

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	No. CR-1544-2020
	:	
v.	:	Order Directing Further
	:	Amendment and Scheduling
OBEDIAH MOSER,	:	Another PCRA Conference
Defendant	:	

ORDER

Petitioner, Obediah Moser filed a Post Conviction Relief Act petition on October 24, 2022. The Court initially appointed the Lycoming County Public Defender's office to review the petition. However, since they had represented Petitioner on direct appeal, new counsel, Donald F. Martino, Esquire was appointed to review the petition and file an Amended Petition or a response pursuant to *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988) and *Commonwealth v. Finley*, 379 Pa. Super. 390 (1988). An amended petition was filed on February 17, 2023. A conference on the petition was held before this Court on June 12, 2023.

To be eligible for relief under the PCRA, the petitioner must plead and prove that his conviction or sentence resulted from ineffective assistance of counsel which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. 42 Pa. C. S. §9543(a)(2) and that the allegation of error has not been previously litigated or waived. 42 Pa.C.S. § 9543(a)(3). A claim is previously litigated under the PCRA if the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue. 42 Pa.C.S. § 9544(a)(2). An allegation is deemed waived "if the petitioner could have raised it but failed to do so before trial, at trial, on appeal or in a prior state

postconviction proceeding.” 42 Pa.C.S. § 9544(b). *Commonwealth v. Brown*, 582 Pa. 461, 470–71, 872 A.2d 1139, 1144 (2005)

The law presumes counsel has rendered effective assistance, and to rebut that presumption, the petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him. *Commonwealth v. Kohler*, 36 A.3d 121, 132 (Pa. 2012). “[T]he burden of demonstrating ineffectiveness rests on [the petitioner].” *Commonwealth v. Rivera*, 10 A.3d 1276, 1279 (Pa. Super. 2010). To satisfy this burden, a petitioner must plead and prove by a preponderance of the evidence that: “(1) his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceeding would have been different.” *Commonwealth v. Fulton*, 830 A.2d 567, 572 (Pa. 2003). Failure to satisfy any prong of the test will result in rejection of the petitioner's ineffective assistance of counsel claim. *Commonwealth v. Jones*, 811 A.2d 994, 1002 (Pa. 2002).

“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. Miller*, 819 A.2d 504, 517 (Pa. 2000) (citation omitted). A claim of ineffectiveness generally cannot succeed through comparing, in hindsight, the trial strategy employed with alternatives not pursued. *Id.* In addition, we note that counsel cannot be deemed ineffective for failing to pursue a meritless claim. *Commonwealth v. Nolan*, 855 A.2d 834, 841 (2004) (superseded by statute on other grounds).

PCRA counsel's amended petition alleged in his first count that trial counsel was ineffective for failing to adequately discuss with him his right to a jury trial and the ramifications of the waiver of that right. PCRA counsel's amended petition alleges in his second count that trial counsel failed to properly meet with Petitioner and explain his options and rights and prepare a defense. Trial counsel submitted a witness certification from trial counsel, which does not support the allegations contained in the PCRA petition. Trial counsel also submitted a witness certification for Petitioner himself, but it was not signed by Petitioner; it was signed by counsel without explanation.¹ 42 Pa. C.S.A. Section 9545(d)(1)(i), (ii). The court is inclined to find substantial compliance and grant an evidentiary hearing, but the court is concerned that the amended petition has not sufficiently pleaded prejudice. *See Commonwealth v. Elliott*, 622 Pa. 236, 80 A.3d 415, 430 (2013)(claim waived where petitioner failed include specific claim in PCRA petition and failed to allege and prove what beneficial information or issues trial counsel should have presented had he prepared adequately, which would have changed the outcome of the trial). In order to ensure that Petitioner's record is protected and that everyone is aware of the issues that will be addressed at any evidentiary hearing, the court directs PCRA counsel to file a second amended PCRA petition to:

¹ d) Evidentiary hearing.--

(1) The following apply:

(i) Where a petitioner requests an evidentiary hearing, the petition shall include a certification signed by each intended witness stating the witness's name, address, date of birth and substance of testimony and shall include any documents material to that witness's testimony.

(ii) If a petitioner is unable to obtain the signature of a witness under subparagraph (i), the petitioner shall include a certification, signed by the petitioner or counsel, stating the witness's name, address, date of birth and substance of testimony. In lieu of including the witness's name and address in the certification under this subparagraph, counsel may provide the witness's name and address directly to the Commonwealth. The certification under this subparagraph shall include any documents material to the witness's testimony and specify the basis of the petitioner's information regarding the witness and the petitioner's efforts to obtain the witness's signature. Nothing in this subparagraph shall be construed to contravene any applicable attorney-client privilege between the petitioner and postconviction counsel.

- a) File with the Court a witness certification for additional witnesses that PCRA Counsel intends to present at the evidentiary hearing, if any;²
- b) Plead with more specificity how trial counsel violated Petitioner's rights, such as:
 - i. what should trial counsel have done that was not done
 - ii. what was the alternative defense or strategy that should have been presented; and
 - iii. how Petitioner believes these alternatives would have affected the outcome of the trial.³

A conference is scheduled on the amended Petition on **February 29, 2024 at 9:00 a.m. in Courtroom #1 of the Lycoming County Courthouse.** PCRA counsel must file any second amended petition and additional witness certification no later than fourteen (14) days prior to the conference or by **February 15, 2024.** At the conference, the court will need the attorneys to provide an estimate of the amount of time needed for any evidentiary hearing.

By The Court,

Nancy L. Butts, President Judge

Cc: DA-Martin Wade, Esq.
Donald F. Martino, Esq.

² For example, it is unclear to the court whether Petitioner is asserting that trial counsel was ineffective with respect to the character witnesses that were not called at trial. If that is a claim, the petition needs amended to state who those witnesses were and witness certifications from those witnesses need to be provided.

³The witness certification seems to be somewhat more specific than the amended petition, but neither seems to indicate, for example, how reviewing discovery and explaining options with Petitioner would have affected the outcome of the trial.