murder committed in any jurisdiction and committed either before or at the time of the offense at issue." The jury's finding of this particular aggravating factor is not in dispute here.

228-29). The jury then returned later that same day with a sentence of death as to both murders (TT4, 251).

This Honorable Court, in a prior decision in this matter, held that the jury's conclusion that the aggravating circumstance at §9711(d)(9) had been satisfied was proper, as the record "amply supports the jury's finding that [Hairston] had a significant history of violent felony convictions" based on the aforementioned criminal behavior involving his stepdaughter. *See Commonwealth v. Hairston*, 985 A.2d 804, 809-10 (Pa. 2009). Nevertheless, Hairston, as noted in the opening paragraph of this argument, claims that such a sentence was unlawful because, according to him, the jury did **not** find that he had a significant history of felony convictions (*see* Brief for Appellant, at p. 58). Hairston says that this is evidenced by the verdict slip and, in particular, the portion in which the jury, when asked what the aggravating circumstances that it found were, wrote, "The 4 Felony convictions that have been placed into the record by stipulation" (*see id.*, at p. 59; *see also* Docket Entry No. 23).

Hairston believes that this notation somehow suggests that the jurors had "found a different non-statutory reason to impose the death penalty" than the one set forth in subsection (d)(9) stating that the defendant had a significant history of violent felonies (*see* Brief for Appellant, at p. 59). The

Commonwealth fails to see any merit to such an argument, considering that the jury **expressly stated** that its finding was based on Hairston's four prior felony convictions for sexually abusing his stepdaughter. Moreover, in examining the verdict slip as a whole, the preprinted portion clearly alerted the jurors that "[t]he following aggravating circumstances are submitted to the jury and must be proven by the Commonwealth beyond a reasonable doubt[,]" with one of them being that "[t]he defendant has a significant history of felony convictions involving the use or threat of violence to the person," in conformity with §9711(d)(9) (*see* Docket Entry No. 23). The form then instructs the jurors that if they unanimously decide to sentence the defendant to death, they are to then check either the box that indicates that they have found "[a]t least one aggravating circumstance and no mitigating circumstance" or that they have found "[o]ne or more aggravating circumstances which outweigh(s) any mitigating circumstance(s)" (*see id.*). The jurors checked the latter box and were then instructed, via the form, to list the aggravating circumstances that they had found (*see id.*). Rather than repeat the statutory language of the two subsections of §9711—which Hairston is intimating that they should have done—the jurors, as noted above, cited Hairston's four felony convictions entered into the record by

stipulation as an acknowledgment that subsection (d)(9) had been satisfied.[19]

As Judge Manning asserted in his Notice of Intention to Dismiss the appellant's PCRA petition, the fact that the jury's written response "did not track the precise language of the aggravating factor provided for in the statute" certainly does not mean that its verdict was based on something other than the statutory aggravating factor provided in §9711(d)(9) (*see* Docket Entry No. 117, at pp. 2-3). The Commonwealth agrees with the PCRA court that the verdict slip does not indicate any ambiguity at all in the jury's determination because even though the stipulated-to convictions did not **necessarily** constitute a significant history of violent felonies, they certainly **can** constitute such a significant history—as this Court indicated in its previous opinion in this matter—and the jury here said that they did, in no uncertain terms.

The cases relied upon by Hairston do not undermine this conclusion. For instance, in *Commonwealth v. May*, 656 A.2d 1335, 1344-45 (Pa. 1995), this Court vacated a sentence of death because the jury, in rendering its

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[19] With regard to the specific verdict slip pertaining to the sentence for the murder of Katherine Hairston, the jury wrote, "The murder of Sean Hairston," as an acknowledgment that the other aggravating factor, subsection (d)(11), had been satisfied (*see* Docket Entry No. 23). On the verdict slip pertaining to the murder of Sean Hairston, the jurors cited the murder of Katherine Hairston as the other aggravating factor (*see id.*).

verdict, found as one of the aggravating factors that the defendant had committed the murder while in perpetration of a rape, but the prosecution had never argued that the victim was raped, and a finding of rape could not be supported by the evidence. The Court wrote that "[t]he jury here simply found what it was not permitted to find." *Id.* at 1344. By contrast, it was presented and argued to the jury in the instant matter that the Commonwealth was seeking to establish that the defendant had a significant history of felony convictions involving the use or threat of violence, as set forth in §9711(d)(9); the trial court instructed the jury on how to determine if Hairston had such a significant history; and the four stipulated-to prior convictions relied upon by the jury satisfied the Commonwealth's burden. Thus, quite unlike the situation in *May*, the jury here did not find what it was not permitted to find.

This Court's decisions in *Commonwealth v. Rizzuto*, 777 A.2d 1069 (Pa. 2001), and *Commonwealth v. Knight*, 156 A.3d 239 (Pa. 2016), on which Hairston also relies, are also unavailing, at least in terms of offering the appellant relief. In *Rizzuto*, despite the fact that the parties had stipulated to the mitigating circumstance set forth at 42 Pa. C.S. §9711(e)(1) establishing that the defendant had no significant history of prior criminal convictions, the court never directed the jury to find the existence of (e)(1), and the jury failed

to find it as a mitigating factor. 777 A.2d at 1088-89. Thus, given that the jury reached its verdict of death without undertaking the proper weighing of aggravating and mitigating circumstances, this Court vacated the defendant's sentence. *Id.* at 1089.[20]

Hairston contends that with these rulings, this Court "placed a greater emphasis on the language of the verdict slip" (*see* Brief for Appellant, at p. 64), but, first of all, that express sentiment appears nowhere in either opinion, and, regardless, the verdict slip in the instant matter clearly establishes that the jury found beyond a reasonable doubt that the Commonwealth had satisfied the aggravating circumstance set forth in §9711(d)(9). The fact that the jury, rather than repeating the statutory language verbatim when asked to provide the aggravating factors that it found, instead (in the case of subsection (d)(9)) cited Hairston's four prior sexual-assault convictions that had been stipulated to by the parties and (in the case of subsection (d)(11)) cited the other murder committed in this matter, did not suggest any

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[20] The only difference between the situations in *Rizzuto* and *Knight* was that while it was undisputed that the defendant in *Knight* had no prior felony or misdemeanor convictions and the prosecutor essentially admitted as much in his closing argument, there was no stipulation between the parties like there was in *Rizzuto*. *See* 156 A.3d at 245. The *Knight* Court, as it had in *Rizzuto*, nevertheless vacated the sentence of death. *Id.* at 248.

ambiguity in the jury's finding; in fact, the specificity of the jury's response provides even more clarity than would a simple recitation of the language of the statute.[21] Thus, because Hairston's position is clearly belied by the record—in particular, by the trial court's instructions to the jury and a review of the verdict slip as a whole—Judge Manning certainly cannot be deemed to have erred in failing to grant him relief on the offered basis.

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[21] The Commonwealth would add here that there is no authority for the appellant's blanket assertion, set forth on page 66 of his brief, that the jury must follow the precise language of the statute and state the aggravating factors verbatim on the verdict slip.

III. AS ESTABLISHED IN THE PREVIOUS ARGUMENT, THE JURY DID NOT IMPOSE DEATH BASED ON A NON-STATUTORY AGGRAVATING CIRCUMSTANCE. THUS, BECAUSE THE APPELLANT CANNOT ESTABLISH THAT HE SUFFERED ANY PREJUDICE AS A RESULT OF THE PROSECUTOR'S COMMENT THAT THE SEXUAL ABUSE SUFFERED BY THE APPELLANT'S STEPDAUGHTER WAS AN AGGRAVATING FACTOR, HIS CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO IT CANNOT SUCCEED. IN ADDITION, THE COMMONWEALTH IS OF THE BELIEF THAT THE COMMENT WAS NOT IMPROPER.

Hairston argues next that his trial counsel was ineffective for failing to object when the prosecutor and/or the judge "allow[ed] the jury to believe" that his sexual abuse of his stepdaughter C.H. constituted an aggravating factor (*see* Brief for Appellant, at pp. 69-75). Specifically, Hairston contends that the assistant district attorney's closing argument during the penalty phase suggested that the abuse suffered by C.H. was itself the aggravating factor, as opposed to the requisite finding of a history of felony convictions involving the use or threat of violence; thus, according to Hairston, the prosecutor's argument led the jury to find a non-statutory reason to impose the death penalty (*see id.*, at pp. 70-72).[22] But as was established in the previous argument, the jury's verdict, as made evident by the verdict slip and

[22] In his closing, ADA Tranquilli said, "[W]hat that girl went through was a significant aggravating circumstance" (TT4, 197-98).

the instructions that were provided, clearly rested on the aggravating factor set forth at §9711(d)(9)—namely, the appellant's significant history of violent felony convictions—and **not** on a non-statutory factor such as the abuse suffered by the victim of the violence.[23] Thus, given that Hairston cannot demonstrate that he suffered any prejudice as a result of the assistant district attorney's comment or his trial counsel's failure to object to it, his claim necessarily fails. *See Commonwealth v. Howard*, 719 A.2d 233, 241 (Pa. 1998) (in a post-conviction attack on his trial counsel's stewardship, the burden is on the defendant to show that but for the act or omission in question, the result of the proceeding would have been different).[24]

The Commonwealth would simply add here that the abuse endured by C.H., intertwined as it was with Hairston's history of violent felony

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[23] Judge Manning, in his closing instructions to the jurors, told them that in order to determine whether Hairston had a significant history of felony convictions involving the use or threat of violence, they were to consider the number of previous convictions, the nature of the previous crimes, and their similarity to, or relationship with, the murders in the instant matter (TT4, 228). He went on to state that "[t]he four convictions upon which this aggravating circumstance is found have been placed in the record by the stipulation of the parties" and then proceeded to list them one by one (TT4, 229).

[24] Where it is clear that a defendant has not met the prejudice prong of the ineffectiveness standard, his claim can be dismissed on that basis alone without consideration of the other two prongs. *See Commonwealth v. Travaglia*, 661 A.2d 352, 357 (Pa. 1995).

convictions, was certainly properly before the jury, as demonstrated by this Honorable Court's decision in *Commonwealth v. Beasley*, 479 A.2d 460 (Pa. 1984). In *Beasley*, the defendant, sentenced to death for the fatal shooting of a bicyclist, argued that the jury unlawfully received evidence regarding his killing of a police officer three months later, which it then used to find the aggravating factor at §9711(d)(9). *Id.* at 464-65. The defendant insisted that the prosecution's evidence should have been limited to establishing the mere fact that he had been convicted of murder "without elaboration as to the facts and circumstances." *Id.* at 465. But this Court stated that it did not believe the legislature's reference to "convictions" in §9711(d)(9) was so narrow as to render extraneous all of the facts and circumstances surrounding those convictions, adding that "sentencing has long been regarded as having at its core a function of character analysis"; therefore, "[c]onsideration of prior 'convictions' was not intended to be a meaningless and abstract ritual, but rather a process through which a jury would gain considerable insight into a defendant's character." *Id.* The Court continued:

> The nature of an offense, as ascertained through examination of the circumstances concomitant to its commission, has much bearing upon the character of a defendant, and, indeed, without reference to those facts and circumstances, considerations of 'convictions' would be a hollow process, yielding far less information about a defendant's character than is relevant.

Id. Thus, the *Beasley* Court held that there was no error resulting from the jury learning that the defendant's prior killing involved a police officer, as that allowed the jury to more properly assess the defendant's character for sentencing purposes. *Id.*

Similarly, the fact that Hairston chose to engage in the continued sexual abuse of his stepdaughter, from age 14 through her early 20s, was certainly information that the prosecution was entitled to introduce to provide the jurors with insight into Hairston's character so as to allow them to determine whether §9711(d)(9) was satisfied. As this conduct, testified to by the victim herself, was inextricably linked to the question of whether Hairston had a significant history of violent felonies, the Commonwealth would submit that the at-issue comment by the prosecutor—one that merely interchanged the damage inflicted by Hairston with the damage suffered by his victim—was not inappropriate and, therefore, an objection to it by defense counsel would not likely have been sustained. For this reason, as well as because Hairston cannot demonstrate the requisite prejudice, the claim was properly rejected by the PCRA court.

IV. BECAUSE THERE IS NO MERIT TO THE CLAIM THAT THE JURY SENTENCED THE APPELLANT TO DEATH BASED ON A NON-STATUTORY AGGRAVATING FACTOR, PRIOR APPELLATE COUNSEL CANNOT BE DEEMED INEFFECTIVE FOR HAVING FAILED TO RAISE SUCH A CLAIM.

Related to his previous two arguments, Hairston argues next that his prior appellate counsel provided ineffective assistance of counsel for failing, in his previous appeals to this Court, to raise a claim that his death sentence was predicated on a non-statutory aggravating factor as evidenced by the verdict slip (*see* Brief for Appellant, at pp. 76-81). As the Commonwealth has demonstrated herein, however, the jury's finding, preserved in the verdict slip, was not ambiguous, as the verdict slip—and the trial court's instructions that had preceded it—clearly demonstrated that the jury, in conformity with the aggravating factor set forth at §9711(d)(9), found that Hairston had a significant history of violent felony convictions based on his continued sexual abuse of his stepdaughter. Thus, there is no merit to a claim that appellate counsel was ineffective for failing to raise such an issue before this Court, and, therefore, it was properly denied by the PCRA court.

V. THE PCRA COURT DID NOT ERR IN DENYING THE APPELLANT'S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S ALLEGEDLY IMPROPER CLOSING ARGUMENT, AS THE PROSECUTOR'S REMARK WAS A FAIR COMMENT ON THE IMPACT THAT THE VICTIMS' DEATHS HAD ON ONE OF THE MEMBERS OF THEIR FAMILY. REGARDLESS, THE APPELLANT HAS NOT ESTABLISHED THAT HE SUFFERED THE REQUISITE PREJUDICE AS A RESULT OF THE COMMENT.

Hairston contends next that his trial counsel was ineffective for failing to object to the portion of the prosecutor's penalty-phase closing argument in which he spoke about the "pain" and "guilt" experienced by C.H. (*see* Brief for Appellant, at pp. 82-85). The Commonwealth respectfully submits that the challenged remark was actually a proper comment on the evidence elicited by the prosecution, and, therefore, because there is no arguable merit to Hairston's underlying claim, the PCRA court did not err in denying him relief on ineffectiveness grounds (*see* Docket Entry No. 117, at pp. 3-4).[25]

During her penalty-phase testimony, C.H. said that, despite years of sexual abuse at the hands of Hairston, she never told her family about it because she had not wanted to hurt anyone (*see* TT4, 42-43). Her reluctance to come forward stemmed from the fact that Hairston had threatened to harm

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[25] To establish an ineffective-assistance-of-counsel claim, a defendant must first demonstrate that the underlying claim is of arguable merit. *See Travaglia*, *supra*, 661 A.2d at 356.

her family if she told them about what he was doing (TT4, 36, 42). Finally, after the incident that occurred on May 21, 2000—which is recounted in detail in the Commonwealth's factual history set forth above—C.H. told a detective with the City of Pittsburgh sex abuse unit about what Hairston had been doing to her through the years (TT4, 44). Despite still being concerned about her family, C.H. agreed to pursue charges against Hairston, stating that by that point she had grown "tired of being afraid" (TT4, 46). It was about a year later that Hairston would kill C.H.'s mother and brother by hitting them in their heads multiple times with a sledgehammer, and when Hairston subsequently confessed his actions to the police, he said that the reason that he had killed them—and intended to kill himself—was because of the sexual-abuse charges levied against him by C.H. (*see* TT3, 21). C.H. had testified at the guilt phase that when a cousin called her and told her that her mother and brother had been killed, she knew that Hairston had done it, given the prior threats that he had made to that effect (*see* TT1, 60-61), and at the penalty phase, she stated that their two deaths "destroyed me" (s*ee* TT4, 48).

In his closing argument, ADA Tranquilli told the jury, "I want you to think about the pain that [C.H.] went through…And I want you to think about the guilt that she's going to have to live with for the rest of her life because finally she had the courage to speak up and talk about the abuse that she had

suffered for years" (TT4, 207). Hairston argues that these comments diverted the jurors' attention from determining the proper sentence and instead inflamed their passions and prejudices (*see* Brief for Appellant, at p. 84), but, pursuant to 42 Pa. C.S. §9711(a)(2), the Commonwealth was clearly allowed to present evidence concerning the impact that the death of the victims had on their family, and it is well settled that a prosecutor's remarks "fall within the ambit of fair comment if they are supported by evidence and they contain inferences which are reasonably derived from that evidence." *Commonwealth v. Hardcastle*, 546 A.2d 1101, 1109 (Pa. 1988). Given that the assistant district attorney's comments in the instant matter were merely references to admissible testimony and a reasonable inference therefrom, the Commonwealth submits that there was no legitimate basis upon which trial counsel could have made a valid objection. Accordingly, the instant claim fails.

The Commonwealth would add that it is well settled that "[c]omments by a prosecutor constitute reversible error only where their unavoidable effect is to prejudice the jury, forming in their minds a fixed bias and hostility toward the defendant such that they could not weigh the evidence objectively and render a fair verdict." *Commonwealth v. Brown*, 196 A.2d 130, 177 (Pa. 2018) (other citations omitted). Furthermore, it is clear that a prosecutor is

permitted wide latitude in making arguments to the jury, and even greater latitude is afforded during the penalty phase of a capital case because the presumption of innocence is no longer applicable. *Commonwealth v. Ogrod*, 839 A.2d 294, 339-340 (Pa. 2003), citing *Commonwealth v. Marshall*, 633 A.2d 1100, 1107 (Pa. 1993). In *Ogrod*, a case in which he was sentenced to death for the murder of a four-year-old girl, the defendant argued that the prosecutor, in her closing argument to the jury during the penalty phase, improperly referenced the impact that the killing had on the family of the victim. *See* 839 A.2d at 338-39. Specifically, the prosecutor, at the end of her statement to the jury, said that the defendant had not just killed the victim "but her entire family and the entire community." *Id.* at 339. Interestingly, in that case, the Commonwealth was **not** allowed to present victim-impact testimony, as the murder had been committed approximately five months before the effective date of the statute that permitted the use of such testimony. *Id.* at 338. Nevertheless, this Court found that the prosecutor's comments did not entitle the defendant to a new sentencing proceeding, as the comments were brief and were determined not to have prevented the jury from properly weighing the evidence and rendering a true verdict. *Id.* at 340.

In the instant case, the complained-of comments by the prosecutor

were similarly brief and, contrary to the contention by Hairston, could not be said to have interfered with the jury's ability to make a proper determination, especially in light of the fact that the trial court instructed the jurors that "[y]ou are not to consider the evidence of the impact the defendant's crimes had on the family of the victims as a separate aggravating factor or as proof of the existence of any aggravating factor. It is only to be used by you to weigh the aggravating factors against the mitigating factors" (TT4, 232). As jurors are presumed to follow the instructions of the court, *see Commonwealth v. Stokes*, 839 A.2d 226, 230 (Pa. 2003), Hairston cannot demonstrate that the remarks of the prosecutor here so effected the jury's determination that he would be entitled to a new sentencing proceeding.

VI. THE PCRA COURT DID NOT ERR IN DENYING THE APPELLANT'S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE COMMONWEALTH'S EXPERT'S TESTIMONY AS TO THE VERACITY OF THE APPELLANT'S STATEMENT TO A DIFFERENT PSYCHIATRIST THAT HE HAD ACTED UNDER AN AUDITORY HALLUCINATION IN KILLING HIS WIFE AND SON. THE TESTIMONY SERVED TO SUPPORT THE EXPERT'S ULTIMATE DIAGNOSIS REGARDING THE APPELLANT'S MENTAL STATE AND, THUS, WAS CLEARLY ADMISSIBLE UNDER THE RULES OF EVIDENCE.

Hairston's next claim is that his trial counsel was ineffective for failing to object when Dr. Bruce Wright, the prosecution's psychiatric expert, testified at the penalty phase to what he believed to be the lack of truthfulness displayed by Hairston during his interviews with psychiatric experts (including Dr. Wright himself) subsequent to the murders (*see* Brief for Appellant, at pp. 86-91). Specifically, Hairston contends that "determin[ing] the credibility of a witness is outside the scope of [the Rules of Evidence pertaining to expert witnesses]" (*see id.*, at p. 88), and he maintains that "[w]hat this Honorable Court has deemed improper and to be reversible error is exactly what happened in the instant case" (*see id.* at p. 90). But the Commonwealth would point out, first of all, that Hairston was not a witness in this matter, as he never took the stand in his own defense, and, therefore, the cases from this Court upon which he relies, all of which involve testimony as to the veracity of live witnesses who had testified in court, are

not applicable here. Thus, Hairston, contrary to his assertion above, has offered no authority from this Court that establishes that the challenged testimony of Dr. Wright was improper. In any event, the Commonwealth would respectfully submit that what Dr. Wright testified to was the very foundation of what an expert's opinion is supposed to be—in other words, not only was his testimony not subject to being stricken, but it was precisely what was expected of him—and, as a result, there is no arguable merit to Hairston's contention that his trial counsel was ineffective for failing to object to it. Accordingly, the claim was properly denied by the PCRA court.

By way of background: The defense, during the penalty phase, called as a witness Dr. Robert Wettstein, an expert in forensic psychiatry who had spoken with Hairston on a total of three occasions in the aftermath of the murders (*see* TT4, 116, 121). Dr. Wettstein testified that Hairston had told him that he had been hearing voices for years and that he had, in fact, heard voices on the morning of the killings that had commanded him to kill his wife and son (TT4, 127, 141). Based upon his interviews with him, Dr. Wettstein concluded that Hairston did not have an antisocial personality disorder (which is what Dr. Wright believed) but, rather, a mood disorder depression with psychotic features—namely, the aforementioned auditory hallucinations—and that at the time of the murders he was acting under an

extreme mental and emotional disturbance (TT4, 128-29, 132, 134).[26]

In order to rebut the testimony of Dr. Wettstein, the Commonwealth presented Dr. Wright, who, contrary to the defense's conclusion, offered antisocial personality disorder as his primary diagnosis of Hairston (TT4, 170). Dr. Wright stated that antisocial personality disorder does not inhibit one's ability to know right from wrong or to think clearly and carry out criminal episodes (TT4, 170-71). He defined it as merely the inability to conform one's behavior to that which is socially acceptable, a condition, he opined, that would likely be present in 80 to 90 percent of the inmates currently housed in the Allegheny County Jail (TT4, 170). Dr. Wright also said that, contrary to Hairston's interview with Dr. Wettstein wherein Hairston told him that the voices that he heard on the morning of the murders had commanded him to kill his wife and son, Hairston had told **him** that the voices only commanded him to take his own life, not those of anyone else (TT4, 167). Dr. Wright added that in reviewing all of the medical, mental health, and police records pertaining to Hairston (*see* TT4, 164-65), the first time that he had made any mention at all of suffering from auditory hallucinations was in speaking with

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[26] That Hairston had been acting under an extreme mental or emotional disturbance was one of the mitigating factors sought by the defense (*see* TT4, 232).

Dr. Christine Martone at Mayview State Hospital in July 2001, which was a date **after** the instant murders (TT4, 169).

In explaining his conclusion of antisocial personality disorder, Dr. Wright testified that Hairston satisfied several of the criteria, one of which was deceitfulness; when asked by the prosecutor to provide the jury with some instances of Hairston being deceitful, Dr. Wright listed several, including "[t]he inconsistencies with respect to the auditory hallucinations. He told me one thing. He told Mayview something else. He told Dr. Wettstein something else" (TT4, 172-73). Dr. Wright stated that "because of the inconsistent nature of the history he gave me…I had great difficulty believing anything he said to me" (TT4, 169). Hairston, as mentioned above, complains that this testimony by Dr. Wright, implicating Hairston's veracity as it does, was improper opinion testimony and, therefore, counsel was ineffective for failing to object to it (*see* Brief for Appellant, at p. 90). As support, he relies upon this Court's decisions in *Commonwealth v. Seese*, 517 A.2d 920 (Pa. 1986), *Commonwealth v. Crawford*, 718 A.2d 768 (Pa. 1998), and *Commonwealth v. Grant*, 387 A.2d 841 (Pa. 1978).

But in *Seese*, a case in which the defendant had been convicted of the statutory rape of an eight-year-old girl, the victim had testified at trial to multiple sexual contacts of her initiated by the defendant. 517 A.2d at 920.

The Commonwealth's expert, a board-certified pediatrician, was then allowed to testify that children of the victim's age do not usually fabricate stories of sexual abuse because they do not have the sexual knowledge sufficient to supply details regarding sexual encounters. *Id.* at 920-21. The Court, in determining whether the expert's testimony was proper, stated that "[t]he question of whether a particular witness is testifying in a truthful manner" involves several factors, including observations of the demeanor and character of the witness, which is one of the reasons why "the question of a witness' credibility has routinely been regarded as a decision reserved exclusively for the jury," and not for experts. *Id.* at 922. Thus, because it was an encroachment upon the province of the jury to allow for the admission of expert testimony on the issue of a witness' credibility, given that the credibility of a witness has traditionally been regarded as being within the ordinary ability of the jury to determine, the Court concluded that it was error to have admitted the testimony of the expert. *Id.* By contrast, the question of whether Hairston was testifying in a truthful manner was not at issue here because he never testified. Thus, *Seese* is inapposite.[27]

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[27] For the same reasons, so, too, are *Crawford*, *supra*, a case in which this Court disallowed expert psychiatric testimony offered by the defense to demonstrate that a Commonwealth witness to events leading to the victim's

Unlike the situation in *Seese*, Dr. Wright was not testifying as to his opinion on whether testimony offered by a witness at trial was credible. Rather, his testimony, as noted by Judge Manning, was made "in the context of explaining the basis for his conclusion that [Hairston's] mental condition was antisocial personality disorder rather than the psychosis and depression that the defense expert…diagnosed" (*see* Docket Entry No. 117, at p. 5). Pursuant to Pennsylvania Rule of Evidence 702, which governs testimony by expert witnesses, a witness who is qualified as an expert may testify in the form of an opinion if, among other things, "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Pa.R.E. 702(b). At the penalty phase of the instant proceeding, one of the matters to be determined, as mentioned above, was whether Hairston's culpability for killing his wife and son was mitigated by an extreme mental or emotional disturbance. In order to counter the defense's contention that such a disturbance existed—and to instead support its conclusion that Hairston

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murder was not credible, *see* 718 A.2d at 773-74, and *Grant*, *supra*, where this Court found that testimony by an assistant district attorney concerning his personal opinion as to the credibility and truthfulness of a key prosecution witness in the defendant's murder trial was improper, as the comments were found to have intruded upon the jury's province as the arbiters of credibility. *See* 387 A.2d at 843-45.

suffered from the fairly common antisocial personality disorder—the prosecution needed to present Dr. Wright's testimony regarding Hairston's lack of veracity, as it served to support the ultimate conclusion reached by the Commonwealth's expert. Such testimony was in no way inadmissible and is, in fact, quite commonplace in cases involving psychiatric experts. *See*, *e.g.*, *Commonwealth v. Baumhammers*, 92 A.3d 708, 715 (Pa. 2014) (the prosecution's expert, a forensic psychiatrist, testified that he did not believe the claims made by the defendant to another psychiatrist that he was suffering from hallucinations in which he believed that the FBI was harassing him and only promised to stop doing so if he killed racial and ethnic minorities; the expert stated that he instead attributed the assertions by the defendant, who was on trial for killing six people, to after-the-fact malingering). Thus, because it is quite clear that Dr. Wright's testimony did not invade the province of the jury, the instant claim fails.[28]

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[28] For what it is worth, the Commonwealth would note that the jury did find the aforementioned mitigating factor presented by the defense (*see* Docket Entry No. 23).

VII. THE PCRA COURT DID NOT ERR IN DENYING THE APPELLANT'S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO TESTIMONY THAT HE WAS ARRESTED FOR A HIT-AND-RUN ACCIDENT AS A TEENAGER. SUCH INFORMATION WAS PROPER TO SUPPORT THE COMMONWEALTH'S EXPERT'S DIAGNOSIS OF THE APPELLANT, AND, MOREOVER, THE APPELLANT DID NOT ESTABLISH THAT HE WAS PREJUDICED BY THE REFERENCE.

Hairston's final claim is that his trial counsel was ineffective for failing to object to a reference by Dr. Wright to him having been arrested as a juvenile for his involvement in a hit-and-run (*see* Brief for Appellant, at pp. 92-94). The Commonwealth submits that the claim fails for multiple reasons and was, thus, properly rejected by the PCRA court.

During the penalty phase, Dr. Wright had been asked by the prosecution what some of the criteria were that needed to be satisfied in order for an individual to be diagnosed with antisocial personality disorder; Dr. Wright indicated that one such indication was problematic behavior during adolescence (*see* TT4, 171). He then noted that in reviewing Hairston's records, he had found out that Hairston was arrested when he was 17 for a hit-and-run accident (TT4, 171). Prior to Dr. Wright's testimony, Dr. Wettstein, the defense's expert, had testified that, while he agreed that such a diagnosis was indeed characterized by early onset behavioral problems such as juvenile delinquency, Hairston "didn't have any problems

as a teenager" and, therefore, he did not fit the criteria for antisocial personality disorder (TT4, 129-30). As demonstrated, Dr. Wright, in his ensuing testimony, countered Dr. Wettstein's assertion regarding Hairston's lack of problems as a juvenile.

Hairston now argues that his counsel should have objected to Dr. Wright's testimony because the facts pertaining to his juvenile arrest "were not in evidence and there was no basis to these facts" (*see* Brief for Appellant, at p. 92). With regard to the assertion that the arrest was not in evidence, the Commonwealth would submit that both psychiatric experts, as is customary, reviewed multiple records pertaining to Hairston (*see* TT4, 119-20, 164-65) and referenced such material during their testimony in order to support their diagnoses of the appellant. Such references are commonplace and proper. *See Baumhammers*, *supra*, 92 A.3d at 715 (Commonwealth's psychiatric expert conducted a records review of 230 sources, produced a written report, and testified consistent with that report in disputing the conclusions offered by the defense's expert). And with regard to the specific assertion that there was "no basis" to the fact testified to by Dr. Wright, if Hairston is attempting to say that he was not involved in a hit-and-run at age 17, he offered no evidence to the PCRA court to that effect (*see* Docket Entry No. 104, at unnumbered page 9, *and* Docket Entry No.

109, at pp. 38-39). Thus, because there is no merit to Hairston's underlying claim, Judge Manning cannot be deemed to have erred in denying it.

In addition, as established previously in this brief, the jurors in this matter were not only aware by the time of the penalty phase that Hairston had killed his wife and child by hitting them in their heads with a sledgehammer, but also that he had sexually assaulted his stepdaughter on multiple occasions prior to the killings. Therefore, the Commonwealth would submit that Hairston has failed to establish, as he must, that the jurors would not have returned a verdict of death had they not heard a rather vague reference to his also having been involved in a hit-and-run accident as a teenager. For this additional reason, the claim was properly dismissed. *See Howard*, *supra*. *See also Commonwealth v. Williams*, 896 A.2d 523, 544-45 (Pa. 2006) (defendant's claim that the introduction of other-crimes evidence—in particular, witnesses' descriptions of his involvement in uncharged robberies and parole violations—had tainted the penalty phase of his trial was baseless, given that three uncontested armed robberies had also been introduced).

CONCLUSION

WHEREFORE, the Commonwealth respectfully requests that the Order denying post-conviction relief be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The applicable portions of the Commonwealth's Brief for Appellee do not exceed 14,000 words.

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CERTIFICATE OF COMPLIANCE

The Commonwealth's Brief for Appellee complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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PROOF OF SERVICE

I hereby certify that I am this day serving a copy 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:

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