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No. 577 EDA 2022

IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

JAMIE LYNN SILVONEK,

Appellant.

REPLY 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.

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PRELIMINARY STATEMENT[1]

The record is painfully clear that Attorney John Waldron's representation of Appellant Jamie Silvonek – a child who had just turned fourteen, who had no history of violent or anti-social behavior, and whose knife-obsessed, abusive, adult boyfriend murdered her mother before her eyes – violated essential standards of care that govern representation of children in criminal proceedings. From the proceedings on Jamie's petition for decertification to juvenile court through her guilty plea and beyond, Attorney Waldron's representation of Jamie was grossly ineffective and highly prejudicial.

First, as a matter of settled law and undisputed fact, the guilty plea that Jamie entered in connection with her mother's murder was involuntary due to the trial judge's improper involvement in setting the terms of her plea – involvement that Attorney Waldron requested. There is no dispute that, in the first conversation Jamie had with Attorney Waldron regarding a possible plea, Attorney

[1] Defined terms in this reply brief have the same meaning ascribed to them in Appellant's opening brief.

Waldron presented Jamie with a fully-formed plea proposal that he had negotiated with the trial judge and the Commonwealth the day before, and told her that the trial judge would accept nothing less. The law prohibiting such judicial involvement in plea discussions is clear and well settled. The Commonwealth's assertion that the Pennsylvania Supreme Court's seminal decision on this point is "outdated" has no legal merit. Its contention that Jamie waived her right to challenge her involuntary plea is equally meritless.

Second, regarding Jamie's claim for ineffective assistance of counsel, the Commonwealth has not even bothered to fully brief an opposition; instead, it improperly purports to incorporate by reference its post-hearing brief from the PCRA proceeding below. Incorporation by reference of arguments made in trial court briefing is not permitted on appeal. Any arguments that the Commonwealth did not make in its appellee brief are waived.

Moreover, the Commonwealth offers no response at all – either in its appellee brief or in its briefing below – to the specific reversible errors that Jamie raises in this appeal relating to the PCRA Court's ruling regarding Attorney Waldron's mishandling of

Jamie's Decertification Hearing, namely: (a) the PCRA Court's factual findings excusing Attorney Waldron's performance that are unsupported by any record evidence; (b) the PCRA Court's erroneous finding that Attorney Waldron did not have in his possession material evidence that it is undisputed he did have; (c) the PCRA Court's erroneous shifting of responsibility for representing Jamie from her attorney to her expert witnesses; and (d) the PCRA Court's application of the wrong legal standard in assessing the prejudice Jamie suffered due to her counsel's ineffectiveness. The Commonwealth's silence on these points is both telling and unsurprising. There is, quite simply, nothing the Commonwealth can say to rebut this clear showing of error.

Jamie's guilty plea was involuntary, and Attorney Waldron's representation of her was ineffective. The PCRA Court's rulings to the contrary should be reversed.

ARGUMENT

I. The Trial Court's Improper Participation in Jamie's Plea Negotiation Rendered Jamie's Plea Involuntary.

Fourteen-year-old Jamie never had a chance to consider what plea, if any, she might want to offer voluntarily in order to acknowledge, and accept responsibility for, her role in the events relating to her mother's murder at the hands of Jamie's violent, unstable boyfriend. Instead, in the very first conversation Jamie had with Attorney Waldron about a potential plea, Attorney Waldron told her he had already talked with the trial judge about a plea, and the trial judge had said she would accept nothing less than that Jamie plead guilty to first degree murder with a minimum sentence of 35 years to life. (Br., Appendix B at B7.)[2] Not surprisingly, two days later Jamie entered the only plea that she had been told the judge would accept. (PCRA Hr'g Tr. 10/4/21 at 42:5-8.) The trial judge's participation in Jamie's plea discussions

[2] "Br." shall refer to Appellant's brief filed before this Court on July 8, 2022, and "Opp. Br." shall refer to Appellee's brief filed on October 7, 2022.

– at the express request of Attorney Waldron – was a clear violation of Jamie's due process rights and rendered her plea involuntary.

A. The Pennsylvania Supreme Court's Ruling in *Evans* Is Controlling Authority.

Attorney Waldron's decision to engage the trial judge in a discussion regarding the plea terms she would accept, before ever even talking with his client about **any** possible plea, violated a prohibition against trial judge involvement in plea negotiations that has been the law of this Commonwealth for more than fifty years. *See Commonwealth v. Evans*, 252 A.2d 689, 690-91 (Pa. 1969) (holding that trial court participation in plea negotiation is "not consistent with due process" and a "plea entered on the basis of a sentencing agreement in which the judge participates cannot be considered voluntary").

The Commonwealth argues that Jamie's "reliance on *Evans* is outdated and misplaced," and that, more than fifty years after *Evans* was decided, it is **still** "common practice" for defense counsel to negotiate a plea deal with the trial judge before discussing a possible plea with his client, "to avoid the

disappointment of [the] defendant, as well as the victims' family, should an agreed upon resolution be rejected." (Opp. Br., at 25, 28.) As authority for this troubling proposition, the Commonwealth relies upon the dissenting opinion from *Evans* and a 1995 procedural rule change that clarified the limited role a trial court may properly play in plea discussions – namely, to ask whether there have been any such discussions and to allow reasonable time for them if requested. (*See id.* at 24-25 (citing Pa. R. Crim. Pro. 590).)

The Commonwealth's disregard for *Evans* is squarely at odds with this Court's continued adherence to it, even after the 1995 amendment to Rule 590. *See*, *e.g.*, *Commonwealth v. Hanes,* 705 EDA 2018, 2019 WL 4274132, at *8 (Pa. Super. Sept. 10, 2019) (applying *Evans* to vacate a judgment and sentence where the Court found active participation by the trial court in the negotiation of defendant's plea); *Commonwealth v. Johnson*, 875 A.2d 328, 331-32 (Pa. Super. 2005) (vacating judgment of sentence where trial court participated in plea negotiation in violation of *Evans*, and citing *Evans* for the proposition that "[i]t is settled that a plea

entered on the basis of a sentencing agreement in which the judge participates cannot be considered voluntary").

The other cases cited by the Commonwealth do not support its contention that *Evans* is "outdated." This is not, for example, a case in which the parties arrived at a mutually acceptable plea which the Court then rejected after it was formally offered, as was the case in *Commonwealth v. Hudson*, 820 A.2d 720, 722 (Pa. Super. 2003) (defendant attempted to enter into a plea agreement, which the trial court rejected following a hearing). Nor is this a case where, although defense counsel might have improperly engaged the trial court in plea negotiations, the defendant never knew that had occurred and so there was no impact on the voluntariness of the defendant's ultimate plea, as was the case in *Commonwealth v. Vealey*, 581 A.2d 217, 221 (1990).

The fact that the trial judge conducted a colloquy with Jamie before accepting her plea is equally irrelevant. When evaluating whether a plea was involuntary or unknowing, courts assess "the adequacy of the guilty plea colloquy and the voluntariness of the

resulting plea by examining the totality of the circumstances surrounding the entry of that plea." C*ommonwealth v. Muhammad*, 794 A.2d 378, 383–84 (Pa. Super. 2002); *Commonwealth v. Allen*, 732 A.2d 582, 587 (Pa. 1999) (a reviewing court must review all of the circumstances surrounding the entry of that plea). Where "the plea of guilty is entered pursuant to an agreement, the determination of whether the plea is voluntarily and knowingly made becomes even more complex." *Commonwealth v. Barrett*, 299 A.2d 30, 31 (Pa. Super. 1972). And, as the *Evans* Court specifically recognized, "if the judge takes part in the preplea discussions, [she] may not be able to judge objectively the voluntariness of the plea when it is entered." *Evans*, 252 A.2d at 691.[3]

[3] In a footnote, the *Evans* Court noted that a trial judge may hear the terms of a proposed plea agreement **after it has been reached**, for the sole purpose of indicating to counsel whether she will concur. The Court reasoned that in this "limited" instance, "there would appear to be little basis upon which the defendant or counsel could conclude that the judge is attempting to force a certain result upon the parties" because the **parties have already reached an agreement** — the Court is merely indicating whether it will be accepted or not. *Evans*, 252 A.2d at 691. Here, even taking at face value the PCRA Court's finding that Attorney Waldron had reached an agreement with the Commonwealth before they met with the trial judge (which is contrary to Attorney Waldron's unrebutted testimony that there was no agreement on a minimum sentence before he met with the judge, *see infra* at n. 4), there is

In this case, before Attorney Waldron ever discussed a possible plea with Jamie, he met with the Commonwealth and the trial judge to ascertain the plea terms that the trial judge would accept. In that meeting, the trial judge told Attorney Waldron that she would not accept a plea of anything less than 35 years to life. He then conveyed that message to Jamie – a traumatized fourteen-year old child who had never previously had so much as a school detention – and Jamie acquiesced, accepting the sentence that the trial judge had decreed for her. At that point, under *Evans*, Jamie's due process rights already had been violated and the plea she subsequently entered was involuntary as a matter of law. The fact that Jamie answered questions in a colloquy with the same trial judge who had already dictated the terms of her plea does not cure the violation of Jamie's rights. *Evans*, 252 A.2d at 691 (finding that "[t]he unquestioned pressure placed on the defendant because of the judge's unique role inevitably taints the plea…").

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no dispute that what **Jamie** was presented with was a "fully-formed plea proposal" which had already been agreed to by the Commonwealth, Attorney Waldron and the trial judge, all without Jamie's prior knowledge or consent. (*See* Br., Appx. B at B6.)

Evans is, as it has been for more than a half century, controlling law in this Commonwealth. Its prohibition against trial court participation in plea negotiations is clear. The trial court's participation in Jamie's plea bargain in this case – at Attorney Waldron's request – is equally clear.[4] That improper judicial influence on Jamie's consideration of a plea rendered her plea involuntary, and it should be set aside.

B. Jamie Did Not Waive Her Challenge to the Voluntariness of Her Plea.

The Commonwealth argues in the alternative that Jamie waived her right to challenge her involuntary plea. She did not.

It is well established that a defendant may withdraw her plea under the Post-Conviction Relief Act ("PCRA") "if ineffective

[4] Before discussing the terms of the plea with the trial court judge (or his client), Attorney Waldron and counsel for the Commonwealth had discussed a potential plea with a **cap** of 35 years to life. (PCRA Hr'g Tr. 10/4/21 at 147:13-15.) Hoping for a minimum sentence of 25 years, Attorney Waldron requested a meeting with the trial judge to find out what terms she would accept. (*Id.* at 24:19-25:7; 29:21-30:2; 30:12-16.) At that meeting, the trial judge expressly stated that she would not accept a plea of less than 35 years to life (*Id.* at 24:24-25:1.). This became the plea that was eventually agreed upon between Attorney Waldron and the Commonwealth (*Id.* at 30:22-31:18.) Only **after** discussing the plea with Judge Dantos and reaching a final, fully formed agreement did Attorney Waldron discuss the plea with his client. (Br., Appx. B at B7 n. 11.)

assistance of counsel caused the defendant to enter an involuntary plea of guilty." *See, e.g.*, *Commonwealth v. Kersteter*, 877 A.2d 466, 468 (Pa. Super. 2005) (citation omitted). *See also Commonwealth v. Heck*, 467 A.2d 896, 897 (Pa. Super. 1983) (guilty plea challenge properly brought in a PCRA petition if appended to an ineffective assistance of counsel claim).

In this case, it was Jamie's prior counsel who improperly drew the trial court judge into plea negotiations, in a clear violation of the law of this Commonwealth and Jamie's due process rights. *See Evans*, 252 A.2d at 691 (holding that trial court participation in plea negotiation is "not consistent with due process" and a "plea entered on the basis of a sentencing agreement in which the judge participates cannot be considered voluntary"); *see also* (Br., Appx. B at B6 (noting that Attorney Waldron was concerned the trial court would not accept the plea, so he and the Commonwealth sought a conference with the trial judge).) It was, therefore, the ineffectiveness of Jamie's prior counsel that caused Jamie to enter

an involuntary guilty plea, and Jamie is permitted to challenge that plea under the PCRA.[5]

II. Attorney Waldron Did Not Provide Jamie with Effective Counsel in Her Decertification Hearing.

Attorney Waldron grossly deviated from accepted standards of care for attorneys representing children in criminal proceedings.

In particular, when representing a child who has been criminally charged as an adult and is seeking decertification to juvenile court, defense counsel must present any mitigating evidence, including evidence demonstrating the child's degree of culpability and amenability to treatment, as well as testimony from witnesses who can attest to the child's history, character, degree of culpability and amenability to treatment. (Br., at 40-41.)

[5] If anything, it is the Commonwealth that waived its waiver argument. Jamie challenged the voluntariness of her plea in her PCRA petition, the parties presented evidence on the issue at her PCRA hearing and the PCRA Court ruled on Jamie's claim (albeit incorrectly, for the reasons presented in this appeal). At no time before this appeal did the Commonwealth argue that Jamie had waived her involuntary plea claim. (*See, e.g.*, Record, Doc. 121 at ¶¶35-36 (Jamie's PCRA petition noting that previously litigated claims are cognizable if based upon an underlying claim of ineffectiveness of counsel and that the issue is not waived under § 9543(a)(4)); Record, Doc. 135 at ¶¶ 122-134, 143-147 (Jamie's post-hearing briefing addressing her involuntary plea); Record Doc. 136 (Commonwealth Post-PCRA hearing brief, with no waiver argument); Br., Appx. B (PCRA Court opinion deciding on the merits of Jamie's claims).)

Here, rather than presenting the mitigating evidence that he had in his possession at Jamie's Decertification Hearing, Attorney Waldron **intentionally withheld** critical evidence from his experts and the trial court showing that Jamie's boyfriend, Caleb Barnes, a twenty-one year-old Army soldier, had physically abused and sexually assaulted her. (*Id.* at 24, 46, 51-52.) He also withheld from both his experts and the trial court evidence showing that Barnes was violent, unstable and obsessed with knives. (*Id.* at 42, 51.) Indeed, Attorney Waldron shared so little of the material evidence in his possession with his experts that, in ruling on Jamie's petition for decertification to juvenile court, the trial judge disregarded their testimony **in its entirety** because they had not been able to consider the entire evidentiary record in forming their opinions. (*Id.* at 50.) The trial judge's ruling denying decertification was notably devoid of any discussion of Barnes' history of violence or his abuse of Jamie, because that evidence had not been put before her. (*See generally*, *id.*, Appx. E (trial court opinion).)

Moreover, even when the Commonwealth called a teacher who barely knew Jamie to testify that she was a manipulative "chameleon," Attorney Waldron did not call a single character witness to testify on Jamie's behalf, despite the fact that the people who knew Jamie best – including the murder victim's own mother and sister-in-law (Jamie's grandmother and aunt) – were available and eager to share with the Court their knowledge of Jamie as an intelligent but emotionally immature and naïve child who was loved by her family, well liked and trusted by her schoolmates, teachers and neighbors, and had no history of anti-social behavior. (*Id.* at 17-18, 41-42, 54-55.) The Commonwealth's characterization of Jamie as a devious criminal mastermind, rather than a sheltered and overwhelmed child, was left unchallenged and ultimately accepted by the trial court. (*Id.* at 25, 54-55.)

A. The Commonwealth Has No Response to the Four Reversible Errors that the PCRA Court Committed in Addressing Attorney Waldron's Mishandling of Jamie's Decertification Hearing.

In her opening brief in this appeal, Jamie raised four specific, material, reversible errors underlying the PCRA Court's

determination that Attorney Waldron had represented Jamie effectively in her Decertification Hearing. The Commonwealth has no response to any of them.

First, Jamie showed that the PCRA Court invented excuses for Attorney Waldron's failure to call witnesses that Attorney Waldron himself never testified to and that have no support in the record. (Br., at 57-60.) The Commonwealth does not (and cannot) cite to anything in the record to support the PCRA Court's findings.

Second, Jamie showed that the PCRA Court erroneously found that Attorney Waldron did not have Barnes' Military Report (documenting a violent encounter just months before he met Jamie, in which he tried to gouge out his own eye with a knife), when it is undisputed (and Attorney Waldron himself testified) both that he had the Military Report and that he failed to disclose it to either his experts or the trial court. (Br., at 60-61.) Jamie further showed that the PCRA Court misapprehended the contents of that report, apparently confusing it with an entirely different document. (Br., at 61-62.) The Commonwealth again does not (and cannot) cite to anything in the record to support the PCRA Court's findings.

Third, Jamie showed that the PCRA Court erroneously shifted responsibility for Jamie's representation from Attorney Waldron to Jamie's experts. (Br., at 62-64.) Again, the Commonwealth has no response, citing neither record evidence nor legal authority to support the PCRA Court's ruling.

Fourth, Jamie showed that the PCRA Court applied the wrong legal standard in assessing the prejudice caused by Attorney Waldron's ineffective representation. The PCRA Court erroneously (and inexplicably) found that Attorney Waldron's woefully inadequate conduct did not prejudice Jamie because, even if he had represented her effectively, her experts still would have opined that she was amenable to treatment in the juvenile system. (*See* Br., at 64-65.) The question, of course, is not whether the opinions of Jamie's own experts would have changed if they had seen all of the evidence that Attorney Waldron withheld from them. Rather, the question is whether there is a reasonable probability that the **outcome of Jamie's Decertification Hearing** would have been different – *i.e.*, that 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 – if Attorney Waldron had represented Jamie effectively. *See Strickland v. Washington*, 466 U.S. 668, 695 (1984); *see also Commonwealth v. Vandivner*, 130 A.3d 676, 680 (Pa. 2015) (citing *Strickland*). Once more, the Commonwealth has no response, citing neither record evidence nor legal authority to support the PCRA Court's ruling.

B. The Commonwealth Has Waived Any Arguments It Improperly Tried to Incorporate by Reference from Other Filings.

Rather than responding to Jamie's particularized statements of error, the Commonwealth cites a handful of cases describing the standard of review for claims of ineffective assistance of counsel (without making any attempt to tie them to the issues in this case), and then generally refers the Court to the PCRA Court's opinion and the Commonwealth's post-hearing briefing below. The Commonwealth's proposed incorporation by reference in lieu of appellate argument is an improper circumvention of the rules of appellate procedure that would, among other things, result in a combined submission far in excess of the page limit for an appellee

brief. (The Commonwealth certified that its appellee brief contains 9,154 words. Its post-PCRA hearing brief contains 9,929 words, for a combined total of 19,083 words – far in excess of the 14,000 word limit set forth in Pa. R.A.P. 2135(a)).

The Pennsylvania Supreme Court has made clear that "'incorporation by reference' is an unacceptable manner of appellate advocacy" that, if tolerated, would enable "wholesale circumvention of our appellate rules[.]" *Commonwealth v. Briggs*, 12 A.3d 291, 342 (Pa. 2011); *see also, e.g.*, *Commonwealth v. Lambert*, 797 A.2d 232, 237 n.4 (Pa. 2001) ("To permit appellant to incorporate by reference his previous motions would effectively allow him to more than double the original briefing limit."). This Court, too, has held that arguments that a party does not present in an appellate brief, but rather seeks to incorporate by reference from earlier filed documents, are waived. *See, e.g., Commonwealth v. Rodgers*, 605 A.2d 1228, 1239 (Pa. Super. 1992) (holding that "an appellate brief is simply not an appropriate vehicle for the incorporation by reference of matter appearing in

previously filed legal documents" and finding the underdeveloped arguments waived).

This Court has at times attempted to decipher undeveloped arguments incorporated by reference for appellants who are *pro se. See, e.g.*, *Batterman v. Santo*, 1532 EDA 2021, 2022 WL 2092754, at * 12 (Pa. Super. June 10, 2022) (finding that *pro se* appellant violated word limit and other appellate briefing rules, but declining to dismiss his appeal in its entirety in the interest of justice). The Commonwealth, however, is a sophisticated litigant and its flouting of the appellate rules should not be so generously excused. Its attempted incorporation by reference of its post-PCRA hearing brief should be rejected, and its appellee brief should stand (or fall) on its own. Any arguments that the Commonwealth did not develop therein, with citations to the factual record and legal authority, should be deemed waived.

C. To the Extent Any Arguments Can Be Gleaned from the Commonwealth's Brief, They Are Unavailing.

To the extent any argument can be discerned from the Commonwealth's brief regarding Attorney Waldron's

representation of Jamie at her Decertification Hearing, it is unpersuasive.

First, the Commonwealth, like the PCRA Court, wrongly presumes that Jamie sought PCRA relief pursuant to Pa. C.S.A. § 9543(a)(2)(iii), which requires an applicant to prove that they were "unlawfully induced" to plead guilty "where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent." Jamie has never sought relief under that statutory provision. Rather, Jamie seeks PCRA relief pursuant to two other provisions of the PCRA statute: Pa. C.S.A. § 9543(a)(2)(i) ("[a] violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place") and Pa. C.S.A. § 9543(a)(2)(ii) ("[i]neffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place").

Second, the Commonwealth cites case law addressing the reasonableness of counsel's investigation that emphasizes a defendant's role in providing her counsel with relevant information. (Opp. Br., at 32-33.) Presumably, the Commonwealth wants this Court to find that Jamie, and not Attorney Waldron, is responsible for Attorney Waldron's failure to share with his experts and present to the trial court evidence of Barnes' extensive control over, and abuse of, Jamie that would have been critical to an understanding of Jamie, her degree of culpability in her mother's death and her amenability to treatment. But the cases cited by the Commonwealth are not on point, and the Commonwealth's attempt to blame a fourteen-year old child for not representing herself more effectively should be rejected. *Compare Commonwealth v. Tharp*, 101 A.3d 736, 772 (Pa. 2014) (counsel's scant investigation into mitigation evidence was ineffective where counsel failed to interview witnesses about his client's claims that she suffered from child abuse and domestic violence, which counsel was "indisputably aware of"), *and Commonwealth v. Zook*, 887 A.2d 1218, 1234 (Pa. 2005) ("[I]t is clear from the evidence adduced at the PCRA

hearing that counsel's failure to present evidence of Appellant's organic brain damage simply was a result of inattention to the mitigating evidence that was known, or should have been known, to counsel"), *with Commonwealth v. Lesko*, 15 A.3d 345, 381 (Pa. 2011) (noting that *Lesko* was not a case where counsel "failed to uncover evidence that was immediately available to him"), *and Commonwealth v. Lott*, 581 A.2d 612, 616–17 (Pa. Super. 1990) (appellant never told trial counsel that he received medical treatment at the time of his arrest, but then blamed counsel for not obtaining records of that treatment).

Here, unlike counsel in *Lesko* and *Lott*, Attorney Waldron **had** the critical evidence he needed to represent Jamie effectively. He had a CY-104 Report of Suspected Child Abuse to Law Enforcement Official, documenting a medical doctor's physical examination of Jamie the day after her mother's murder, in which the doctor observed petechial bruising on Jamie's neck, left posterior thigh and buttock consistent with "forcibly restraining the throat and from high velocity slaps," and in which the doctor concluded that Jamie had been sexually assaulted. (*See* Br., at 14, 51) He had

documents showing Barnes to be violent and unstable, including Barnes' Military Report and the photos of his knives (which he dubbed his "killers") that Barnes kept on his computer. (*See id.* at 15-16, 51.) He had evidence showing Barnes' obsessive control over Jamie, including months' worth of phone records showing that Barnes called and texted Jamie, a child in eighth grade, dozens of times every day, at all hours of the day and night. (*See id.* at 16, 52.) There were numerous character witnesses, people who had known Jamie her entire life, ready and willing to testify that she was a loving, naïve child with no history of antisocial or violent behavior, but Attorney Waldron never spoke to a single one of them. (*See id.* at 17, 41-42.) Attorney Waldron simply failed – and, in at least one instance, deliberately chose – not to present any of this compelling mitigating evidence to his experts and the trial court.[6]

[6] If anything, much of Attorney Waldron's ineffectiveness seems to stem from his disdain for his own client, rather than a lack of easily discoverable information. (*See, e.g.*, PCRA Hr'g Tr. 10/4/21 at 83:17-85:3 (Attorney Waldron did not allow Officer Costello to interview Jamie because he thought Jamie was too untrustworthy); *Id.* at 67:22-68:3 (Attorney Waldron did not share the CY-104 Report documenting physical evidence of Jamie's sexual assault with his experts because he thought Jamie was a liar).) But Attorney

Third, the Commonwealth cites *Lesko* for the proposition that a defendant seeking relief for ineffective assistance of counsel must "prove **actual prejudice**, that is, a reasonable probability that, but for counsel's lapse, the result of the penalty proceeding would have been different." (Opp. Br. at 32-33 (citing *Lesko*, 15 A.3d at 383 (emphasis in original)).) Presumably, the Commonwealth wants this Court to find that, even if Attorney Waldron had presented all the evidence available to him to his experts and the trial court, the outcome would have been the same – Jamie would not have been decertified to juvenile court and she still would have entered a guilty plea with a sentence of 35 years to life. This case, however, is not *Lesko*.

Waldron himself conceded that, by the time of Jamie's decertification hearing, Jamie was telling the truth about what had happened to her and about the events relating to her mother's murder – a damning admission that undermines Attorney Waldron's and the Commonwealth's insistence that Jamie was just too untrustworthy to represent effectively, and that Attorney Waldron's failure to do so was Jamie's own fault. (*Id.* at 105:14-16 ("as time went on, the truth came out. She was upset. She was crying. She just turned 14."); *id.* at 115:9-24 (Attorney Waldron acknowledged that Jamie was being more truthful before her decertification hearing).) And, regardless, the fact that a child accused of a crime may be less than truthful, especially at the outset, is no excuse for an attorney who undertakes the representation of that child to fail to advocate effectively for her.

The *Lesko* Court was careful to note at the outset of its review into whether the defendant had been prejudiced by ineffective representation of his counsel at his resentencing hearing that:

> [T]his is not an instance where counsel failed to conduct any investigation and presented limited mitigating evidence . . . nor is it a case where counsel conducted minimal investigation and failed to uncover evidence that was immediately available to him. Instead, it is a case where counsel undertook a reasonable investigation and presented a compelling and partially successful case in mitigation, albeit the defense did not ultimately carry the day.

Lesko, 15 A.3d at 189 (internal citation omitted); *see also id.* at 150, 194-195 (noting that defense counsel had successfully persuaded the resentencing jury to find four mitigating factors relating to two separate statutory mitigating circumstances, and that Lesko had a "unique criminal history" and "powerful aggravating circumstance[s]," including his conviction for two other murders that he committed the same week as the murder for which he was being resentenced (one of which was "the cold-blooded murder of an on-duty police officer")).

The *Lesko* Court found the case before it analogous to that presented in *Bobby v. Van Hook*, 130 S. Ct. 13 (2009), in which

the U.S. Supreme Court, rejecting a claim for *habeas corpus* relief, noted:

> This is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face, or would have been apparently from documents any reasonable attorney would have obtained. It is, instead, a case like [*Strickland v. Washington*, 466 U.S. 668 (1984)] itself, in which defense counsel's "decision not to seek more" mitigating evidence from the defendant's background "than was already in hand" fell "well within the range of professionally reasonable judgments."

Lesko, 15 A.3d at 196 (quoting *Bobby*).

The *Lesko* Court also noted that, "under similar circumstances, the *Strickland* court did not find prejudice where the 'proposed evidence would barely have altered the sentencing profile presented to the sentencing judge.'" *Id.* at 197 (quoting *Strickland,* 466 U.S. at 699-700).

Lesko itself articulates the crucial reasons that differentiate that case from this one. This **is** a case in which Attorney Waldron "failed to act while potentially powerful mitigating evidence stared him in the face." Indeed, not only did Attorney Waldron fail to act on powerful mitigating evidence, such as calling the victim's own willing family members to rebut the Commonwealth's

characterization of Jamie, he **intentionally withheld** at least some of it from both his experts and the trial court.

Moreover, this **is** a case in which the evidence that Attorney Waldron had in his possession, but failed to present to his experts and the trial judge, would have materially altered the profile of Jamie that the trial court considered in her decertification ruling (and this Court and the Pennsylvania Supreme Court considered in Jamie's direct appeals) and that the trial judge considered in her improper advice to Attorney Waldron regarding the terms of a plea that she would accept. Indeed, the trial judge clearly stated in her decertification opinion that she rejected the testimony of Attorney Waldron's experts **in its entirety** for the express reason that they had not considered the full evidentiary record – a failing that is entirely the fault of Attorney Waldron, the lawyer who had that evidence in his possession, and not the experts, who justifiably believed that he had given them all the information he had. (PCRA Hr'g Tr. 10/6/21 at 31:11-20; PCRA Hr'g Tr. 11/10/21 at 13:11-14

(Drs. Dattilio and Berkowitz expected Attorney Waldron to give them everything he received in discovery.).[7]

Finally, even if this Court were to consider the Commonwealth's post-PCRA hearing brief (which it should not), that brief does nothing to address the issues Jamie has raised on appeal – except, perhaps, to suggest that the PCRA Court was led into error by the Commonwealth's own flawed arguments, to the extent the PCRA Court's opinion echoes them.

III. Attorney Waldron Did Not Represent Jamie Effectively in Connection with Her Guilty Plea.

For the reasons stated above and in Jamie's opening brief, Attorney Waldron's handling of Jamie's guilty plea was anything but "eminently reasonable," as the Commonwealth contends.

It was not "eminently reasonable" for Attorney Waldron to negotiate a "fully-formed" plea with the trial judge before ever even discussing a possible plea with his client, in violation of the

[7] Attorney Waldron's failure to provide his experts with the evidence they needed to testify effectively on Jamie's behalf – which led to the trial court's exclusion of their testimony in its entirety - was especially prejudicial here, given that the Commonwealth's expert offered **no** opinion regarding Jamie's amenability to treatment in the juvenile justice system.

long-standing prohibition in this Commonwealth against doing just that – a prohibition that Attorney Waldron admits he did not even know. (*See* PCRA Hr'g Tr. 10/4/21 at 45:11-46:11, 150:7-22.)

Nor was it "eminently reasonable" for Attorney Waldron to falsely advise Jamie that her plea could be reduced later if she cooperated with the Commonwealth – advice that Attorney Waldron himself admits was wrong. (*Id.* at 44:8-45:10, 63:25-64:21, 156:15-17.)

Attorney Waldron's handling of Jamie's plea was legally unsound, contrary to well-established law and had no reasonable basis designed to effectuate Jamie's interests. Jamie's guilty plea should accordingly be withdrawn.

IV. Attorney Waldron Did Not Represent Jamie Effectively in Her Appeal.

Finally, this is not, as the Commonwealth suggests, a case involving a "stand alone claim of appellate counsel's ineffectiveness." (Opp. Br., at 38.) Rather, Attorney Waldron's mishandling of Jamie's appeal was just one of many instances of his ineffective representation of Jamie. The cumulative effect of

multiple errors can be considered in assessing prejudice in an ineffective assistance of counsel claim. *See, e.g.*, *Commonwealth v. Sneed*, 45 A.3d 1096, 1117 (Pa. 2012) ("Where the failure of individual claims [of ineffective representation] is founded upon a lack of prejudice, then the cumulative prejudice from the individual claims is properly assessed.") (citing *Commonwealth v. Johnson*, 996 A.2d 523, 532 (2009)).

The Commonwealth's defense of Attorney Waldron's mishandling of Jamie's direct appeal also suffers from the same flaw as its own briefing in this PCRA appeal – namely, the Commonwealth presumes that appellate courts, including this Court, will do the work of parties and their counsel in developing arguments if the parties and their counsel fail to do so themselves. (*See* Opp. Br., at 40.) The very authority cited by the Commonwealth belies the Commonwealth's position. (*See id.* (citing *Commonwealth v. Fetter*, 770 A.2d 762, 771 (Pa. Super. 2001) ("It is not the function of this court to consider, and respond to, vacuous claims. When issues are not properly raised and developed in briefs, when the briefs are wholly inadequate to

present specific issues for review, a court will not consider the merits thereof.") (quoting *Commonwealth v. Delligatti*, 538 A.2d 34, 41 (Pa. Super. 1988)); *Commonwealth v. Long*, 753 A.2d 272, 278-79 (Pa. Super. 2000) (appellant's failure to develop argument in support of his claim resulted in waiver)).)

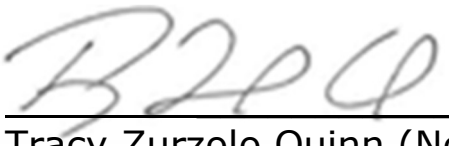
The trial court in this case wrongly held that Jamie's lack of a diagnosed mental disorder rendered her not amenable to treatment in the juvenile system. (Br., Appx. E at E34 n. 18.) The Pennsylvania Supreme Court held to the contrary in *Commonwealth v. Kocher*, 602 A.2d 1308, 1315 (Pa. 1992) (holding that "to find that a lack of mental disorder is dispositive of the entire amenability question is to distort the clear legislative scheme"). Attorney Waldron's failure to raise that issue properly on appeal was a clear error that, at a minimum, should be considered when assessing the prejudice that Jamie suffered as a result of his ineffective representation.

CONCLUSION

For the foregoing reasons and those stated in her opening brief, Appellant Jamie Silvonek respectfully 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) reversing and remanding for further proceedings accordingly.

Respectfully submitted,



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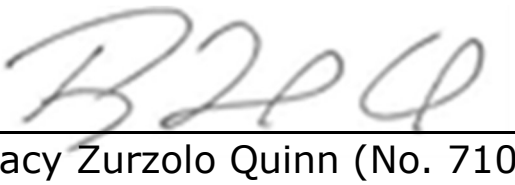
DATED: October 28, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify this 28th day of October, 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.

I hereby certify this 21st day of October, 2022, that the foregoing Brief of Appellant complies with the word count limits as set forth in Pa.R.A.P. 2135 and contains 6,035 words.



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