IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CP-41-CR-1063-2016**
v.	:	
KNOWLEDGE DANTE FRIERSON,	:	**PCRA**
Petitioner	:	

OPINION AND ORDER

Knowledge Frierson (Petitioner) filed a *pro se* petition for Post Conviction relief on October 2, 2020. The Court appointed Nicole J. Spring, Esq. to represent Petitioner and she filed an Amended Post Conviction Relief Act petition on May 7, 2021. A preliminary conference on the petition was held on July 9, 2021. After the conference, Petitioner was granted leave to file a second amended petition. The parties requested to file briefs in support of their respective positions.

On January 11, 2022, the Court granted an evidentiary hearing on one issue: whether Commonwealth violated *Brady v. Maryland*[1] by failing to provide promises of leniency or dismissal of the charges to trial counsel involving the Commonwealth's primary witness, Keith Freeman. In preparation of its decision on the *Brady* issue, the Court requested an additional hearing, which was held on October 16, 2023, on the issue of whether trial counsel was ineffective in failing to cross examine the same witness about his pending charges. The Court will address all of the issues raised by Petitioner and those contained in both amended PCRA petitions.

Background

Petitioner was charged with Criminal Homicide [2] and related charges from a shooting that occurred on October 13, 2015, in the 400 block of Brandon Avenue, City of Williamsport,

[1] *Brady v. Maryland*, 373 U.S. 83 (1963)
[2] 18 Pa. C.S. Section 2501(a).

Lycoming County, PA. Petitioner's jury trial began October 30, 2017. On November 2, 2017, Petitioner was found guilty by the jury of third-degree murder[3], aggravated assault[4] (attempted serious bodily injury to Keith Freeman), aggravated assault with a deadly weapon[5], possessing an instrument of crime,[6] and tampering with evidence[7]. Trial Counsel stipulated to the Petitioner's prior record and this Court sitting without a jury, found Petitioner guilty of the charges of Persons not to Possess a Firearm[8] and Firearms not to be carried without a license.[9] The Court sentenced Petitioner to an aggregate of 26 to 60 years.

Trial Counsel filed timely post sentence motions, which the court denied. Trial Counsel raised in his post sentence motion six issues: 1) did the trial court err in failing to grant the motion to suppress when the Petitioner told the police that he did not wish to speak with them; 2) did the trial court err in failing to hold a *Frye*[10] hearing on the issue of the science behind gunshot residue analysis; 3) did the trial court err by failing to give the missing witness instruction regarding Tyson Bolden who was alleged to have been an eyewitness to the shooting; 4) did the trial court err in precluding the testimony of a witness, Greg Smith, from trial who would have corroborated the Petitioner's reason for being at the Freeman house that evening; 5) the jury's verdict was against the weight of the evidence; and, 6) did the trial court err in failing to hold a hearing regarding the case disposition of the eyewitness Freeman when the testimony presented at trial revealed no agreement.

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[3] 18 Pa.C.S. § 2501.
[4] 18 Pa.C.S. § 2702(a)(1).
[5] 18 Pa.C.S. § 2702(a)(4).
[6] 18 Pa.C.S. § 907.
[7] 18 Pa.C.S. § 4910.
[8] 18 Pa.C.S. § 6105.
[9] 18 Pa.C.S. § 6106.
[10] *Frey v. United States,* 293 F. 1013 (D.C. Cir. 1923).

After timely direct appeal, the Superior Court in a memorandum opinion dated July 31, 2019 affirmed Petitioner's judgment of sentence. *Commonwealth v. Frierson*, 1241 MDA 2018, 2019 WL 2453342 (Pa. Super. July 31, 2019). The Superior Court held that even though Petitioner wished to have an attorney before questioning when they first met with him, when the police approached him again almost six months later, the was no presumption of involuntariness. *Id.* at 16, 2019 WL 2453342 at *7-8

On the second issue, the Superior Court held that no *Frey* hearing was required as gunshot residue testing is not novel science and holds general acceptance in the scientific community. *Id.* at 18, 2019 WL 2453342 at *9.

As to the third issue, the Superior Court held that there was no indication that the witness, Tyson Bolden, was only available to the Commonwealth. In fact, trial counsel agreed that no one could locate him. However, since trial counsel could not establish that his testimony was more than cumulative and could only speculate as to what he would say at trial, the Superior Court held this issue was without merit. *Id.* at 20, 2019 WL 2453342 at *10.

Next the Superior Court found that the trial court did not abuse its discretion in failing to allow the testimony of Greg Smith, landlord of Freeman's residence, as his testimony would not have exculpated the Petitioner or materially aided him in his defense. *Id.* at 22, 2019 WL 3452242 at *11.

On the fifth issue, the Superior Court held that based upon the totality of the evidence presented, eyewitness accounts, ballistic evidence, DNA evidence, video surveillance footage and Petitioners recorded confession, there was no error of law committed by the trial court in determining that sufficient evidence had been presented. *Id.* at 24, 2019 WL 3452242 at *12.

Finally, on the issue of after discovered evidence and the failure of the trial court to hold a hearing, the Superior Court determined that since the information that trial counsel wished to obtain would have been used to further impeach Freeman's credibility, it would have not been eligible for a new trial, and the trial court did not abuse its discretion. *Id.* at 25, 2019 WL 3453342 at *12-13 (citing *Commonwealth v. Griffin,* 137 A.3d 605 (Pa. Super. 2016)).

Trial Counsel filed a petition for allowance of appeal which was denied by the Pennsylvania Supreme Court on January 22, 2020. Therefore, Petitioner's judgment of sentence became final on April 21, 2020. Since Petitioner filed his pro *se* Petition for Post Conviction Relief (PCRA) on October 2, 2020, his petition was filed timely.

Since this filing was his first PCRA petition, counsel was appointed to either file an amended PCRA petition or a *Turner/Finley*[11] no merit letter. Nicole J. Spring, Esquire, Chief Public Defender was appointed to represent Petitioner and a first amended PCRA petition was filed on May 7, 2021.

In this first amended petition, Petitioner raised three interrelated issues. Petitioner asserted that: 1) trial counsel was ineffective for failing to properly preserve the Keith Freeman *nolle pros* issue; 2) trial counsel was ineffective for failing to cross examining Keith Freeman about his pending charges, possible sentences and expectations of leniency for his cooperation; and 3) trial counsel was ineffective for failing to request a jury instruction regarding Keith Freeman's potential bias based upon his pending criminal charges. PCRA counsel attached an attorney certification stating that he had no reasonable strategic basis for not asking Freeman about his pending charges and asking for a specific jury instruction about his potential bias, prejudice or motive to lie to favor the Commonwealth.

[11] *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988); *Commonwealth v. Finley*, 379 Pa. Super. 390, 550 A.2d. 213 (1988)(en banc).

At the conference on the petition held on July 9, 2021, Petitioner argued the issues set forth in the petition along with several others. PCRA Counsel alleged that trial counsel was also ineffective for failing to conduct an investigation to find Tyson Bolden and his girlfriend who were both at Keith Freeman's residence at the time of the shooting; trial counsel was ineffective for failing to request a ballistics expert due to the question of fact regarding the direction from which bullets were shot as there were bullets found in the east side of a tree near the scene and that Keith Freeman was running east from the scene; and, trial counsel was ineffective for failing to preserve a record of the race of the jurors during voir dire and did not challenge the jury array. As a result, Petitioner was given 30 days to file a second Amended PCRA petition.

Petitioner filed a second amended PCRA petition on July 16, 2021. In his second petition, Petitioner provided more information regarding the issue on the failure to request a jury instruction concerning the testimony of Keith Freeman along with the additional issues raised at the conference. Counsel also added another issue alleging material misstatements and or omissions in his affidavit citing to *Franks v. Delaware*, 98 S.Ct. 2674 (1978). In response to the Petitioner's second Amended PCRA petition being filed, the Commonwealth submitted a brief on August 9, 2021 in support of its position against the grant of an evidentiary hearing.

After consideration of the arguments and brief filed by the Petitioner, on January 11, 2022, this Court granted an evidentiary hearing on the issue of whether the Commonwealth's failure to disclose its intent to dismiss witness Freeman's charges violated its obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), *Commonwealth v. Bagnall*, 235 A.3 1075 (Pa. 2020) and *Commonwealth v. Felder*, 247 A.3d 14 (Pa. Super. 2021) and as a result affected the truth determining process of the trial. The hearing was originally scheduled for April 11, 2022. The

initial hearing was continued as Petitioner had not been transported for the hearing. A subsequent continuance was requested by the Commonwealth as trial counsel was not available for the hearing. The evidentiary hearing was ultimately held on September 27, 2022. The parties requested that briefs be submitted after the hearing with the last brief received by the Court on January 26, 2023.

In light of the issues argued in their respective briefs and in preparation of its opinion the Court determined that in addition to the Commonwealth's failure to provide information about Keith Freeman to trial counsel, it needed to explore whether trial counsel was ineffective for filing to cross-examine Freeman about his pending charges, possible sentences and expectations of leniency. Order, 07/24/2023. Hearing was held on October 16, 2023 to investigate these issues. At the end of the hearing, the Commonwealth was given until October 20, 2023 to determine if they had given Freeman's prior criminal history to trial counsel and if so, whether an additional hearing needed to be scheduled. The parties entered into a stipulation on the issue dated November 13, 2023 including the information which was discovered to trial counsel regarding Freeman's prior criminal history so no additional hearing was requested. In lieu of argument, counsel agreed to submit briefs, with the Petitioner's brief due November 7, 2023 and the Commonwealth's brief due November 21, 2023.

Testimony

At the first evidentiary hearing on September 27, 2022, Petitioner called one witness, Robert Hoffa, Esquire (Hoffa), who was Petitioner's trial counsel. N.T. 9/27/22 at 4. Hoffa described the facts of the case as a woman was killed as a result of crossfire. *Id*. He testified that ballistics testing could never definitively identify which firearm discharged the projectile that killed the woman. *Id*. at 5. He described Freeman as the primary witness in the trial with

the remainder of the witnesses either being law enforcement or experts. *Id*. Hoffa testified that he believed that he thought Freeman had charges pending but he was not charged with shooting Petitioner. *Id*. He also believed that the charges against Freeman were as a result of the investigation of Petitioner. *Id*. Hoffa also testified that he did not think that he had cross-examined Freeman about his charges, because the First Assistant DA (Ken Osokow, Esq. at the time) asked him about the charges on direct examination. *Id*. at 6. Once the trial was over, Hoffa testified that he learned that the Commonwealth dismissed all of the charges against Freeman which made him very angry. *Id*. Hoffa testified that he had requested that a hearing on after discovered evidence be held on why and how the charges against Freeman came to be dismissed but the trial court denied that request. *Id*. at 7. He testified that on appeal, the Superior Court did not want to consider his claim of after discovered evidence. *Id*.

Hoffa also described his experience working with the Commonwealth when representing defendants who were offering cooperation. He stated that he was always told that there is no deal right now, but that "we'll take care of it afterwards." N.T. 9/27/2022 at 8. He then surmised that there had to be a deal in place at the time that Freeman testified, because he was never able to receive that benefit (*nol pros* of the charges) from the Commonwealth for his clients. *Id*. Freeman had weapons charges along with both a possession of drugs charge and a recklessly endangering charge since there would have been children at the house when he was allegedly selling drugs. *Id*. at 9.

Hoffa testified on cross examination that he did not think that he had asked Freeman many questions about his pending charges because the first assistant (Osokow) had already gone over them. *Id*. at 9. Hoffa also agreed that he had the opportunity to question Freeman thoroughly about the interviews that he had provided to law enforcement prior to the trial in an

effort to challenge his credibility or his recollection of what happened that evening. *Id*. Hoffa also agreed with the Commonwealth that Freeman's credibility was always at issue. *Id*. Without reviewing any of the transcripts prior to the hearing Hoffa relied on his memory but believed that his cross examination was calculated and pointed. *Id*. at 9. Hoffa also believed that because of that extensive cross examination, he did not need more than the standard jury instruction on credibility to be read to the jury. *Id*. Because he did not believe Freeman, Hoffa felt that he needed to cross examine him to challenge his credibility and because the Commonwealth had not shared anything with Hoffa about any plea agreement he would have had. *Id*. He knew that he would not have been able to ask Freeman's attorney because the request would have been dismissed as work product. *Id*. at 14.

The Commonwealth called one witness, Martin Wade (Wade) to testify at the hearing. Currently the First Assistant DA, during October-November 2017 he was an assistant da with no direct responsibility in this case. N.T. 9/27/2022 at 16. The only knowledge that he had about this case was assisting the assigned ADA (Melissa Kalaus) in the preparation of a power point or diagram on a poster board of the crime scene area. *Id*. He also was not involved in the prosecution of Freeman's case which was charged as a result of this case. *Id*.

Wade testified that when he became the First Assistant in 2018 and the Freeman case came across his desk, he decided to dismiss the charges against him. N.T. 9/27/2022 at 17. He was the one who decided to enter a *nolle prosequi* (or *nol. pros.)* in the case against Freeman. *Id*. Wade testified that the primary reason he *nol prossed* the case was that there had been a number of unsolved shootings with multiple witnesses and if he dismissed the charges against Freeman, it would send a message that it pays to cooperate. *Id*. As part of the evidence, the Commonwealth introduced the order dated February 28, 2018, which *nol prossed* Freeman's

case. Commonwealth's exhibit #1. Wade testified that he was not involved in any negotiations with Freeman or his attorney and at no time suggested to Freeman or his attorney that is charges would be *nol prossed*. *Id.* at 18.

On cross examination Wade testified that he was familiar with the DA's office policy of offering a statement of cooperation to be noted with defendants who were cooperating with the Commonwealth. N.T. 9/27/2022 at 19. They would not get an offer until after they finished cooperating. *Id*. Wade also described the situation where a codefendant in a homicide case was required to enter a guilty plea to third degree murder and told that if he lied under oath his agreement would be revoked. *Id*. He also explained that the process was really varied and that it also depended upon the attorney who was assigned to the case. *Id*. Wade also noted that Melissa Kalaus was the lead attorney for the Commonwealth and Osokow assisted her during the trial. *Id*. He also testified that Freeman's case was *nol prossed* when Osokow[12] was off for his injury. *Id*. at 20.

After this Court's order of July 24, 2023 an additional hearing was held on October 16, 2023. Trial counsel, Robert Hoffa (Hoffa) was again called to testify. Hoffa explained that he did not question Freeman about the matters that the Commonwealth had already asked him about. N.T. 10/16/2023 at 5. Although Freeman had been charged with Tampering with Evidence he neither recalled it nor asked Freeman about the charge. *Id.* at 4-5. Hoffa did not ask about the tampering charge or whether he had been charged with an aggravated assault.[13] He also did not ask Freeman about any maximum penalties for the offenses he was charged

[12] At this point, Ken Osokow, Esq. had been elevated to District Attorney since the current District Attorney Eric Linhardt was elected to the Common Pleas court with two years remaining on his term. Osokow was off due to a fall injury which required surgery and a period of convalescence at home.

[13] Freeman testified at trial that there were people shooting at him and he returned fire hitting Petitioner. N.T., 10/30/2017 at 77. Carolyn Barr was killed in the crossfire; however, they could not determine where the bullet came from, what caliber it was or from which gun it was discharged. N.T. 10/16/2023 at 6.

with. *Id.* at 6. While he recognized that the jury could have used Freeman's testimony to convict, he thought that since they couldn't identify which one of the people with a gun fired the bullet that killed Barr, Petitioner would have been found not guilty. *Id.* at 7.

Hoffa agreed that the only charge that was not specifically discussed with Freeman was the tampering charge, but both the Commonwealth and trial counsel had asked him about discarding his firearm after the shooting. *Id.* at 8. He further testified that both he and the Commonwealth did question Freeman about discarding his firearm after the shooting. *Id.* Hoffa believed that it formed the basis for the Commonwealth charging him with tampering. *Id.* at 10. Hoffa also testified that, in his opinion, questioning a witness about the length of the sentence he or she could be facing means nothing to a jury; since there are "other impeachment avenues available," he did not think that it was relevant. *Id.* at 8.

Discussion

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 post-conviction 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).

Petitioner alleges that trial counsel was ineffective in his handling of the Commonwealth's primary witness, Keith Freeman. Petitioner alleges three separate ways in which trial counsel was ineffective by either failing to effectively cross examine Freeman on

his potential bias; failing to frame the Commonwealth's failure to provide information regarding the potential case dismissal for Freeman as a *Brady* violation; and, failing to request an accomplice liability instruction to highlight Freeman's potential bias in favor of the Commonwealth, during Petitioner's trial.

Failing to cross examine Freeman during trial about his potential for bias in favor of the Commonwealth

Petitioner alleges that trial counsel was ineffective for failing to cross examine Freeman during the trial about his potential for bias in favor of the Commonwealth.

The testimony adduced at trial from Freeman about his charges was as follows:

> OSOKOW: At some point you talked to other persons after you got to your friend's house?
>
> FREEMAN: Yes
>
> OSOKOW: As a result of speaking to those other persons, did you turn yourself in?
>
> FREEMAN: Not that night. The next morning.
>
> OSOKOW: Why didn't you turn yourself in that night?
>
> FREEMAN: Cause I was nervous. I thought they was going to charge me and everything at the time.
>
> OSOKOW: And what did you think that you would be charged with?
>
> FREEMAN: Well, they had said that he was life flighted to Geisinger, so I didn't –with the shooting for him.
> …
> OSOKOW: Now you indicated that at some point you turned yourself in, is that correct?
>
> FREEMAN: Yes.
>
> OSOKOW: What caused you to turn yourself in?

FREEMAN: My family told me to, and they were going to go down there with me, everybody.

OSOKOW: Okay. As a result of this incident were you charged with anything?

FREEMAN: Yes.

OSOKOW: Do you know what you were charged with?

FREEMAN: Reckless endangerment, not to have a firearm, and I forget what else.

OSOKOW: That would be to not have a firearm without a license?

FREEMAN: Yes.

OSOKOW: Were you also charged with possession of a controlled substance?

FREEMAN: Oh yes.

OSOKOW: And those charges still pending, is that correct?

FREEMAN: Yes

OSOKOW: Has anybody promised you anything as a result of what you're going to get on those charges?

FREEMAN: No.

…

Jury Trial, N.T., 10/30/2017, at 82-83.

To demonstrate ineffectiveness 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." *Fulton*, 830 A.2d at 572. Failure to prove any prong of this test will defeat an ineffectiveness claim. *Commonwealth v. Basemore*, 560 Pa. 258, 744 A.2d 717, 738 n. 23 (2000) (citation omitted). *Commonwealth v. Fears*, 624 Pa. 446, 461, 86 A.3d 795, 804 (2014).

Petitioner argues that in a case where there are no other witnesses or ballistic evidence to assist the Commonwealth in its case in chief, trial counsel's "failure to pursue every avenue of impeachment available to him was not a reasonable strategic decision designed to advance the interests of his client." Petitioner's Brief, 11/9/2023, at 5. Petitioner relies on the case of *Commonwealth v. Davis*, 652 A.2d 885 (Pa. Super. 1995) establishing that the underlying claim has arguable merit satisfying the first prong of Petitioner's burden.

In *Davis,* the Superior Court determined that when there is an opportunity for the defense to demonstrate potential bias by cross examining the witness with respect to [her] pending charges and fails to do so, a claim has arguable merit unless the exclusion of the evidence was harmless error. 652 A.2d at 888.

> [A]n error will be deemed harmless where the appellate court is convinced beyond a reasonable doubt that the error could not have contributed to the verdict. Guidelines for determining whether an error is harmless include: (1) whether the error was prejudicial to the defendant or if prejudicial, whether the prejudice was de minimis; (2) whether the erroneously admitted evidence was merely cumulative of other, untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) whether the evidence of guilt was so overwhelming as established by properly admitted and uncontradicted evidence that the prejudicial effect of the error was so insignificant by comparison to the verdict.

Davis, citing *Commonwealth v. Nolen,* 535 Pa. at 85, 634 A.2d at 196 (citation omitted).

Davis also stressed that

> the victim, as accuser, must be subject to the utmost scrutiny if his [or her] accusations are to fairly form the basis of the criminal prosecution at hand. The strength or weakness derived from an attempt to show that the victim has some ulterior motive for continuing his [or her] role as an accuser due to subsequent acts, bringing him into the sphere of the influence by the prosecutor, must rightly be determined by the jury, which, after hearing all the evidence in the matter before them, will be most able to ferret out the presence or absence of improper motive on the part of the victim.

Davis, 652 A.2d at 888.

The Court finds that the failure to cross-examine Freeman about his pending charges was harmless error. The jury was aware of Freeman's charges because the attorney for the Commonwealth brought most of them out on direct examination. Furthermore, the jury was aware that Freeman had possessed a firearm and disposed of it because he was concerned about being charged with shooting Petitioner. Acknowledging that he was concerned about being charged with shooting Petitioner was a worse offense than the charge of tampering with evidence that the Commonwealth failed to disclose during direct examination. The Court concludes that the failure to cross-examine Freeman about his charges was either not prejudicial or any prejudice was *de minimus*. Therefore, the Court finds that Petitioner failed to establish that this claim has arguable merit.

To satisfy the second prong, Petitioner must show that trial counsel had no reasonable basis for his or her chosen trial strategy, and prove that his alternative strategy "offered a potential for success substantially greater than the course actually pursued." *Commonwealth v. Brown*, 649 Pa. 293, 196 A.3d 130, 150 (2018) (quoting *Commonwealth v. Spotz*, 610 Pa. 17, 18 A.3d 244, 260 (2011)).

> When assessing whether counsel had a reasonable basis for his act or omission, the question is not whether there were other courses of action that counsel could have taken, but whether counsel's decision had any basis reasonably designed to effectuate his client's interest.... [T]his cannot be a hindsight evaluation of counsel's performance but requires an examination of whether counsel made an informed choice, which at the time the decision was made reasonably could have been considered to advance and protect the defendant's interests. Our evaluation of counsel's performance is highly deferential.

Commonwealth v. Robinson, 278 A.3d 336, 345 (Pa. Super. 2022)(quoting *Commonwealth v. Williams*, 636 Pa. 105, 141 A.3d 440, 463 (2016)(quotations, brackets, and citations omitted)).

Trial counsel's strategy was clearly all about showing the jury that Freeman was a not a truthful person. It is clear from how trial counsel questioned Freeman that he was not truthful about what happened that night and shared that belief rather forcefully with the jury in his closing argument. Trial counsel testified that he felt that he had more valuable information with which to challenge Freeman's credibility-comparing his three contradictory police statements. In other words, trial counsel did not want to distract or confuse the jury with details about the penalties Freeman could receive for his crimes when he wanted the jury to focus on Freeman's lack of truthfulness in his varied statements.

In his arguments, Petitioner ignores the extent to which trial counsel confronted Freeman about his different statements to the police. It is hard to imagine what questioning Freeman about any agreements would have contributed to the already damaging cross examination regarding his contradictory statements, let alone how counsel could verify that what he was telling the jury was the truth. Trial counsel spent his entire cross examination questioning Freeman on the three different statements that he made to the police, painstakingly pointing out the conflicting information that he provided to the police. (N.T. 10/30/2017 at 84-103).

One example of trial counsel's cross examination was that he immediately confronted Freeman about the fact that he initially told the police he didn't have a gun that evening. *Id*. at 85. He then followed up by pointing out on a subsequent interview Freeman admitted to having a handgun when after speaking to people he found out his son told the police that he had a gun, and it had a silver barrel with a black handle. *Id*. at 85. Trial counsel also pointed out that the lead investigator specifically told Freeman that he was not being truthful with them and was asked again about a gun. *Id*. at 86. When trial counsel asked Freeman about what he said about

the gun in his second interview, he told the police that he was, "holding a gun for a friend from the Elks party." *Id*. at 88. And later on, **in the same interview**, he told the police once again that he did not have a gun. *Id*.

Another example of trial counsel's strategy is contained in his closing argument to the jury; trial counsel offered the following about Keith Freeman:

> I talked in my opening with you about credibility, and that you have to watch the people, testify and listen to what they say, and determine whether you want to believe a part of it, none of it, and then make your determination based upon what you hear and see.
>
> A liar is a liar. Is a liar. Keith Freeman lied. On multiple occasions.
>
> The first time Keith Freeman goes in and that's the thing. That's really bizarre. Here you are, now this is his version, I'm getting shot at and by the way, he mentions the two guys down the street, too, this is not something that Knowledge came up with, Keith says, yes, I saw him down the street, OK; But now think about this. Here I am, I'm in a shootout and I take off for 17 hours. Even after I get a phone call that says my aunt is dead.
>
> He lied when he came in about having a gun. Do you know why? Because he didn't go home. He didn't know that his 12-year-old was interviewed and said, yeah, my dad had a gun and he describes the gun and lo and behold. Guess what it is? Silver handle, I'm sorry, silver barrel, black grip, whatever the Commonwealth's exhibit, the gun, that's what the kid described the night it happened. Keith didn't know that.
>
> So, his first venture with the cops I didn't have a gun. No. Even though there is two bullets found inside the house I didn't have a gun. He then lies about where he went. OK. The path he took. So I would venture a guess that he went home after that statement was BS and finds out that his son told him, dad, I told them you had a gun.
>
> So what did he do? He goes back the next day, and he comes up with a long concoction about, well, I was holding a gun for a friend of mine, yeah, it was during the blackouts, I got it, and I held it until the Eagles/Jets game, and, you know, I think I gave that silver and black gun back; but, yeah, somebody brought me a gun. That wasn't true either.
>
> So, then they ask him well, where is the gun? So he takes them on this wild goose chase to find a gun. Now, this is 24 hours, 48 hours at most later. Agent Kontz and Freeman and I forget the other officer that was there, go the path where he claims he dropped the gun. They don't find it. Why? Because it's BS. He didn't ditch the gun. OK. Don't you – – and what's even better is did he tell anybody where he put the gun? He didn't call anybody to go get the gun and he himself didn't go get the gun. So somehow this gun in 48 hours after a shooting disappears. Fine. Can't find it. All right.

> Keith Freeman told you because I have poker games and I sell a little bit of weed, yet they found heroin in his house, not weed. Now I have a theory for you. He didn't want to police searching his house, OK. Anthony Staggers may have taken his stuff, I don't know, you don't know; but all we know is this.
>
> He was – – Keith Freeman was subsequently called in May all right, so we're talking from October 14 to the 15th and then in May 2016 they interview him again and they start off the interview by saying, Keith, you haven't been honest with us. So now he comes up with a different version of what happened. So three times he's interviewed, then he testifies at a preliminary hearing and we get three different versions on what happened.
>
> Is Keith Freeman scared of Tyson Bolden? I don't know. But he didn't tell the truth and he wants to make himself look like he's not a big drug dealer. You know darn well he's not buying Louis Vuitton belts for 300 bucks by doing construction. So that's Keith Freeman."
>
> … Now, let's talk about this gun being found on the rock. As I said to you, it matches the description that was given by Keith's son as to the gun that his dad had.
>
> … Keith Freeman is totally unbelievable...
>
> … Keith Freeman thought wrong. Keith Freeman as was concerned about being robbed, but not by him [Petitioner]. That was his mistake. And you know what, If Keith Freeman had called the cops instead of playing vigilante law, we wouldn't be here and Carolyn Barr would still be alive, But, no, he had to protect his rep. Don't call the cops, You know, I'll deal with it myself.

N.T. 11/2/2017 at 17-20, 22, 25.

Trial counsel's strategy was clearly all about showing the jury that Freeman was a not a truthful person. It is clear from how trial counsel questioned Freeman that he was not truthful about what happened that night and shared that belief rather forcefully with the jury in his closing argument. Regardless of the fact he did not cross examine him on whether he was going to receive any specific benefit from his cooperation, the Commonwealth did establish that Freeman was charged with criminal offenses out of the incident and that no promises were made about his cooperation. Trial counsel had more valuable information with which to challenge Freeman's credibility-comparing his three contradictory police statements. It is hard to imagine what questioning Freeman about his charges would have contributed to the already damaging cross examination regarding his contradictory statements, let alone how counsel

could verify that what he was telling the jury was the truth about any promises. Therefore, the Court finds that Petitioner has failed to establish that trial counsel lacked a reasonable or strategic basis for his failure to cross-examine Freeman about his criminal charges.

Petitioner also failed to establish prejudice. Petitioner has failed to show that there is a reasonable probability that the outcome of the proceedings would have been different if trial counsel had questioned Freeman about the charges which had been filed against him. The jury was aware of the charges and Freeman's disposal of his firearm from the information elicited by the Commonwealth during direct examination. Rather than waste time or bore the jury re-hashing these matters, what trial counsel chose to do was focus on a much more powerful idea—that everything Freeman was telling the jury was a lie. The Court is hard-pressed to see how the outcome of the trial would have changed had trial counsel asked Freeman about any agreements from the Commonwealth for his cooperation.

Based upon the efforts that trial counsel made to confront Freeman with his statements, contrasting the discrepancies between his multiple statements and the fact that the jury was told that charges had been filed against Freeman for his actions that night, the Court does not find that failing to ask specific questions about those charges would have resulted in a different verdict exonerating the Petitioner. The Court finds the strategy trial counsel employed was designed to promote Petitioner's interests and he had a reasonable basis for that strategy. Therefore, Petitioner has failed to prove the elements or prongs for this ineffective assistance of counsel claim.

Did the Commonwealth fail to disclose favorable treatment of Freeman's case in violation of Brady v. Maryland

In order to establish a *Brady* violation, Petitioner must show that: (1) evidence was suppressed by the state, either willfully or inadvertently; (2) the evidence was favorable to the

defendant, either because it was exculpatory or because it could have been used for impeachment; and (3) the evidence was material, in that its omission resulted in prejudice to the defendant. *See Commonwealth v. Lambert,* 584 Pa. 461, 471, 884 A.2d 848, 854 (2005); *Commonwealth v. Collins,* 585 Pa. 45, 68, 888 A.2d 564, 577–78 (2005). However, "[t]he mere possibility that an item of undisclosed information *might* have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense." *Commonwealth v. Chambers,* 570 Pa. 3, 29, 807 A.2d 872, 887 (2002) (citation omitted and emphasis added). Rather, evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 29, 807 A.2d at 887–88 (quoting *Bagley,* 473 U.S. at 682, 105 S.Ct. 3375). *Commonwealth v. Willis*, 616 Pa. 48, 61, 46 A.3d 648, 656 (2012).

The crux of the *Brady* rule is that due process is offended when the prosecution withholds material evidence favorable to the accused. *Wholaver*, 177 A.3d at 158. The *Brady* rule extends to impeachment evidence including any potential understanding between the prosecution and a witness, because such information is relevant to the witness' credibility. *Id.* To establish his alleged *Brady* violations, Appellant must prove that the Commonwealth willfully or inadvertently suppressed impeachment evidence and that prejudice ensued. *Id.* Clearly, if there was an agreement made prior to Petitioner's trial about the disposition of his case, it would have been favorable to Petitioner for impeachment purposes satisfying the second prong of the *Brady* test. The question before the court then is whether the agreement existed prior to trial and was not disclosed to trial counsel.

Testimony presented by the Commonwealth at the evidentiary hearing establishes that the decision to *nol pros* the case was made after the Petitioner's trial and sentencing by someone who was not involved in the prosecution of either Petitioner or Freeman. The attorney who made the decision to dismiss the charges against Freeman, newly appointed First Assistant DA Wade, did so to acknowledge Freeman's cooperation in the murder trial. He would not have been in a position to make such an agreement with Freeman up to and during the trial as he never was directly involved in the case and was not in a position of authority to make the decision until after Petitioner's trial and sentencing. The decision was made sometime in 2018 and memorialized by an order dated February 28, 2018 (Commonwealth's exhibit #1). The Court finds that no such agreement existed during the time of trial and so it was neither willfully nor inadvertently suppressed by the state. Therefore, Petitioner's claim fails under the first prong.

Additionally, Petitioner has failed to establish the third prong of the *Brady* test, as he has not shown any prejudice has come to him or that the verdict of the jury would have been different.

"Favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Wholaver,* 177 A.3d at 158. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "In determining if a reasonable probability of a different outcome has been demonstrated, '[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.' *Id.* "The mere possibility

that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense." *Id. at 159*. Moreover, as explained above, for purposes of his claims of ineffective assistance of counsel, Appellant was required to demonstrate, *inter alia*, that he suffered prejudice as a result of counsel's deficient performance, "that is, a reasonable probability that but for counsel's act or omission, the outcome of the proceeding would have been different." *Cooper*, 941 A.2d at 664. *Wholaver*, 177 A.3d at 158–59.

In *Wholaver*, three witnesses were called to testify on behalf of the District Attorney's office of Dauphin County as the Commonwealth who had spent time with the defendant in his prosecution for murder. Witness Stephens testified at trial that another prosecutor with the Dauphin County DA's office did not promise him anything in exchange for his testimony at trial. Stephens ultimately received a lesser sentence on another case he had. Witness Meddings testified that he was looking at two 20-year sentences and ultimately received one 7-year sentence for his crimes in federal court. Witness Marley who was also one of Wholaver' s cellmates testified that while he had no specific promises from the Commonwealth, they were instrumental in helping him with parole and probation violations he had received along with a new charge he received with the Attorney General's office. He testified that he knew that if he cooperated with the Commonwealth he could "get a good deal." *Id*. at 644 Pa. at 419, 177 A.3d at 155. The Supreme Court found that while the witnesses against Wholaver did receive a benefit for their cooperation there was no specific agreement that the Commonwealth failed to reveal. *Id*. In addition, the Supreme Court determined that the information that trial counsel had was used so forcefully during cross examination and in closing argument that anything

unknown to the defense would have been cumulative and would unlikely have changed the juror's minds about their testimony. *Id.*

The Court finds for the purpose of the *Brady* analysis there was no agreement made with the witness Freeman to dismiss the charges that the Commonwealth failed to reveal to trial counsel.

Petitioner claims that he is also entitled to relief on this issue under 42 Pa.C.S.A. § 9543(a)(2)(vi) on the basis that the information was exculpatory after-discovered evidence. To be entitled to relief under the PCRA on this basis, the petitioner must plead and prove by a preponderance of the evidence "[t]he unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced." 42 Pa.C.S.A. § 9543(a)(2)(vi).

As the Pennsylvania Supreme Court has summarized, to obtain relief based on after-discovered evidence, [an] appellant must demonstrate that the evidence: (1) could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) would likely result in a different verdict if a new trial were granted. *Commonwealth v. Pagan*, 597 Pa. 69, 106, 950 A.2d 270, 292 (2008) (citations omitted). "The test is conjunctive; the [appellant] must show by a preponderance of the evidence that each of these factors has been met in order for a new trial to be warranted." *Commonwealth v. Padillas*, 997 A.2d 356, 363 (Pa.Super.2010) (citation omitted).

Petitioner cannot satisfy his burden of proof for relief based on an after discovered evidence claim as the evidence did not exist before or at the time of trial and would only have been used to impeach Freeman's credibility.

In summary, Petitioner has failed to show that the agreement existed prior to trial, that if this agreement had existed prior to trial, that it was not provided to trial counsel, and if not provided to Petitioner how this agreement prejudiced him and the outcome of the trial would have been different. Despite trial counsel challenging the truthfulness of Freeman through the entirety of his cross examination, the jury chose to believe his version of the facts supported by the other testimony, physical evidence and expert testimony.

Since Petitioner has failed to prove the third prong of PCRA standard, this issue fails.

Failing to request a "corrupt and polluted source" jury instruction regarding Freeman's testimony

Petitioner alleges that trial counsel should have requested the "corrupt and polluted source" jury instruction from the Pennsylvania Standard Criminal jury instructions regarding Freeman's testimony. Petitioner further alleges that trial counsel should have at least asked for in the alternative the standard instruction used by the Third Circuit in cases involving cooperating witnesses. Petitioner does not allege that Freeman was an accomplice in the events that took place on October 13, 2015. Petitioner does not provide a copy of the Third Circuit instruction that should have been used.

The Pennsylvania Standard Criminal Jury instruction addressing the "corrupt and polluted source" doctrine is found in section 4.01.

> 4.01 ACCOMPLICE TESTIMONY
>
> Before I begin these instructions, let me define for you the term *accomplice*. A person is an accomplice of another person in the commission of a crime if he or she has the intent of promoting or facilitating the commission of the crime and (1) solicits the other person to commit it, or (2) aids or agrees or attempts to aid such other person in planning or committing the crime. Put simply, an accomplice is a person who knowingly and voluntarily cooperates with or aids another person in committing an offense.

1. When a Commonwealth witness is an accomplice, his or her testimony has to be judged by special precautionary rules. Experience shows that an accomplice, when caught, may often try to place the blame falsely on someone else. [He or she may testify falsely in the hope of obtaining favorable treatment, or for some corrupt or wicked motive.] On the other hand, an accomplice may be a perfectly truthful witness. The special rules that I will give you are meant to help you distinguish between truthful and false accomplice testimony.

2. [In view of the evidence of *[name of accomplice]*'s criminal involvement, you must regard [him] [her] as an accomplice in the crime charged and apply the special rules to [his] [her] testimony.] [You must decide whether *[name of accomplice]* was an accomplice in the crime charged. If after considering all the evidence you find that [he] [she] was an accomplice, then you must apply the special rules to [his] [her] testimony, otherwise ignore those rules. Use this test to determine whether *[name of accomplice]* was an accomplice: [Again, an accomplice is a person who knowingly and voluntarily cooperates with or aids another in the commission of a crime].]

3. These are the special rules that apply to accomplice testimony:
First, you should view the testimony of an accomplice with disfavor because it comes from a corrupt and polluted source.
Second, you should examine the testimony of an accomplice closely and accept it only with care and caution.
Third, you should consider whether the testimony of an accomplice is supported, in whole or in part, by other evidence. Accomplice testimony is more dependable if supported by independent evidence. [However, even if there is no independent supporting evidence, you may still find the defendant guilty solely on the basis of an accomplice's testimony if, after using the special rules I just told you about, you are satisfied beyond a reasonable doubt that the accomplice testified truthfully, and the defendant is guilty.]

A corrupt and polluted source instruction is required when an accomplice's testimony implicates the defendant; the instruction informs the jury "that the accomplice is a corrupt and polluted source whose testimony should be viewed with great caution." *Commonwealth v. Smith*, 609 Pa. 605, 17 A.3d 873, 906 (2011) (quoting *Commonwealth v. Chmiel*, 536 Pa. 244, 639 A.2d 9, 13 (1994)). This instruction is necessary if the trial evidence is sufficient to present an inference that a Commonwealth witness was an accomplice. *Smith*, 17 A.3d at 906.

"A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both." 18 Pa. C.S. § 306(a) "A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of the offense." 18 Pa. C.S. §306(b). The statute defines an accomplice as follows:

> **(c) Accomplice defined. —** A person is an accomplice of another person in the commission of an offense if:
> (1) with the intent of promoting or facilitating the commission of the offense, he:
> (i) solicits such other person to commit; or
> (ii) aids or agrees or attempts to aid such other person in planning or committing it; or
> (2) his conduct is expressly declared by law to establish his complicity.

18 Pa. C.S. §306(c).

In the subcommittee notes of the instruction, the Superior Court has identified the circumstances under which this particular instruction is required. An "accomplice" is an individual who "knowingly and voluntarily cooperates with or aids another in the commission of a crime." *Commonwealth v. Carey*, 293 Pa. Super. 359, 439 A.2d 151, 158 (1981).

As to when a "corrupt source" instruction is necessary, the Superior Court has also stated that

> the testimony of an accomplice of a defendant, given at the latter's trial, comes from a corrupt source and is to be carefully scrutinized and accepted with caution; it is clear error for the trial judge to refuse to give a charge to this effect after being specifically requested to do so. The justification for the instruction is that an accomplice witness will inculpate others out of a reasonable expectation of leniency. An accomplice charge is necessitated not only when the evidence requires an inference that the witness was an accomplice, but also when it permits that inference. Thus, if the evidence is sufficient to present a jury question with respect to whether the prosecution's witness was an accomplice, the defendant is entitled to an instruction as to the weight to be given to that witness's testimony. Where, however, there is no evidence that would permit the jury to infer that a

> Commonwealth witness was an accomplice, the court may conclude as a matter of law that he was not an accomplice and may refuse to give the charge. This is so because a trial court is not obliged to instruct a jury upon legal principles which have no applicability to the presented facts. There must be some relationship between the law upon which an instruction is required, and the evidence presented at trial.

Commonwealth v. Manchas, 430 Pa. Super. 63, 633 A.2d 618, 627 (1993) *(*citations, internal quotations, and internal corrections omitted).

There was no evidence to establish that Freeman was an accomplice, or even a co-conspirator, of Petitioner. To the contrary, the evidence was that Freeman and Petitioner were at odds with each other. Petitioner was knocking on Freeman's door purportedly looking for a friend or acquaintance who he thought lived there. Freeman thought it was a ruse and that Petitioner was going to rob him. Freeman and Petitioner ended up shooting at each other, although each claimed the other shot first in their trial testimony. Furthermore, although Freeman was charged with offenses as a result of this incident, possession of drugs and weapons offenses as a person not to possess a firearm, he was never considered a suspect or charged with the murder of Carolyn Barr. Since there was no evidence that showed that Freeman could have been responsible for the death of his aunt, no "corrupt source" instruction was needed and counsel "cannot be faulted for failing to request the instruction." *Manchas*, 633 A.2d at 627; *Commonwealth v. Hall*, 867 A.2d 619, 630-31 (Pa. Super. 2005).

The instruction that was given by the Court was the standard Credibility of Witnesses instruction.

> 4.17 CREDIBILITY OF WITNESSES, GENERAL
>
> > 1. As judges of the facts, you are sole judges of the credibility of the witnesses and their testimony. This means you must judge the truthfulness and accuracy of each witness's testimony and decide whether to believe all or part or none of that testimony. The following

> are some of the factors that you may and should consider when judging credibility and deciding whether or not to believe testimony:
> a. Was the witness able to see, hear, or know the things about which they testified?
> b. How well could the witness remember and describe the things about which they testified?
> [c. Was the ability of the witness to see, hear, know, remember, or describe those things affected by youth, old age, or by any physical, mental, or intellectual deficiency?]
> d. Did the witness testify in a convincing manner? [How did they look, act, and speak while testifying? Was their testimony uncertain, confused, self-contradictory, or evasive?]
> e. Did the witness have any interest in the outcome of the case, bias, prejudice, or other motive that might affect the testimony?
> f. How well does the testimony of the witness square with the other evidence in the case, including the testimony of other witnesses? [Was it contradicted or supported by the other testimony and evidence? Does it make sense?]
>
> [2. If you believe some part of the testimony of a witness to be inaccurate, consider whether the inaccuracy casts doubt upon the rest of his or her testimony. This may depend on whether he or she has been inaccurate in an important matter or a minor detail and on any possible explanation. For example, did the witness make an honest mistake or simply forget or did they deliberately falsify?]
>
> [3. While you are judging the credibility of each witness, you are likely to be judging the credibility of other witnesses or evidence. If there is a real, irreconcilable conflict, it is up to you to decide which, if any, conflicting testimony or evidence to believe.]
>
> **[**4. As sole judges of credibility and fact, you, the jurors, are responsible to give the testimony of every witness, and all the other evidence, whatever credibility and weight you think it deserves.]

Pa. SSJI (Crim), §4.17.

Given the trial court's instruction on the credibility of witnesses to the jury and the fact that the jury was aware of Freeman's interest in testifying for the Commonwealth, Petitioner has failed to establish that, but for counsel's failure to seek and obtain a "corrupt and polluted source" jury instruction, there was a reasonable probability that the outcome of his trial would have been different. See also *Smith*, 17 A.3d at 904–07 (concluding that, in light of the totality

of the jury charge and the trial evidence demonstrating the appellant's accomplices' interest in testifying for the Commonwealth, the appellant failed to establish the prejudice prong of his claim that appellate counsel was ineffective for not pursuing a claim regarding a "corrupt and polluted source" instruction). *Commonwealth v. Wholaver*, 177 A.3d 136, 166 (Pa. 2018).

Additionally, during the PCRA evidentiary hearing, Hoffa believed that based upon his questioning of Freeman as well as his arguments made during his closing argument, he did not need to request any special instruction other than the general credibility instruction to highlight Freeman's motive to assist the Commonwealth through his testimony and how he lacked credibility.

To show that trial counsel had no reasonable basis for his or her chosen trial strategy, a PCRA petitioner must prove that his alternative strategy "offered a potential for success substantially greater than the course actually pursued." ***Commonwealth v. Brown***, 649 Pa. 293, 196 A.3d 130, 150 (2018) (quoting ***Commonwealth v. Spotz***, 610 Pa. 17, 18 A.3d 244, 260 (2011)).

Petitioner has not shown any of the elements for an ineffective assistance of counsel claim with respect to the corrupt and polluted source instruction. Since there was no evidence that Freeman was an accomplice with Petitioner, this claim lacked merit. Trial counsel had a reasonable basis for not requesting such an instruction as the focus of the defense in this case was Freeman's lack of credibility; thus, counsel properly focused on the credibility jury instruction. Finally, Petitioner was not prejudiced by counsel's alleged failure. There was no likelihood of success on this issue. If trial counsel had requested such an instruction, the Court would have denied it because there was no evidence that Freeman was an accomplice with Petitioner.

Trial counsel was ineffective for failing to conduct an investigation to find Tyson Bolden and his girlfriend who were at the Freeman residence at the time of the shooting.

Petitioner alleges that trial counsel failed to conduct an investigation to locate Tyson Bolden and his girlfriend. Freeman would have told the police that Bolden and Bolden's girlfriend were with him at the house the night of the shooting. Petitioner alleges no other facts or basis for the allegation. In fact, PCRA counsel was not able to locate Bolden and his girlfriend or to provide witness certifications as to the substance of their testimony had it been requested at trial. This alone was a basis to deny an evidentiary hearing on this claim.

When a petitioner seeks an evidentiary hearing on a claim, he or she is required to submit certifications for the witnesses he or she wishes to present. *See* Pa. R. Crim. P. 902(A)(15); 42 Pa. C.S. §9545(d). The certification shall be signed by the witness; state the witness's name, address, date of birth and substance of testimony; and include any documents relevant to the witness's testimony. *See* 42 Pa. C.S. §9545(d)(1)(i). A failure to substantially comply with the witness certification requirements renders the proposed witness's testimony inadmissible. *See* 42 Pa. C.S. §9545(d)(1)(iii). Petitioner failed to comply at all with the witness certification requirements for this claim and the remaining claims. Therefore, an evidentiary hearing was not required on these claims because there was no testimony that would be admissible at the hearing.

In its opinion on post sentence motions, the Supreme Court noted that "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. Colavita,* 606 Pa. 1, 993 A.2d 874, 887 (2010) (quoting *Commonwealth v. Howard,* 553 Pa. 266, 719 A.2d 233, 237 (1998)). "A finding that a chosen

strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued." *Id.* A claim of ineffectiveness generally cannot succeed "through comparing, in hindsight, the trial strategy employed with alternatives not pursued." *Commonwealth v. Miller,* 572 Pa. 623, 819 A.2d 504, 517 (2002).

Even though Petitioner's claim in hindsight involves trial strategy, Petitioner fails to even to make an allegation as to what counsel would state in response to the accusations or what the evidence would have been had Bolden and his girlfriend been found. Petitioner presents merely an allegation that trial counsel's failure to locate these witnesses was somehow ineffective. "PCRA hearings are not discovery expeditions; rather, they are conducted when necessary to offer the petitioner an opportunity to prove that which he already has asserted, and only when his proffer establishes colorable claim about which there remains a material issue of fact". See *Commonwealth v. Edmiston,* 578 Pa. 284, 851 A.2d 883, 887 n. 3 (2004). It is not enough to take a cold record, state that "counsel could have done this instead, or in addition," and then declare an entitlement to relief or discovery and further delay. *Commonwealth v. Sneed*, 616 Pa. 1, 20, 45 A.3d 1096, 1107 (2012).

At the time of trial, the Commonwealth attempted to locate Bolden, but it was unable to do so. When asked, Agent Peacock, lead investigator, testified that Bolden was Freeman's friend and was seen by a witness leaving Freeman's house the night of the shooting. Trial N.T. 11/1/2017 at 29. Peacock also added that no matter how many times he attempted to reach out, leave a message or contact him through his girlfriend, he would not cooperate. *Id*. In fact, Peacock was never able to speak with Bolden after the shooting, even though he had a pending case here, which was only discovered after the fact. *Id*. at 30. Since the Commonwealth with its

investigative resources was not able to locate Bolden at the time of trial, it is unlikely that trial counsel would be able to locate him either.

Furthermore, trial counsel used the absence of Bolden to his advantage. In his closing argument, he discussed Bolden being missing from the trial.

> So, let's talk a little bit about what we don't have. Tyson Bolden. Keith Freeman says he called him, tells him to come over with a gun. OK. Last we seen or heard of him apparently. They didn't find him in Philadelphia. I don't know if they looked for him in Philadelphia. Didn't find him here. When do you think he would want to hear from an eyewitness? He's right there. Why isn't he here? Maybe he doesn't want to testify against his buddy, Keith. Maybe he shot her. Who knows?
>
> What's interesting is he is a friend of Keith Freeman's and wouldn't you think if he could corroborate Keith's story that Keith would have said to him, dude, I need you. I need you to come in and tell him what happened? I need you to come in and tell them how it went down, that this kid was trying to rob me, that's what I need you for? No. Doesn't do that.
>
> Here's the other bizarre thing about that. If for some reason, Keith Freeman thinks there is a home invasion about to occur and he's got a nine-month-old, six-year-old, eight year old, and 12 year old in his house, wouldn't you think the logical thing to do would be to call the police instead of calling backup and enforcement? Wouldn't you say, even Karina said to him, call the police.
>
> Well, you know why he didn't call the police? He's a drug dealer. He's got drugs in the house. But to think that he can't, you know, we're going to have a shootout at the OK Corral because somebody is knocking on your door? So I'm telling you where is Tyson Bolden?

N.T. 11/2/2017 at 16-17.

Clearly, it was to Petitioner's benefit that Bolden and his girlfriend were not found to testify. Trial counsel did not seek out Bolden and his girlfriend and there was a reasonable and strategic reason for not doing so.

For all of the foregoing reasons, Petitioner was not entitled to an evidentiary hearing on this issue.

Trial counsel did not preserve the record a record of race, story of jurors during voir dire, and did not challenge the jury array

Petitioner alleged that trial counsel was ineffective for failing to raise the question of the race of the prospective jurors and neither challenging the jury array nor preserving a record of the race of the jurors[14]. Petitioner raised this issue for the first time in his PCRA petition, and he did not submit any witness certifications in support of this claim. Petitioner failed to set forth any information regarding the composition of the jury panel, or any errors trial counsel may have made during *voir dire*. In fact, there is no indication as to whether any African Americans had been present for jury selection.

As properly pointed out by the Commonwealth in their brief in opposition to Petitioner's petition for post-conviction relief, while Petitioner asserts that as an African American he was tried by a jury of Caucasians, he does not delineate any identifiable and specific error for review. "Given the presumption of effectiveness that attaches to prior counsel's actions, and as it is Appellant's burden to demonstrate eligibility for relief under the PCRA, mere conjecture does not establish an entitlement to relief. *Commonwealth v. Hughes,* 581 Pa. 274, 314, 865 A.2d 761, 785 (2004). *Accord Commonwealth v. Johnson,* 312 Pa. Super. 484, 494, 459 A.2d 5, 10 (1983). Therefore, Petitioner was not entitled to an evidentiary hearing on this claim.

[14] Petitioner is making a claim inferring a violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). *Batson* held the government denies a defendant equal protection of the laws when it "puts him on trial before a jury from which members of his race have been purposefully excluded." *Batson*, 476 U.S. at 85, 106 S.Ct. at 1716.

Trial counsel was in effective for failing to obtain a ballistics expert when the direction of the bullets might have been an issue during the trial.

Petitioner alleges that trial counsel was ineffective for failing to obtain a ballistics expert but does not allege how the lack of the ballistics expert was a genuine issue of material fact justifying collateral relief. Petitioner did not submit any witness certifications in support of this claim.

Trial counsel need not introduce expert testimony on his client's behalf if he is able effectively to cross-examine prosecution witnesses and elicit helpful testimony. *Commonwealth v. Williams,* 537 Pa. 1, 29, 640 A.2d 1251, 1265 (1994)(citing *Commonwealth v. Clemmons,* 505 Pa. 356, 479 A.2d 955 (1984)). *Commonwealth v Copenhefer*, 553 Pa. 285, 307, 719 A.2d 242, 253 (1998).

Sgt. Elwood Spencer, of the Bureau of Forensic Services, Pennsylvania State Police was called to testify by the Commonwealth. Sgt. Spencer was qualified as an expert firearm and tool mark examiner. Trial N.T. 11/1/2017 at 41.

Sgt. Spencer testified about a Sturm, Ruger and Company, double action .357 magnum revolver along with two discharged and mutilated bullets that was sent to him for examination in this case. N.T. 11/1/2017 at 41, 43. He testified that he could not conclusively state that the bullets were discharged from the Ruger. *Id.* at 46. He did opine that they were discharged from the same unknown weapon. *Id*. at 49. When asked by trial counsel on cross examination about whether the clothing of Carolyn Barr contained gunshot residue, he also determined that there was none found. *Id*. at 52.

When a claim of ineffectiveness relates to the failure of counsel to call a witness, the petitioner must plead and prove that:

> (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 was so prejudicial as to have denied the defendant a fair trial.

See 42 Pa.C.S.A. §9543(a)(2)(to be eligible for relief, the petitioner must plead and prove that the conviction and sentence resulted from ineffective assistance of counsel that so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place); *Brown*, 196 A.3d at 167 (regarding the requirements to prevail on an ineffective assistance of counsel claim for failing to call a witness), quoting *Commonwealth v. Washington*, 927 A.2d 586, 599 (Pa. 2007).

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Petitioner has failed to allege how calling an expert for the defense at trial would have been helpful to the defense. Petitioner cannot point to how such an expert would have testified to any facts or opinions that would have exculpated him. Counsel is not ineffective merely

because he does not call a medical or forensic specialist to present testimony which would critically evaluate the expert testimony presented by the prosecution. *Commonwealth v. Yarris,* 519 Pa. 571, 602, 549 A.2d 513, 529 (1988). *Commonwealth v. Smith*, 544 Pa. 219, 238, 675 A.2d 1221, 1230 (1996). Therefore, Petitioner cannot establish the likelihood of prejudice attributable to the manner in which trial counsel responded to the Commonwealth's expert evidence. *Yarris*, 549 A.2d at 602.

Trial counsel was in effective in failing to allege a Franks violation concerning material misstatements, and or omissions in his affidavit of probable cause.

Petitioner alleges in his second amended PCRA petition that the Commonwealth included material misstatements and/or omissions in his affidavit of probable cause. However, PCRA counsel in neither the petition nor at the conference pointed to specific instances in which Petitioner was alleging omissions or misstatements. PCRA counsel alleges only that there was insufficient evidence in the affidavit to establish probable cause. Additionally, no witness certifications were provided to indicate who, if anyone, could testify regarding any misstatements or omissions.

The United States Supreme Court recognized the right to challenge an affidavit's veracity in *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), which addressed whether a defendant has the right, under the Fourth and Fourteenth Amendments, to challenge the truthfulness of factual averments in an affidavit of probable cause. *Id.* at 155, 98 S.Ct. 2674. The Court held where the defendant makes a substantial preliminary showing the affiant knowingly and intentionally, or with reckless disregard for the truth, included a false statement in the affidavit, the Fourth Amendment requires a hearing be held at the defendant's request. *Id*. at 155–56, 98 S.Ct. 2674. The Court emphasized the defendant's attack on the

affidavit must be "more than conclusory and must be supported by more than a mere desire to cross-examine [ ]"; the defendant must allege deliberate falsehood or reckless disregard for the truth, accompanied by an offer of proof. *Id.* at 171, 98 S.Ct. 2674. If the defendant meets these requirements, but the remainder of the affidavit's content is still sufficient to establish probable cause, no hearing is required. *Id.* at 171–72, 98 S.Ct. 2674. If the affidavit's remaining content is insufficient, a hearing is held, at which the defendant must establish, by a preponderance of the evidence, the allegation of perjury or reckless disregard. *Id.* at 156, 172, 98 S.Ct. 2674. If he meets this burden, the affidavit's false material is disregarded; if its remaining content is insufficient to establish probable cause, the search warrant is voided, and the fruits thereof are excluded. *Id.* at 156, 98 S.Ct. 2674.

Petitioner has failed to meet its burden of showing that a material misstatement or omission was contained in the affidavit of probable cause. While trial counsel filed a suppression motion alleging that the statements of Petitioner that he made to the Williamsport Bureau of Police were taken in violation of *Miranda*[15] or the product of undue influence, the Superior Court, *supra*, found that the statements were obtained lawfully by the police. In light of the fact that Petitioner cannot allege prejudice to warrant a hearing, this issue has no merit.

Conclusion

After evidentiary hearing, the Court finds that trial counsel's choice not to cross examine Commonwealth's witness Freeman on his pending charges was a reasonable trial strategy designed to effectuate his client's interests. Petitioner failed to establish the existence an agreement to *nol pros* the charges against Freeman for his cooperation in the trial which was

[15] *Miranda v. Arizona*, 384 U.S. 436 (1966)

not provided to trial counsel. If no agreement existed at the time of trial, it could not be considered after discovered as referenced in 42 Pa.C.S.A. § 9543(a)(2)(vi).

Trial counsel was not ineffective for his failure to request the "corrupt and polluted source" instruction as Freeman was not an accomplice or co-conspirator with Petitioner.

Trial counsel was not ineffective for failing to investigate to find Tyson Bolden and his girlfriend. Petitioner did not provide trial counsel with accurate names for Bolden and his girlfriend, and even the Commonwealth could not locate Bolden. Furthermore, Petitioner did not establish that Bolden could offer any testimony that would not have been cumulative of the testimony presented at trial. Trial counsel also used the absence of these witnesses to Petitioner's advantage. Petitioner was not prejudiced by the lack of these witnesses.

Petitioner has not satisfied his burden of proof to show that counsel was ineffective for failing to assert a *Batson* claim. Petitioner did not plead any facts necessary to establish a *Batson* claim and did not provide any witness certifications to support such a claim.

Trial counsel was not ineffective for failing to obtain and call a ballistic expert. Petitioner failed to allege that there was a ballistic expert available and willing to testify on behalf of Petitioner or what the expert could say. Petitioner did not provide any witness certifications to support this claim. The Commonwealth's expert could not tie the bullets that killed Caroline Barr to any particular firearm because the bullets were too damaged or fragmented.

Trial counsel was not ineffective for failing to file a *Franks* challenge to the affidavit of probable cause. Petitioner has neither alleged what facts within the affidavit of probable cause were material misstatements nor what facts were omitted from the affidavit of probable cause.

ORDER

AND NOW, this 18th day of March, 2024, for the reasons set forth above, the court DENIES Defendant's PCRA petition.

Defendant is hereby notified that he has the right to appeal from this order to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the Lycoming County courthouse, and sending a copy to the trial judge, the court reporter, and the prosecutor. The form and contents of the Notice of Appeal shall conform to the requirements set forth in Rule 904 of the Rules of Appellate Procedure.

The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa.R.A.P. 903. If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, Defendant may lose forever his right to raise these issues.

The Clerk of Courts shall mail a copy of this order to the defendant by certified mail, return receipt requested.

By the Court,

Nancy L. Butts, President Judge

cc: DA (Martin Wade, Esq.)
Nicole Spring, Esq.
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