Received 2/21/2023 9:54:52 PM Supreme Court Middle District

Filed 2/21/2023 9:54:00 PM Supreme Court Middle District
86 MAL 2023

NO.

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,

Respondent,

v.

JAMIE LYNN SILVONEK,

Petitioner.

PETITION FOR ALLOWANCE OF APPEAL FROM THE SUPERIOR TO THE SUPREME COURT

Petition to Allow an Appeal from the January 19, 2023 Judgment of the Superior Court of Pennsylvania (No. 577 EDA 2022) Affirming the Order of January 31, 2022 Denying Motion for Post-Conviction Relief in the Court of Common Pleas, Lehigh County, Docket CP-39-CR-0002141-2015.

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February 21, 2023

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I. OPINIONS DELIVERED IN THE COURTS BELOW

Appellant Jamie Silvonek ("Jamie"), was charged at the age of fourteen with criminal homicide in connection with her adult boyfriend's murder of her mother. The Trial Court denied her motion for transfer to juvenile court (also known as "decertification") and sentenced her as an adult. Jamie's appeals from the denial of her request for decertification were also denied. Jamie then sought relief under the Pennsylvania Post-Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. § 9541 *et seq*., which the PCRA Court denied. The Superior Court of Pennsylvania affirmed that denial of PCRA relief. Jamie seeks review of that Superior Court ruling through this petition.

The Court of Common Pleas of Lehigh County issued its opinion denying Jamie's Motion to Transfer Proceedings to Juvenile Court on November 19, 2015.[1] On August 9, 2017, the Superior Court issued an opinion affirming the trial court's denial of decertification.[2] On February 7, 2018, this Court denied Jamie's petition for allowance of appeal from the Superior Court's Order. *Commonwealth v. Silvonek*, 645 Pa. 554 (2018).

The Court of Common Pleas of Lehigh County issued its opinion denying Jamie's petition for post-conviction relief on January 31, 2022.[3] Following Jamie's

[1] Attached hereto as APPENDIX B.
[2] *Commonwealth v. Silvonek*, No. 818 EDA 2016, 2017 WL 3411919 at *7 (Pa. Super. Aug. 9, 2017), Attached hereto as APPENDIX C.
[3] Attached hereto as APPENDIX D.

notice of appeal from that ruling, the Court of Common Pleas of Lehigh County issued a memorandum opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925(a) on March 25, 2022.[4]

On January 19, 2023, the Superior Court issued its opinion affirming the dismissal of Jamie's PCRA petition.[5]

II. THE ORDER IN QUESTION

On January 19, 2023, the Superior Court issued an opinion that states: "we affirm the order dismissing Appellant's PCRA petition." A copy of the opinion is attached hereto as Appendix A.

III. STATEMENT OF PLACE OF RAISING OR PRESERVATION OF ISSUES

A. Issue 1: Jamie's Unknowing and Involuntary Plea

The first issue presented in this appeal concerns the unknowing and involuntary nature of a plea, the terms of which are agreed to by defense counsel, Commonwealth counsel and the trial judge without any knowledge, input or involvement of the accused defendant, and then presented by defense counsel to the defendant as a fully-formed plea proposal with an admonition that the trial judge will not accept a lesser plea, in violation of *Commonwealth v. Evans*, 252 A.2d 689 (Pa. 1969). Jamie raised this question in her original and amended Petitions for

[4] Attached hereto as APPENDIX E.
[5] Attached hereto as APPENDIX A.

Habeas Corpus and Post-Conviction Relief ("Amended Petition"). (*See* Record, Doc. 121, ¶¶ 282-312; Record, Doc. 87, ¶¶ 262-292.)

At the PCRA hearing, Jamie's prior counsel, Attorney John Waldron ("Attorney Waldron"), testified that he did not discuss a potential plea with Jamie until after he and Commonwealth counsel had met with the Trial Judge and learned what plea terms the Trial Judge would accept. (PCRA Hr'g Tr. 10/4/21 at 150:4-22; PCRA Op., App. D, pp. D6 n.8, D7 n.11.)

In her post-hearing briefing to the PCRA Court, Jamie argued that Attorney Waldron's solicitation of input from the Trial Judge regarding potential plea terms before there was any plea agreement between the parties was a violation of *Evans*. (Record, Doc. 135, Petitioner's Proposed Findings of Fact and Conclusions of Law, ¶¶122-124, 126; Record, Doc. 137, Petitioner's Reply Br., pp. 9-10.) The PCRA Court, applying the incorrect standard[6] and relying at least in part on the Trial Judge's improper testimony from the bench that she did not participate in the plea discussions, rejected Jamie's claim that her plea was not knowing and voluntary. (PCRA Op., App. D, pp. D5-6.)

Jamie raised the issue in her appeal to the Superior Court. (Appellant's Br., pp. 5, 27-37.) The Superior Court affirmed, holding that "*Evans* does not

[6] *See* Super. Ct. Op., App. A, p. A9. ("[W]e agree that the PCRA Court considered this claim pursuant to the wrong subsection . . .").

require…that counsel present the full-formed plea offer to a defendant before consulting the trial court as to whether it would be accepted," and that "Attorney Waldron's decision to present the fully-formed plea offer to the trial court to determine its viability before presenting it to Appellant was not ineffective assistance but, instead, entirely reasonable and permissible under Pennsylvania jurisprudence." (Super. Ct. Op., App. A, p. A10.)

B. Issue 2: Defense Counsel's Delegation of His Duty of Zealous and Effective Representation to Non-Attorneys.

The second issue presented in this appeal concerns counsel's delegation of his duty of zealous and effective representation to non-attorneys, in violation of the Sixth Amendment. In particular, in her original and amended PCRA petitions Jamie raised the issue of Attorney Waldron's failure to provide his experts with material information in his possession and his failure to present mitigating evidence at the PCRA hearing. (Record, Doc. 121, ¶¶188-206 (citing Standard 4-4.4 of the Am. Bar Ass'n, CRIMINAL JUSTICE STANDARDS FOR DEF. FUNCTION and Standard 5.8 of the NATIONAL JUVENILE DEFENSE STANDARDS): Record, Doc. 87, ¶¶171-186 (same).) Appellant also raised Attorney Waldron's failure to investigate or call character witnesses. (Record, Doc. 121, ¶¶162-180 (citing NATIONAL JUVENILE DEFENSE STANDARDS, Standards 8.3, 8.4, 9.2); Record, Doc. 87, ¶¶145-163 (same).) Appellant further raised Attorney Waldron's failure to personally interview witnesses. (Record, Doc. 121, ¶171; Record, Doc. 87, ¶154.)

At the PCRA hearing, Attorney Waldron testified that he did not affirmatively give his experts discovery, but rather they requested documents from him, which he would then provide. (PCRA Hr'g Tr. 10/4/21 at 48:14-19, 49:6-10.) Jamie challenged this inappropriate concession of control to an expert in her post-hearing briefing. (Record, Doc. 135, ¶86-88) (citing Standard 4-4.4, *supra*, Am. Bar Ass'n, CRIMINAL JUSTICE STANDARDS FOR DEF. FUNCTION.)

The PCRA Court found that Attorney Waldron's failure to ensure that his experts had the material information they needed, and his failure to prepare and present mitigating evidence at Jamie's decertification hearing, did not render his representation of Jamie ineffective. (PCRA Op., App. D, pp. 10-25.) The PCRA Court also found that Attorney Waldron's decision not to call any character witnesses was reasonably based, because "testimony" from character witnesses was "enmeshed" within Dr. Dattilio's report, and the witnesses were therefore spared from cross-examination. (PCRA Op., App. D, pp. D28.)

Jamie appealed that ruling to the Superior Court, arguing that the PCRA Court inappropriately shifted the burden of representation from Attorney Waldron to his retained experts. (Appellant's Br., pp. 5, 62-64.) The Superior Court affirmed, finding that, "[i]t is not incumbent on trial counsel to sit in the shoes of an expert witness and guess at what the expert might need to render an opinion in their field of expertise," and that "we will not deem Attorney Waldron ineffective because the

trial court decided that his experts did not review enough materials to render a convincing report." (Super. Ct. Op., App. A, p. A26.) The Superior Court also found that Attorney Waldron's failure to call at Jamie's decertification hearing any of the witnesses who could have given mitigating character testimony was reasonable for reasons similar to the PCRA Court. (Super. Ct. Op., App. A, pp. A18-19.)

C. Issue 3: Defense Counsel's Failure to Meet Accepted Professional Standards for Representing Children in Criminal Proceedings and the Prejudice Caused by that Failure.

The third issue presented in this appeal concerns the effectiveness of representation by defense counsel who clearly failed to meet accepted professional standards for representing children in criminal proceedings, and whose client was materially prejudiced thereby. In her original and amended PCRA petitions, Jamie asserted that Attorney Waldron was ineffective for, *inter alia*, failing to investigate or present mitigating testimony from fact witnesses; failing to provide his experts and the Court with relevant evidence; and brokering an unconstitutional plea. (Record, Doc. 121, ¶¶ 162-180, 188-206, 216-235, 282-290-312; Record, Doc. 87, ¶¶145-163, 171-186, 196-201-215, 262-270-292.) Jamie's petition cited to a variety of standards of conduct, including *inter alia*, ABA CRIMINAL JUSTICE STANDARDS: PLEAS OF GUILTY, STANDARD 14- 3.3(d), NATIONAL JUVENILE DEFENSE STANDARDS, Standards 8.3, 8.4, 9.2. (*Id.*)

The PCRA Court found that Attorney Waldron was not ineffective despite

those undisputed deviations from professional standards. (*See, e.g.*, PCRA Op., App. D, pp. D6 n.8, D7 n.11, D13, D35.)

Jamie raised all of these issues on appeal to the Superior Court. (Appellant's Br., pp. 37-68.) The Superior Court affirmed the PCRA Court's ruling, finding that Attorney Waldron's actions did not amount to ineffective assistance of counsel. (Super Ct. Op. at pp. 13-27.)

IV. QUESTIONS PRESENTED

1. Did the Superior Court err in holding that Jamie's plea was knowing and voluntary, where her trial counsel discussed plea terms with the Trial Court judge before consulting Jamie and then told Jamie that the Court would not accept a plea of less than 35 years to life, in violation of *Commonwealth v. Evans*, 252 A.2d 689 (Pa. 1969)?

   Suggested Answer: Yes.

2. Did the Superior Court err in placing the burden of representation and investigation of mitigating evidence on Jamie's expert witnesses rather than trial counsel?

   Suggested Answer: Yes.

3. Did the Superior Court err in finding that trial counsel effectively represented Jamie notwithstanding the prejudice she suffered as a result of his material deviation from professional standards, including his concealment of important evidence from his experts, his failure to call (or even interview) any fact witnesses, his failure to present mitigating evidence and his solicitation of the trial court's input on a potential plea without his client's knowledge or consent?

   Suggested Answer: Yes.

V. STATEMENT OF THE CASE

A. The Trial Court's Denial of Jamie's Request for Decertification to Juvenile Court.

In April 2015, just weeks after she turned fourteen, Jamie, an eighth grade honor student with no history of violent or anti-social behavior, was arrested and charged as an adult with criminal homicide (among other charges) after her adult boyfriend brutally murdered Jamie's mother before her eyes. (Record, Doc. 1, Criminal Complaint, at 3.)

Jamie's father retained Attorney Waldron to represent her. (*See* PCRA H'rg Tr. 10/4/21 at 13:10-18.) Attorney Waldron petitioned for Jamie's decertification from adult criminal court to juvenile court. (Record, Doc. 12, Motion to Remand Case to Juvenile Division.) He retained Drs. Frank Dattilio (a clinical and forensic psychologist) and Steven Berkowitz (a child psychiatrist) to provide expert testimony at Jamie's decertification hearing. (PCRA Hr'g Tr. 10/4/21 at 21:23-25; PCRA Hr'g Tr. 10/6/21 at 23:13-15; PCRA Hr'g Tr. 11/10/21 at 9:11-15.)

Before Jamie's decertification hearing, Attorney Waldron had in his possession material evidence showing that Jamie's boyfriend, Caleb Barnes – a twenty-year old Army soldier – was violent and unstable, and that he was emotionally controlling and abusive of Jamie. That evidence included, among other things, a military police report showing that, just months before meeting Jamie, Barnes had a violent outburst in which he attempted to stab himself in the eye with

one of several knives he was carrying, and ultimately had to be tased into submission before being arrested. (PCRA Hr'g Tr. 10/6/21 at 77:25-78-8, 78:19-79:5; PCRA Hr'g Tr. 10/10/21 at 39:8-15.) Attorney Waldron also had photographic images of Barnes' knives, taken from Barnes' computer, which Barnes had labeled "my killers." (Record, Doc. 121, Amended PCRA Pet., App. Y (PCRA Ex. 30); He had a complete record of Jamie's texts and phone records with Barnes, going back to the beginning of their relationship in October 2014, showing that Barnes was communicating with Jamie at all hours of the day and night, sometimes dozens of times a day. (Com. Ex. 8.)[7] And he had a report documenting a medical doctor's examination of Jamie the day after she was arrested (the "CY-104 Report"), in which the doctor observed physical evidence of bruising on Jamie's neck and buttock that corroborated Jamie's report that Barnes had assaulted and raped her shortly before and after her mother's murder. (Com. Ex. 10; PCRA Hr'g Tr. 10/4/21 at 67:22-68:3.) Other than giving Dr. Dattilio a portion of Jamie's texts with Barnes from the spring of 2015, and giving Dr. Berkowitz two binders comprising more than 6000 texts between Jamie and Barnes on the eve of the decertification hearing (and more than one month after Dr. Berkowitz had submitted his expert report), Attorney Waldron did not give any of this evidence to his experts. (PCRA Hr'g Tr. 10/4/21 at 74:19-:21, 77:4-7) (Attorney Waldron testimony that he received the Military Police Report

[7] Exhibits file, Bookmark C-8-29-25.

in discovery); PCRA Hr'g Tr. 11/6/21 at 75:11-16 (Dr. Dattilio testimony that he was not aware of the military police report before the decertification); PCRA Hr'g Tr. 11/10/21 at 39:5-9 (Dr. Berkowitz testimony regarding the military police report); PCRA Hr'g Tr. 11/10/21 at 40:14-21, 43:15-44:10 (Dr. Berkowitz testimony regarding the "My Killers" photos); Dattilio Report 9/17/15, p. 2 (PCRA Ex. 2B, DDH 2) (my killers images not listed in Materials Received); PCRA Hr'g Tr. 10/4/21 at 67:22-68:3 (Attorney Waldron testimony regarding the CY-104 Report.)[8]

Attorney Waldron also had access to numerous witnesses who knew Jamie well and who were available and prepared to testify on Jamie's behalf. Those witnesses included Jamie's maternal grandmother and paternal aunt, both of whom had known Jamie her entire life and were very close with both Jamie and her mother, as well as a teacher who had taught Jamie from kindergarten through eighth grade, the mother of Jamie's closest friend, Jamie's pastor and Jamie's therapist. Those witnesses were prepared to testify that Jamie was an intelligent but emotionally immature and naïve child, who was well liked and trusted by friends, classmates and adults and who had no history of violent or antisocial behavior. (PCRA Hr'g Tr. 10/5/21 at 7:5-19:11 (testimony of Margaret Lynn); *id.* at 19:17-39:7 (testimony of

[8] Attorney Waldron gave Dr. Dattilio only a portion of the texts between 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.)

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).) Attorney Waldron knew of all of these witnesses, but made no attempt to interview any of them (or any other fact witnesses) before the decertification hearing. (PCRA Hr'g Tr. 10/4/21 at 23:5-8; 46:12-18.)

At Jamie's decertification hearing in November 2015, Attorney Waldron called just three witnesses – Dr. Dattilio, Dr. Berkowitz and Lisa Costello, a Lehigh County Juvenile Probation Officer. (PCRA Hr'g Tr. 10/4/21 at 62:14-17.) Although they lacked the benefit of a complete record, 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.) 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.)

Attorney Waldron did not call any fact witnesses to attest to Jamie's character, degree of culpability or amenability to treatment, even after the Commonwealth called a teacher from Jamie's school – who had never actually taught Jamie – to

testify that Jamie was a "manipulative chameleon," and called an expert witness to opine that Jamie was a "budding sociopath." (*See* PCRA Hr'g Tr. 10/4/21 at 85:11-16; Decert Hr'g Tr. 10/29/15 at 272:24-273:1, 191:22-23.) Although Dr. Dattilio had spoken with some witnesses in the course of preparing his report, Attorney Waldron did not elicit any testimony from Dr. Dattilio regarding what he had learned from those witnesses. (*See generally,* Decert. Hr'g Tr. 10/29/15.)

On November 19, 2015, the trial court denied Jamie's motion for transfer to juvenile court. (*See* App. B, Decertification Order.)

B. Attorney Waldron's Plea Negotiation With the Trial Court.

Following the Trial Court's decision with respect to Jamie's 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 cap at 35 years to life. (PCRA Hr'g Tr. 10/4/21 at 147:13-15; PCRA Op., App. D, p. D6.) Attorney Waldron then arranged a meeting with the trial judge and Commonwealth counsel to discuss the plea terms that Judge Dantos would accept. (PCRA Hr'g Tr. 10/4/21 at 24:19-25:7, 30:14-16.) At that meeting, the trial judge informed Attorney Waldron that she would not accept a plea of less than 35 years to life. (*Id.* at 24:24–25:1.) Jamie played no role in Attorney Waldron's communications with Commonwealth counsel and the trial judge regarding a plea – Attorney Waldron did not talk with Jamie about a potential plea at all until after he had solicited the trial

judge's views regarding the plea terms that the trial court would be willing to accept. (PCRA Op., App. D, p. D7 n.11; PCRA Hr'g Tr. 10/4/21 at 150:4-10.)

The day after his conversation with the trial judge, Attorney Waldron met with Jamie and her father for one hour to discuss a potential plea. (*See id*. at 40:16-12.) In that meeting, Attorney Waldron told Jamie that the trial judge had already made clear she would not accept a plea of less than 35 years to life. (*Id.* at 27:3-6.) He also erroneously 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; PCRA Op., App. D, p. D7 n.12).

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).)

C. The PCRA Court's Denial of Jamie's Petition for PCRA Relief.

On May 6, 2019, Jamie filed a Petition for Habeas Corpus and Post-Conviction Relief pursuant to the Post-Conviction Relief Act (PCRA). (*See generally* Record, Doc. 87, PCRA Pet.) In her petition, Jamie asserted that her guilty plea had not been knowing and voluntary and that Attorney Waldron's representation was ineffective. (*Id.*) Specifically, she asserted that Attorney Waldron made a series of errors including, *inter alia*, improperly involving the trial court in

plea discussions before Jamie could consider the plea terms she might want to offer voluntarily; failing to present mitigating evidence, including character testimony, at her decertification hearing; and failing to provide his experts and the Court with material evidence her decertification hearing. Jamie filed an Amended PCRA Petition on December 2, 2021. (Record, Doc. 121, Amended PCRA Pet.)

The PCRA Court conducted an evidentiary hearing in October and November of 2022. (*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 Petition for Post-Conviction Relief (App. D.)

D. The Superior Court's Affirmance of the Denial of PCRA Relief.

Jamie timely appealed the PCRA Court's denial of PCRA relief, raising legal and factual errors with respect to the PCRA Court's findings related to the constitutionality of her guilty plea and the effectiveness of Attorney Waldron's counsel. (*See* Record, Doc. 144, Concise Statement of Errors on Appeal; Brief of Appellant.)

On March 25, 2022, the PCRA Court filed its 1925(a) Memorandum. (App. E.) On January 19, 2023, the Superior Court of Pennsylvania issued an opinion affirming the PCRA Court's denial of Jamie's petition for PCRA relief. (App. A.) In particular, the Superior Court held that: (a) criminal defense counsel may negotiate a plea – and solicit the trial court's views of that plea – without his client's

knowledge or input, notwithstanding the prohibition against engaging trial courts in plea discussions that this Court articulated in *Commonwealth v. Evans*, 252 A.2d 689 (Pa. 1969); (b) it was the responsibility of the experts that Attorney Waldron retained, and not Attorney Waldron himself, to represent Jamie effectively at her decertification hearing by gathering and presenting relevant evidence; and (c) Attorney Waldron's representation of Jamie was effective notwithstanding his numerous documented failures to meet established professional standards governing the representation of children in criminal proceedings, including, *e.g.,*, his concealment of material evidence, failure to present mitigating evidence, and solicitation of trial court input regarding potential plea terms that he had never discussed with Jamie. (*See generally* Sup. Ct. Op., App. A).

VI. STATEMENT OF REASONS FOR ALLOWANCE OF APPEAL

A petition for allowance of appeal may be granted where:

> (1) the holding of the intermediate appellate court conflicts with another intermediate appellate court opinion;
> (2) the holding of the intermediate appellate court conflicts with a holding of the Pennsylvania Supreme Court or the United States Supreme Court on the same legal question;
> (3) the question presented is one of first impression;
> (4) the question presented is one of such substantial public importance as to require prompt and definitive resolution by the Pennsylvania Supreme Court
> . . .
> (6) the intermediate appellate court has so far departed from accepted judicial practices or so abused its discretion as to call for the exercise of the Pennsylvania Supreme Court's supervisory authority

. . .

Pa.R.A.P 1114.

Jamie's Petition for Review fits squarely within at least three of the six allowable bases for review, as set forth below.

A. The Superior Court's Ruling that Defense Counsel May Negotiate a Plea Agreement with the Commonwealth and the Trial Court Without Their Client's Knowledge or Consent Conflicts with This Court's Controlling Authority, Conflicts with Established Superior Court Jurisprudence, and Presents an Issue of Substantial Public Importance that Warrants Prompt and Definitive Resolution by This Court. (Pa. R. App. P. 1114(b)(1), (2), (4)).

"The decision whether to plead guilty or contest a criminal charge is probably the most important single decision in any criminal case. This decision must finally be left to the client's wishes; counsel cannot plead a man guilty, or not guilty, against his will." *Commonwealth v. Copeland*, 554 A.2d 54, 60 (Pa. Super. 1988). (*See also, e.g.,* Pa. R. Prof. Conduct, R. 1.4, Cmt. 2 ("[A] lawyer who receives from opposing counsel . . . a proffered plea bargain in a criminal case must promptly inform the client of its substance . . ."); ABA CRIMINAL JUSTICE STANDARDS: PLEAS OF GUILTY ("ABA STANDARDS, PLEAS OF GUILTY"), STANDARD 14- 3.2. *Responsibilities of defense counsel* ("Defense counsel should conclude a plea agreement only with the consent of the defendant, and should ensure that the decision whether to enter a plea of guilty or nolo contendere is ultimately made by the defendant.").[9]

[9] Criminal Justice Standards, American Bar Association,

In *Commonwealth v. Evans*, this Court addressed a critical aspect of the plea process, holding that "a plea entered on the basis of a sentencing agreement in which the judge participates cannot be considered voluntary." 252 A.2d 689, 690 (Pa. 1969). This rule, as set forth in *Evans*, has been the law of the Commonwealth for more than fifty years. *See, e.g.*, *Commonwealth v. Hanes*, 705 EDA 2018, 2019 WL 4274132, at *8-9 (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").

"Participation. . . denotes some active role in discussion or negotiation relative to a plea." *Commonwealth v. Sanutti*, 312 A.2d 42, 44 (Pa. 1973). In *Evans*, defense counsel, the district attorney and the trial court discussed the potential sentences that might be imposed if the defendant were to offer a plea. *Evans*, 252 A.2d at 690. This Court held that "such a procedure is not consistent with due process." *Id*. Of

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particular concern to the Court was the judge's role in sentencing and the impact that judicial participation in the plea process might have on a defendant's ability to fairly evaluate a potential plea. *Id.* at 690-691 (noting that judge's "awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not" and that "[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"). This Court specifically warned of three dangers:

> 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.

Id.

While plea bargaining is an accepted practice, due process requires courts to maintain a distinction between the accepted practice of "advice and 'bargaining' between defense and prosecuting attorneys" and unconstitutional "discussions by judges who are ultimately to determine the length of sentence to be imposed." *Id.* at 690. Thus, *Evans* permits the parties to present a "final bargain" to the trial judge after it has been reached between the parties and before the guilty plea is formally offered. *Id.* at 691 n.*. However, this "limited action" is permissible only ***after*** "the

parties have reached agreement, and thus 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." *Id.* (quoting ABA Minimum Standards, at 75).

The facts in this case are squarely on point with those that were at issue in *Evans.* Here, as in *Evans*, Attorney Waldron met with Commonwealth counsel and the trial judge to discuss the terms of a potential plea, and that a "fully formed" plea proposal was reached through those discussions. (PCRA Op., App. D, p. D6; *see also* Super Ct. Op., App. A, p. A11 n.3.) It is also undisputed that Attorney Waldron did not discuss a plea with Jamie ***at all*** before he had those discussions with the trial judge and Commonwealth counsel. (PCRA Op., App. D, pp. D6 n.7, D7 n.11.) Instead, Attorney Waldron's first, and only, communication with Jamie regarding a potential plea was when he told her that (a) he had talked with the judge and the Commonwealth, and (b) the judge would accept nothing less than a plea to the charge of first degree murder with a minimum sentence of thirty-five years to life. (*Id.*; *see also* PCRA Hr'g Tr. 10/4/21 at 25:4-12, 27:2-6, 150:4-22.) Two days later, Jamie accepted that admonition and entered a plea accordingly. (Super. Ct. Op., App. A, p. A11; PCRA Hr'g Tr. 10/4/21 at 25:4-9, 42:5-8.)

Attorney Waldron's decision to involve the trial court prematurely in Jamie's plea process is a clear violation of *Evans* and its progeny. This Court made clear in *Evans* that a judge may be informed of, and express an opinion on, the terms of a

potential plea only ***after*** the parties have reached agreement. *Evans*, 252 A.2d at 691 n.*.

The Superior Court, however, found nothing wrong with Attorney Waldron's conduct, holding that "*Evans* does not require, as Appellant claims, that counsel present the fully-formed plea offer to a defendant before consulting the trial judge as to whether it would be accepted. Rather, Attorney Waldron's decision to present the fully-formed plea offer to the trial court to determine its viability before presenting it to Appellant was not ineffective assistance but, instead, entirely reasonable and permissible under Pennsylvania jurisprudence." (Sup. Ct. Op., App. A, p. A12.)

The crux of the Superior Court's error is in its finding that 'the certified record bears out that the ***parties*** reached an agreement before requesting permission to disclose the proposed agreement to the trial court to determine if the court would accept it." (*Id.* at pp. 11-12 (emphasis added).) Attorney Waldron is not a party in this case. It is not Attorney Waldron whose life and liberty were at stake when he discussed a potential plea with the trial judge. ***Jamie***, not Attorney Waldron, is the party whose agreement to a plea proposal was required before anything could be presented to the trial judge. It is undisputed that Jamie knew nothing of any potential plea until ***after*** Attorney Waldron conferred with Commonwealth counsel and the

trial judge, and then informed her of the plea terms that the judge would – and would not – accept.

The Superior Court's ruling cannot be reconciled with *Evans* or with other Superior Court cases that followed it.[10] Jamie's minor age at the time Attorney Waldron presented her with a "fully formed" plea deal that the trial judge had already endorsed only heightens the severity of the deprivation of Jamie's due process rights. *See Commonwealth v. Hernandez*, 2015 WL 6080360, at *6 (Pa. Super. Oct. 15, 2015) ("[W]hen a juvenile seeks to confess guilt to a crime, close scrutiny must be paid to the surrounding circumstances."). Ensuring that the constitutional due process rights of people charged with crimes – especially children – are protected when they are considering whether to plead guilty to a crime is a matter of substantial public importance. The Superior Court's holding that defense counsel may engage the trial court in plea discussions without his client's knowledge or consent, and then present his client with a "fully formed" plea proposal that the trial court has already endorsed, poses a serious threat to those due process rights.

[10] The Superior Court notes, as the Commonwealth did in their brief on appeal, that the Rules of Criminal Procedure where changed to eliminate an "absolute" prohibition of judicial involvement in plea discussions. (Super. Ct. Op., App. A7.) This procedural rule change 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* 234 Pa.Code Rule 590, Comment). Nothing in Rule 590 changes or is inconsistent with this Court's pronouncement in *Evans* and Courts have continued to rely on and apply *Evans* even after the 1995 amendment to Rule 590. *See, e.g.*, *Johnson*, 875 A.2d 328; *Hanes*, 2019 WL 4274132.

For the foregoing reasons, this Court should grant allowance of appeal and correct the Superior Court's error.

B. The Superior Court's Ruling that Defense Counsel May Delegate His Duty of Zealous and Effective Representation to Non-Attorneys Conflicts with This Court's Controlling Authority, Conflicts with Established Superior Court Jurisprudence and Presents an Issue of Substantial Public Importance that Warrants Prompt and Definitive Resolution by This Court. (Pa. R. App. P. 1114(b)(1), (2), (4)).

This Court has held that "[a]n attorney cannot abdicate his own responsibility by hiring a mental health expert, or any other expert for that matter . . . . the expert is not an attorney, and should not be expected to make decisions as to whether to obtain records, such as school and hospital 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, 1282 (Pa. 2020). Yet that is precisely what Attorney Waldron admitted he did in this case, and is precisely what the Superior Court erroneously endorsed as effective representation.

It is undisputed that Attorney Waldron failed to provide his experts with significant evidence bearing on, among other things, the relative degree of culpability between Jamie and Barnes, including, *e.g.*, evidence showing that Barnes had a history of violence, instability and an obsession with knives, and that Barnes was emotionally controlling of and physical abusive with Jamie. (*See*, *e.g.*, PCRA Hr'g Tr. 10/6/21 at 73:1-74:9; 75:1-16; 79:6-80:10; PCRA Hr'g Tr. 11/10/21 at 29:12-30:20; 31:6-15; 39:5-40:13; 42:3-43:14.) Indeed, in at least one instance,

Attorney Waldron admitted that he ***deliberately*** withheld evidence probative of Barnes' physical abuse of Jamie from his experts. (PCRA Hr'g Tr. 10/4/21 at 67:22-68:3.)

Attorney Waldron accepted no independent responsibility, as Jamie's counsel, for ensuring that his experts were aware of evidence that might inform their opinions, regardless of whether they knew to ask for it. Instead, he provided his experts only with the specific materials they affirmatively asked for, and nothing more. (PCRA Hr'g Tr. 10/4/21 at 47:17-48:2, 48:14-49:10.)

In a clear departure from this Court's jurisprudence, the Superior Court endorsed this procedure, holding – with no citation to legal authority – that, "[i]t is not incumbent on trial counsel to sit in the shoes of an expert witness and guess at what the expert might need to render an opinion in their field of expertise." (Super. Ct. Op., App. A, p. A26.) To the contrary, as this Court held in *Housman*, trial counsel's representation is unconstitutionally deficient where counsel leaves it to his expert witness to figure out what evidence should be collected, reviewed and presented, essentially acting as "co-counsel." 226 A.3d at 1281. Indeed, the trial counsel whose representation this Court found to be ineffective in *Housman* described the same arrangement that Attorney Waldron testified to in this case, stating that his expert provided him with a "list of the records he wanted to review" and trial counsel then provided those records. *Id.* at 1280. Trial counsel's apparent

"strategy" in *Houseman* was to rely on his expert for "purposes of looking for 'potential mitigating evidence within the records[.]'" *Id.* at 1281. This Court found such an abdication of responsibility by legal counsel to amount to constitutionally ineffective representation. *Id.* at 1282; *see also, e.g., Commonwealth v. Zook*, 887 A.2d 1218, 1234-35 (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).

It is also undisputed that Attorney Waldron did not interview a single potential witness to testify on Jamie's behalf, despite the fact that numerous people who had intimate knowledge of Jamie were ready and willing to do so – including the murder victim's own mother and sister-in-law. (PCRA Hr'g Tr. 10/4/21 at 23:5-12, 46:12-23; 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).) Attorney Waldron's testimony that he made a "strategic" decision not to call any of those witnesses at Jamie's decertification hearing in order to spare them from being cross-examined is belied by the fact that he never interviewed any of those witnesses himself, nor did he take any other steps to assess their ability to withstand cross-examination; instead, he left it to his expert witnesses and a private investigator to interview some of the available witnesses, without his participation. (PCRA Hr'g Tr. 10/4/21 at 23:5-12, 46:12-23, 85:19-86:9,179:23-182:2.) With no basis for assessing how the numerous witnesses who

were waiting to testify on Jamie's behalf might withstand cross-examination, Attorney Waldron's assertion that he made a "strategic" decision not to call any of them to rebut testimony that Jamie was a "manipulative chameleon" and a "budding sociopath" is not defensible.

Counsel may reasonably decline to call character witnesses if he has "a legitimate reason to believe that the Commonwealth would cross-examine the witnesses concerning bad-character evidence." *Commonwealth v. Hull*, 982 A.2d 1020, 1023 (Pa. Super. 2009). However, "[f]or counsel's decision to be reasonable, counsel would have had to investigate the witnesses, determine what they knew about Appellee, and evaluate how that information would help or hurt his trial strategy." *Id.* at 1025; *see also Commonwealth v. Miller*, 1790 WDA 2013, 2014 WL 10790353, at *8 (Pa. Super. Oct. 1, 2014) (attorney's decision not to call character witnesses "was not a tactical one made after weighing all of the alternatives, but was based on the fact that he failed to interview and prepare potential character witnesses, and consult with his client thereto"); NATIONAL JUVENILE DEFENSE STANDARDS ("NATIONAL STANDARDS"),[11] Standards 4.3, 8.4 (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

[11] National Juvenile Defense Standards, NJDC, https://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf (last visited Feb. 21, 2023).

evidence and testimony that may convince the court to keep the client in juvenile court").

"[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." *Commonwealth v. Fears*, 836 A.2d 52, 71-72 (Pa. 2003); *see also, e.g.*, *Zook*, 887 A.2d at 1234 ("[C]ounsel's effectiveness is seriously in question where counsel either fails to realize, or realizes but fails to pursue, a course of investigation objectively dictated by the Sixth Amendment."); *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").

Here, Attorney Waldron left it to one of his experts and a private investigator to identify and interview potential fact witnesses, without his involvement. (PCRA Hr'g Tr. 10/4/21 at 23:5-12, 46:12-23; 180:13-21.) That is not an exercise of reasonable professional judgment. On the contrary, as this Court held in *Houseman*, such an abdication of counsel's responsibility to investigate, gather and present evidence on behalf of his client constitutes ineffective representation. *See Housman*, 226 A.3d at 1282 (counsel's performance "was not based upon a reasonable strategy, but resulted from inattention to the mitigation evidence that was readily available").

The Superior Court's holding that it was the responsibility of non-attorney experts and investigators, rather than Attorney Waldron himself, to identify, gather, analyze and present to the Court relevant mitigating evidence – in other words, to provide Jamie with effective representation – cannot be reconciled with this Court's controlling precedent. A lawyer's ethical and professional duty to represent a client zealously and effectively cannot be delegated to non-attorneys. *See, e.g., Housman*, 226 A.3d at 1282; *see also* Pa. R. Prof. Conduct R. 1.3, Cmt. 1 ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.") The Superior Court's holding also violates relevant ABA standards governing the relationship between counsel and expert witnesses. *See*, *e.g.*, Standard 4-4.4 Relationship with Expert Witness, Am. Bar Ass'n, CRIMINAL JUSTICE STANDARDS FOR DEF. FUNCTION (2017) ("defense counsel should provide the expert with all information reasonably necessary to support a full and fair opinion.") The Superior Court's deviation from these principles presents an issue of substantial public importance that warrants prompt and definitive resolution by this Court.

C. The Superior Court's Ruling that Attorney Waldron's Representation of Jamie Was Not Ineffective is Contrary to United States Supreme Court Precedent and Controlling Authority from this Court, and Presents a Question of Substantial Public Importance that Requires Prompt and Definitive Resolution by This Court. (Pa. R. App. P. 1114(b) (2), (4)).

The constitutional right to counsel includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citing *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970)). The Sixth Amendment does not define effective representation. It "relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." *Id.* at 688.

"Generally, where matters of strategy and tactics are concerned, counsel's assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis designed to effectuate his client's interests." *Commonwealth v. Puksar*, 951 A.2d 267, 277 (Pa. 2008) (quoting *Commonwealth v. Miller*, 819 A.2d 504, 517 (Pa. 2002)).

In this case, Attorney Waldron's representation of Jamie fell far below that standard. Effective representation at any phase of a case requires a commitment and loyalty to one's client as well as the obligation to act zealously on the client's behalf. *U.S. v. Cronic*, 466 U.S. 648, 658-59 (1984); *see also* Pa. R. Prof. Conduct, Preamble [2] ("Counsel, must, as an advocate, "zealously assert[] the client's position under the rules of the adversary system."). Counsel has an additional duty to keep his client

informed of major developments, particularly with respect to plea discussions. PA R. Prof. Conduct, Rule 1.4 (attorneys must "promptly" inform clients of decisions with require the client's informed consent); *Id.* at Cmt. 1 (lawyer who receives offer of a proffered plea bargain must promptly inform the client of the substance of the offer); ABA STANDARDS, PLEAS OF GUILTY, STANDARD 14- 3.2 (counsel must keep defendant apprised of developments in plea discussions and must promptly communicate and explain to the defendant all plea offers).

At a minimum, lawyers may not delegate to non-attorney experts and agents the responsibility for investigating and presenting evidence, nor should they withhold material evidence from their experts. *See Houseman*, 226 A.3d at 1281-82. Lawyers also may not deprive their clients in criminal proceedings of their due process right to decide whether to plead guilty to a crime knowingly and voluntarily, free from trial court influence in plea discussions. *Evans*, 252 A.2d at 690-691.

Here, Attorney Waldron failed to conduct his own proper investigation into evidence that might be presented on Jamie's behalf, delegating that responsibility instead to non-attorney experts and an investigator. Even then, Attorney Waldron interfered with his experts' ability to opine effectively on Jamie's behalf by withholding material evidence from them. As a result, Attorney Waldron failed to present the trial court with important mitigating evidence, including character testimony from Jamie's family and others who knew her well, as well as evidence

of Caleb Barnes' violent and unstable history and his abuse of Jamie. None of this conduct can be considered a "strategy" intended to further Jamie's best interests.

Character evidence has been held to be "critical" to credibility determinations. *See Commonwealth v. Weiss*, 606 A.2d 439, 442 (Pa. 1992). National and state standards governing the representation of children in decertification proceedings similarly emphasize the need to investigate and present "all facts, mitigating evidence, and testimony that may convince the court to keep the client in juvenile court." *See* NATIONAL STANDARDS at Standard 8.3; *see also id.* at Standards 4.3, 8.3 (counsel has a duty to interview witnesses and thoroughly investigate). 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." JUVENILE DEFENDER ASS'N OF PA., PERFORMANCE GUIDELINES FOR QUALITY AND EFFECTIVE JUVENILE DELINQUENCY REPRESENTATION ("PA. GUIDELINES")[12] at Guideline 9, Sections 2, 3.[13]

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[12] Performance Guidelines for Quality and Effective Juvenile Delinquency Representation, JDAP, https://www.juvjustice.org/sites/default/files/resource-files/Performance%20Guidelines%20For%20Quality%20and%20Effective%20Juvenile%20Delinquency%20Representation.pdf (last visited February 22, 2023).

[13] The character testimony that was available to Attorney Waldron would have

The Superior Court's attempt to excuse Attorney Waldron's failure to present mitigating character evidence only highlights its importance. In response to Jamie's assertion that the trial court expressly rejected the testimony of Drs. Dattilio and Berkowitz in its entirety due to Attorney Waldron's failure to provide them with relevant evidence, the Superior Court held that the testimony of those experts related to just one factor in the decertification analysis – Jamie's amenability to treatment – and that the trial court had placed greater weight on other factors of the analysis, stating:

> Based on the foregoing, the trial court did not deny decertification solely based upon its discrediting of the reports of Dr. Dattilio and Dr. Berkowitz. In fact, Appellant's lack of amenability to treatment was not even the most heavily-weighted factor against decertification. Critically, the trial court found that the impact of the offense on the victim, the impact of the offense on the

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corroborated the conclusions of Drs. Dattilio and Berkowitz, who found Jamie to be naive, immature and vulnerable. (Decert. Hr'g Tr. 10/29/15 at 28:15-16, 48:6-7; Decert Hr'g Tr. 11/2/15 at 19:8-10, 33:5-13); *see also* PCRA Hr'g Tr. 10/5/21 at 25:9-12 (testimony of Jamie's aunt, Tonya Lynn, noting that she was "not really" mature); PCRA Hr'g Tr. 10/6/21 at 7:3-17 (testimony of Heather Lesko, the mother of Jamie's lifelong close friend, describing Jamie as "naïve" and "not emotionally mature" and noting that Jamie had a "naïve child-like view on the world"). Character evidence also would have rebutted testimony from the Commonwealth's witnesses that Jamie was a "manipulative chameleon" and a "budding sociopath." Attorney Waldron's failure to anticipate how this mitigating evidence would have increased Jamie's chances of decertification, and his failure to interview available, willing witnesses so that he would be prepared to present that testimony, is evidence of his ineffective representation. *Commonwealth v. Hull*, 982 A.2d 1020, 1025 (Pa. Super. 2009) (finding ineffective assistance of counsel for failure to interview or call character witnesses where "counsel did not understand what role character evidence should have played in his overall trial strategy").

> community, and Appellant posing a threat to public safety all weighed against Appellant. *See* Trial Court Opinion, 11/19/15, at 24-26. As to the fourth and fifth factors, the court found that **"[n]o factors weigh so heavily** to this [c]ourt as do the sophistication of the crimes committed and [Appellant's] degree of culpability in the commission thereof." *Id.* at 25-26 (citation omitted, emphasis added). Given this backdrop, even if the trial court had not discredited the opinions of Appellant's experts, Appellant has not established that the trial court likely would have granted decertification.

(Super Ct. Op., App. A, pp. A24-25.)

Setting aside whether the Superior Court accurately characterized the trial court's ruling, if in fact the impact of the offense on the victim, the impact of the offense on the community, and the extent to which Jamie posed a threat to public safety grounds were truly crucial issues in the decertification analysis, then that would make Attorney Waldron's failure to interview and call people who had known Jamie for much or all of her entire life ─ including the victim's mother and sister-in-law, as well as the mother of Jamie's best friend, Jamie's pastor and a teacher who had known Jamie throughout her entire school career ─ to address these considerations head on, even more inexcusable, especially where there is ***no evidence*** of any downside or risk associated with calling those witnesses. *Compare, e.g., Strickland*, 466 U.S. at 691 (counsel's representation not ineffective where the evidence he did not present might have been harmful to his client's case).

Attorney Waldron's representation of Jamie in connection with her plea was also ineffective. By improperly drawing the trial court into a discussion of the plea terms the Court would (and would not) accept before ever even talking with Jamie about a potential plea, Attorney Waldron deprived Jamie of the ability to consider what plea, if any, she might voluntarily have offered. Instead, Attorney Waldron presented Jamie with a "fully formed plea proposal" and an admonition that the trial judge would accept nothing less than what he was proposing to her – precisely the situation that the *Evans* Court held to violate an accused person's constitutional due process rights. *See Evans*, 252 A.2d at 690-91. There is no respect in which Attorney Waldron's violation of Jamie's due process rights can be considered a "strategy" or "tactic" undertaken in Jamie's best interests.[14]

Attorney Waldron's failure to represent Jamie consistent with applicable ethical and professional standards caused Jamie to suffer real prejudice. When assessing the effectiveness of legal representation, Pennsylvania applies the "performance and prejudice test" set forth in *Strickland v. Washington*, 466 U.S. 668, 698 (1984). *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

[14] Attorney Waldron compounded his errors in the handling of Jamie's plea by advising her – falsely – that her sentence might later be reduced if she were to enter a plea and then testify for the Commonwealth at Caleb Barnes' trial. (*See* PCRA Hr'g Tr. 10/4/21 at, 64:16-21, 156:15-17.) Attorney Waldron's advice to Jamie on that point was simply wrong as a matter of law, as even he was forced to admit at the PCRA hearing. (*Id.* at 44:8-45:10.)

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).

The assessment of prejudice presumes that the decisionmaker (*i.e.*, the trial court) is reasonable and impartial, and "should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency....[E]vidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination." *Strickland*, 466 U.S. at 695 (1984). In other words, any concerns Attorney Waldron might have had regarding the trial court's sentencing practices – which he cited as his excuse for

violating *Evans* when negotiating Jamie's plea – is irrelevant to the prejudice analysis. (PCRA Hr'g Tr. 10/4/21 at 24:18-24.)

Here, there can be no doubt that Attorney Waldron's ineffective representation of Jamie prejudiced Jamie's chances of decertification and tainted her plea. Attorney Waldron's failure to give his experts a complete record to review led the Trial Court to disregard their testimony ***in its entirety***. (Decert. Op., App. B, pp. B26-B31 (PCRA Ex. 6).) Had Drs. Dattilio and Berkowitz been provided with all of the relevant evidence, they 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 ─ factors that, as the Superior Court noted, were important to the Trial Court. (*See*, *e.g.*, Super. Ct. Op., App. A, pp. A21, A24-26; PCRA Hr'g Tr. 10/8/21 at *passim* (PCRA hearing testimony of additional expert, Dr. Beyer, addressing all of the evidence that was available to Attorney Waldron at the time of Jamie's decertification hearing). *See also Zook*, 887 A.2d at 1235 (rejecting the PCRA Court's conclusion that no prejudice resulted from counsel's failure to investigate and present certain evidence where the evidence would have allowed counsel to establish additional mitigating factors which might have changed the balance of the factors weighed by the jury).

The Superior Court's finding that Attorney Waldron's representation of Jamie was effective renders the professional and ethical standards discussed herein essentially meaningless. The Superior Court's opinion undermines important standards regarding counsel's duty in decertification proceedings to investigate and present mitigating evidence and testimony on his client's behalf. It also absolves counsel of his duty to keep his client appraised of developments in plea negotiations, and opens the door for counsel to negotiate plea agreements with the court and Commonwealth counsel without their clients' knowledge or consent, in violation of their clients' due process rights.

The public has a vital interest in ensuring that attorneys follow professional and ethical standards when representing clients, and in ensuring that attorneys' representation of their clients is consistent with fundamental due process. The Superior Court's determination that Attorney Waldron's representation of Jamie was effective jeopardizes that public interest and should be reversed.

VII. CONCLUSION

Adherence to the rule of law, due process and the obligation to provide zealous advocacy for one's client are among the key pillars of the American justice system. For Jamie Silvonek, these principles were painfully absent in Attorney Waldron's representation of her. In excusing Attorney Waldron's ineffective representation, both the trial court and the Superior Court ignored clear violations of longstanding

and accepted professional and ethical standards, and also ignored controlling precedent from this Court, the United States Supreme Court and other decisions of the Superior Court. For all these and all of the foregoing reasons, this Court should grant the instant Petition for Allowance of Appeal and reverse the Order of the Superior Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the word count limitation of Rule 1115(f) of the Pennsylvania Rules of Appellate Procedure. This brief contains 8,855 words. In preparing this certificate, I relied on the word count feature of Microsoft Word.

/s/ Marsha L. Levick
Marsha L. Levick

Dated: February 21, 2023