IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-0050-2003 (03-10,050)**
	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
RICHARD WAYNE ILLES, SR.,	**:**	**Notice of intent to dismiss**
Defendant	**:**	**PCRA**

OPINION AND ORDER

This matter came before the Court on Defendant's First Amended Post Conviction Relief Act (PCRA) petition. For a variety of reasons, the Court finds that the petition, as currently pleaded, is insufficient to hold an evidentiary hearing. The Court will endeavor to give a brief explanation for each claim raised by Defendant.

Defendant first asserts that trial counsel were ineffective for failing to interview and call numerous character witnesses. For any claim of ineffective assistance of counsel, Defendant must **plead** and prove the underlying substantive claim has arguable merit, counsel whose effectiveness is being challenged did not have a reasonable basis for his or her actions or failure to act, and the defendant suffered prejudice as a result of that counsel's deficient performance. 42 Pa.C.S.A. §9543(a)(2)(ii); Commonwealth v. Pierce, 567 Pa. 186, 203, 786 A.2d 203, 213 (Pa. 2001). In addition to the general, three-prong test set forth above, when the claim involves failure to call a witness a defendant must plead and prove the following: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of, the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial. Commonwealth v.

Washington, 592 Pa. 698, 721, 927 A.2d 586, 599 (Pa. 2007); Commonwealth v. Fletcher, 561 Pa. 266, 292, 750 A.2d 261, 275 (Pa. 2000). Defendant has neither pleaded facts to satisfy all the elements required nor has he provided an affidavit or certification from each proposed witness to show that he could present testimony to establish each of the elements. Pa.R.Cr.P. 902(A)(12)(b); Pa.R.Cr.P. 902(A)(15); Commonwealth v. Williams, 573 Pa. 613, 619 n.6, 828 A.2d 981, 984 n.6 (Pa. 2003); Commonwealth v. Pierce, 567 Pa. 186, 205, 786 A.2d 203, 214 (Pa. 2001)(appellant's claims of ineffective assistance of counsel for failing to call certain witnesses were properly denied without holding an evidentiary hearing where appellant failed to offer affidavits from the witnesses or to supply proof that they were available and would have testified on his behalf at trial); Commonwealth v. O'Bidos, 849 A.2d 243, 249 (Pa.Super. 2004)("ineffectiveness for failing to call a witness will not be found where a defendant fails to provide affidavits from the alleged witnesses indicating availability and willingness to cooperate with the defense"). Obtaining affidavits or certifications should not be an undue burden in this case given the fact that Defendant is represented by private counsel, who has an investigator working on this case.

Defendant next asserts his attorneys were ineffective in failing to call him as a witness despite his lack of criminal record and counsel advised him that he could raise this issue as an appeal issue. This issue lacks merit. The Court conducted a colloquy with Defendant regarding his right to testify at trial. The Court explained to Defendant that his attorneys could advise him one way or the other but the decision to testify was his. The Court also explained to Defendant that if he were convicted, he could not come back later and say he wanted a new trial so he could testify; he was giving up his right to testify for all time.

Defendant indicated his understanding of this right and knowingly, voluntarily and intelligently waived his right to testify in his case. N.T., 2/17/2004, at pp. 122-128. Furthermore, testifying may have opened the door to additional information and certainly would have subjected Defendant to questioning from the DA regarding difficult topics such his obtaining information regarding countries without extradition treaties, obtaining a passport for Richie, obtaining the books "How to Hide Your Assets and Disappear" and "They Write Their Own Sentences," writing his manuscript about the murder, and the like.

Defendant also contends trial counsel were ineffective for failing to object to a fifty year old photograph of Joseph Kowalski. Defendant fails to specify how or why this photograph was allegedly objectionable. The fact that the photograph was used as part of the evidence to tie the murder weapon to Defendant does not make it objectionable; it makes it relevant.

Defendant alleges trial counsel were ineffective in failing to object to the admission of book chapters and/or failing to object to the prosecutor's characterization of the book chapters as an admission of guilt by Defendant. Again, Defendant fails to specify how or why the book chapters were objectionable or inadmissible.

Defendant next claims his attorneys were ineffective for failing to request a cautionary instruction when highly prejudicial statements by Mr. Butler and Mrs. Smith were admitted under 'state of mind' exception to the hearsay rule; thus allowing the jurors to use such statements as substantive evidence. The Court notes Defendant challenged the admissibility of Mr. Butler and Mrs. Smith's testimony in his direct appeal and did not prevail. The Court does not believe Defendant can prevail on this aspect either. This

testimony was a small part of the trial and counsel, for strategic reasons, may not have wanted to highlight or emphasize this testimony by requesting a cautionary instruction. Furthermore, it is highly unlikely that if a cautionary instruction had been given that the jury would have acquitted Defendant. Mr. Butler and Mrs. Smith's testimony was admitted to show motive, intent, the parties' relationship and/or state of mind. This, however, was not the only such evidence admitted at trial. Testimony was introduced from various witnesses about statements Defendant made, which was admissible as substantive evidence. For example, James Swann testified that, when he was discussing the amount his divorce was costing him in terms of attorney fees, temporary alimony and child support, Defendant stated that if he was under those circumstances he would take his wife out. N.T., 1/21/2004, at p.84. Norma Ulmer testified that she overheard a conversation between Defendant and Dr. Zama where Defendant said "I wish the bitch were dead, my life would be a whole lot easier." N.T., 1/21/2004, at p. 209. Dr. Nche Zama testified that Defendant would call his wife a wicked bitch. N.T., 1/30/2004, at p. 43. With respect to the conversation overheard by Norma Ulmer, Dr. Zama testified Defendant came over to Dr. Zama's house and said something to the effect of the bitch is just making my life miserable, I wish she would just go away. N.T., 1/30/2004, at p. 44. Justin Lee, who was in the cell next to Defendant's at the prison, testified he overheard Defendant say I'm glad the bitch got it or I'm glad I got the bitch. N.T., 2/05/2004, at pp. 100-101. When Defendant found out Mr. Lee told the district attorney what he heard, Defendant called Mr. Lee a mother f***ing snitch. N.T., 2/05/2004, at p. 103. Based on the foregoing, the Court does not believe Defendant was prejudiced by his attorneys' failure to request a cautionary instruction.

Defendant asserts Attorney Miller was ineffective for introducing the concept of "planting of evidence" during his closing statements which permitted the prosecutor to argue that all the scientific evidence that exculpated Defendant was planted by Defendant. The Court cannot agree. Regardless of whether Attorney Miller addressed this issue in his closing statement, the prosecutor was going to argue that certain evidence was planted because there was only one set of footprints in the snow outside the victim's house, but the DNA from the cigarette butt, the sneakers and the letters from the alleged killer did not match each other, indicating it was from different individuals. Since the prosecutor gets to make the last closing statement, Attorney Miller had to anticipate this argument and address it during his closing statements or the prosecutor's argument would be uncontested. Thus, it is apparent from the record that Attorney Miller had a rational or strategic reason for discussing the concept of 'planting of evidence' during his closing statement.

Defendant contends trial counsel were ineffective for failing to object to the Court's examples of circumstantial evidence, because only examples of strong circumstantial evidence were given, leaving the jury to possible infer that all circumstantial evidence is strong. This issue is without merit. The examples given were appropriate. See N.T., 2/18/2004 at pp. 228-232. In fact, the one example about it raining while in a movie theater is very similar to the illustration contained in the comment to Pennsylvania Suggested Standard Criminal Jury Instruction 7.02A, which states," If, while walking outdoors, you hear thunder and see lightning and see water falling on the ground and on you, you have direct evidence that it is raining. On the other hand, if you leave a movie theater and see that the streets, sidewalks, and grass are wet, and that people are carrying umbrellas and wearing

coats, even though you didn't see it raining, you have circumstantial evidence that it rained while you were at the movies." Therefore, even if counsel had objected, the Court would have overruled the objection.

Defendant alleges trial counsel were ineffective for failing to call Steven A. Smith as a witness at trial when Mr. Smith could offer testimony that years prior to the murder he discarded the alleged murder weapon in the woods where police discovered it. The Court cannot agree. Trial counsel did not become aware of Mr. Smith's proposed testimony until nearly mid-February, well after the trial had started. See N.T., 7/08/2004, at pp. 78-79, 82-83. Mr. Smith was called as a witness during the hearing on Defendant's post sentence motions. N.T., 7/08/2004, at pp. 16-51. The Court did not find Mr. Smith credible. Mr. Smith was not a good witness. He did not have good memory. He could not give the full name of the individual from whom he allegedly borrowed the gun and he could not state the make or model of the weapon. When the prosecutor tried to explore these details with Mr. Smith during cross-examination, he became argumentative. Based on the lack of detail and Mr. Smith's attitude and demeanor, the Court finds his testimony would not have changed the outcome of this trial, because the jury would not have believed that the weapon allegedly discarded by Mr. Smith was the same weapon found by the police in this case.

Defendant next claims his attorneys were ineffective for depending on Defendant to read all of the discovery materials and present them with what Defendant though was important. This assertion is simply too general to entitle Defendant to relief. Defendant has failed to specify what information he did not think was important but counsel should have presented that would have changed the outcome of the trial.

Defendant also alleges trial counsel were ineffective for failing to object to the flight instruction given to the jury and the idea of flight being argued when no flight occurred. The Court gave a consciousness of guilt instruction. N.T., 2/18/2004, at pp. 233-235. Such an instruction was appropriate given the evidence introduced regarding Defendant's conduct. The Commonwealth contended the following conduct showed consciousness of guilt on the part of Defendant: (1) Defendant got passport for Richie; (2) Defendant obtained information about countries without extradition treaties with U.S.; (3) Defendant possessed the book "How to Hide Your Assets and Disappear;" (4) Defendant would not allow police to interview Richie until September 14, 2000; and (5) Defendant reported that his home had been burglarized on or about January 23, 1999 but wouldn't let the police come to his house to investigate. Defendant claimed this evidence did not show consciousness of guilt because he did not flee the country; he did not allow interview of Richie on advice of psychologist due to Richie's fear of police; and he did not allow police investigate burglary because nothing missing. Clearly, there was a fact issue for jury whether these actions by Defendant showed consciousness of guilt.

Defendant contends trial counsel were ineffective for failing to impeach the credibility of the Commonwealth's expert witness, Mr. Greenleaf, during the preliminary hearing. The Court cannot agree. First, Defendant's petition lacks specificity; he has not indicated what information trial counsel should have used to impeach Mr. Greenleaf that would have affected the outcome of the trial. Second, trial counsel did not know Mr. Greenleaf was not going to testify at trial. The Commonwealth intended to call Mr. Greenleaf as a witness at trial; it did not intend to use his preliminary hearing testimony.

Unfortunately, Mr. Greenleaf subsequently developed a medical condition which rendered him unavailable for trial, and the Commonwealth asked to introduce the preliminary hearing transcript of Mr. Greenleaf's testimony at trial. Trial counsel had no way of knowing Mr. Greenleaf would develop a back problem that would prevent him from traveling from Massachusetts to attend the trial. Third, trial counsel also would have had good reasons not to impeach Mr. Greenleaf's credibility at the preliminary hearing. Credibility is not an issue determined at a preliminary hearing. Liciaga v. Court of Common Pleas of Lehigh County, 523 Pa. 258, 263, 566 A.2d 246,248 (Pa. 1989)(magistrate is precluded from considering the credibility of a witness who is called upon to testify during the preliminary hearing); Commonwealth v. Marti, 779 A.2d 1177, 1180 (Pa.Super. 2001)(weight and credibility of the evidence are not factors at the preliminary hearing stage). Moreover, since everyone expected Mr. Greenleaf to testify at trial, counsel would not want to alert Mr. Greenleaf to the areas where he was going to be challenged so he could come up with explanations or excuses to combat those issues at trial.

Defendant asserts trial counsel were ineffective in failing to request sequestration of the jury during trial when extensive media coverage was evident. The Court cannot agree. Numerous times the Court instructed the jury not to read the papers, not to watch or listen to the news or in any other way hear or see information about this case outside the courtroom. N.T., 1/20/2004, at pp. 5-7; p. 238; N.T., 1/21/2004, at p. 227; N.T., 1/22/2004, at p. 3; N.T. 1/23/2004, at p. 184; N.T., 1/30/2004, at p. 123; N.T., 2/04/2004, at p. 195; N.T., 2/10/2004, at p. 178; N.T., 2/12/2004, at p. 225; N.T., 2/17/2004, at pp. 135-136. The jury is presumed to follow the court's instructions. Commonwealth v. McRae, 574

Pa. 594, 606, 832 A.2d 1026, 1034 (Pa. 2003), cert. denied, 543 U.S. 822, 125 S.Ct. 31, 130 L.Ed.2d 32 (2004); Commonwealth v. Bridges, 563 Pa. 1, 45, 757 A.2d 859, 883 (Pa. 2000), cert. denied, 535 U.S. 1102, 122 S.Ct. 2306, 152 L.Ed.2d 1061 (2002). Defendant has provided no witness certifications, affidavits, or documents to show the jurors had any contact with the media or any other outside influences during the trial.

Defendant next asserts his attorneys were ineffective for failing to do a survey of county residents prior to jury selection and failing to complete motions for change of venue or venire. This issue lacks merit. Although there was an initial flurry of media attention near the time of the murder in January 1999, Defendant was not arrested until December 2002 and the trial did not occur until January and February of 2004. There was not a lot of media coverage immediately prior to trial. The prospective jurors were questioned about their exposure to media coverage of this case, and a jury was selected over the course of a few days without difficulty. Therefore, even if defense counsel had pursued the motion for change of venue or venire, the Court would have denied it.

Defendant claims his attorneys were ineffective for failing to properly preserve the statement of his son Richie that was given during a police interview on September 14, 2000. Defendant fails to specify what counsel could have done. By the time Defendant agreed to allow the police to speak to his son, approximately 20 months had passed since the murder and the events were no longer fresh in Richie's mind. In fact, at the request of Defendant or Mr. Costopolous (Defendant's former counsel), Dr. Schneider asked Richie about the events the weekend of his mother's death during his last session with Richie on November 9, 1999. Dr. Schneider described what Richie told him as "very vague." N.T.,

2/11/2004, at p. 25, 28. Therefore, due to Defendant's actions, the statements did not qualify as recorded recollection under Rule 803.1(3) of the Rules of Evidence.

Defendant alleges defense counsel were ineffective for failing to interview the McDonald's employees immediately after his wife was murdered to confirm Defendant's alibi. Defendant contends if this had occurred the employees would have had a much clearer memory of Defendant and his son being there earlier than 11:00 p.m. This is sheer speculation. The victim was shot on a Friday night in January 1999. Her body was not discovered until early Sunday evening. The earliest defense counsel could have interviewed the McDonald's employees was several days after Defendant and his son allegedly were there.[1] It is unlikely that the employees would remember the exact time Defendant was at McDonald's even if they had been asked a few days thereafter. Furthermore, even if they had been interviewed earlier, that does not mean the witnesses would have had any better memory of Defendant and his son when they testified at trial. Moreover, Defendant was not arrested and charged until December 2002. If defense counsel interviewed the witnesses to establish an alibi before Defendant was charged, that might be viewed as suspicious or even consciousness of guilt by the police and the jury.

Defendant alleges his attorneys were ineffective for failing to object to Defendant's manuscript "Heart Shot – The Murder of the Doctor's Wife" going out with the jury during their deliberations. Defendant argues that since the Commonwealth called the manuscript a confession, it was reversible error for the manuscript to go into the jury room under Rule 646 (B)(2). The Court cannot agree. The manuscript was not a confession per se;

1 If defense counsel had interviewed the employees before the police discovered the body, the Commonwealth would have used this evidence to show Defendant was the perpetrator.

it did not state that Defendant was the killer. The prosecutor indicated the manuscript was **not** a direct confession; instead, he argued that the manuscript was Defendant's way of bragging about the crime without confessing to being the killer. N.T., February 18, 2004, pp. 206-211.

Defendant asserts trial counsel were ineffective in failing to object the taped statement of Defendant. Defendant argues that the statement was not against his interest and was prejudicial. Defendant fails to state how or why the statement was allegedly objectionable. Statements made by a party opponent are admissible under Rule 803(25) of the Pennsylvania Rules of Evidence. Therefore, even if counsel had objected, the Court would have overruled the objection and allowed the Commonwealth to introduce the statement under Rule 803. Defendant also fails to state how or why the statement was unfairly prejudicial. Evidence is not prejudicial merely because it is not helpful to the defense.

Defendant also asserts his attorneys were ineffective in failing to object to the testimony of Justin Lee regarding a conversation he overheard while incarcerated on Defendant's block in the county jail. Again, Defendant fails to state how or why the statement was allegedly objectionable. Mr. Lee testified to statements made by Defendant. As with the previous issue, these statements were admissible under Pa.R.E. 803(25). Therefore, even if counsel had objected, the Court would have overruled the objection and permitted the Commonwealth to present the testimony of Mr. Lee.

Defendant claims his attorneys were ineffective for failing to request a continuance of closing arguments because Attorney Miller had been up all night with the flu;

in the alternative, Mr. Lepley could have given the closing argument. The only specifics mentioned by Defendant is that Mr. Miller neglected to present a large printed board that summarized the DNA evidence and failed to argue that Defendant's assets were protected in the event of a divorce by a prenuptial agreement. Initially, the Court notes Defendant has not provided a certification from Attorney Miller to support his allegation that Mr. Miller was up all night with the flu. Second, the large printed board was not evidence; the cigarette butt, the hairs found on the envelope, on the silencer and on the sneakers and the testimony of the scientists was. Third, Attorney Miller addressed the DNA evidence to some extent in his closing. Attorney Miller argued Defendant does not smoke and the DNA on the cigarette did not match him. N.T., 2/18/2004, at p.88. He argued that the DNA from the hair on the silencer did not match. Id. at p. 90. He also argued that the police and the district attorney were trying to make the evidence fit Defendant when it didn't. One example of that was his argument that despite Sandra Singer saying the hair found on the sneaker did not look like Richie's the district attorney had it sent off to a paid lab. Id. at p. 91.

With respect to the prenuptial agreement, Defendant has not attached a copy of the agreement to his petition to show what its terms were. It appears from the allegation and the testimony presented at trial that the prenuptial agreement only protected Defendant's separate property. If it protected Defendant from equitable distribution of marital assets, Defendant's attorney would not have been sending letters to the victim's attorney suggesting the victim receive 55% of the marital assets. N.T., 1/21/2004, at pp. 164-166. Regardless of its terms, a prenuptial agreement could not protect Defendant from paying child support if the agreement did not adequately provide for the child. See Knorr v. Knorr, 527 Pa. 83, 86,

588 A.2d 503, 505 (Pa. 1991). The Commonwealth argued that one of the reasons Defendant killed his wife was so he would no longer have to pay support. Defendant was paying $5500 per month in child support. N.T., 1/21/2004, at p.132. Defendant also was paying over $7200 per month in spousal support. Id. at 132, 139. Depending on the time frame, Defendant's total monthly support obligation was $12,716 to $13,340 per month. Id.

Defendant contends his attorneys were ineffective for failing to recall Commonwealth's witness Dr. Zama to impeach his credibility with documents that indicated he had been fined for perjury in Ohio, his medical license had been revoked for not paying alimony and his wife had filed a contempt petition against him to show he lied about how well he and his wife got along. Defendant has not attached any such documents to his petition contrary to Rule 902(15) of the Pennsylvania Rules of Criminal Procedure. The defense offered some documents for Court review during trial, but the documents did not show Dr. Zama had been convicted of perjury or contempt. The defense introduced testimony and a document through George Manchester to show that Dr. Zama's Ohio medical license had been suspended for failing to pay child support. N.T., 2/11/2004, at pp. 176-179. The defense attorneys sought to introduce a contempt petition filed by Denise Zama against Dr. Zama for his failure to appear at a deposition. The petition alleged that Dr. Zama avoided paying past support orders to the point he was incarcerated three days and fined $20,000; the defense attorneys did not have a court order imposing these sanctions. The defense attorneys also sought to introduce a contempt petition filed by Dr. Zama against Denise Zama for her refusing to allow Dr. Zama certain visitation with their children. The Court did not allow the attorneys to introduce this evidence because it involved collateral

issues. N.T., 2/17/2004, at pp. 106-114. The Court also notes the documents contained allegations, not findings of fact by the Ohio court.

Defendant alleges his attorneys were ineffective for failing to question the time of the victim's death despite Susan Van Fleet indicating that she saw the victim drive past her home Saturday, the day after she was allegedly murdered. Susan Van Fleet testified at trial, but she never made any statement similar to Defendant's allegations. Defendant claims Mrs. Van Fleet gave this information to the police and it is contained in police discovery materials. Defendant has failed to attach any such documents to his petition. He also has failed to supply a certification from Mrs. Van Fleet, indicating that she would testify consistent with the alleged statement. Even if Mrs. Van Fleet would testify consistent with this statement, the Court questions whether it would change the outcome of the case. Instead, the Court believes it is likely the jury would simply have thought Mrs. Van Fleet was mistaken. The Commonwealth had very strong and clear evidence as to the time of death of Miriam Illes. This was not an issue at trial.

Defendant asserts his counsel were ineffective for failing to ask for a cautionary instruction or mistrial after attorney Steve Hurvitz deliberately stated that the victim was afraid of Defendant, where there was no question before him. This issue lacks merit. If counsel had requested a mistrial, the court would not have granted it. The Court sustained defense counsel's objection to this remark and instructed the jury to disregard it. N.T., 1/21/2004, at p. 205. Counsel would have had a rational, strategic reason to not request any further cautionary instruction, because they would not want to draw the jury's attention to this off-hand remark. Furthermore, there was other evidence admitted which showed that

the victim was afraid of Defendant and Defendant's hostility toward the victim. This evidence included the testimony of Dr. Zama, James Swann, Norma Ulmer, Leslie Smith and Gordon Butler. Therefore, any asserted error by counsel would not have changed the outcome.

Defendant next contends his attorneys were ineffective for failing to get into evidence that the victim changed her will three months prior to her murder, leaving all her assets to Francis Kummer and the police never investigated the financial situation of Francis Kummer and her husband. Defendant wants to argue that perhaps Mrs. Kummer killed the victim. Without other evidence to show she was in the area on the night in question or to otherwise connect her to the murder, the Court would not have permitted defense counsel to introduce this evidence at trial.

Defendant alleges his attorneys were ineffective for failing to object to the Court not making Defendant's son view his entire videotaped police interview and failed to object to his aunt and uncle possibly tainting his testimony by their presence while he was watching the video. The Court cannot agree. If counsel had objected to not making Richie view the entire tape, the Court would have overruled their objection. Richie watched approximately forty minutes of the tape. Richie asked that the tape be stopped and said he thought he could remember. N.T., 2/10/2004, at p. 130. When it was explained to Richie that he wasn't supposed to say what he saw or read, but what he remembered from that weekend, Richie remembered some things, but he didn't remember specifics like what the roads and the weather were like, whether they stopped to eat, and whether they stayed somewhere on the way to his Aunt Sue's house. N.T., 2/10/2004 at pp. 158-171. Defense counsel also tried

to refresh Richie's recollection with a transcript of the videotaped interview. Defense counsel acknowledged on the record that the portion of the taped viewed by Richie contained the majority of the information in which the defense was interested. N.T., 2/10/2004, at pp. 186-187, 189-190. Although the murder occurred on Friday night, Richie did not know his mother had been killed until Sunday evening. Richie was five years old when his mother was murdered. He was almost seven years old when the videotaped interview occurred on September 14, 2000 and he was ten at the time of trial. It was not surprising to the Court that Richie could not remember the details of Friday, January 15, 1999 when he was called to testify on February 10, 2004. Richie viewed the portions of the tape that contained the information important to Defendant's alibi defense, such as the weather and road conditions on Friday, January 15; whether they stopped at McDonald's and whether they stayed overnight at a hotel. He also reviewed portions of the transcript of that tape. The Court does not believe watching the remainder of the tape would have made a difference.

The Court also would have overruled any objection to Richie's aunt and uncle being present in the courtroom. Richie's aunt and uncle are his legal guardians and have been since sometime after Defendant's arrest in December 2002. N.T., 2/17/2004, at p. 117. While they were present in the courtroom, they did not do anything to 'taint' his testimony.

Defendant claims trial counsel were ineffective for failing to object to Trooper McDermott testifying about tool mark evidence when he was not a tool mark expert. Trooper McDermott did not testify as an expert witness; he testified as a fact witness about how he made the end caps in replica silencer, the drill bits and tapes he used, and the drill bits and taps that were missing from one of Defendant's tool boxes. N.T., 2/10/2004 at pp.

54-94.

Defendant next claims Attorney Miller failed to file an appropriate motion with the Court when it became apparent that a coercive portion (the part regarding the expense to the county) of Judge Brown's instruction to the jury when they were deadlocked was not included in the trial transcripts. Defendant also asserts the "missing" portion is a basis for a new trial. This argument is meritless. No portion of the transcript was deleted or omitted. The Court did not tell the jury anything about the expense to the county to retry the case. The Court merely told jury if could not reach a verdict another jury would be evaluating the same evidence and deciding the same issue. N.T., 2/19/2004, at pp. 59-60.

Defendant alleges his attorneys were ineffective for failing to question the crime scene supervisor regarding multiple deviations from the standard of crime scene investigations. Defendant claims these deviations were failing to gather DNA evidence from soda cans that were on the sink next to the murder victim, failing to recover DNA evidence from the toilet on the first floor that had the lid up indicating a male had recently used it, and failing to search for evidence of sexual activity in the victim's bed. Defense counsel inquired into these areas when they questioned Trooper Holmes. N.T., 2/17/2004, at pp. 52-53, 60-61, 64-65. Furthermore, there was a reasonable explanation for not doing these things. The victim was in her locked house and she was shot through the kitchen window. There was no indication that the murderer was inside the victim's residence.

According to Defendant, his attorneys were also ineffective for failing to secure unbiased expert witnesses despite being provided $85,000 for that purpose. Defendant contends expert witnesses could have shown that the scientific methods used by

the FBI were not valid, the components of the silencer were common throughout the state and country, and the DNA evidence was the most reliable method to identify the murderer. Defendant, however, has not identified any witness who could testify in the manner he suggests and he has not provided a certification from any such witness. Defendant also has not alleged all the elements for an ineffectiveness claim for a failure to call witnesses. It is also clear from the record that the defense attorneys addressed these issues to some extent. The defense attorneys consulted with an expert on bullet lead analysis, and the trial was not in session on Friday, February 13, 2004, so defense counsel could consult with their witness. N.T., 2/11/2004, at pp. 227-229, 235. The defense attorneys also questioned the FBI experts about the availability and commonness of the foam, PVC, and wire. N.T., 2/4/04, at pp. 111, 114, 116-118, 163-164, 178. The defense attorneys also pointed out in their questioning and their arguments the DNA evidence that did not match Defendant. However, DNA evidence would only be a reliable way to identify the murderer if the DNA came from the murderer. Just because a cigarette butt was found, does not mean the murderer smoked it. The Commonwealth would have cross-examined any defense expert on this topic. Based on the all the evidence at trial, the jury could find that the cigarette butt found at the scene did not belong to the murderer, but was planted.

Defendant asserts his attorneys were ineffective for failing to vigorously represent him at trial in that they did not vigorously question the Commonwealth's witnesses and they did not effectively argue that the scientific evidence in the case indicated Defendant was innocent. Defendant fails to specify what his attorneys could have done in their questioning or their arguments that would have changed the outcome in this case. His

attorneys cross-examined all of the Commonwealth's witnesses and addressed the DNA evidence in their arguments. Just because Defendant did not get the result he wanted, does not mean his attorneys were ineffective.

Defendant next contends his attorneys were ineffective for failing to argue that the verdict was against the weight of the evidence. Although Defendant's attorneys failed to raise this issue in post trial motions, which resulted in this issue being waived for purposes of Defendant's direct appeal, Defendant was not prejudiced because the verdict was not against the weight of the evidence. See Opinion docketed July 8, 2005, at pp.115-119.

Defendant alleges trial counsel was ineffective for failing to subpoena records of snow plowing activities and road conditions from PennDOT that pertained to the routes in question during the night of the murder. The Court cannot agree. First, Defendant has not attached any such records to his petition. Second, absent a stipulation by the Commonwealth, the defense would need to call a witness to introduce these records into evidence. Defendant has not supplied any witness certifications on this issue. Third, evidence relating to the weather and road conditions was admitted at trial. The parties stipulated to the admission of weather reports. N.T., 1/22/2004, at pp. 96-98. Trooper McDermott was cross-examined about the difficulty cleaning up after the storm due to the quantity of freezing rain and sleet that fell. N.T., 1/22/2004, at pp. 110-111. Dwayne Van Fleet, Romaine Lapori, Sue Kaufman, Michael Bird and Michelle Newton all testified about the bad weather or the bad road conditions. N.T, 1/20/2004 at pp. 118-119, 124-125; N.T., 2/12/2004, at pp. 52-53, 66, 72, 93, 192, 194. Any further evidence from PennDOT would have been cumulative. Fourth, Dwayne Van Fleet and Defendant's sister testified Defendant

drove the speed limit or faster and bad weather and road conditions typically did not intimidate Defendant. N.T., 1/20/2004, at p.131; N.T., 2/12/2004, at pp. 73-74.

Defendant claims his attorneys were ineffective for failing to retain and call an expert witness that could determine exactly where Defendant's call to his sister on the night of the murder originated. As with Defendant's other claims for failing to call witnesses, Defendant has not identified any witness who could testify in this manner, let alone provided a witness certification or pleaded all the elements related to a claim for failure to call a witness. Absent identification of the witness by Defendant, the Court questions whether such an expert exists given the testimony from a phone company employee presented by the Commonwealth that an exact location could not be pinpointed, but only the tower that transmitted the call and the area covered by that tower. N.T., 1/22/2004, at pp. 145-149.

Defendant asserts Attorney Miller was ineffective for failing to monitor the case of Commonwealth v. Levanduski, 907 A.2d 3 (Pa.Super. 2006) and to provide notice to the Supreme Court that it directly impacted certiorari to the Pennsylvania Supreme Court. The Court finds no merit in this issue. The Superior Court decided Defendant's appeal on March 2, 2006. Attorney Miller had to file the petition for allowance of appeal to the Pennsylvania Supreme Court within thirty days thereafter. The Superior Court decision in Levanduski was not issued until August 2, 2006.

The Court also believes the Levanduski case is distinguishable. In Levanduski, the victim drafted a letter that conveyed a mixed message about the relationship between the appellant and the victim, vacillating between possible separation and promises

of reconciliation. Although the victim expressed some concerns about his gun being missing, the Superior Court noted the fact that the letter did not contain any threats made on the victim's life by the appellant or her paramour. 907 A.2d at 20. Unlike Levanduski, the victim's statements to Leslie Smith and Gordon Butler contained threats made on the victim's life by Defendant. Leslie Smith testified the victim told her that Defendant threatened her life if she got a dime of child support or got custody of Richie. N.T., 1/22/2004, at pp. 11-12. Gordon Butler testified the victim indicated to him that she had an altercation with Defendant where he came up onto her porch, got in her face and said she could die. N.T., 1/30/2004, at pp. 29-30.

Defendant claims Attorney Miller was ineffective for allowing Defendant to research issue for appeal and write most of the brief to the Superior Court. He also claims Attorney Miller should have limited arguments and issues to those that would have a real chance of success on appeal and should have used better legal arguments and form. Defendant's appeal was not denied based on defects in form. His attorney appropriately limited the issues he pursued on appeal. Although the defense initially raised over twenty issues in his statement of matters complained of on appeal, based on the Superior Court decision it appears only that six issues were briefed and argued on appeal. Out of all the issues initially raised, the ones addressed in the Superior Court's decision were the ones with the greatest chance of success. Defendant has not specified any issue that was not argued before the Superior Court that likely would have resulted in his conviction being overturned.

Defendant next contends his attorneys were ineffective for failing to contact Carol Chaski, a linguistics expert, to counter Fitzgerald's testimony and show that his

analysis was flawed and biased in favor of the Commonwealth. Defendant has not pleaded the elements necessary for a claim that counsel was ineffective for failing to call Ms. Chaski as a witness and he has not supplied a certification or affidavit from Ms. Chaski, indicating her opinions or the basis therefor.

Defendant alleges Attorney Miller was ineffective for failing to discuss extensive exculpatory evidence regarding DNA and hair evidence in his closing statement. Mr. Miller discussed the DNA and hair evidence in his closing. N.T., 2/18/2004, at pp. 88, 90, 91. All the hair evidence was not exculpatory. Mitochondrial DNA analysis was conducted and Richie could not be excluded as the source of one of the hairs found on a Reebok sneaker (see N.T., 2/02/2004, at pp. 99-100), the tread of which matched the footprints in the snow at the scene. With respect to the cigarette butt found at the scene and the hair taken from the envelope in which the anonymous letter was sent to the police, the fact that all of the DNA evidence did not match undercut the defense argument that it was the DNA of the murderer and provided the Commonwealth with a persuasive argument that these items were planted.

Defendant claims the attorneys were ineffective for failing to insist upon full grand jury testimony of the Commonwealth's witnesses and relied on the prosecution to decide what information was helpful to the defense. This is not accurate. The Court issued an Order requiring the Commonwealth to provide the grand jury testimony of each witness the night before he or she testified. See Order dated January 7, 2004. This was a big case with many boxes of evidence and transcripts. There were a few transcripts that the Commonwealth inadvertently did not provide prior to Trooper Holmes and McDermott

testifying. See N.T., 1/26/2004 at pp. 4-9. When the Commonwealth discovered these additional transcripts, they promptly provided them to the defense. These troopers testified multiple times during the trial. After the transcripts were provided, the Court permitted defense counsel to cross-examine the witnesses with the transcripts even when it was beyond the scope of the Commonwealth's direct examination. N.T., 1/26/2004, at pp.119-131.

Defendant contends trial counsel were ineffective for failing to call Deb Donohue as a witness to refute James Swann's testimony that he did not hold Defendant responsible for his termination. As with each of the other issues regarding failure to call witnesses, Defendant has neither pled facts to support each of the elements for such a claim nor has he provided an affidavit or certification from the proposed witness.

Defendant alleges his attorneys were ineffective for failing to request a taint hearing to determine if the testimony of Defendant's son was tainted by the maternal custodial aunt and uncle prior to and during the trial, despite the well known fact that victim's family wanted Defendant arrested. The Court cannot agree. In the seminal case of Commonwealth v. Delbridge, 578 Pa. 641, 855 A.2d 27 (Pa. 2003), the Pennsylvania Supreme Court defined taint as "the implantation of false memories or the distortion of real memories caused by interview techniques of law enforcement, social service personnel, and other interested adults, that are so unduly suggestive and coercive as to infect the memory of the child, rendering that child incompetent to testify. Id. at 655, 855 A.2d at 35. The Court also provided guidance on when a taint hearing is necessary and who carries the burden of proof as follows:

> In order to trigger an investigation of competency on the issue of taint, the moving party must show some evidence of taint. Once some

> evidence of taint is presented, the competency hearing must be expanded to explore this specific question. During the hearing the party alleging taint bears the burden of production of evidence of taint and the burden of persuasion to show taint by clear and convincing evidence. Pennsylvania has always maintained that since competency is the presumption, the moving party must carry the burden of overcoming that presumption.

Id. at 664, 855 A.2d at 40. Defendant has not provided any evidence of taint for the Court to hold a hearing. In fact, the Butlers indicated at a court conference prior to the child testifying that they had not discussed the case with Richie and they did not even tell him he would be called to testify until the day before he appeared in court. N.T., 2/09/2004, at pp. 119-120. Furthermore, it was not in Defendant's interest to have the child declared incompetent. The defense in this case was an alibi. The defense attorneys were hopeful that Richie could give some support to Defendant's alibi by providing testimony consistent with the interview of September 14, 2000.[2] Unfortunately, Richie's memory was hazy and he could not provide any details about the trip from Williamsport on Friday, January 15, 1999. This did not strike the Court as unusual. Richie was five years old in January 1999. He was called to testify on February 10, 2004. Given Richie's age at the time of the incident and the lapse of five years between the victim's death and the trial, it was not surprising that Richie could not remember the weather conditions, where he ate, or where he slept on February 15, 1999. Unlike the sexual abuse cases where the appellate courts have stated a taint hearing should have been held, this was not a case where the child made statements which implicated Defendant.

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2 If the Court had any questions about taint, it was with the September 14, 2000 statement. Defendant refused to let the police speak to Richie for about 20 months. By that time Defendant had taken Richie to two different psychologists. The second psychologist, Dr. Schneider, only asked Richie about what he did on January 15, 1999 at the request of Defendant or Mr. Costopoulos, his attorney at that time. N.T., February 11, 2004, at pp. 27-29. It was as if Defendant wanted to make sure Richie could remember the things he told him about that weekend before he would even consider letting the police speak to Richie. There also were times during the taped interview where Richie indicated he knew something because his dad told him.

Defendant also contends his attorneys were ineffective for failing to investigate the victim's history of nymphomania that required psychological counseling. Defendant believes this information could have been used to impeach the police stating that they did not find any evidence that the victim had a paramour during the one year separation from Defendant. This contention is ludicrous. Whether or not the victim had a history of nymphomania was not relevant to this trial. Similarly, whether she had a paramour is irrelevant unless Defendant could produce evidence to tie the paramour to the victim's murder. The Court believes this allegation is nothing more than an attempt by Defendant to smear the victim's reputation.

Defendant next asserts his attorneys were ineffective for stipulating to evidence of his son's hair drug testing, precluding impeachment of laboratory personnel. Defendant fails to specify how the laboratory personnel could have been impeached or how it would have changed the outcome of the trial. Furthermore, this allegation lacks merit. The stipulation was not harmful to the defense and, in fact, may have been helpful, because it included the fact that Richie's hair was tested but no controlled substances were found.[3]

Defendant alleges his attorneys should have objected to the State Police reenactment of their theory of the crime as it is impossible to recreate conditions exactly, road conditions were not the same and the police exceeded the speed limit during reenactments, which they testified the assailant would not be doing. This allegation is not

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3 Quite frankly, the Court does not believe the stipulation was particularly helpful or harmful to either side. The Commonwealth's theory was that Defendant was able to commit the murder despite having custody of Richie, because he drugged him. Defendant claimed he could not have committed the murder because he was traveling to visit his sister. The murder occurred on January 15, 1999. Richie's hair sample was not obtained until sometime in June, 1999. It was not surprising that no drugs were found in Richie's hair sample and, even if drugs had been found, no expert could determine the specific date the drugs were taken.

entirely accurate. During the first two reenactments, the state police testified they did not exceed the speed limit. N.T., February 5, 2004, pp. 153, 160. The police did exceed the speed limit during their last reenactment conducted on January 15, 2004 (see N.T., February 9, 2004, at pp. 84, and 90-91), but they did not say the assailant would not do this; they only acknowledged that the murderer would not want to be stopped for speeding (N.T., February 9, 2004, at p. 76-77). On the few portions of the reenactment where the police were exceeding the speed limit, it was only by between five and ten miles per hour. To convict someone for speeding using a mechanical, electrical or electronic speed timing device, the police must clock the individual going six miles over the speed limit and, depending on the device used, may need to clock them at ten miles over the speed limit when the limit if less than 55 miles per hour. See 75 Pa.C.S. §3368(c)(4). The amount the police were exceeding the speed limit was not so great as to make it likely that they would be stopped for speeding; therefore, the assailant could have been exceeding the speed limit in the manner the police were during their final reenactment.

Defendant also was not prejudiced by this failure. If defense counsel had objected on these bases, the Court would have overruled the objection and found these concerns went to the weight of the officers' testimony and not its admissibility.

Defendant claims his attorneys were ineffective for failing to object to mitochondrial DNA evidence being admitted pertaining to the failure to rule out Defendant's son as a possible contributor to the hair found on the sneakers allegedly used by the murdered, since the lab did not have enough sample to verify their results and none was

available to the defense team for their own testing.[4] Defendant has failed to state what witness could testify to these allegations. He also has failed to indicate how this would change the outcome. Even assuming for the sake of argument that Defendant's allegations are true, the Court would have overruled the objection and simply permitted defense counsel to bring these allegations to light during cross examination of the witness.

Defendant asserts his attorneys failed to call as a witness a State Police soil expert to refute misleading testimony by Trooper Holmes that soil from site where shoes were found was more similar to soil on shoes than soil at victim's home. As with Defendant's other assertions relating to failure to call witnesses, Defendant has failed to identify the witness and provide a certification or affidavit from the alleged witness. He also has failed to plead all the elements for such a claim, including but not limited to whether counsel knew of the witness, and whether the witness was willing and available to testify for the defense.

Defendant next contends his attorneys failed to impeach the integrity of the police by failing to argue that they circumvented the law multiple times to obtain incriminating evidence by asking the Van Fleets to question Richie about the events of the weekend, by obtaining samples of Richie's hair from Defendant's in-laws, and requesting the garbage collector remove his garbage. This issue is without merit. The Court did not find a reference in the record where the Van Fleets questioned Richie at the behest of the police or

4 The Court has reviewed the transcripts and the copies of the lab reports that it has. It is possible that the Court does not have all the reports, but the only item for which there was insufficient sample or the data was below the lab's standards was the pubic hair found on the sneakers. See report to Trooper William Holmes dated April 24, 2001submitted by Shelley Johnson, Charity Holland and Mitchell Holland. Defendant could not be excluded as a source of the hair, but that information was used only for investigative purposes; it was not introduced into evidence in this case.

that any incriminating evidence was obtained as a result. Defendant has not provided any documentation, certifications or affidavits to support his allegations regarding the Van Fleets. The hair and garbage evidence was not obtained unlawfully. Defendant challenged the seizure of his garbage through a suppression motion and litigated this issue in his direct appeal. All the Courts found this evidence was lawfully obtained. Furthermore, this would not have changed the outcome of the trial. The jury was aware of how the police obtain Defendant's garbage and Richie's hair because the Commonwealth presented this evidence in its case-in-chief. N.T., 1/22/2004, at pp. 193-200 (garbage); N.T., 1/29/2004, at pp. 86-92 (hair).

Defendant asserts his attorneys were ineffective for failing to object to the prosecutor stating in his opening that Defendant was behind on his support payments, which was false. This assertion is not entirely accurate and even if it were, Defendant was not prejudiced. The prosecutor did not argue that Defendant was behind in his support payments, but he did note the amounts Defendant was required to pay in support and that there were arrearages related to changes in the support amounts being retroactive to the date of the filing of the modification petition.[5] See N.T., January 20, 2004, at pp. 23-25. Even if this argument were inaccurate, Defendant was not prejudiced because the jury was instructed that the arguments of counsel are not evidence. N.T., February 18, 2004, at pp239-240. The law presumes that the jury follows the Court's instructions. Commonwealth v. McRae, 574 Pa. 594, 606, 832 A.2d 1026, 1034 (Pa. 2003), cert. denied, 543 U.S. 822, 125 S.Ct. 31, 130 L.Ed.2d 32 (2004); Commonwealth v. Bridges, 563 Pa. 1, 45, 757 A.2d 859, 883 (Pa. 2000),

5 The testimony of Barbara Hall made clear that although there were arrearages, they were not due until the parties' exceptions were resolved. N.T., January 21, 2004, at pp. 135-139.

cert. denied, 535 U.S. 1102, 122 S.Ct. 2306, 152 L.Ed.2d 1061 (2002).

Defendant also claims his attorneys were ineffective for failing to elicit the inexperience of he investigating officers with such a complex murder case when Trooper McDermott stated in his interview on 48 Hours, aired June 4, 2005 that this case was the most complex case the Montoursville barracks had ever handled and they only average 1 to 2 homicide cases per year. This argument is without merit. The experience of the officers, or alleged lack thereof, does not change the evidence. In fact, much of the evidence was analyzed by the Wyoming State Police lab, the FBI, and Bode Laboratories.

Defendant alleges his attorneys were ineffective for stipulating to weather reports, precluding cross-examination of the authors. Defendant has failed to specify what information could have been used to cross-examine the authors of the weather reports and how that information would have affected the outcome of trial. The stipulation also was somewhat helpful to the defense. Although the stipulation allowed the Commonwealth to introduce into evidence the fact that the snow storm ended on around 10:00 or 11:00 a.m. on the day of the murder through the testimony of Corporal McDermott, it also allowed the defense to introduce evidence contained in those reports that the storm was more difficult to clean up after than a normal storm because of the quantity of freezing rain and sleet that fell without having to call the custodian or author of the report to testify. N.T., January 22, 2004, at p. 110. Defense counsel also was able to use the reports to get Corporal McDermott to indicate that the storm affected travel into Saturday, January 16, 1999. N.T., January 22, 2004, at p. 111.

Defendant complains because his attorneys failed to request a mistrial when

the jury informed the Court of the numerical breakdown when they were deadlocked. Defendant believes this information influenced the Court's tone and demeanor when instructing them to continue to deliberate. This complaint is without merit. The numerical breakdown affected neither the instruction given nor the Court's tone and demeanor. If counsel had requested a mistrial, the Court would have denied it. Regardless of the numerical breakdown, the Court would have done the same thing. The jury had only deliberated for approximately one day when they sent the Court a note claiming they were deadlocked. This was not a lengthy deliberation in light of the fact the trial lasted several weeks.

Defendant next alleges his attorneys failed to use conflicting grand jury testimony of Officer Holmes and Officer Bramhall to impeach their trial testimony. Defendant has failed to specify what information he thinks his defense attorney should have used to impeach these officers' testimony. His attorneys did cross-examine Corporal Bramhall and Corporal McDermott regarding inconsistencies in their testimony concerning their initial interview of Defendant and whether they asked him solely about Miriam's enemies or both his and Miriam's enemies. See N.T., 1/22/2004, pp. 66-68, 82-86; N.T., 1/26/2004, pp. 28-34, 105-107, 109-110.

Defendant contends his attorneys were ineffective for failing to have Defendant's handwriting expert compare the printing of the anonymous letters to Defendant's known printing. Like many of Defendant's other contentions, Defendant has not alleged sufficient facts for this issue. Defendant has failed to identify the alleged witness or submit a certification or affidavit from him or her. He has failed to indicate to what

information the expert could testify, whether he or she was available and willing to testify for the defense and the like. Furthermore, it is possible that the expert could compare the printing and reach the same conclusions as the Commonwealth's experts.

Defendant asserts his counsel should have objected to the reading of portions of the book "They write their own sentences: The FBI handwriting analysis handbook." Defendant claims the case had nothing to do with his trial and the book's prejudicial value far outweighed any possible probative value. The Court disagrees with Defendant's assertion that the prejudicial value outweighed the probative value. The book was highly relevant. When the police conducted a search of Defendant's premises, they observed the book. They photographed it, but did not take it because it was not listed in the items to be seized under the search warrant. Instead, the purchased a copy of the book. The book provided a case example where an anonymous letter was written with a pencil in block printing. Two anonymous letters were sent to Attorney Lepley in this case. Both letters were written with a pencil in block printing.

The book also was not unfairly prejudicial. Under Rule 403 of the Pennsylvania Rules of Evidence, relevant evidence "may be excluded if its probative value is outweighed by the danger of unfair prejudice…." Evidence is unfairly prejudicial when it has "a tendency to suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially." Pa.R.E. 403, comment; Commonwealth v. Dillon, 592 Pa. 351, 366, 925 A.2d 131, 141 (Pa. 2007). It does not mean evidence that is damaging to a defendant's case, as all relevant evidence will have that effect. Commonwealth v. Broaster, 863 A.2d 588, 592 (Pa.Super. 2004)("Because all relevant

Commonwealth evidence is meant to prejudice a defendant, exclusion is limited to evidence so prejudicial that it would inflame the jury to make a decision based upon something other than the legal propositions relevant to the case"). Under this standard the evidence was not prejudicial. Therefore, even if counsel had objected, the Court would have overruled the objection.

Defendant alleges his attorneys failed to object to testimony by FBI agent Fitzgerald that linguistics "is the science of language," when it was determined during a pre-trial hearing that his testimony was not scientific and therefore not subject to limitations of scientific testimony. Defendant misconstrues the Court's pre-trial ruling. The Court found that the subject of Agent Fitzgerald's proposed testimony was not **novel**. Stylistic and linguistic comparisons have been made in cases this Commonwealth and other jurisdictions for years. See 1925(a) Opinion docketed July 8, 2005, at pp. 120-122. Since the Frye test only applied to **novel** scientific evidence, the Court rejected the defense attorneys' efforts to preclude the evidence under Frye. Thus, the Court would have overruled any such objection made by defense counsel. Furthermore, that one phrase of testimony was not going to change the outcome in this case.

Defendant also complains that his attorneys stipulated to the testimony of Jean Malatesta (sister of Joe Kowalski) regarding a photograph of Joe Kowalski from 1947, but did not include her testimony that she did not know if he owned the gun in the photograph and that she never saw the gun in the picture in possession of Joe Kowalski. Defendant has not provided an affidavit or certification from Ms. Malatesta to support his allegation that she did not know if Mr. Kowalski owned the gun or that she never saw it in his possession. The

Court also does not believe this would have changed the outcome of the trial. The photograph shows Mr. Kowalski was in possession of the gun when the photograph was taken. Just because Ms. Malatesta did not see it, does not mean Mr. Kowalski never possessed it. Furthermore, the defense attorneys addressed the ownership issue, albeit through cross-examination of Trooper Holmes. The stipulation included the fact the Mr. Kowalski gave a handwritten list of his firearms to Ms. Malatesta within the last five years of his life. N.T., 1/29/2004, at p. 158. The list was marked as Commonwealth Exhibit 134. The defense attorneys, through their cross-examination of Trooper Holmes, emphasized to the jury the fact that the .22 caliber Savage Hornet Model 23D was not on this list. N.T., 1/29/2004, at pp. 166-167. They also brought out the number of friends, family members and hunting buddies of Mr. Kowalski that the police interviewed and none of them ever recalled him having a Savage Hornet 23D. N.T., 1/29/2004, at pp173-174, 178.

Defendant contends his attorneys were ineffective for failing to call an expert witness in the area of analytical chemistry when, according to Defendant, a National Academy of Science paper indicated the methods used by the FBI in their bullet lead analysis was not scientifically valid and Defendant had provided his attorneys with $85,000 for expert witnesses. First, Defendant has not identified any witness who could testify in the manner he suggests and he has not provided a certification from any such witness. Second, Defendant has not alleged all the elements for an ineffectiveness claim for a failure to call witnesses. For example, one element is that the witness was available and willing to testify for the defense. The defense attorneys contacted an expert on bullet lead analysis, and the trial was not in session on Friday, February 13, 2004, so defense counsel could consult with this

witness. N.T., 2/11/2004, at pp. 227-229, 235. Defendant has not pleaded that this expert, or any other expert on bullet lead analysis, was available and willing to testify at Defendant's trial.[6] Third, although the National Academy of Science paper found that some of the conclusions being offered by some of the FBI examiners were not appropriate, such as a bullet came from a particular box of ammunition,[7] and it offered some recommendations or suggestions for making the procedures and testimony better, it did not find that the methods used by the FBI were invalid. Some of the findings were: (1) the technology used by the FBI – inductively coupled plasma-optical emission spectrophotometry (ICP-OES) – is appropriate and the best available technology for the application; (2) compositional analysis of bullet lead (CABL) is sufficiently reliable to support testimony that bullets from the same compositionally indistinguishable volume of lead (CIVL) are more likely to be analytically indistinguishable than bullets from different CIVLs; and (3) an examiner may testify that having CABL evidence that two bullets are analytically indistinguishable increases the probability that two bullets come from the same CIVL, versus no evidence of match status. See "Forensic
Analysis: Weighing Bullet Lead Evidence," Nation Academy of Sciences (2004), retrieved 11 February 2004<http://books.nap.edu/books/0309090792/html>.

Defendant again claims his attorneys were ineffective for failing to object to Trooper McDermott showing an experiment with different tools to make replicas of the silencer components, showing photographs and testifying before the jury on this topic when

6 The Court has a vague recollection that one of the proposed defense expert witnesses was not available because he was involved in another trial in another state.
7 The FBI examiner in this case was Diana Wright, whom this Court previously found testified consistent with the recommendations of the NAS paper. See Opinion issued July 8, 2005, at pp. 124-127.

Trooper McDermott was not qualified as an expert in tool marks or ballistics. The Court already addressed this issue on pages 16 and 17 of this Opinion.

Defendant next asserts his attorneys failed to object to prejudicial testimony that Defendant kept loaded guns in his homes and cars for protection and was licensed to do so. The transcript pages referenced by Defendant only showed that Defendant owned or possessed certain weapons, some of which were loaded; it did not show the reason why Defendant owned them or whether he was licensed to do so. Nevertheless, there was no reason for defense counsel to object to this testimony. Lots of individuals own guns for various reasons, including protection, hunting, and other recreational activities such a trap or skeet shooting. Furthermore, Defendant was not prejudiced by this testimony. In a claim for ineffective assistance of counsel, prejudice means but for counsel's act or omission, the outcome of the trial likely would have been different. For this allegation, the prejudice question becomes, if counsel had objected to this testimony and the Court had sustained the objection, would Defendant have been found not guilty? The answer to this question is a resounding no.

Defendant alleges Attorney Lepley failed to properly advise Defendant of a proper course of action once it was clear that he was a suspect in that: (1) Attorney Lepley allowed and advised Defendant to give police a second interview knowing this was unwise since the police will use any little, naturally occurring deviation between the two interviews to say he changed his story; (2) Attorney Lepley advised Defendant to have a news conference to answer questions, which prejudiced him in the minds of the jury pool; and (3) the defense attorneys did not advise Defendant to let the police interview his son in a method

that would preserve his testimony for trial. As with numerous other issues in this petition, Defendant has failed to provide any documents or certification from any witness, including himself, to support these allegations. Defendant also has not cited to the portion of the record where the police or prosecutor compared his two interviews and argued that he changed his story. Absent them actually doing this and the difference being related to a material fact or issue in this case, there would be no prejudice to Defendant. Similarly, there was no prejudice to Defendant from his news conference. As the Court previously noted with respect to the venue issue, there was no indication at the jury selection that the jury was in any way prejudiced against Defendant by any media coverage. With respect to the interview of Defendant's son, the interview occurred in September 2000, approximately 20 months after the murder.[8] The defense attorneys had no way of knowing that: Defendant would not be arrested until over two years later; the trial would not occur until two years after Defendant's arrest; or by the time of trial his son would not be able to recall even after attempting to refresh his recollection with the interview and the defense would want to use the interview at trial.

Defendant claims his attorneys were ineffective because they failed to put into evidence and argue that Defendant did not sue the victim's estate for return of marital funds and property or for legal percentage of the victim's estate. First, Defendant has not identified or presented a certification or affidavit from any witness who could support these allegations. Second, presenting such evidence would have opened the door to the Commonwealth presenting evidence regarding the Slayer's Act (20 Pa.C.S. §8801 et seq.), which precludes

8 This delay appears to be attributable to Defendant and his opposition to the police speaking to his son.

any person who participates in the willful and unlawful killing of another person from acquiring any property or receiving any benefit as a result of the death. The Commonwealth also could have argued under Drumheller v. Marcello, 516 Pa. 428, 532 A.2d 807 (1987) that if anyone should have pursued litigation over marital funds it was the victim's estate to obtain whatever the victim would have received in equitable distribution had she not been killed by Defendant. Third, the Court does not believe Defendant was prejudiced by this failure, as the Court does not believe the introduction of this evidence likely would have resulted in a not guilty verdict.

Defendant next requests recusal of the undersigned because Defendant has filed complaints against him and because all the judges of the Lycoming County Court of Common Pleas recused themselves from Defendant's civil action against attorney Lepley. The Court denies Defendant's request. Defendant bears the burden of producing evidence establishing bias, prejudice or unfairness necessitating recusal. Commonwealth v. Druce, 577 Pa. 581, 589, 848 A.2d 104, 109 (Pa. 2004).

> It is presumed that the judge has the ability to determine whether he will be able to rule impartially and without prejudice, and his assessment is personal, unreviewable and final. Where a jurist rules that he or she can hear and dispose of a case fairly and without prejudice, that decision will not be overturned on appeal but for an abuse of discretion.

Commonwealth v. Blakeney, 946 A.2d 645, 663 (Pa. 2008).

The Court has no prejudice or bias against Defendant. The Court has always been courteous and helpful to Defendant and his counsel and has tried to keep Defendant apprised of the status of this case.[9] Although Defendant did file a complaint against the

9 In fact, even though the Court recused itself from handling Defendant's civil action against Attorney Lepley, the Court sent Defendant copies of the docket entries for his appeal of that case when he claimed he was having

undersigned sometime in 2005 related to the amount of time it took for the record and the Court's opinion to be completed for Defendant's direct appeal, nothing ever came of it. The Court explained the delay was related to the length of Defendant's trial, the number of transcripts that needed to be prepared, the number of issues initially raised by Defendant in his statement of matters complained of on appeal, and the Court's unavailability for a period of time due to shoulder surgery. While Defendant asserts that this complaint is being investigated, no one has contacted the Court regarding this complaint since the summer of 2005. Based on the Court's explanation of the delay and the passage of nearly three years, the Court believes the Judicial Conduct Board declined to pursue Defendant's complaint. With respect to the civil action against Mr. Lepley, all the judges recused themselves because of the Court's policy not to hear cases where a local attorney is a named party. Mr. Lepley is not a party to this action, and any decision on Defendant's PCRA petition will only directly affect Defendant's conviction; it will not result in any type of monetary judgment or award against Mr. Lepley.

Defendant's final contention is that Attorney Lepley had a conflict of interest because he obtained the media rights prior to trial from Defendant. According to Defendant, this conflict of interest results in presumed prejudice to Defendant and reversible error. The Court cannot agree. Defendant has not provided any certification or affidavit from any witness who would support these contentions. Moreover, Attorney Miller was co-counsel in this case and was in a position to protect Defendant's interests. There is no allegation that Mr. Miller had this conflict of interest. Therefore, Defendant is not entitled a new trial. See

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difficulty obtaining them from the Prothonotary.

Commonwealth v. Wakeley, 433 Pa. 159, 162, 249 A.2d 303, 304 (1969)("It would perhaps be enough to answer that appellant was represented at trial by two attorneys, and had one of them had a conflict, the other was in a position to protect appellant's interests").

O R D E R

AND NOW, this ___ day of June 2008, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the Court gives Defendant notice of its intent to dismiss his Post Conviction Relief Act (PCRA) petition without holding an evidentiary hearing. Defendant may respond to this proposed dismissal within forty-five (45) days. If no response or request for an extension of time to respond is received within that period, the Court will enter an order dismissing the petition.

By The Court,

_____
Kenneth D. Brown, P.J.

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