

No. 577 EDA 2022

IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

JAMIE LYNN SILVONEK,

Appellant.

BRIEF FOR APPELLANT

On Appeal from the Final Order of January 31, 2022, Denying
PCRA Motion in the Lehigh County Court of Common Pleas,
Docket No. CP-39-CR-0002141-2015

The Honorable Anna-Kristie M. Marks, Judge Presiding.

Tracy Zurzolo Quinn (No. 71072)
Victoria LeCates (No. 329003)
HOLLAND & KNIGHT LLP
Cira Centre, Ste. 800
2929 Arch Street
Philadelphia, PA 19104
(215) 252-9522
tracy.quinn@hklaw.com
victoria.lecates@hklaw.com

Marsha L. Levick (No. 22535)
JUVENILE LAW CENTER
1800 JFK Blvd., Ste. 1900B
Philadelphia, PA 19103
(215) 625-0551
mlevick@jlc.org

COUNSEL FOR APPELLANT

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STATEMENT OF JURISDICTION

Pursuant to 42 Pa.C.S.A. § 742 and 234 Pa. Code § 910, this Court has exclusive appellate jurisdiction of this appeal from the January 31, 2022 Order ("**Order**") of the Lehigh County Court of Common Pleas (Marks, J.) ("**PCRA Court**") denying Appellant's Motion for Post-Conviction Relief (the "**PCRA Motion**" or "**Motion**") pursuant to the Pennsylvania Post-Conviction Relief Act ("**PCRA**"), 42 Pa. C.S. §§ 9541 *et seq.*

ORDER IN QUESTION

The PCRA Court's Order states verbatim (emphasis in original):

NOW, this 31st day of January, 2022, upon consideration of Defendant's Motion for Post Conviction Collateral Relief, and after hearing on October 4, 2021, through October 6, 2021, October 8, 2021, November 10, 2021, and November 12, 2021, and for the reasons expressed in our accompanying Opinion,

IT IS HEREBY ORDERED that Defendant's Motion for Post Conviction Collateral Relief is DENIED. *Pursuant to Pennsylvania Rule of Criminal Procedure 908(E), Defendant is hereby advised of her right to file a notice of appeal to the appropriate appellate court within thirty (30) days of the entry of this Order.*

IT IS FURTHER ORDERED that the *Defendant is advised that should she intend to raise any claims regarding PCRA counsel's ineffectiveness in connection with this PCRA, such claims must be raised on appeal from this Order. Failure to do so may result in waiver of such claims in any future proceedings.*

IT IS FURTHER ORDERED that the Clerk of Courts-Criminal Division shall send a copy of this Order to Defendant by certified mail, return receipt requested.

[BY THE COURT]¹

¹ A copy of the Order is attached hereto as Appendix "A." The PCRA Court's January 31, 2022 Opinion is attached as Appendix "B", and its March 25, 2022 Memorandum Opinion and Order are attached as Appendix "C." Appellant's Statement of Matters Complained of on Appeal is attached as Appendix "D."

SCOPE AND STANDARD OF REVIEW

In reviewing the PCRA Court's denial of post-conviction relief, this Court must determine whether the record supports the PCRA Court's findings and whether its Order is otherwise free of legal error. *E.g., Commonwealth v. Fears*, 86 A.3d 795, 803 (Pa. 2014).

Factual findings by the PCRA Court that are supported by the record are given deference on appeal; however, this Court is not bound by factual findings that are not supported by the record. *See, e.g., Commonwealth v. Johnson*, 966 A.2d 523, 532 (Pa. 2009); *see also Commonwealth v. Benton*, 655 A.2d 1030, 1032 (Pa. Super. 1995) ("Only factual findings which are supported by the record are binding upon this court.").

The PCRA Court's legal conclusions are reviewed *de novo*. *See, e.g., Commonwealth v. Rios*, 920 A.2d 790, 810 (Pa. 2007) ("[W]e will draw our own legal conclusions as to whether counsel's conduct fell below the constitutionally required standards[.]").

"In determining whether a guilty plea was entered knowingly and intelligently, a reviewing court must review all of the circumstances surrounding the entry of that plea." *Commonwealth*

v. Allen, 732 A.2d 582, 587 (Pa. 1999). If an individual's plea is based on the advice of her counsel, "the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (quoting *McMann v. Richardson*, 397 U.S. 759, 771) (1970)).

"[W]hen a juvenile seeks to confess guilt to a crime, close scrutiny must be paid to the surrounding circumstances." *Commonwealth v. Hernandez*, No. 2052 MDA 2014, 2015 WL 6080360, at *6 (Pa. Super. Oct. 15, 2015).

STATEMENT OF QUESTIONS INVOLVED

1. Whether the guilty plea offered by Appellant Jamie Silvonek ("**Jamie**"), a 14-year old child whose 21-year old boyfriend murdered her mother, was involuntary when, before she entered her plea, her trial counsel discussed plea terms with the Trial Court judge and told Jamie that the Court would not accept a plea of less than 35 years to life, violating the prohibition on trial court participation in plea discussions (*see Commonwealth v. Evans*, 252 A.2d 689 (Pa. 1969))?

PCRA Court answer: No.

2. Whether Jamie's trial counsel ineffectively represented Jamie given, *inter alia*: (a) his failure to present mitigating fact evidence at Jamie's decertification hearing; (b) his failure to inform his experts of material evidence; (c) his improper involvement of the Court in plea discussions and failure to discuss the plea deal with Jamie until the terms were set by the Court; and (d) his failure on appeal to cite controlling authority to this Court that contradicted the Trial Court's findings?

PCRA Court answer: No.

STATEMENT OF THE CASE

I. Form of Action.

This is an appeal from a January 31, 2022 Order denying Appellant's Motion for Post-Conviction Relief.

II. Procedural History.

On April 2, 2015, Jamie and her boyfriend, Caleb Barnes ("**Barnes**") were charged with criminal homicide (among other crimes) in connection with the murder of Jamie's mother, Cheryl Silvonek. (Record, Doc. 1, Criminal Complaint, at 3.)

Jamie, who had just turned fourteen before her mother's death, petitioned for decertification from adult criminal court to juvenile court. (Record, Doc. 12, Motion to Remand Case to Juvenile Division.) On November 19, 2015, after a two-day evidentiary hearing (the "**Decertification Hearing**"), the Trial Court denied Jamie's petition. ("**Decertification Order**") (Appendix E.)

On February 11, 2016, Jamie pled guilty to first degree murder and the Trial Court sentenced her to 35 years to life. (Appendix F) ("**Sentencing Order**").²

Jamie appealed the Decertification Order. (Record, Doc. 61, Concise Statement of Matters Complained of on Appeal, 4/1/2016); (Super. Ct. Br. 9/12/2016 (PCRA Ex. 27).) On August 9, 2017, this Court denied her appeal. *Commonwealth v. Silvonek*, No. 818 EDA 2016, 2017 WL 3411919 at *7 (Pa. Super. Aug. 9, 2017) (Appendix G). On February 7, 2018, the Pennsylvania Supreme Court denied Jamie's petition for allowance of appeal. *Commonwealth v. Silvonek*, 645 Pa. 554 (2018) (Appendix H).

On May 6, 2019, Jamie filed her PCRA Motion, asserting that her guilty plea had not been knowing and voluntary and that her trial counsel's representation was ineffective. (*See generally* Record, Doc. 87, PCRA Pet.) Jamie filed an Amended PCRA Petition on December 2, 2021. (Record, Doc. 121, Amended PCRA Pet.)

² In October 2016, a jury convicted Barnes of first degree murder. Barnes was sentenced to life without parole plus 22 to 44 years. See <https://www.cbsnews.com/news/caleb-barnes-soldier-sentenced-in-slaying-of-teen-girlfriends-mom/> (last visited July 8, 2022).

On May 6, 2019, Jamie moved to recuse the trial judge from adjudicating Jamie's PCRA Motion because the judge's participation in Jamie's plea negotiation was a material issue in that Motion. On June 6, 2019, the Trial Court denied Jamie's recusal request. ("**Recusal Order**") (Record, Doc. 95, Recusal Order (PCRA Ex. 15).)³ The trial judge subsequently retired from the bench, and Jamie's Motion was reassigned to the PCRA Court.

On October 4, 5, 6, and 8, and November 10 and 12, 2021, the PCRA Court conducted an evidentiary hearing on Jamie's Motion (collectively, the "**PCRA Hearing**"). (See PCRA Hr'g Tr. 10/4/21, 10/5/21, 10/6/21, 10/8/21, 11/10/21, and 11/12/21.)

On January 31, 2022, the PCRA Court entered an Order and Opinion denying Jamie's Motion. (Appendix A and B.) Jamie timely appealed the Order. (Appendix D, Concise Statement of Errors.)

³ Jamie appealed the Trial Court's order denying recusal, without success. (Record, Doc. 102, Order Denying Pet, Pa. Super. 10/3/2019.)

III. Prior Determinations.

The prior determinations in this case, described above, consist of:

- (a) the Decertification Order (Appendix E (PCRA Ex. 6));
- (b) the Sentencing Order (Appendix F (Record, Doc. 49));
- (c) this Court's denial of Jamie's appeal from the Decertification Order (Appendix G (Record, Doc. 72)), reported at 2017 WL 3411919 (Pa. Super. Ct. 2017);
- (d) the Pennsylvania Supreme Court's denial of Jamie's petition for allowance of appeal (Appendix H (Record, Doc. 71)), reported at 645 Pa. 554 (2018);
- (e) the Recusal Order (Appendix I (Record, Doc. 95) (PCRA Ex. 15)); and
- (f) the Order that is the subject of this appeal. (Appendix A and B.)

IV. Judges Whose Determinations Are to Be Reviewed.

The Honorable Maria L. Dantos (ret.) entered the Decertification Order (Appendix E), Sentencing Order (Appendix F) and Recusal Order (Appendix I).

The Honorable Anna-Kristie M. Marks entered the Order that is the subject of this appeal (Appendix A and B).

V. Chronological Statement.

A. Cheryl Silvonek's Murder.

Jamie was a thirteen-year-old honor student in eighth grade when, in October 2014, at a concert for teens, she met Mr. Barnes, a twenty-year old Army soldier with a professed affinity for knives and a history of violence. (See Dattilio Report 9/17/15, at 6-8; Record, 121, Amended PCRA petition, at App. X, Y.)⁴ Mr. Barnes entered into a relationship with Jamie that quickly escalated to involve hours of texts and calls every day and numerous clandestine meetings. (Guilty Plea and Sentencing Tr. at 10:11-11:3. (PCRA Ex. 14).)

⁴ Bookmarked as D-2 10-29-15 in the "Exhibits" record file.

Shortly after Jamie's fourteenth birthday, Jamie's mother learned of their relationship, Mr. Barnes' age and that Mr. Barnes and Jamie had had sexual relations in the Silvonek home. (Guilty Plea and Sentencing Tr. at 11:11-12:5 (PCRA Ex. 14).) Jamie's mother informed Mr. Barnes of Jamie's minor age and demanded that the relationship end. (See Appendix E at E14, E21. (PCRA Ex. 6); Guilty Plea and Sentencing Tr. at 9:4-21:10 (PCRA Ex. 14).)

Jamie ultimately persuaded her mother to escort Jamie and Mr. Barnes to a concert. (Guilty Plea and Sentencing Tr. at 13:16-19 (PCRA Ex. 14).) When they returned from the concert late at night, Barnes stabbed and strangled Jamie's mother to death in her car, in the Silvoneks' driveway, with Jamie in the car. (*Id.* at 17:23-18:7 (PCRA Ex. 14).)

After the murder, Barnes and Jamie took a shovel from the Silvonek garage, purchased additional materials at a nearby Wal-Mart, and drove Cheryl Silvonek's car to a wooded area where Barnes buried Cheryl's body. (*Id.* at 20:10-14 (PCRA Ex. 14).) Barnes and Jamie then returned to Jamie's home (where her father was sleeping). (PCRA Hr'g Tr. 10/8/21 at 28:1-5 ; see *also* Jamie

Silvonek Statement, 2/18/16, at 161-162 (PCRA Ex. 8).) They were found by police in Jamie's bed hours later and taken in for questioning. (Record, Doc. 1, Criminal Complaint, at 6 (Aff. of Probable Cause).)

During her interrogation hours after her mother's murder, Jamie stated that Barnes had forcibly raped her. (Police Interview 3/15/15, at 156, 173.) Jamie cited three instances of sexual intercourse with Mr. Barnes — once in her basement, days before the murder, once in her mother's car in the concert venue parking garage on the night of the murder (where her mother found them), and once in her bed after the murder. (PCRA Hr'g Tr. 10/8/21 at 27:17-28:5.) Jamie had no sexual experience before her relationship with Mr. Barnes. (PCRA Hr'g Tr. 10/8/21 at 27:17-23.)

The police sent Jamie for a medical examination, where the doctor who examined Jamie found bruising on her neck, thighs and buttocks consistent with her report of sexual assault, and concluded that Jamie had been sexually assaulted. (the "**CY-104 Report**") (Com. Ex. 10.)

Jamie and Barnes were charged as adults with criminal homicide. (See Record, Doc, 1, Criminal Complaint, at 4.)

B. Jamie's Decertification Hearing.

1. The Pre-Hearing Preparation.

Jamie's father retained Attorney John Waldron ("**Attorney Waldron**") to represent Jamie. (See Record, Doc. 11, Praecipe of Appearance, John Waldron Esq.) Attorney Waldron filed a motion to decertify Jamie's case from adult to juvenile court. (Record, Doc. 12, Motion to Remand Case to Juvenile Division.)

Attorney Waldron retained Dr. Frank Dattilio, a forensic psychologist, to provide expert testimony at Jamie's Decertification Hearing. (PCRA Hr'g Tr. 10/6/21 at 23:13-15.) At Dr. Dattilio's recommendation, Attorney Waldron also engaged Dr. Steven Berkowitz, a clinical psychiatrist, to evaluate Jamie. (PCRA Hr'g Tr. 11/10/21 at 9:11-15.) Drs. Dattilio and Berkowitz both wanted to retain a mitigation specialist to help with witness interviews and factual investigation, but Attorney Waldron declined. (PCRA Hr'g Tr. 10/6/21 at 34:12-35:18; PCRA Hr'g Tr. 11/10/21 at 22:15-18.)

Dr. Berkowitz concluded that Jamie had a non-verbal learning disability and recommended neuropsychological testing to assess Jamie's neurocognitive functioning, both to "pinpoint the areas of deficit and be more specific about the nature of the connection between the nonverbal learning disorder and her behavior" and to "indicate areas where intervention and treatment may be effective." (PCRA Hr'g Tr. 11/10/21. at 17:4-13, 17:21-18:2.) Dr. Dattilio recommended experts to conduct that testing, but Attorney Waldron again declined. (PCRA Hr'g Tr. 10/6/21 at 34:2-11; PCRA Hr'g Tr. 11/10/21. at 22:15-23:7.)

Drs. Dattilio and Berkowitz expected Attorney Waldron to give them all of the information he received regarding Jamie's case. (PCRA Hr'g Tr. 10/6/21 at 31:11-20; PCRA Hr'g Tr. 11/10/21 at 13:11-14.) He did not. The materials that Attorney Waldron had in his possession before Jamie's Decertification Hearing, but did not give his experts, include:

- the CY-104 Report documenting physical evidence of Jamie's sexual assault (Com. Ex. 10; PCRA Hr'g Tr. 10/4/21 at 67:22-68:3);

- a January 2014 military police report from Barnes' military records (the "**Military Police Report**") describing a violent encounter between Barnes and the military police several months before Barnes met Jamie, during which Barnes tried to gouge out his own eye with a knife (one of several found on his person) and had to be tased into submission before he could be handcuffed (Record, Doc. 121, Amended PCRA Pet., App. X (PCRA Ex. 31., Military Police Report); PCRA Hr'g Tr. 10/4/21 at 74:18-21 (Attorney Waldron testimony); PCRA Hr'g Tr. 10/6/21 at 75:11-16 (Dr. Dattilio testimony); PCRA Hr'g Tr. 11/10/21 at 39:8-20 (Dr. Berkowitz testimony); Dattilio Report 9/17/15, at 2 (Military Police Report not listed in Materials Received));
- images from Barnes' computer of knives from his knife collection, which he labeled "my killers" (Record, Doc. 121, Amended PCRA Pet., App. Y (PCRA Ex. 30); PCRA Hr'g Tr. 11/10/21 at 40:14-21, 43:15-44:10 (Dr.

Berkowitz testimony); Dattilio Report 9/17/15, at 2 (my killers images not listed in Materials Received);

- Mr. Barnes' text messages with Jamie, going back to the beginning of their relationship in October 2014;⁵ and
- a security camera video of Jamie and Barnes in Wal-Mart in the hours after her mother's murder.⁶

Attorney Waldron deliberately did not give the CY-104 Report to his experts because he believed Jamie was a liar and her report of sexual assault was therefore not credible. (PCRA Hr'g Tr. 10/4/21 at 67:22-68:3.)

⁵ Attorney Waldron gave Dr. Dattilio only a portion of the texts between Mr. Barnes and Jamie from the spring of 2015. (PCRA Hr'g Tr. 10/6/21 at 72:22-73:21; Decert. Hr'g Tr. 10/29/15 at 70:1-25.) He gave Dr. Berkowitz the full set of Barnes' texts with Jamie – comprising two binders of more than 6000 messages – the weekend before Dr. Berkowitz was scheduled to testify at Jamie's decertification hearing, more than one month after Dr. Berkowitz had interviewed Jamie and submitted his report. (Decert Hr'g Tr. at 60:14-21; PCRA Hr'g Tr. 11/10/21 at 97:11-98:13.)

⁶ At the PCRA Hearing, Attorney Waldron testified that Dr. Dattilio had "access" to the Wal-Mart video. (PCRA Hr'g Tr. 10/4/21 at 65:8 -66:22.) Dr. Dattilio, however, testified that he asked to see the video but could not. (PCRA Hr'g Tr. 10/6/21 at 167: 17-20; Decert Hr'g 10/29/2015 at 78:3-7 .) In his report, Dr. Dattilio listed the materials he reviewed, and the Wal-Mart video was not included. (Dattilio Report 9/17/15, at 2.) Likewise, Dr. Berkowitz knew the video existed but never received it from Attorney Waldron. (PCRA Hr'g Tr. 11/10/21 at 28:14-18.)

Attorney Waldron did not interview any potential fact witnesses before Jamie's Decertification Hearing, although he retained an investigator to interview some and Dr. Dattilio, on his own initiative, interviewed others. (PCRA Hr'g Tr. 10/4/21 at 22:19-23:12, 46:12-23.) Witnesses who were available and willing to testify on Jamie's behalf included Jamie's grandmother (Cheryl Silvonek's mother), who was with Jamie nearly every day of Jamie's life; Jamie's aunt (Cheryl Silvonek's sister-in-law), who also had a close relationship with Jamie; the mother of Jamie's closest friend; Jamie's pastor; and a teacher who taught Jamie every year from kindergarten through eighth grade. (PCRA Hr'g Tr. 10/5/21 at 7:5-19:11 (testimony of Margaret Lynn); *id.* at 19:17-39:7 (testimony of Tonya Lynn); *id.* at 91:21-105:14 (testimony of Pastor Jimmy Lee Werley); PCRA Hr'g Tr. 10/6/21 at 4:19-18:15 (testimony of Heather Lesko); *id.* at 186:4- 202:8 (testimony of Erich Joella); *id.* at 202:18-223:4 (testimony of Nicolas Jupina).)

2. The Decertification Hearing.

At Jamie's Decertification Hearing, Attorney Waldron called three witnesses – Dr. Dattilio, Dr. Berkowitz and Lisa Costello, a Lehigh County Juvenile Probation Officer. (PCRA Hr'g Tr. 10/4/21 at 62:14-14.) He did not introduce the CY-104 Report, Barnes' Military Police Report or other evidence showing that Barnes had abused Jamie. (*See generally* Decert. Hr'g Tr. 10/29/15; Decert. Hr'g Tr. 11/2/15.) Nor did he call any fact witnesses to attest to Jamie's character, degree of culpability or amenability to treatment. (See PCRA Hr'g Tr. 10/4/21 at 85:11-16.)

Drs. Dattilio and Berkowitz opined that Jamie was amenable to treatment in the juvenile justice system and should be decertified. (Decert. Hr'g Tr. 10/29/15 at 48:18-25; Decert Hr'g Tr. 11/2/15 at 41:19-22.) They noted, among other things, that Jamie was highly intelligent but emotionally immature, and that she had no history of violence or antisocial behavior. (Decert. Hr'g Tr. 10/29/15 at 48:6-17; Decert Hr'g Tr. 11/2/15 at 20:14-15, 33:5-13.)

Officer Costello testified generally regarding juvenile facilities in Pennsylvania but could not offer any testimony regarding which particular facilities or treatment programs might be suitable for Jamie because Attorney Waldron did not have Officer Costello interview Jamie. (Decert Hr'g Tr. 10/29/15 at 106:9-15; PCRA Hr'g Tr. 10/4/21 at 83:17-84:4.)

The Commonwealth called a teacher from Jamie's school, who had never taught Jamie but advised her on a science fair project, to testify that Jamie was a "chameleon." (Decert Hr'g Tr. 10/29/15 at 267:11-12, 272:24-273:1.) The Commonwealth also presented expert testimony from Dr. John O'Brien, a psychiatrist who opined that Jamie showed signs of "an evolving Cluster B Personality Disorder." (*Id.* at 192:7-10.) Dr. O'Brien offered no opinion as to whether Jamie was amenable to treatment in the juvenile justice system; rather, he opined that Jamie was so manipulative that no treating professional could do so with reasonable medical certainty. (*Id.* at 200:19-23, 201:6-12; *see also* PCRA Hr'g Tr. 11/12/21 at 62:2-3.)

Attorney Waldron presented no rebuttal to the Commonwealth's evidence. (See PCRA Hr'g Tr. 10/4/21 at 84: 11-13.) Drs. Dattilio and Berkowitz, and fact witnesses including Jamie's grandmother and aunt (the murder victim's mother and sister-in-law), as well as Jamie's teacher, pastor and the mother of her closest friend were all available and willing to testify in rebuttal if called. (PCRA Hr'g Tr. 10/6/21 at 80:22-24 (Dr. Dattilio); PCRA Hr'g Tr. 11/10/2021 at 44:17-46:5 (Dr. Berkowitz); *see also* p. 17, *supra* (character witnesses)).

3. The Decertification Order.

The Trial Court (Dantos, J.) denied Jamie's motion for decertification. (Appendix E at E1 (PCRA Ex. 6).) The Court rejected the testimony of Drs. Dattilio and Berkowitz in its entirety because neither of them had reviewed the full record in forming their opinions. (*Id.* at 27, 30-31.) The Court also noted that Officer Costello expressed no opinion regarding the suitability of any particular juvenile treatment facility for Jamie. (*Id.* at 33.) The Court further held that Jamie's lack of a recognized mental health

diagnosis rendered her not amenable to treatment. (*Id.* at 33, n.18.)

C. Jamie's Guilty Plea and Sentencing.

On February 8, 2016, after the Trial Court denied Jamie's request for decertification, Attorney Waldron discussed a potential plea with counsel for the Commonwealth pursuant to which Jamie would plead guilty to first degree murder with a maximum sentence of 35 years to life. (PCRA Hr'g Tr. 10/4/21 at 147:13-15.) Attorney Waldron wanted a minimum sentence of 25 years, but he did not know whether Judge Dantos would accept it. (*Id.* at 29:21-30:4.) Attorney Waldron arranged a meeting with Judge Dantos and Commonwealth counsel to discuss the plea terms that Judge Dantos would accept. (*Id.* at 24:19-25:7, 30:14-16.) At that meeting, Judge Dantos informed Attorney Waldron that she would not accept a plea of less than 35 years to life. (*Id.* at 24:24-25:1.) Attorney Waldron did not talk with Jamie about a possible plea before his meeting with Judge Dantos. (See PCRA Hr'g Tr. 10/4/21 at 150:7-22.)

The next day, Attorney Waldron met with Jamie and her father for one hour to discuss a potential plea. (See *id.* at 41:3-12.) In that meeting, Attorney Waldron told Jamie that Judge Dantos would not accept a plea of less than 35 years to life. (*Id.* at 27:3-6.) He also told Jamie that, if she pled guilty and then testified at Barnes' trial, her sentence might be reduced. (*Id.* at 64:16-21, 156:15-17.)

Jamie entered a guilty plea two days later. (*Id.* at 42:5-8.) Attorney Waldron asked the Court to sentence Jamie that same day, and the Court did so, sentencing her to 35 years to life. (Guilty Plea and Sentencing Tr. at 30:4-10, 40:11-25 (PCRA Ex. 14). See *also* Appendix F.)

D. Jamie's Appeal.

Attorney Waldron appealed the Trial Court's Decertification Order. On appeal, he did not cite controlling authority from the Pennsylvania Supreme Court holding that the lack of a recognized mental health diagnosis does not mean that a child is not amenable to treatment in the juvenile system. (PCRA Hr'g Tr. 10/4/21 at

178:2-8.; *see also Commonwealth v. Kocher*, 602 A.2d 1308 (Pa. 1992).)

VI. Statement of Order Under Review.

In the Order, the PCRA Court held that: (a) Jamie's plea was knowing and voluntary; and (b) Attorney Waldron's representation of Jamie was not ineffective. The PCRA Court therefore denied Jamie's PCRA Motion. (Appendix A at A1.)

SUMMARY OF THE ARGUMENT

Jamie was barely a teenager when she was convicted of first-degree murder. That alone makes this case exceptional.⁷ The array and scope of errors committed by her attorney are likewise exceptional, causing a travesty of justice. This Court can, and should, correct that.

Attorney Waldron's mishandling of Jamie's case raises two compelling concerns.

⁷ In more than 40 years, just six children aged 13 or 14 have been convicted of murder in Pennsylvania. (See Record, Doc. 121, Amended PCRA Petition, at 132, n. 37).) Just one of those children was convicted of first degree murder when he did not wield the murder weapon. (*Id.*)

First, as a matter of law, and even on the facts as found by the PCRA Court, Attorney Waldron's involvement of the Trial Court in plea negotiations before Jamie entered a plea rendered her plea involuntary as a matter of Constitutional due process and fundamental fairness. *See Evans*, 252 A.2d at 691. The PCRA Court's ruling to the contrary violates controlling authority from the Pennsylvania Supreme Court and should be reversed.

Second, the PCRA Court's attempts to excuse Attorney Waldron's ineffective assistance of counsel are equally flawed, both legally and factually. Attorney Waldron kept critical evidence of Barnes' violent and unstable character, and the degree of his control over Jamie, from his key experts, Drs. Dattilio and Berkowitz. He deliberately withheld a report documenting physical evidence of Jamie's sexual assault from his experts because he believed his client – a 14-year old child whose boyfriend had murdered her mother before her eyes – was a liar. He did not allow Officer Costello to interview Jamie, leaving her unable to testify about suitable treatment programs for Jamie. He failed to present **any** mitigating factual evidence at Jamie's Decertification

Hearing, in violation of national and state standards, and even after the Commonwealth had called witnesses to testify that Jamie was a “chameleon” and a “budding sociopath.”

Attorney Waldron’s mishandling of Jamie’s case had grave consequences. The Trial Court disregarded the testimony of Drs. Dattilio and Berkowitz ***in its entirety*** because Attorney Waldron had not given them the full evidentiary record to review. The Trial Court disregarded Officer Costello’s testimony because she could not speak to any particular placement that would be suitable for Jamie. And the Trial Court was left with an unrebutted impression of Jamie as a lying, manipulative, criminal mastermind, even though the people who knew Jamie best were ready and willing to testify to the contrary. On the record before it, it is perhaps unsurprising that the Trial Court denied decertification.

Even when he appealed the Trial Court’s denial of decertification for Jamie, Attorney Waldron did not cite to this Court controlling authority that debunked one of the Trial Court’s key findings – namely, that because Jamie had no recognized mental health diagnosis, she was not amenable to treatment.

The PCRA Court's decision that Attorney Waldron did nothing wrong is contrary to law and undisputed fact. Its findings that Jamie's plea was voluntary, and that Attorney Waldron's representation was not ineffective, should be reversed.

ARGUMENT

Appellant Jamie Silvonek was a 13-year old child in eighth grade – an honor student with no history of violence or antisocial behavior – when she met Barnes, a 20-year old soldier with a history of violence and instability. Barnes quickly drew Jamie into an intense, isolating relationship that subjected Jamie to emotional and physical coercion and control. Months later, just weeks after Jamie's fourteenth birthday, Barnes murdered Jamie's mother – in Jamie's presence – because Jamie's mother had learned of their relationship and insisted that it end.

This tragic event resulted in Jamie being charged as an adult with first degree murder. As set forth in detail below, following a botched decertification hearing at which her attorney, John Waldron, committed numerous errors, Jamie's petition to be tried as a child was denied. That denial only compounded the tragedy of

this case. Due to Attorney Waldron's ineffective assistance of counsel, not only was Jamie prosecuted as an adult, but she also entered a guilty plea that was legally involuntary, which led to her current incarceration in an adult prison for a minimum of thirty-five years. Jamie's incarceration has left her mother's grieving family and community to suffer yet another loss, as Jamie — also a beloved member of her family and community, who was drawn as a child into a relationship with a violent older man that led to her mother's tragic death — will remain behind bars for decades to come unless this Court corrects the egregious errors that preceded this PCRA claim.

I. Jamie's Plea Was Not Knowing and Voluntary.

A. Trial Judges Are Barred from *Any* Participation in Plea Bargaining Before the Offer of a Guilty Plea.

For at least half a century, trial judges in this Commonwealth have been barred from participating in plea bargain discussions before the offer of a plea. *Evans*, 252 A.2d at 691. "Participation, in the sense there used, denotes some active role in discussion or negotiation relative to a plea." *Commonwealth v. Sanutti*, 312 A.2d 42, 44 (Pa. 1973).

The *Evans* Court explained the reason for this absolute prohibition:

First, the defendant can receive the impression from the trial judge's participation in the plea discussions that he would not receive a fair trial if he went to trial before the same judge. Second, if the judge takes part in the preplea discussions, he may not be able to judge objectively the voluntariness of the plea when it is entered. Finally, the defendant may feel that the risk of not going along with the disposition which is apparently desired by the judge is so great that he ought to plead guilty despite an alternative desire.

Evans, 252 A.2d at 690-91.

The Court emphasized that the issue is one of fundamental fairness:

What was pointed out in a recent case bears repeating here: "The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence." For these reasons, we feel compelled to forbid any participation by the trial judge in the plea bargaining **prior** to the offering of a guilty plea.

Id. (emphasis in original) (quoting *U.S. ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244, 254 (S.D.N.Y.1966)).

The Court accordingly held that “[i]t is the view of this Court that such a procedure ***is not consistent with due process*** and that a plea entered on the basis of a sentencing agreement in which the judge participates ***cannot*** be considered voluntary.” *Id.* at 690 (emphasis added).

B. Attorney Waldron Presented Jamie with a “Fully-Formed Plea Proposal” that He Had Already Negotiated with the Trial Court.

In this case, the Trial Court did not just discuss plea terms with Attorney Waldron before Jamie offered a guilty plea. Judge Dantos ***told*** Attorney Waldron the plea terms that she would (and would not) accept before he ever even spoke with Jamie about a plea. As the undisputed evidence showed, and the PCRA Court found, when Attorney Waldron first met with Jamie to discuss a plea he presented her with a “formed plea offer” that he had already negotiated with the Commonwealth and vetted with Judge Dantos, “and also conveyed that Judge Dantos would not accept any sentence less than thirty-five (35) years on the minimum with

regard to the charge of Murder of the first degree.” (Appendix B at B7.)⁸

That is precisely the scenario that the *Evans* Court held to violate due process and substantial fairness. Jamie was never given a chance to consider voluntarily what plea she might want to offer. Instead, she was presented with a *fait d’accompli* – a “fully-formed plea proposal” (Appendix B at B6), the terms of which Attorney Waldron had already discussed with the Commonwealth and then allowed Judge Dantos to conclusively set, coupled with an express warning that Judge Dantos would accept nothing less than a plea of 35 years to life. It is hard to image a clearer violation

⁸ The PCRA Court acknowledged that “Attorney Waldron had not discussed concrete numbers/years of incarceration with regard to a plea deal with the Defendant or her father” until after he met with Judge Dantos. (Appendix B at B7, n.11.) In fact, Attorney Waldron never discussed a plea **at all** with Jamie before he met with Judge Dantos. (See PCRA Hr’g Tr. 10/4/21 at 150:11-22 (**Q [Commonwealth]**: Did you, however -- at some point prior to you deciding to go down with me to Judge Dantos, prior to that, had you had any discussions with Ms. Silvonek about the potential for resolving the case just broadly through a plea? **A [Attorney Waldron]**: You know, I don't think -- I don't think we discussed the plea or anything along those lines prior to the decertification, because we were looking forward to the decertification hoping that that would be successful. So we weren't talking about a plea in criminal court or the potential sentences or anything until we saw what happened with the decertification.); see also *id.* at 150:7-10 (Attorney Waldron did not discuss with Jamie his plea negotiations with the Commonwealth before meeting with Judge Dantos).)

of *Evans*. The fact that Jamie was a 14-year old child only heightens the severity of that violation. See *Hernandez*, 2015 WL 6080360, at *6 (“[W]hen a juvenile seeks to confess guilt to a crime, close scrutiny must be paid to the surrounding circumstances.”)⁹

C. The PCRA Court Erred as a Matter of Law in Attempting to Excuse the Trial Court’s Participation in Jamie’s Plea Bargaining.

The PCRA Court strained to justify Attorney Waldron’s plea-related communications with Judge Dantos. In doing so, it applied the wrong legal standard, wrongly credited Judge Dantos’ statements from the bench regarding her discussions with Attorney Waldron and reached an ultimate conclusion that cannot be reconciled with its own factual findings.

First, the PCRA Court wrongly held that, “[i]n order to be granted relief based on the involuntary and unknowing nature of a guilty

⁹ Attorney Waldron’s false representation to Jamie that, if she pled guilty and cooperated with the Commonwealth at Barnes’ trial, her sentence might later be reduced, further contributed to the involuntariness of Jamie’s plea. (See Appendix B at B7, n.12; PCRA Hr’g Tr. 10/4/21 at 44:8-45:10, 64:16-21, 156:15-17; see also, e.g., *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (voluntariness of plea depends on whether counsel’s advice was within range of required competence); *U.S. v. Couto*, 311 F.3d 179, 187-88 (2d Cir. 2002).

plea, the defendant must prove by a preponderance of the evidence that the defendant was induced, where the circumstances make it likely that the inducement caused the defendant to plead guilty and the defendant is innocent.” (Appendix B at B5 (citing 42 Pa. C.S.A. § 9543(a)(2)(iii).) Jamie never sought relief under that PCRA provision and it has nothing to do with this case.

Rather, Jamie’s plea was involuntary because (a) the Trial Court’s participation in her plea bargaining before Jamie offered a plea violated Constitutional due process and fundamental fairness, and (b) Attorney Waldron’s ineffective representation, including his invitation to Judge Dantos to participate in unlawful pre-plea discussions, led Jamie to enter her involuntary plea. The PCRA permits withdrawal of an involuntary guilty plea on each of those separate grounds. See 22 Pa. C.S.A. §§ 9542(a)(2)(i) (PCRA relief available for “violation of the Constitution of this Commonwealth or the Constitution or laws of the United States”) and § 9542(a)(2)(ii) (PCRA relief available for “[i]neffective assistance of counsel”). See *also, e.g., Evans*, 252 A.2d at 691 (vacating unconstitutional guilty plea and judgment under PCRA in light of

trial court's pre-plea participation); *Commonwealth v. Kersteter*, 877 A.2d 466, 468 (Pa. Super. 2005) ("A defendant is permitted to withdraw [her] guilty plea under the PCRA if ineffective assistance of counsel caused the defendant to enter an involuntary plea of guilty.") (citation omitted).

Second, the PCRA Court wrongly credited Judge Dantos' statement – made *sua sponte* in her Recusal Order (see Appendix I at I2, n.1 (PCRA Ex. 15))– that "at no point did this Court directly participate in plea negotiations in this matter." (Appendix B at B6 and n.9 (citing Judge Dantos' representation).) It was improper for Judge Dantos to profess from the bench personal knowledge regarding her participation in Jamie's plea bargaining, and equally improper for the PCRA Court to rely on those non-evidentiary representations. See, e.g., 1 JONES ON EVIDENCE § 2:12 (7th ed.) ("Even though facts are known to the judge personally, they must be proved by evidence unless they are matters of which judicial notice may properly be taken. Thus, it is inappropriate for a judge to rely on personal knowledge in ruling on a pretrial motion, a suppression hearing, or on the merits."); see also, e.g., *Mun.*

Pubs., Inc. v. Ct. of Common Pleas of Phila. County, 489 A.2d 1286, 1289 (Pa. 1985) (noting that it is improper for a judge to “decide[] to give testimony concerning his own conduct” where the judge “not only had personal knowledge of disputed facts but was in a position to rule on objections to his own testimony and to assess his own credibility in light of conflicting evidence”).

Third, the PCRA Court’s ultimate conclusion that Jamie’s plea was voluntary because “it [is] extremely clear that the trial Court did not participate in plea negotiations” (Appendix B at B6) is belied by the Court’s own recitation of the undisputed facts:

In late 2016, discussions occurred among Attorney Waldron, District Attorney James B. Martin, and members of his staff. Ultimately the Commonwealth offered the Defendant a cap of the minimum sentence at thirty-five (35) years in exchange for a guilty plea to Murder of the first-degree.[] However, as Attorney Waldron was familiar with Judge Dantos’ strict sentencing practices, he was concerned that she would not accept this plea offer. Consequently, Attorney Waldron and the prosecutor scheduled a conference with Judge Dantos in order to determine if she would accept this fully-formed plea proposal.* During the conference, it became clear that Judge Dantos would not accept a plea that entailed a minimum sentence of less than thirty-five (35) years on the Murder of the first-degree charge, but rather a fixed minimum sentence of thirty-five (35) years. Hence, the thirty-five (35) years mentioned by Judge Dantos had already been a part of the agreement arrived at between the prosecutor and Attorney Waldron....

After this conference with Judge Dantos, Attorney Waldron spoke with the Defendant's father, David Silvonek, regarding the plea agreement entailing a fixed minimum sentence of thirty-five (35) years on the charge of Murder of the first-degree. After speaking with Mr. Silvonek, Attorney Waldron petitioned the Court to allow Mr. Silvonek to be present when Attorney Waldron presented and explained the formed plea agreement offered by the Commonwealth.[] The Court granted said request on February 9, 2016. During this meeting at the Lehigh County Jail, Attorney Waldron communicated to the Defendant and her father the formed plea offer and also conveyed that Judge Dantos would not accept any sentence less than thirty-five (35) years on the minimum with regard to the charge of Murder of the first degree.

* Attorney Waldron did not want to present the Defendant with the plea offer that entailed a cap of the minimum sentence at thirty-five (35) years, only to have it be rejected later by the Court. The purpose of this conference was to avoid such a situation by quantifying the minimum sentence ahead of time.

(Appendix B at B5-B7 and n.8 (internal record citations omitted).)¹⁰

¹⁰ Although the PCRA Court found that Attorney Waldron and counsel for the Commonwealth presented Judge Dantos with a "fully formed plea proposal," the undisputed evidence was to the contrary. Before meeting with Judge Dantos, Attorney Waldron and counsel for the Commonwealth had discussed a potential plea with a cap of 35 years to life, but with no agreement on a minimum sentence. (PCRA Hr'g Tr. 10/4/21 at 147:13-15.) Attorney Waldron wanted a minimum sentence of 25 years, but he did not know whether Judge Dantos would accept that. (*Id.* at 29:21-30:4.) Attorney Waldron requested the meeting with Judge Dantos to find out what terms she would accept. (*Id.* at 24:19-25:7; 30:14-16.) At that meeting, Judge Dantos advised that she would not accept a plea of less than 35 years to life. (*Id.* at 24:24-25:1.) **After** the meeting with Judge Dantos, Attorney Waldron and counsel for the

The fact that Attorney Waldron also talked with Jamie about the likely outcome of a trial (his assessment of which was tainted by his own mishandling of Jamie’s case, as discussed below), and that Jamie subsequently participated in a colloquy with the Trial Court when she entered her plea (see Appendix B at B7-B9), as the PCRA Court noted, neither neutralizes nor erases the fundamental violation of Jamie’s due process rights that Attorney Waldron committed when – as the PCRA Court itself found – he presented Jamie, a 14-year old child, with a “fully formed plea proposal” that he had already negotiated with the Commonwealth and vetted with the Trial Court, and informed her that the Trial Court would accept nothing less than a plea of 35 years to life.¹¹ The Trial Court’s participation in setting the terms of Jamie’s plea, which happened

Commonwealth agreed to a plea with 35 years as the minimum sentence. (*Id.* at 30:22-31:18.) It was Judge Dantos – not counsel – who set the minimum sentence for Jamie’s proposed plea at 35 years. Regardless, there is no dispute that Attorney Waldron presented **Jamie** with both a fully formed plea deal and a clear admonition that Judge Dantos would accept nothing less.

¹¹ Notably, even Judge Dantos’ description of her involvement in Jamie’s plea confirms the violation of *Evans*. Although she denied that she “directly participate[d]” in Jamie’s plea bargaining, she acknowledged that “trial counsel and the Commonwealth requested a meeting with the Court to determine if this Court would reject a potential plea.” (Appendix I at I2, n. 1 (PCRA Ex. 15).) That admitted meeting, **before** Jamie offered a plea, was a clear violation of *Evans*.

before Jamie ever even had a chance to consider what plea she might want to make, renders her plea involuntary as a matter of law. *Evans*, 252 A.2d at 691. The PCRA Court's finding to the contrary should be reversed.

II. Attorney Waldron's Representation Was Ineffective.

The PCRA Court's denial of Jamie's ineffective assistance of counsel claim was equally flawed. The Court invented justifications with no evidentiary support for Attorney Waldron's failure to meet basic standards for representing children in decertification proceedings, and improperly shifted the responsibility of representing Jamie effectively from Attorney Waldron to his experts. The Court also, as discussed above, erred in excusing Attorney Waldron's improper handling of Jamie's plea. The Court further erred in excusing Attorney Waldron's failure to cite on appeal controlling authority that contradicted one of the Trial Court's key findings.

When Attorney Waldron's conduct is viewed in light of the actual evidentiary record and the proper legal standards, there can

be no question that his representation of Jamie fell well below the constitutionally required standards. *Cf. Rios*, 920 A.2d at 810.

A. Applicable Legal Standards.

1. Elements of a PCRA Claim for Ineffective Assistance of Counsel.

Pennsylvania applies the “performance and prejudice test” set forth in *Strickland v. Washington*, 466 U.S. 668, 698 (1984), to ineffectiveness claims. *See, e.g., Commonwealth v. Vandivner*, 130 A.3d 676, 680 (Pa. 2015). To sustain a claim of ineffective assistance of counsel, a petitioner must establish that: (1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's action or failure to act; and (3) the petitioner suffered prejudice as a result of counsel's error, with prejudice measured by whether there is a reasonable probability that the result of the proceeding would have been different. *Id.*

A “reasonable probability” is defined as “a degree of likelihood ‘sufficient to undermine confidence in the outcome of the proceeding.’” *Commonwealth v. Little*, 246 A.3d 312, 326 (Pa. Super. 2021) (quoting *Commonwealth v. Collins*, 957 A.2d 237, 244 (2008)). The reasonable probability analysis is not a

“stringent” test and it is “less demanding than the preponderance standard.” *Id.* (quoting *Commonwealth v. Hickman*, 799 A.2d 136, 141 (Pa. Super. 2002)) (internal quotations omitted).

Although non-meritorious claims of error cannot collectively warrant relief, the cumulative effect of multiple errors can be considered in the prejudice analysis. See *Commonwealth v. Bardo*, 105 A.3d 678, 717 (Pa. 2014).

2. Standards for Representing Children in Criminal Proceedings.

The need for effective assistance of counsel is paramount in decertification proceedings, where the determination of whether a child will be tried as an adult in criminal court can have “monumental” consequences. *Commonwealth v. Brown*, 26 A.3d 485, 494 (Pa. Super. 2011) (quoting *Kent v. U.S.*, 383 U.S. 541, 556 (1966)). Effective assistance of counsel during the decertification process “is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice.” *Kent*, 383 U.S. at 561.

When considering an attorney's effectiveness, courts look to "[p]revailing norms of practice" as reflected in applicable professional standards. *Wiggins v. Smith*, 539 U.S. 510, 523 (2003).

There are both national standards and Pennsylvania guidelines that describe prevailing standards of practice for effective representation of children who are criminally charged as adults. See generally NATIONAL JUVENILE DEFENSE STANDARDS, ("NATIONAL STANDARDS")¹²; Juvenile Defender Ass'n of Pa., PERFORMANCE GUIDELINES FOR QUALITY AND EFFECTIVE JUVENILE DELINQUENCY REPRESENTATION ("PA. GUIDELINES")¹³.

Attorneys representing children in adult criminal court should interview "all witnesses named by the client, all known state witnesses, and any other relevant witnesses," and "[p]resent all facts, mitigating evidence and testimony that may convince the

¹² <https://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf> (last visited July 1, 2022).

¹³ <https://njdc.info/wp-content/uploads/2016/03/PA-Performance-Guidelines-for-Quality-Effective-Juv-Del-Representation-2010.pdf> (last visited July 1, 2022).

court to keep the client in juvenile court.” NATIONAL STANDARDS, Standards 4.3, 8.4; *see also id.* at Standard 8.3.

Attorneys representing children in Pennsylvania decertification proceedings have a further “obligation to actively investigate the social, psychological and educational history of the child,” and should “be prepared to offer evidence and testimony, such as from teachers, counselors, psychologists, probation officers, religious associates, and/or employers, to establish amenability to the juvenile system.” PA. GUIDELINES, Guideline 9, Sections 2, 3.¹⁴

B. The PCRA Court’s Finding that Attorney Waldron’s Representation Was Effective Is Legally Flawed and Not Supported by the Record.

1. Jamie Had a Strong Claim for Decertification.

People who had known Jamie her entire life – including the murder victim’s own mother and sister-in-law – were prepared to testify at Jamie’s Decertification Hearing that Jamie was a loving,

¹⁴ Jamie was prepared to call an expert witness to present evidence at the PCRA Hearing regarding prevailing norms of practice in Pennsylvania PCRA proceedings, but the PCRA Court did not permit her to do so. (PCRA Hr’g Tr. 10/5/21 at 88:4-90:25.)

naïve, emotionally immature child with no history of violence or antisocial behavior. (See, e.g., PCRA Hr'g Tr. 10/5/21 at. 13:4-5; 13:11; *id.* at 25:9-12.) Their testimony, coupled with an informed review of Jamie's extensive communications with Mr. Barnes over a period of months, the evidence of Barnes' violent tendencies (as demonstrated by his Military Police Report and the photos reflecting his obsession with knives), the CY-104 Report documenting bruises on Jamie's body corroborating her statement that Mr. Barnes had sexually assaulted her, and testimony from Jamie's friends who witnessed Mr. Barnes' controlling behavior with Jamie (see, e.g., Dattilio Report 9/17/15, at 11) would have presented a compelling picture of a vulnerable child who had become entangled in an intense, abusive relationship with a violent, unstable older man. (See *generally* PCRA Hr'g Tr. 10/8/21 at 8:6-98:13 (PCRA testimony of Dr. Marty Beyer, psychologist, reviewing evidence available at time of Jamie's decertification hearing).)¹⁵

¹⁵ Dr. Beyer's testimony at Jamie's PCRA Hearing showed what Drs. Dattilio and Berkowitz could have addressed in Jamie's Decertification Hearing if

Even with the incomplete information they had, Drs. Dattilio and Berkowitz – two highly regarded specialists in child psychology and psychiatry – were confident that Jamie was amenable to treatment in the juvenile system. (Decert. Hr’g Tr. 10/29/15 at 48:18-25; Decert Hr’g Tr. 11/2/15 at 41:19-22.)

In all, Jamie had a strong case for decertification. A child charged with murder must show by a preponderance of evidence that decertification would serve the public interest pursuant to the factors enumerated in 42 Pa. C.S.A. § 6355(a)(4)(iii). 42 Pa. C.S.A. § 6322(a). Those factors are:

- (A) the impact of the offense on the victim or victims;
- (B) the impact of the offense on the community;
- (C) the threat to the safety of the public or any individual posed by the child;
- (D) the nature and circumstances of the offense allegedly committed by the child;
- (E) the degree of the child's culpability;

Attorney Waldron had given them the relevant evidence and prepared and examined them effectively. (See *generally* PCRA Hr’g Tr. 10/8/21 (Dr. Beyer PCRA testimony). See *also* PCRA Hr’g Tr. 10/6/21 at 19:1-185:11 (Dr. Dattilio PCRA testimony); PCRA Hr’g Tr. 11/10/21 (Dr. Berkowitz PCRA testimony).)

(F) the adequacy and duration of dispositional alternatives available under this chapter and in the adult criminal justice system; and

(G) whether the child is amenable to treatment, supervision or rehabilitation as a juvenile by considering the following factors:

(I) age;

(II) mental capacity;

(III) maturity;

(IV) the degree of criminal sophistication exhibited by the child;

(V) previous records, if any;

(VI) the nature and extent of any prior delinquent history, including the success or failure of any previous attempts by the juvenile court to rehabilitate the child;

(VII) whether the child can be rehabilitated prior to the expiration of the juvenile court jurisdiction;

(VIII) probation or institutional reports, if any; [and]

(IX) any other relevant factors.

42 Pa. C.S.A. § 6355(a)(4)(iii).

Here, although the murder of Jamie's mother had a powerful impact on her family and community, and Jamie's involvement in that murder was both tragic and painful, the people most affected

by it were ready and willing to testify on Jamie's behalf. There was compelling evidence that Barnes – an unstable, violent man who was exerting considerable control over Jamie and subjecting her to emotional and physical coercion and abuse – was far more culpable in the murder of Jamie's mother than Jamie. Jamie's young age, lack of any prior delinquent history, lack of sophistication (criminal or otherwise), and mental capacity all weighed in favor of decertification.

2. There Was No Reasonable Basis for Attorney Waldron's Failure to Represent Jamie Effectively in Her Decertification Hearing.

National and state standards governing the representation of children in decertification proceedings emphasize the need to identify and present "all facts, mitigating evidence, and testimony that may convince the court to keep the client in juvenile court." NATIONAL STANDARDS, Standards 4.3, 8.4; *see also id.* at Standard 8.3; *see also* PA. GUIDELINES, Guideline 9, Sections 2, 3.

Other than his experts, Attorney Waldron presented **no** testimony or mitigating evidence at Jamie's Decertification Hearing. Even when the Commonwealth presented testimony from

a teacher who had, at best, limited interaction with Jamie to testify that Jamie was a manipulative “chameleon” (Decert Hr’g Tr. 10/29/15 at 267:11-12, 272:24-273:1), Attorney Waldron did not call a single witness to rebut that testimony, even though numerous witnesses were available and ready to do so. (PCRA Hr’g Tr. 10/4/21 at 84:11-13.)

Attorney Waldron failed to give his experts material information in his possession – including, among other things, the CY-104 Report that corroborated Jamie’s report of sexual assault and all of Jamie’s texts with Mr. Barnes. (See *e.g.*, PCRA Hr’g Tr. 10/4/21 at 67:22-68:3 (Attorney Waldron admitted that he decided not to share the CY-104 Report with Drs. Dattilio and Berkowitz because he felt that Jamie was lying).)

Attorney Waldron failed to present any evidence regarding placements and treatment programs that would be suitable for Jamie – a key component of the determination of whether or not Jamie was amenable to treatment in the juvenile justice system – because he did not let Officer Costello interview her to make that evaluation. (PCRA Hr’g Tr. 10/4/21 at 83:17-85:3 (testifying that

he did not allow Officer Costello to interview Jamie because he thought Jamie was too untrustworthy); Decert Hr'g Tr. 10/29/15 at 106:9-15 (stating -- incorrectly -- that he did not think Officer Costello could interview Jamie because Jamie was in adult court). Nor did Attorney Waldron establish through Officer Costello that Jamie could remain in custody to age 21 – a point of concern for Judge Dantos. (See Decert Hr'g Tr. 10/29/15 at 122:18-23; 124:16-125:21.)

Attorney Waldron failed to present any rebuttal to the Commonwealth's expert, Dr. O'Brien. Had he consulted with his own experts regarding Dr. O'Brien's testimony, Attorney Waldron would have known that Dr. O'Brien's assessment of Jamie as a "budding sociopath" who was "exhibiting signs and symptoms of an evolving Cluster B Personality Disorder" was medically and scientifically inaccurate. They could have told him – and testified on rebuttal – that: (a) "terms like manipulation [and] sociopath...don't have diagnostic currency"; (b) the Cluster B personality disorders Dr. O'Brien discussed are "never" talked about in the context of adolescence because "adolescents are in

the midst of development” and cannot have a “static diagnosis”; and (c) none of the experts who examined Jamie diagnosed her with a conduct disorder, which is the appropriate diagnosis to consider for children and which is a prerequisite to a finding of a Cluster B disorder as an adult – a point that Dr. O’Brien himself was forced to admit at the PCRA Hearing. (PCRA Hr’g Tr. 11/10/21 at 45:8-10, 45:19-47:4; PCRA Hr’g Tr. 11/12/21 at 69:4-20.)

Attorney Waldron’s failure to give his experts material information in his possession, and failure to present any mitigating fact evidence, had no reasonable justification. At the PCRA Hearing, Attorney Waldron claimed that he did not call any fact witnesses at Jamie’s Decertification Hearing because he had decided to treat the hearing as a “battle of the experts.” (PCRA Hr’g Tr. 10/4/21 at 137:15-23, 179:20-25.) If that were truly the case, however, his failure to give critical information to his experts, his decision to affirmatively **withhold** the CY-104 Report confirming that Jamie had been sexually assaulted, and his failure to re-call his experts to rebut Dr. O’Brien’s testimony is all the more damning.

Moreover, even if Attorney Waldron had initially planned to use a “battle of the experts” strategy, once the Commonwealth presented evidence from fact witnesses who characterized Jamie as a “chameleon” and a “budding sociopath,” Attorney Waldron should have been prepared to rebut that evidence with character evidence from the people who knew Jamie best. He was not, because he had never interviewed a single witness. A “strategy” that is based on a complete failure to investigate and prepare – in violation of both national and Pennsylvania standards for representing children in decertification proceedings – is not a strategy at all, much less a reasonable one. *See, e.g., Fears*, 836 A.2d at 71-72 (“[S]trategic choices made following a less than complete investigation are reasonable precisely to the extent that reasonable professional judgement supports the limitation of the investigation.”).

3. Jamie Was Prejudiced by Attorney Waldron’s Ineffective Representation at her Decertification Hearing.

Jamie was clearly prejudiced by Attorney Waldron’s deficient representation, as there is more than a reasonable probability that,

but for his ineffective representation, Jamie would have been decertified to juvenile court. Instead, Attorney Waldron's ineffective representation fundamentally tainted the Trial Court's assessment of Jamie.

First, Attorney Waldron's failure to give his experts a complete record to review led the Trial Court to disregard their testimony ***in its entirety***. (Appendix E at E27-E32 (PCRA Ex. 6).) Drs. Dattilio and Berkowitz were the ***only*** experts to opine on Jamie's amenability to treatment. The Commonwealth's expert, Dr. O'Brien, declined to answer the question, opining only that he did not believe any expert could make that assessment to a reasonable degree of certainty. (Decert Hr'g Tr. 10/29/15 at 200:19-201:1.) Had the Trial Court not completely rejected the testimony of Drs. Dattilio and Berkowitz due to Attorney Waldron's failure to give them material information, it would have had to decide Jamie's case based on a record in which two highly credible experts with extensive experience in child psychology and psychiatry opined that Jamie was amenable to treatment, while the Commonwealth's

expert expressed **no** opinion as to whether Jamie was amenable to treatment.

Second, Attorney Waldron's failure to give his experts a complete record also left them with incomplete insight into the nature of Jamie's relationship with Mr. Barnes. Drs. Dattilio and Berkowitz were both troubled by the considerable disparity between Jamie and Barnes in age and experience. (See PCRA Hr'g Tr. 10/6/21 at 36:20-37:12, 38:25-39:2; PCRA Hr'g Tr. 11/10/21 at 22:3-9.) But they had seen no evidence of Barnes' violent and unstable history — because Attorney Waldron did not give them Barnes' Military Police Report or his photos of the knives he dubbed "my killers." (See PCRA Hr'g Tr. 11/10/21 at 22:7-9, 36:9-25; PCRA Hr'g Tr. 10/6/21 at 40:23-41:21.) They did not know that a doctor who examined Jamie found that she had been sexually assaulted — because Attorney Waldron deliberately kept the CY-104 Report from them. (PCRA Hr'g Tr. 10/4/21 at 67:22-68:3; see *also* PCRA Hr'g Tr. 10/6/21 at 41:16-21 (Dr. Dattilio did not receive the "rape report" prior to testifying); PCRA Hr'g Tr. 11/10/21 at 34:14-17 (Dr. Berkowitz learned after his testimony that Jamie had

reported a sexual assault and was seen by a doctor). And, they did not know just how intense and obsessive Mr. Barnes' relationship with Jamie was because Attorney Waldron did not give them the full history of Jamie's texts and calls with Mr. Barnes, which showed that for months Mr. Barnes had been communicating with Jamie, a child in eighth grade, at all hours of the day and night, sometimes dozens of times a day. (See PCRA Hr'g Tr. 10/8/21 at 26:17-25.)

Had Attorney Waldron given them that critical information, Drs. Dattilio and Berkowitz would have been able to testify with far greater insight and evidentiary support to Jamie's degree of culpability, lack of sophistication and amenability to treatment once she was extracted from the abusive relationship with Barnes, just as Dr. Beyer was able to do at the PCRA Hearing after reviewing all of the evidence that was available to Attorney Waldron at the time of Jamie's Decertification Hearing. Based on that evidence, Dr. Beyer was able to opine – and Drs. Dattilio and Berkowitz could have opined – that, “had [Jamie] not become involved in an intimate partner controlling abusive

relationship...[h]er immature decision making would have been much more like that of other teenagers not something nearly as disastrous as it was.” (PCRA Hr’g Tr. 10/8/21 at 30:3-11; see *generally id. at passim* (Dr. Beyer’s testimony).)

Moreover, had Drs. Dattilio and Berkowitz been able to review Jamie’s full history of texts and calls with Mr. Barnes before Jamie’s Decertification Hearing, they would have been able at that hearing to provide essential context and insight regarding those communications. They would have testified — as they and Dr. Beyer did at the PCRA Hearing — that children say outrageous things in texts that they don’t actually believe will happen, and that Jamie was particularly ill-equipped to appreciate the danger in her communications with Barnes. (See PCRA Hr’g Tr. 10/6/21 at 74:1-19; PCRA Hr’g Tr. 10/8/21 at 26:17-25, 36:23-37:25; PCRA Hr’g Tr. 11/10/21 at 30:10-33:20.) Absent that critical context, the Trial Court found — based in large part on the substance of those communications — that Jamie was “a willing and active participant in the murder of her mother,” “integral to the success of the

criminal plan,” and the “genesis of the idea” who “provided the opportunity.” (Appendix E at E26.)

Third, Attorney Waldron’s failure to present any mitigating fact evidence left the Trial Court with unrebutted evidence from the Commonwealth’s expert and fact witnesses that Jamie was “a chameleon,” “manipulative,” and a “psychologically bullying sociopath.” (See Decert. Hr’g 10/31/21 at 191:22-23; 272:24.) Numerous witnesses who had known Jamie her entire life — ***including the victim’s mother and sister-in-law*** — were ready and willing to testify to the contrary on her behalf.

If Attorney Waldron had called any of them, the Trial Court would have heard that — far from being the sophisticated, deceitful mastermind that the Commonwealth’s witnesses described — Jamie was in fact a loving, thoughtful, kind, intelligent, emotionally immature and naïve child. The Court would have heard that Jamie was a child who still had monthly sleepovers with her beloved aunt, (PCRA Hr’g Tr. 10/5/21 at 20:12-13), a child who was close to her maternal grandmother, whom she saw nearly every day of her entire life (see *id.* at 8:21-9:5), a child who was well liked and

trusted by her teachers, classmates and neighbors (*see id.* at 13:11-12; PCRA Hr'g Tr. 10/6/21 at 198:22-24), a child who played the French horn and cared for her neighbors' pets, and who had never been in any trouble either in or outside of school. (See, e.g., PCRA Hr'g Tr. 10/5/21 at 9:16-18, 13:5-10; PCRA Hr'g Tr. 10/6/21 at 196:23-24, 198:21-22.) The Trial Court heard none of that evidence, and was left with nothing to counter the Commonwealth's portrayal of Jamie.

Finally, Attorney Waldron's failure to allow Officer Costello to interview Jamie left Officer Costello unable to opinion on the suitability of any particular juvenile facility for Jamie or how long Jamie might remain in detention – issues that the Trial Court found material in its ruling on decertification. (Appendix E at E34 (PCRA Ex. 6).)

Perhaps not surprisingly given the record presented, the Trial Court found that Jamie was not amenable to treatment in the juvenile system and denied decertification, and this Court affirmed that finding. *See Commonwealth v. Silvonek*, No. 818 EDA 2016, 2017 WL 3411919 (Pa. Super. 2017) (Appendix G).

Had Attorney Waldron properly prepared his experts, the Trial Court could not have completely disregarded their testimony, and their testimony would have been even more compelling. Had he allowed Officer Costello to interview Jamie, Officer Costello could have opined on appropriate facilities and treatment programs for her, including the length of time she could remain in placement. And had he presented any mitigating fact evidence at all, the Trial Court would have heard from the people who knew Jamie best that Jamie was a loving, immature, naïve child who was caught in an abusive relationship with a violent and unstable older man. There is more than a reasonable probability that, on ***that*** record, the outcome of Jamie's Decertification Hearing would have been different.

4. The PCRA Court's Assessment of Attorney Waldron's Conduct Relating to Jamie's Decertification Hearing Is Not Supported by the Record and Legally Flawed.

In finding Attorney Waldron's representation of Jamie at her Decertification Hearing to have been effective, the PCRA Court: (a) offered excuses for his conduct that are not supported by the

record; (b) erroneously found that Attorney Waldron did not have Barnes' Military Police Report (when it is undisputed that he did), and misapprehended its contents and significance; (c) improperly shifted from Attorney Waldron to his experts the legal responsibility for representing Jamie effectively; and (d) applied the wrong standard in assessing the impact of Attorney Waldron's conduct by questioning whether a more effective representation would have changed the opinions of his own experts rather than the outcome of Jamie's petition for decertification.

i. The PCRA Court Offered Excuses for Attorney Waldron's Failure to Interview or Call Fact Witnesses.

First, the PCRA Court repeatedly offered excuses for Attorney Waldron that Attorney Waldron never himself proposed and that are not supported by the record. In particular, the PCRA Court explained away Attorney Waldron's failure to call Jamie's pastor, her counselor and the mother of her closest friend (who had known Jamie all her life), offering reasons for his failure to call those witnesses that Attorney Waldron himself never testified to. (*Compare* Appendix B at B27-B28, *with* PCRA Hr'g Tr. 10/4/21.)

The PCRA Court's excuses for Attorney Waldron's failure to call these witnesses are unsupported by the record and should be given no deference. See, e.g., *Wiggins*, 539 U.S. at 526-27 (rejecting lower courts' "post hoc rationalization" of defense counsel's ineffective representation); *Commonwealth v. Spatz*, 84 A.3d 294, 313 (Pa. 2014) (finding that PCRA court engaged in improper speculation as to trial counsel's strategy, and noting that although "*Strickland/Pierce* requires an objective assessment of the reasonableness of counsel's performance, this deference does not extend so far as to permit the PCRA court to base its decision on speculation derived from the testimony which it deems to be credible); *Laird v. Horn*, 159 F. Supp. 2d 58, 116 (E.D. Pa. 2001) ("[C]ourts should not conjure up tactical decisions an attorney could have made, but plainly did not....Tolerance of tactical miscalculations is one thing; fabrication of tactical excuses is quite another."), *aff'd and remanded*, 414 F.3d 419 (3d Cir. 2005).

More broadly, the PCRA Court accepted at face value Attorney Waldron's testimony that he decided not to call any fact witnesses because he did not want to subject them to cross-examination, and

he believed it sufficient for Dr. Dattilio to have included notes of his interviews with some of those witnesses in his written report. (Appendix B at B26; see *also* PCRA Hr'g Tr. 10/4/21 at 21:23–22:1, 85:11–16.) The PCRA Court ignored two critical facts, however: (a) Attorney Waldron elicited no testimony from Dr. Dattilio at Jamie's Decertification Hearing regarding those witness interviews, nor did he cite them in argument or briefing to the Trial Court;¹⁶ and (b) Attorney Waldron did not interview a single potential fact witness, and thus had no basis for making **any** judgment as to how they would testify or how they would respond to cross-examination.

"[S]trategic choices made following a less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitation of the investigation."

¹⁶ Attorney Waldron's sole reference to Dr. Dattilio's witness interviews was in his closing statement: Decert. Hr'g Tr. 11/2/15 at 97:15–20 ("One teacher that was interviewed, Eric [sic.] Joella, no violence, no abusive behavior ").) If Attorney Waldron wanted the Trial Court to consider Dr. Dattilio's written summaries of his witness interviews, then he should have brought them to the Court's attention. It was not the Trial Court's job to sift through the undiscussed documentary record to see what might be there. See, e.g., *Kundratic v. Kundratic*, 248 A.3d 498 (table), 2021 WL 225613 at *3 (Pa. Super. 2021) ("We will not scour the record to find support for Husband's allegations, nor will we develop his argument for him.").

Fears, 836 A.2d at 71-72; see also, e.g., *Commonwealth v. Bailey*, 390 A.2d 166, 170 (Pa. 1978) (criminal defense attorneys “must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed”).

Attorneys representing children in decertification cases are expected to investigate, and present, mitigating evidence on their clients’ behalf. See NATIONAL STANDARDS at Standards 4.3, 8.3, 8.4; PA. GUIDELINES at Guideline 9, Sections 2, 3. No “reasonable professional judgment” can excuse Attorney Waldron’s failure to interview, or call, a single fact witness to testify on Jamie’s behalf — especially once the Commonwealth presented fact and expert witness testimony attacking her character.

ii. The PCRA Court Erroneously Found that Attorney Waldron Did Not Have Barnes’ Military Police Report and Misapprehended Its Contents and Significance.

Second, the PCRA Court wrongly found that Attorney Waldron did not have Barnes’ Military Police Report. (Appendix B at B15.) It is undisputed that he did. The Commonwealth produced it to him months before Jamie’s Decertification Hearing. (PCRA Hr’g Tr.

10/4/21 at 74:15-75:1, 77:4-7, 173:14-21.) It is equally undisputed that he failed to give the report to his experts. (*Id.* at 77:9-10 (Attorney Waldron testified that “I don’t know that my experts reviewed this”); (PCRA Hr’g Tr. 10/6/21 at 74:25-75:16 (Dr. Dattilio testified that he was not aware of the Military Police Report prior to testifying at Jamie’s Decertification Hearing); PCRA Hr’g Tr. 11/10/21 at 39:5-20 (Dr. Berkowitz recalls learning of the report after he testified); Dattilio Report 9/17/15, at 2 (Military Police Report not listed in Materials Received).)¹⁷

The PCRA Court also misapprehended the contents of the report, finding that “[w]hile a review of the Military Police Report would have strengthened Dr. Dattilio’s belief that the Defendant was vulnerable, nothing new or novel would have been gleaned from it.” (Appendix B at B15.) Barnes’ Military Police Report had

¹⁷ The PCRA Court appears to have confused Barnes’ Military Police Report with Barnes’ personnel file – a different document with different information that Attorney Waldron did not receive before the Decertification Hearing. That document was not at issue before the PCRA Court. (Appendix B at B15; Record, Doc. 38 Order Disclosing Documents (PCRA Ex. 4) (referring only to Barnes’s Military Personnel and Medical File). See *also* PCRA Hr’g Tr. 10/6/21 at 75:20-76:17 (counsel clarifies that the Military Police Report was produced to Attorney Waldron and was separate from Barnes’s other military files that were the subject of the discovery order).)

nothing to do with Jamie's vulnerability. It was a report documenting a violent encounter between Barnes and the Military Police just months before he met Jamie, in which he tried to gouge out his own eye with a knife and had to be tased into submission before he could be handcuffed. (PCRA Hr'g Tr. 10/6/21 at 77:25-79:5; PCRA Hr'g Tr. 11/10/21 at 39:8-20.) That report would have given Drs. Dattilio and Berkowitz — and the Trial Court — critical insight into Barnes' dangerous and unstable character, shed essential light on the nature of the relationship between Mr. Barnes and Jamie and been highly relevant to an assessment of Jamie's relative culpability in her mother's death.

Attorney Waldron had the Military Police Report. His failure to bring it to the attention of his experts and the Trial Court is inexplicable and inexcusable. The PCRA Court's findings to the contrary are clearly erroneous.

iii. The PCRA Court Erroneously Shifted Responsibility for Jamie's Representation from Attorney Waldron to Jamie's Experts.

Third, the PCRA Court wrongly tasked Drs. Dattilio and Berkowitz, rather than Attorney Waldron, with responsibility for representing Jamie effectively in her Decertification Hearing.

It is undisputed, as the PCRA Court recognized, that Attorney Waldron did not produce to his experts all of the information he received in connection with Jamie's case; rather, he gave them only the specific documents that they knew to ask for. (*E.g.*, PCRA Hr'g Tr. 10/4/21 at 163:8-13 ("Q: So it's the experts' job to come to you and say, is there anything more I should see, rather than your job as counsel to give the experts information you think they should consider. A: I give them what they request of me for the job they're doing.").) The PCRA Court repeatedly faulted Drs. Dattilio and Berkowitz for not specifically asking Attorney Waldron for documents that the Court presumed they knew to exist. (Appendix B at B11-B12, B18-B22.) It offered no explanation for how Drs. Dattilio and Berkowitz could have asked for documents that they did not know about.

"An attorney cannot abdicate his own responsibility by hiring [an expert]...the expert is not an attorney, and should not be

expected to make decisions as to whether to obtain records...that are clearly relevant to a defendant's mitigation case, or to decide what witnesses to interview." *Commonwealth v. Housman*, 226 A.3d 1249, 1281-82 (Pa. 2020); *see also, e.g., Commonwealth v. Zook*, 887 A.2d 1218, 1230-34 (Pa. 2005) (counsel who failed to provide experts with mitigating evidence, and failed to present mitigating evidence that was or should have been known to counsel, was ineffective).

The PCRA Court improperly shifted the burden of representing Jamie from Attorney Waldron to the experts he retained. As a matter of law, it was Attorney Waldron's job, not that of his experts, to provide effective representation. His failure to give material information to his experts is attributable to him alone, and the PCRA Court's findings to the contrary are wrong as a matter of law.

iv. The PCRA Court Applied the Wrong Legal Standard in Assessing the Prejudice Caused by Attorney Waldron's Ineffective Representation.

Finally, the PCRA Court wrongly held that Jamie was not prejudiced by Attorney Waldron's ineffective representation because, even if he had given his experts all relevant information and presented mitigating evidence at the Decertification Hearing, Drs. Dattilio's and Berkowitz's opinions regarding Jamie's amenability to treatment would not have changed. See PCRA Op. at 9-10 ("[T]here is no arguable merit to the Defendant's ineffectiveness claim because it seems to disregard that the ultimate opinions and conclusions of these experts would not change in any way by reviewing these additional documents."); see *also id.* at 12, 20.

The PCRA Court's adoption of this plainly erroneous standard, and its failure to apply the proper legal standard, is both inexplicable and inexcusable. The question is not whether the opinions of **Jamie's own experts** – who already believed she should be decertified – would have changed if Attorney Waldron had represented her effectively. The question is whether there is a reasonable probability that the **outcome of Jamie's Decertification Hearing** would have been different – *i.e.*,

whether a reasonable, conscientious and impartial factfinder, either at the trial level or on appeal, would have found Jamie amenable for treatment in the juvenile system. *See Strickland*, 466 U.S. at 695; *see also Vandivner*, 130 A.3d at 680 (citing *Strickland*).

Here, there is at least a reasonable possibility that a reasonable, conscientious and impartial factfinder, presented with all of the evidence that was available to Attorney Waldron attesting to Jamie's character and amenability to treatment in the juvenile system, as well as Barnes' violent nature and his coercive relationship with Jamie, would have granted Jamie's petition for decertification. The PRCA Court's finding to the contrary should be reversed.

5. Attorney Waldron Was Ineffective in Representing Jamie in Connection with Her Guilty Plea.

Under the PCRA, a defendant may withdraw her plea where "ineffective assistance of counsel caused the defendant to enter an involuntary plea of guilty." *Commonwealth v. Kersteter*, 877 A.2d 466, 468 (Pa. Super. 2005) (citation omitted).

As discussed above, Jamie's claim that her guilty plea was involuntary is meritorious. Attorney Waldron's negotiation of a plea agreement with the Trial Court before Jamie offered a plea (or even had the chance to consider one) was a clear violation of *Evans* that renders her plea involuntary as a matter of law. See *supra* at Argument, I.

Attorney Waldron had no reasonable basis for ignoring the Supreme Court's prohibition against engaging the trial court in pre-plea discussions – indeed, he was not even aware of it. (PCRA Hr'g Tr. 10/4/21 at 45:11–46:11.) His conduct thus fell well below the “range of competence demanded of attorneys in criminal cases.” *Cf. Hill*, 474 U.S. at 56 (“the voluntariness of the plea depends on whether counsel's advice ‘was within the range of competence demanded of attorneys in criminal cases’”) (internal quotation omitted).

Attorney Waldron also had no reasonable basis for (a) telling Jamie that, if she pled guilty and then cooperated in Barnes' trial, her sentence might be reduced but then (b) ensuring that could never happen by urging the Trial Court to sentence Jamie the day

she entered her plea, which guaranteed that the window in which Jamie's sentence could be reduced would close long before Barnes ever went to trial. Attorney Waldron himself has admitted that his advice to Jamie about a possible reduction in her sentence was simply wrong. (PCRA Hr'g Tr. 10/4/21 at 44:8-45:10, 63:25-64:21). His legally erroneous advice to Jamie regarding the consequences of her plea only further demonstrates the involuntary nature of her plea and the ineffectiveness of his representation. *See, e.g., Couto*, 311 F.3d at 187-88.

Jamie was clearly prejudiced by Attorney Waldron's handling of her plea (an issue that the PCRA Court never addressed). She never had a chance to consider the plea terms she might voluntarily accept – rather, a fully formed plea was presented to her, with an admonition that the Court would accept nothing less.

The PCRA Court's denial of Jamie's claim for ineffective assistance of counsel based on Attorney Waldron's handling of her plea was wrong as a matter of law and should be reversed.

6. Attorney Waldron Was Ineffective in Representing Jamie in Her Appeal.

Attorney Waldron's ineffective representation of Jamie continued through her appeals. Attorney Waldron knew that the Trial Court's finding that Jamie's lack of a recognized mental health diagnosis rendered her not amenable to treatment was contrary to controlling authority. (PCRA Hr'g Tr. 10/4/21 at 175:8-176:8.) Although he summarily raised the issue in Jamie's appeal, he cited no legal authority – including the Pennsylvania Supreme Court's decision in *Kocher*. (*Id.* at 174: 14-176:8; *see also* PCRA Ex. 27, at 28 (Waldron's appeal brief).)

Attorney Waldron's failure to cite controlling authority on a critical issue to the appellate court had no reasonable basis. *C.f., e.g., Kundratic*, 2021 WL 225613, at *3 (court will not scour the record or develop a party's arguments for him) (non-precedential).

Jamie was prejudiced by Attorney Waldron's failure to represent her effectively in her appeal. The fact that she had no recognized mental health diagnosis should, if anything, have weighed in her favor rather than against her when considering whether her decertification was in the public interest. Instead, the Trial Court found that the lack of a recognized diagnosis showed

that Jamie's lack of amenability to treatment was "beyond questionable." (Appendix E at E34, n.18.)

The PCRA Court excused Attorney Waldron's failure to present this issue effectively on appeal as a strategic decision to avoid "diluting" his other appellate arguments with "flawed or less meritorious issues." (Appendix B at B38.) But there is nothing "flawed or less meritorious" in a claim that the Trial Court's decision was squarely at odds with controlling Pennsylvania Supreme Court law. Jamie's amenability to treatment was at the heart of her decertification petition. The Trial Court's finding that she was not amenable to treatment because she did not have a recognized diagnosis was a clear legal error that should have been presented effectively for appellate review and reversal. Attorney Waldron's failure to do so is further evidence of his ineffective representation of Jamie, and the PCRA Court's finding to the contrary should be reversed.

CONCLUSION

For the foregoing reasons, Appellant requests that this Court enter an Order: (a) finding that Appellant's guilty plea was not

knowing and voluntary; (b) finding that Appellant's trial counsel provided ineffective assistance of counsel; (c) awarding Appellant such other and further relief as this Court may deem proper; and (d) remanding for further proceedings accordingly.

Respectfully submitted,

/s/ Marsha L. Levick

Marsha L. Levick (No. 22535)
JUVENILE LAW CENTER
1800 JFK Blvd., Ste. 1900B
Philadelphia, PA 19103
(215) 625-0551
mlevick@jlc.org



Tracy Zurzolo Quinn (No. 71072)



Victoria LeCates (No. 329003)
HOLLAND & KNIGHT LLP
Cira Centre, Ste. 800
2929 Arch Street
Philadelphia, PA 19104
(215) 252-9522
tracy.quinn@hklaw.com
victoria.lecates@hklaw.com

COUNSEL FOR APPELLANT

DATED: July 8, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify this 8th day of July, 2022, that this filing 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 requires filing confidential information and documents differently than non-confidential information and documents. x

I hereby certify this 8th day of July, 2022, that the foregoing Brief of Appellant complies with the word count limits as set forth in Pa.R.A.P. 2135 and contains 12,749 words.

/s/ Marsha L. Levick
Marsha L. Levick (No. 22535)
JUVENILE LAW CENTER
1800 JFK Blvd., Ste. 1900B
Philadelphia, PA 19103
(215) 625-0551
mlevick@jlc.org