IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CP-41-CR-1544-2020**
v.	:	
OBADIAH MOSER	:	**PCRA**
Petitioner	:	

OPINION AND ORDER

Obadiah Moser (Petitioner) filed a *pro se* petition for Post Conviction Relief on October 24, 2022. The Court appointed Nicole J. Spring, Esq. to represent Defendant on October 28, 2022. However, after original trial counsel withdrew from the case, and prior to the direct appeal, the Public Defender's Office took over representation of Petitioner's case. Since a conflict existed, Donald F. Martino, Esq. was appointed to represent Petitioner on his first PCRA on November 18, 2022. Preliminary conference on the petition was held on January 3, 2023. Attorney Martino then filed an Amended Post Conviction Relief Act (PCRA) Petition on February 17, 2023. After a conference on the Amended Petition March 13, 2023, the Court issued an opinion on November 30, 2023 setting forth the concerns it had with the issues raised in the Amended PCRA petition. Petitioner was directed to clarify the issues being raised at the evidentiary hearing so that all relevant issues could be evaluated and to plead with more specificity as to how trial counsel violated Petitioner's rights. A Second Amended petition was filed February 8, 2024 with an additional conference scheduled on February 29, 2024.

After the conference, the Court issued an order outlining the issues to be covered in the one-half day evidentiary hearing. Those issues were litigated at the hearing on August 2, 2024.

Background

Appellant was charged with three (3) counts of Rape of a Child[1] in addition to forty-seven (47) related sexual offenses in connection with the sexual abuse of a minor child. Following a non-jury trial, Appellant was found guilty of all counts except for Counts 49 and 50, Involuntary Deviate Sexual Intercourse—Person Less than 16 Years[2]. On February 17, 2022, this Court sentenced Appellant after determining that Appellant was a sexually violent predator to state incarceration for a minimum of eighty (80) years and a maximum of one hundred sixty (160) years.

Trial Counsel was granted leave to withdraw, and the Lycoming County Public Defender's Office, now representing Petitioner, filed an appeal on March 7, 2022. Petitioner raised three (3) issues: first, that the Court erred in its decision to deny the suppression of evidence obtained from Appellant's cellular phone pursuant to an overly broad search warrant. Second, Appellant argued that the Court erred in failing to suppress the evidence[3] unlawfully obtained from the cell phone because this particular evidence was outside the scope of the warrant. Lastly, Appellant contended that the sentencing court abused its discretion in imposing an excessive and unduly harsh sentence without considering the fundamental norms of the sentencing process.

The Superior Court, in its opinion dated September 19, 2022, affirmed the judgment of the trial court. On the first issue raised, the Superior Court held that the search of the

[1] 18 Pa.C.S. § 3121(c).
[2] 18 Pa.C.S. § 3121(a)(7).
[3] Since the Petitioner was tried without a jury, this Court suspended its trial to enable the suppression hearing to be held before another judge on October 21, 2022 and issued his written decision on October 27, 2021 and whose opinion was incorporated by this Court in its 1925(a) Statement.

Petitioner's phone did not exceed the scope of the second search warrant because Petitioner's Notes were "messages" or "conversations". *Commonwealth v. Moser*, 283 A.3d 850, 855-857 (Pa. Super. 2022).

On the second issue, the Superior Court held that the second warrant was not overbroad to have authorized the police to search for the Notes on Petitioner's phone because there was not an "unreasonable discrepancy" between the items sought and the items for which there is probable cause to search and seize. The Court found that the limiting language in the warrant allowed only certain files to be seized: those relating to the nature of the relationship between [Petitioner] and the victim and the charges alleged to have been committed. *Id.* at 857-58.

As to the third issue, the Superior Court held that Counsel failed to preserve the issue regarding sentencing because no objection was entered at the time of sentencing or that no motion for reconsideration was filed. *Id*. at 858. Even if the issue had been preserved, it lacked merit. *Id*. at 858 n. 9.

Petitioner had 30 days within which to file a petition for allowance of appeal, but no such petition was filed. Therefore, Petitioner's judgment of sentence became final on October 19, 2022. Since Petitioner filed his pro *se* Petition for Post Conviction Relief (PCRA) on October 24, 2022, his petition was filed timely.

After consideration of the arguments and petitions filed by the Petitioner on January 11, 2022, this Court granted an evidentiary hearing. The hearing was held on August 2, 2024. The issues to be raised at the hearing as outlined in this Court's order:

1. Did defense counsel fail to properly advise Defendant regarding the differences between and advantages and disadvantages to a jury trial compared to a nonjury trial, resulting in a waiver of his right to jury trial that was not knowing, voluntary, and intelligent; and
2. Did defense counsel fail to properly meet with Defendant, to

prepare a defense and to explain his options and rights with respect to:

(i) character witnesses;
(ii) failing to review police reports, phone records and other written materials;
(iii) did defense counsel fail to discuss the elements of the offenses, the evidence required to prove the offenses, the sentencing maximums and the sentencing guideline ranges;
(iv) did trial counsel fail to make Moser aware of the phone conversations between Moser and the alleged victim until 20 minutes before jury selection;
(v) failing to meet with Moser after the nonjury verdict was rendered and before sentencing.

For ease of discussion, the Court will organize the issues as they were pled in PCRA counsel's second amended petition for relief.

Testimony

At the evidentiary hearing on August 2, 2024, Petitioner called four witnesses. The first witness was trial counsel, Kyle Rude (Rude) who testified that he has been a criminal defense trial attorney for 30 years. PCRA Transcript, 08/02/24, at 4. He testified that he first received an email from Petitioner's wife since Petitioner was incarcerated. *Id.* at 5; see also Petitioner's Exhibit #3. She then came into the office to retain him. PCRA Transcript, *id.* Rude explained that his usual practice was that he would meet with the Petitioner before the preliminary hearing. *Id.* at 6. Petitioner's preliminary hearing was scheduled at MDJ Solomon's office. *Id.* Rude described that he met with Petitioner prior to the trial once or twice and with Petitioner's wife present. *Id.* He also would have either emailed or sent Petitioner his discovery through the US Mail. *Id.* at 8. Rude explained the evidence to Petitioner and also sent him videos of his statements. *Id.* He also remembered that he reviewed the maximums and mandatory sentences along with the guidelines with Petitioner. *Id.* Rude said that he wasn't sure if the

Commonwealth had made a plea offer in the case. *Id.* Rude thought that they waived the preliminary hearing to have the Petitioner released on bail. *Id.*

Rude testified that he remembered that when he spoke with Petitioner, he would have denied the charges to him completely. *Id.* at 9. Petitioner said that the facts were completely fabricated. *Id.* After discussion as to why the victim might make them up about Petitioner, he offered that the victim's family was very dysfunctional and that during this time Petitioner would have taken the victim under his wing and they would go fishing. *Id.* Rude testified that the majority of communications were with Petitioner's wife, either by phone or email. *Id.* at 10. They discussed possible witnesses as the groups of people Petitioner would have been around: his wife, and people at the hunting and fishing camp. *Id.* Rude testified that in June 2021 he received additional discovery that they would have discussed with Petitioner in August and that he would have met with both Petitioner and his wife on the morning of the non-jury trial. *Id.* He believed that the Commonwealth's case was the victim versus Petitioner. *Id.* Specifically Rude wrote to the Petitioner in an email, "No evidence, just a delayed report of something they cannot prove. *Id.* They also discussed character witnesses that could be called on Petitioner's behalf. *Id.*

In June 2021, Rude testified that he would have received a "phone dump" from Petitioner's phone. *Id.* at 11. Rude thought that it may have been sent to Petitioner but he could not recall. *Id.* He met with Petitioner and his wife in August 2021 and believed that he would have gone over it at that time. *Id.* Rude also testified about an email from Petitioner's wife and his response after the trial about the notes from Petitioner's phone. *Id.* at 13. He acknowledged that he received the information as part of the phone dump but did not recognize it until the Commonwealth alerted Rude to the information the day of jury selection on October 8, 2021.

Id. at 15. Rude believed that in light of that evidence he would have proposed to Petitioner that he waive his jury trial. *Id.* at 17. He thought that the evidence would be worse in front of a jury. *Id.* He also testified that he would have reviewed the differences between a jury and non-jury trial with the client and stressed that the only defense he would have would be to get the notes suppressed. *Id.* Rude testified that he would have recommended to Petitioner that he should proceed by non-jury trial. *Id.* Rude thought that he might have discussed the idea previously because of the nature of the charges, but he knew that he discussed the matter with Petitioner at least on jury selection day. *Id.* at 18. Petitioner would have signed the jury waiver form in court (see Petitioner's Exhibit #4) and filled out nothing else. *Id.* at 21. Rude then testified that he provided Petitioner with the notes, and asked Petitioner and his wife to respond to what was in the notes. *Id.* at 22. He then would have called or talked with them for about an hour as a result of the two to three-page response they provided to Rude. *Id.* Petitioner disputed the contents of the notes, but between the time of the waiver and trial he did not seek the opinion of an expert about the authenticity of the notes. *Id.* at 23.

On cross-examination, the Commonwealth showed Rude a supplemental report (Commonwealth's Exhibit #1) that was sent to his office filed by the prosecuting officer. *Id.* at 24. The Commonwealth also provided a copy of an email sent the night before jury selection (Commonwealth's Exhibit #2), which discussed the notes from the Petitioner's phone. *Id.* at 27. Rude also testified that neither Petitioner nor his wife expressed concern about the waiver of a jury trial from the time it was waived (October 8) and the date of trial (October 20). *Id.* Rude also remembered a conversation with Petitioner about the way the case would have been perceived by a jury, and he continued to believe that going non-jury was still the best course of action. *Id.* at 28. He also continued to believe that Petitioner's waiver of his jury trial right was

knowing, intelligent, and voluntary. *Id.* at 29. Once Petitioner was confronted with the notes, he did not request a continuance of his trial. *Id.* Rude also believed that the Petitioner's behavior at the time of the jury waiver was rooted in frustration, not confusion. *Id.* Rude testified that he made a last-minute suppression motion to challenge the notes, which if suppressed would have made the Commonwealth's case much weaker. *Id.* Although Petitioner alleged that Rude did not go over the elements of the crimes, applicable mandatories or sentencing guidelines with him, Rude said that he specifically did. *Id.* at 33. In preparation for the hearing, Rude was also not made aware of the name of any expert prepared to issue a report questioning the authenticity of the incriminating evidence found on Petitioner's cell phone. *Id.* at 35. Rude also testified that if he had a case he believed had a greater chance of success in front of a jury, he would have taken it in front of the jury. *Id.* at 37.

The next witness called by Petitioner was Kim Welch. She was to be offered as a character witness for Petitioner that trial counsel would have failed to call at trial. Her testimony was not permitted as she would not have been able to present relevant and admissible testimony. *Id.* at 45.

Petitioner next presented the testimony of his wife, Jeri Moser (Moser). She testified that they have been married for 43 years, and she was the one who facilitated the hiring of Rude. She testified that Petitioner was arrested on November 5, 2020. She met with Rude on November 11, 2020 and retained him on November 12, 2020. Moser testified that she believed that Rude visited her husband prior to the preliminary hearing. Rude also told her that she did not need to attend the preliminary hearing. *Id.* at 48. Petitioner would have been released from jail shortly after the hearing.

Finally, Petitioner was called as a witness. He testified that he first time he met Rude was after he had been held in jail for about two weeks. *Id.* at 58. Petitioner said that Rude reminded him that he did not need a public defender as Rude was going to represent him but that he did not remember much of the conversation. *Id*. He testified that other than a speeding ticket in Lewisburg many years ago, he was unfamiliar with the criminal justice system. *Id*. Petitioner also testified that he did not go to his preliminary hearing but was released on bail shortly after the hearing was scheduled. *Id.* at 60. He estimated that he met with his attorney between the time he was released on bail and his jury waiver approximately twice. *Id.* at 61. While his wife may have remembered another meeting, he did not. *Id.* Petitioner said that when he becomes frustrated his "short-term memory kinda goes out the door" so he had trouble testifying to what he and his attorney reviewed when they met. *Id.* at 62. When asked about any discovery that was reviewed with Rude, he talked about a video of the victim made at the CAC, and a video of the Petitioner at the police station. *Id.* Petitioner testified that he believed that he reviewed it between the meeting in December 2020 and August 2021. *Id.* Petitioner claimed that Rude neither reviewed the sentencing guidelines with him nor showed him the sentencing matrix. *Id.* at 63. Rude also did not go over the pros and cons of a jury or non-jury trial until the day of jury selection. *Id.* at 64. While Petitioner said that Rude did not review the jury selection process, he understood it from watching NCIS. *Id.* at 66. Petitioner did testify that he had his concerns about a jury trial as he feared that the "jury would be stacked" in favor of the prosecution. *Id.* at 64. He also was worried about a jury trial after he reviewed the notes from the search of his phone with Rude. *Id.* at 64-65. Petitioner testified that he didn't recall Rude going over how a jury would be selected or that he would have the opportunity to challenge the credibility of witnesses or what that even meant. *Id.* at 67. Petitioner generally testified that he

waived his right to a jury trial based upon his attorney's recommendation. *Id.* at 68. Knowing what he knows now from his time at SCI Forest, he would never waive his jury. *Id.* at 70. On cross, Petitioner said that he absolutely did not write the notes in the phone and would never have taken a plea bargain. *Id.* at 71.

The Commonwealth called one witness, Detective Justin Segura from Lycoming Regional Police Department, a detective for about 6 years and a police officer for 14 years. *Id.* at 72. He testified that as the lead investigator he would have sent the electronics to the Pennsylvania State Police (PSP) for extraction. *Id.* at 73. On April 28, 2021, he received the forensic report from PSP which indicated that nothing of evidentiary value was discovered on any of the items submitted. *Id.* at 74. He then needed to request copies of the actual extractions, which he obtained June 15, 2021. *Id.* at 78. It wasn't until October 7, 2021 when the Commonwealth would have called him to tell him that there were some items of interest contained in the materials that he would have missed the first time he went through the materials. *Id.* at 75. On cross, he acknowledged that he may have found some internet searches of pornographic material in the extractions, but did not discover the notes information until the Commonwealth told him. *Id.* at 77.

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).

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).

Was Petitioner's jury waiver valid

PCRA counsel argues that trial counsel was ineffective for failing to properly advise Petitioner of the ramifications of waiving a jury trial. PCRA counsel also alleges that the waiver itself was deficient under Rule 620 of the Pa Rules of Criminal Procedure and applicable appellate court decisions. Although this issue appeared to arguable merit to warrant an evidentiary hearing, the Court finds that this issue lacks merit based on the evidence presented at the evidentiary hearing.

Rule 620 of the Pa Rules of Criminal Procedure states that "the judge shall ascertain from the defendant whether this is a knowing and intelligent waiver, and such colloquy shall appear on the record. The waiver shall be in writing, made a part of the record, and signed by the defendant, the attorney for the Commonwealth, the judge, and the defendant's attorney as a witness." Pa. R. Crim. P. 620.

[T]he essential elements of a jury waiver, though important and necessary to an appreciation of the right, are nevertheless simple to state and easy to understand. The ... essential ingredients, basic to the concept of a jury trial, are the requirements that the jury be chosen from members of the community (a jury of one's peers), that the verdict be unanimous, and that the accused be allowed to participate in the selection of the jury panel. *Commonwealth v. Mallory*, 941 A.2d 686, 696–697 (Pa. 2008). "When a presumptively-valid waiver is collaterally attacked under the guise of ineffectiveness of counsel, it must be analyzed like any other ineffectiveness claim. Such an inquiry ... must focus on the totality of relevant

circumstances." *Id.* at 698. "Those circumstances include the defendant's knowledge of and experience with jury trials, his explicit written waiver (if any), and the content of relevant off-the-record discussions counsel had with his client." ***Id.*** "Counsel's advice to waive a jury trial can be the source of a valid claim of ineffective assistance of counsel only when [ ] counsel interferes with his client's freedom to decide to waive a jury trial [or when a defendant] can point to specific advice of counsel so unreasonable as to vitiate the knowing and intelligent waiver of his right." *See Commonwealth v. Hook*s, 394 A.2d 528, 532 (Pa. 1978). To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's constitutionally deficient representation, the outcome of the waiver proceeding would have been different, *i.e.*, that the defendant would not have waived his right to a jury trial. *See Mallory*, 941 A.2d at 697.

At the time scheduled for jury selection, Petitioner executed a written waiver, answered the Court's colloquy and responded in the affirmative when asked whether he knew and understood the critical components of a jury trial, whether he discussed these issues with counsel, whether he comprehended the importance of the rights subject to waiver, and whether he intended to waive those rights freely. Transcript of Jury Waiver, 10/7/2021 at 3-14. The waiver form was signed by Petitioner, Rude, the prosecutor and the Court in accordance with Rule 620. The Rule does not require that an explanation of the rights that are being waived be contained in the waiver or even in writing. The Court conducted an oral colloquy on the record. Furthermore, because of the manner in which Petitioner was answering the Court's questions, the Court took additional time to make certain that the concepts were explained to Petitioner and that he answered the questions directly. To add additional certainty to the colloquy, the Commonwealth requested that trial counsel ask additional questions to make certain that the

choice to waive was Petitioner's and no one else's. *Id.* at 15-16. At his colloquy, Petitioner acted strangely in his responses. The way he responded to the Court's questions showed his impatience with the process rather than lack of understanding what was happening. Accordingly, the Court finds that the Petitioner knowingly, intelligently and voluntarily waived his jury trial. Therefore, this claim lacks merit.

Even if this claim had merit, Petitioner would not be entitled to relief. In order to obtain PCRA relief, Petitioner must show that in addition to the issue having arguable merit, that the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate Petitioner's interests and prejudice. Generally, counsel's assistance is deemed constitutionally effective if he chose a particular course of conduct that had some reasonable basis designed to effectuate his client's interests. *See Commonwealth v. Ali,* 10 A.3d 282, 291 (Pa. 2010). Where matters of strategy and tactics are concerned, "[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." *Commonwealth v. Colavita,* 993 A.2d 874, 887 (Pa. 2010). To demonstrate prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Commonwealth v. King,* 57 A.3d 607, 613 (Pa. 2012). " '[A] reasonable probability is a probability that is sufficient to undermine confidence in the outcome of the proceeding.' " *Ali,* 608 Pa. at 86–87, 10 A.3d at 291, *Commonwealth v. Spotz*, 624 Pa. 4, 33–34, 84 A.3d 294, 311–12 (2014).

Since counsel did not interfere with Petitioner's freedom to waive a jury trial and Petitioner has made it clear that he would not have pled guilty, Petitioner has pointed to no specific advice of counsel or information that vitiated a knowing and intelligent waiver of

Petitioner's right to a jury trial. Given the nature of charges and the evidence presented along with the demeanor of Petitioner, the choice of proceeding by nonjury trial appeared to be a logical strategic decision. Petitioner's own testimony at the evidentiary hearing showed that he had concerns proceeding before a jury. Rude testified that given the evidence in the case, particularly the Notes from Petitioner's phone, it would be better for this case to proceed to trial before a judge rather than a jury. Therefore, Petitioner cannot show that counsel lacked a strategic decision for his advice to waive his right to a jury trial and proceed with a nonjury trial.

The Court is also not convinced that if the questions regarding the jury waiver were in writing that the results of the waiver hearing would have been any different. The Court finds that Petitioner was frustrated about the evidence that was found in the Notes on his phone and the process for waiving his right to a jury trial. The Court finds that Petitioner was not confused about his right to a jury trial or his decision to waive that right. Instead, the Court finds that Petitioner's current feelings about his waiver of his right to a jury trial are the result of "buyer's remorse" from conversations with other inmates or "jailhouse lawyers", who believe they know better than an actual licensed attorney and who convinced him that he never should have waived his right to a jury trial. Petitioner also does not point to anything in the record which would indicate that this Court weighed the evidence improperly or incorrectly, or that a jury would have viewed his case more sympathetically. Therefore, since Petitioner cannot reasonably show that the outcome of the waiver hearing or the trial would have been different, Petitioner has failed to establish prejudice.

As Petitioner has failed to establish all three prongs of an ineffective assistance of counsel claim, Petitioner is not entitled to relief on this issue.

Did trial counsel fail to properly meet with Petitioner in violation of his Sixth Amendment rights

Petitioner alleges that trial counsel abdicated his responsibility to minimally perform as required in this type of case he was unable to establish the relationship necessary for him to adequately defend Petitioner. Petitioner further claims that by failing to meet with him sufficiently, trial counsel was unable to "gather information from him, evaluate his demeanor, adequately explain the trial process or defense strategies" which failed to establish a working relationship with him. Petitioner cites that a particular level of trial preparation is an "abdication of the minimum performance of defense counsel." *Commonwealth v. Perry,* 644 A.2d 705 (Pa. 1994).

In *Perry*, the Supreme Court found that trial counsel's failure to meet with his client, and prepare for trial, failure to use his investigator, unawareness that he was defending a capital case, and failure to prepare for the death penalty hearing-had merit, and that counsel's failure to interview witnesses was ineffective, arguably per se. *Perry*, 644 A.2d at 709.

This is neither a capital case nor a situation where counsel failed to meet his client at all. Whether Petitioner remembers meeting or discussing matters with his attorney, the testimony presented established that Rude met with Petitioner multiple times both before and after providing discovery to discuss. He also encouraged Petitioner to write his story in detail as he was adamant that he was innocent of the charges. The Court finds Rude's testimony credible. Furthermore, the length and frequency of the consultations alone are insufficient to support a finding of ineffectiveness. *See Commonwealth v. Watley*, 153 A.3d 1034, 1046 (Pa. Super. 2016)(counsel is not ineffective per se merely because of the short amount of time he has met with his client; rather, to establish ineffectiveness the petitioner must show that counsel

inexcusably failed to raise issues, which had they been raised, would have entitled petitioner to relief); *Commonwealth v. (Kevin) Johnson*, 51 A.3d 237, 244 (Pa. Super. 2012)(en banc)("we disagree with Appellant that the length and frequency of the consultations alone can support a finding of ineffectiveness").

It was also clear during the jury waiver hearing that trial counsel had gotten to know the Petitioner because Rude knew Petitioner's "frame of mind" or mindset. He was aware at an earlier jury selection that, due to medication Petitioner was taking after back surgery, he would not have been able to understand what was happening in court. Rude also knew that having the Petitioner's wife attend meetings enabled Petitioner to remain calm to understand the matters being discussed in their meetings. Only someone who had spent time with the Petitioner would be able to know his client in that manner. Petitioner may not have been happy to have been prosecuted for these offenses, but it was clear that trial counsel attempted to establish a relationship and did what he could to prepare for Petitioner's trial. Therefore, the Court finds that Petitioner failed to establish that trial counsel did not have a reasonable basis for his actions and this issue has no merit.

Was trial counsel ineffective due to the cumulative error arising from trial counsel's failure to advise Petitioner of his rights and prepare a defense

No number of failed claims may collectively attain merit if they could not do so individually. *Commonwealth v. Lopez*, 854 A.2d 465, 471 (Pa. 2004), quoting *Commonwealth v. Williams*, 615 A.3d 716, 722 (Pa. 1992). *See Spotz*, 84 A.3d at 321 n. 22 (where counsel ineffectiveness claims fail because of "lack of merit or arguable merit," "no number of failed [] claims may collectively warrant relief if they fail to do so individually" (alteration in original)). Further, there is no cumulative prejudice here requiring a finding of ineffectiveness. The claims

"are independent factually and legally, with no reasonable and logical connection warranting a conclusion that the cumulative effect was of such moment as to establish actual prejudice." See *Spotz,* 18 A.3d at 321.

Of the issues raised by Petitioner none appear to show that trial counsel had no reasonable basis to pursue them. Petitioner raised the issue of the Notes being overlooked by defense counsel. Both trial counsel and the prosecuting officer overlooked the documents in a deleted folder. No evidence was presented at the hearing that an expert existed to testify that the Notes couldn't have been prepared by the Petitioner in that phone.

Our Supreme Court has repeatedly said that a defendant claiming ineffective[ness] based on an attorney's failure to proffer expert testimony must articulate what evidence was available and identify the witness who would have been willing to offer the proposed expert testimony. *Commonwealth v. Bryant*, 855 A.2d 726, 745 (Pa. 2004) [(reiterating "the well-settled rule that, in addition to the ineffectiveness test, '[w]hen a defendant claims that expert testimony should have been introduced at trial, the defendant must articulate what evidence was available and identify the witness who was willing to offer such evidence' ") *Commonwealth v. Dean,* 328 A.3d 495 (Pa. Super. 2024).

On the issue of failing to review guidelines information or elements of the charges, the Court accepts trial counsel's testimony that he reviewed the charges and the guidelines with Petitioner. If his issue is that he did not know that information prior to his waiver, it is clear from the transcript of the waiver hearing that he was advised of all of that information by the Court before he waived his right to a jury trial. It is also clear that Petitioner testified that he would not have entered a plea as he did not commit the offenses. The Court cannot see how he

was prejudiced, or that the outcome of the trial would have been different. Therefore, this issue also has no merit.

Conclusion

Based on the foregoing, this Court finds no basis upon which to grant Petitioner's PCRA petition.

ORDER

AND NOW, this 21st day of April, 2025, 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 (MWade)
Donald F. Martino, Esq.
Obadiah Moser, QN7238 (certified mail)
SCI Forest
P.O. Box 307
286 Woodland Drive
Marienville, PA 16239
Laurel Fox, Esq.
Jerri Rook