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Commonwealth v. Reid

Commonwealth of Pennsylvania v. Albert Ezron Reid, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch, Criminal Action - Law No. 1997-382

HEADNOTER'S NOTE: As of the date of these headnotes, the opinion and order to which these headnotes correspond is the subject of a motion to reconsider.

HEADNOTES

[1] *Post-Conviction Relief: PCRA: Sole Means of Post-Conviction Relief*

1. The PCRA is the sole means of obtaining post-conviction relief, and subsumes the writs of habeas corpus and coram nobis. 42 Pa. C.S. § 9542.

2. The PCRA does not unconstitutionally suspend the writ of habeas corpus.

3. A court must consider any document requesting post-conviction relief under the PCRA, no matter the title of the document.

[2] *Post-Conviction Relief: Ineffective Assistance of Counsel*

1. A lawyer renders constitutionally ineffective assistance of counsel when (1) the underlying legal claim has arguable merit; (2) counsel had no reasonable basis for his or her actions or inactions; and (3) counsel's actions prejudiced the defendant.

2. Pennsylvania's three-part test for ineffective assistance of counsel is the same as the two-part test employed by federal courts.

3. To prevail on a claim of ineffectiveness, a petitioner must plead and prove all three parts of the test for ineffective assistance of counsel. If one of the parts is not proved, the claim fails.

[3] *Post-Conviction Relief: Ineffective Assistance of Counsel*

1. Some actions by counsel are so deficient that they constitute *per se* ineffective assistance of counsel.

2. In a claim for *per se* ineffective assistance of counsel, prejudice is presumed.

3. Pennsylvania limits *per se* ineffectiveness to claims where counsel failed to (a) timely file a concise statement of errors complained of on appeal, thereby waiving all appellate issues; (b) fail to timely file a petition for allowance of appeal; and (c) complete abandonment on appeal.

[4] *Post-Conviction Relief: Ineffective Assistance of Counsel: Reasonable Basis*

1. A post-conviction court does not employ hindsight or second-guess counsel's actions.

2. To prove that counsel's actions were unreasonable, a post-conviction petitioner must show that an unchosen alternative had a substantially greater chance for success.

[5] *Post-Conviction Relief: Ineffective Assistance of Counsel: Prejudice*

1. To prove prejudice, a post-conviction petitioner must show that there is a reasonable probability that the result of the proceedings would have been different but for counsel's action.

[6] *Post-Conviction Relief: Previous Litigation*

1. A court cannot grant relief on a PCRA claim that is previously litigated. 42 Pa. C.S. § 9544(a)(2).

2. An issue is previously litigated if the highest court in which a petitioner had a right to review passed upon the merits of an issue.

3. A post-conviction petitioner cannot repackage previously litigated claims as ineffective assistance of counsel.

[7] *Post-Conviction Relief: Waiver*

1. A court cannot grant relief on a PCRA claim that is waived. 42 Pa. C.S. § 9544(b).

2. A claim is waived if it could have been raised pretrial, at trial, on appeal, on unitary review, or in a prior post-conviction proceeding.

3. Claims of ineffective assistance of counsel allow a post-conviction petitioner to avoid waiver.

[8] *Post-Conviction Relief: Layered Claims of Ineffective Assistance of Counsel*

1. Prior to *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002), a defendant's lawyer was required to raise previous counsel's ineffective assistance at the earliest opportunity.

2. If a defendant had a different lawyer post-trial or on direct appeal, that lawyer was required to raise trial counsel's ineffectiveness at that time.

3. If direct-appellate counsel failed to raise trial counsel's ineffectiveness, the claim is waived and must be raised as a claim of layered ineffective assistance of counsel.

4. In a layered claim, the arguable merit of direct-appellate counsel's ineffective assistance of counsel is established by proving all three parts of the ineffective-assistance-of-counsel test for trial counsel.

5. In a layered claim, a post-conviction petitioner must prove that direct-appellate counsel's course of action was unreasonable and that he or she suffered prejudice as a result.

[9] *Post-Conviction Relief: Layered Claims of Ineffective Assistance of Counsel: Current Law*

1. Under current Pennsylvania law, claims of ineffective assistance of counsel must generally be deferred to collateral review.

2. A defendant may raise an extraordinary claim of ineffective assistance of counsel on direct appeal if he waives his right to collateral review.

3. A defendant may raise an ordinary claim of ineffective assistance of counsel on direct review if he waives his right to collateral review and a court finds good cause to address the claim.

[10] *Post-Conviction Relief: Credibility of Witnesses*

1. A PCRA court's determinations of witnesses credibility is entitled to deference on appeal.

2. A PCRA court may properly find that a post-conviction petitioner's trial counsel was not a credible witness when it appears to the court that trial counsel's testimony is a mere attempt to garner the petitioner a new trial.

[11] *Ineffective Assistance of Counsel: Pretrial Discovery and Inspection*

1. Counsel has a general duty to investigate a case.

2. An unreasonable failure to investigate a case pretrial is ineffective assistance of counsel.

3. The failure to interview witnesses is not per se ineffectiveness.

[12] *Ineffective Assistance of Counsel: Pretrial Discovery and Inspection*

1. The reasonableness of counsel's pretrial investigation depends on the defendant's cooperation and the information supplied by the defendant.

2. A PCRA petitioner cannot refuse to cooperate with his or her attorneys or fail to divulge relevant information and then claim that his or her attorneys failed to adequately prepare for trial

3. The failure to interview witnesses is not per se ineffectiveness.

4. Counsel were not ineffective for failing to adequately investigate capital murder defendant's case when defendant obstinately refused to cooperate with counsel or reveal pertinent information to counsel.

5. Counsel were not ineffective for failing to file a pretrial request for statements of prospective prosecution witnesses, because defendant had no right to view those statements before trial began.

6. Counsel were not ineffective for failing to challenge prosecution's insinuation that defendant violated his pretrial release by contacting murder victim, because overwhelming evidence indicated that defendant had impermissibly contacted victim.

[13] *Criminal Law: Statements of Witnesses or Prospective Witnesses*

1. Pretrial disclosure of non-exculpatory written statements of eyewitnesses is discretionary.

2. Under Pennsylvania law, a defendant has no right to receive non-exculpatory written witness statements pretrial.

3. The prosecution must turn over any written witness statements to the defense after the witness testifies at trial.

[14] *Criminal Law: Witnesses*

1. Impeachment of a witness on a collateral matter is not allowed.

2. Evidence that murder victim's mother believed that victim lied about her daughter being sexually abused by defendant would have been inadmissible on cross-examination, as the evidence was hearsay and concerned a collateral matter.

[15] *Criminal Law: Witnesses*

1. A witness may not be cross-examined on irrelevant prior bad acts. Pa. R.E. 609(a).

2. Evidence that prosecution witness was incarcerated on drug charges was inadmissible, because charges were not convictions and drug charges are not crimes of falsehood.

[16] *Criminal Law: Witnesses*

1. A witness may impeached by extrinsic evidence of specific instances of conduct. Pa. R.E. 608(b).

2. Witness could not be impeached with jail records showing that she was in pretrial detention at the county jail, because records were extrinsic evidence of a specific instance of conduct.

[17] *Post-Conviction Relief: Affidavits and Declarations*

1. To qualify as an affidavit, a statement must be made under oath, before an officer authorized to administer oaths, and certified by that officer. 1 Pa. C.S. § 1991.

2. The Judicial Code defines "affidavit" to include unsworn statements. 42 Pa. C.S. § 102.

[18] *Ineffective Assistance of Counsel: Pretrial Discovery and Inspection*

1. The failure to interview witnesses is not per se ineffectiveness.

2. Counsel were not ineffective for failing to interview witness pretrial where they tried to contact witness and witness refused to consent to interview.

[19] *Criminal Law: Evidence: Prior Bad Acts*

1. Evidence that a person accused of murder previously abused the victim, his former paramour, is admissible to prove ill will, motive, or malice.

2. Remoteness in time of prior-bad-acts evidence generally goes to the evidence's weight, not its admissibility.

3. Trial court properly admitted evidence that defendant abused murder victim, because the evidence tended to show ill will, motive, or malice to kill.

4. Trial court properly admitted evidence that defendant held a knife to the throat of witness, because the action occurred while defendant threatened to kill murder victim.

5. Trial court properly admitted evidence that defendant threatened to carve his name into witness's forehead, because threat was made after witness confronted defendant about abusing murder victim.

6. Trial court properly allowed witnesses' testimony that they viewed bruises on murder victim, because context clearly indicated that the defendant inflicted the injuries.

[19] *Criminal Law: Evidence: Hearsay*

1. Statements admitted for reasons other than their truth are not hearsay. Pa. R.E. 801.

2. Trial court properly admitted evidence that bar patrons told murder victim to watch out for defendant, because statements were admitted because they occurred—not because they were true.

[20] *Ineffective Assistance of Counsel: Failure to Call Witness*

1. The decision to call a person as a witness cannot be evaluated in hindsight.

2. A post-conviction court must evaluate counsel's decisions regarding calling witnesses to see whether those decisions had a reasonable basis designed to effectuate the defendant's best interests.

3. Trial counsel's decision to call a forensic pathologist was not unreasonable even though the pathologist gave somewhat unhelpful testimony.

[21] *Ineffective Assistance of Counsel: Failure to Properly Cross-Examine Witnesses*

1. The examination of witnesses is generally committed to the discretion of trial counsel.

2. Trial counsel will be found ineffective for failing to properly cross-examine witnesses only where counsel's strategy lacked any reasonable basis.

3. Counsel were not ineffective for failing to properly cross-examine Commonwealth's gunshot-residue expert. PCRA petitioner relied on evidence that post-dated trial to support alternate theory, petitioner did not give information pretrial to counsel to support alternate theory, and counsel presented defense expert to rebut Commonwealth's expert.

4. Counsel were not ineffective for failing to properly impeach Commonwealth's evidence on boot-prints. PCRA petitioner's proposed impeachment evidence did not qualify as prior inconsistent statement.

[22] *Ineffective Assistance of Counsel: Failure to Present Expert Testimony*

1. The failure to obtain an expert rebuttal witness is ineffectiveness only if the PCRA petitioner demonstrates that an expert witness was available who would have offered testimony designed to advance his cause.

2. PCRA petitioner's claim that trial counsel were ineffective for failing to present expert in voodoo was frivolous. Voodoo is primarily a Hatian religion, petitioner was Jamaican, not Hatian, counsel called an expert in Jamaican Obeah.

[23] *Ineffective Assistance of Counsel: Pro Se Claims*

1. A defendant who has validly waived the right to counsel cannot raise his own ineffectiveness.

2. PCRA petitioner could not raise a claim of ineffective assistance of counsel arising from pretrial period during which he represented himself.

[24] *Ineffective Assistance of Counsel: Previously Litigated Claims*

3. A PCRA court cannot grant relief on claims that were previously litigated.

4. Counsel were not ineffective for failing to challenge chain of custody of gloves. Claim was addressed and rejected by the Supreme Court on direct review

[25] *Post-Conviction Relief: Evidence and Burden of Proof*

1. A PCRA petitioner has the burden of proving his claims.

2. PCRA court could not grant relief on claim that prosecution failed to test hairs found on victim's body when defendant failed to present evidence to support the claim.

[26] *Prosecutorial Misconduct: Vouching for Witnesses*

1. A prosecutor cannot assert personal opinions about the credibility of witnesses.

2. A prosecutor's vouching for a witness is not reversible error when it responds to a prior attack on the witness's credibility by the defense.

3. Prosecutor's statement that witnesses "told the truth" was not improper when it responded to defense accusations that the witnesses lied.

[27] *Prosecutorial Misconduct: Invoking Oath of Office*

1. A prosecutor cannot invoke his or her oath of office to justify the investigation of a case.

2. A prosecutor's invocation of his or her oath of office is not reversible error when it responds to defense attacks on the thoroughness of the investigation.

3. Prosecutor's statement that police investigation was not incompetent was not reversible error when it responded to defense accusations that prosecution too quickly charged defendant with murder, improperly excluded other suspects, and failed to explain key facts about the murders.

[28] *Prosecutorial Misconduct: Commenting on Evidence*

1. Prosecutors are permitted to comment on the evidence or appropriate inferences from it, and to employ rhetorical flair in their arguments.

2. A prosecutor cannot assert a personal belief that the defendant is guilty.

3. Prosecutor's reference to studies that children sleep more soundly than adults was not improper. Reference was an offhand remark urging jurors to use their common sense.

4. Prosecutor's remark that defendant may have disposed of murder weapon in a rural area was not improper. Remark was a fair inference derived from the evidence.

[29] *Constitutional Law: Confessions: Pre-Arrest Silence*

1. A defendant must affirmatively invoke the privilege against self-incrimination in a non-custodial pre-arrest interview.

[30] *Constitutional Law: Confessions: Pre-Arrest Silence*

1. Currently under Pennsylvania law, the prosecution cannot use a non-testifying defendant's pre-arrest silence to imply the defendant's guilt.

[31] *Ineffective Assistance of Counsel: Changes in the Law*

1. Effectiveness of counsel must be judged using the law as it existed at the time of the relevant proceeding.

2. Counsel cannot be found ineffective for failing to predict future changes in the law.

3. Counsel were not ineffective for failing to object to reference to defendant's pre-arrest silence. At the time of defendant's trial, the defendant's pre-arrest silence was admissible evidence.

[32] *Criminal Law: Jury Instructions*

1. In evaluating jury instructions, a reviewing court views the charge to the jury as a whole.

2. A trial court has broad discretion in charging the jury and may choose its own wording so long as the instructions are clear, adequate, and accurate.

3. A court will award a new trial based on an erroneous jury instruction only where the charge was fundamentally erroneous, or misled or confused the jury.

[33] *Ineffective Assistance of Counsel: Jury Instructions*

1. In evaluating jury instructions, a reviewing court views the charge to the jury as a whole.

2. Counsel were not ineffective for failing to object to clause of jury instructions that told the jury that the prosecution "does not have to prove [the defendant's] guilt beyond a reasonable doubt." Clause was either a misstatement by the trial judge or a typographical error in the record; was a single, isolated occurrence; and the jury was informed ten times of the proper burden of proof.

[34] *Criminal Law: Jury Instructions*

1. The court may instruct the jury on how to weigh the number of witnesses where the defense has presented evidence and has presented significantly less witnesses than the prosecution.

2. Counsel were not ineffective for failing to object to jury charge on number of witnesses. Charge was proper statement of the law.

[35] *Criminal Law: Jury Instructions*

1. In a murder case, a progression charge requires the jury to render a verdict of guilt or acquittal on the greatest of degree of murder charged before moving onto the second-greatest degree of murder charged, and so on.

2. Progression charges are proper in Pennsylvania.

3. Court properly charged jury in murder case to render verdict of guilty or not guilty of first-degree murder before deliberating on second-degree murder.

[36] *Ineffective Assistance of Counsel: Jury Instructions*

1. Counsel cannot be ineffective for failing to argue the law of foreign jurisdictions.

2. Counsel were not ineffective in failing to object to progression jury charge using the law of other states. The foreign law was irrelevant and contradicted Pennsylvania law.

[37] *Ineffective Assistance of Counsel: Failure to Challenge Jury Array*

1. The method of assembling jury arrays is a matter of state law.

2. An array must be composed of a fair cross-section of the community and cannot systematically exclude distinctive groups.

3. To show that an array does not represent a fair cross-section, a defendant must prove that the group allegedly excluded is a distinct group; the representation of that group is not fair and reasonable; and the underrepresentation is systematic.

4. The use of voter rolls and drivers' license databases does not systematically exclude minority groups from jury arrays.

5. Appellate counsel was not ineffective for failing to challenge composition of jury array composed using voter rolls and drivers' license database. Supreme Court had repeatedly approved such a method for selecting venire panels.

[38] *Ineffective Assistance of Counsel: Failure to Preserve Record*

1. States must provide indigent defendants with a trial transcript.

2. The failure to have every sidebar at trial transcribed is not ineffective assistance of counsel.

3. Counsel were not ineffective for failing to have sidebars transcribed. Transcript of jury selection and trial totaled over 1,500 pages, and defendant failed to prove that significant portions were missing.

[39] *Ineffective Assistance of Counsel: Conflict of Interest*

1. A county public defender's office is treated as one law firm, and one member of that office cannot argue the ineffectiveness of another member.

2. The prohibition against arguing the ineffectiveness of another public defender applies only to lawyers who were members of the office at the time of the alleged ineffectiveness.

3. Only an actual conflict of interest that adversely affects an attorney's performance results in a complete denial of the right to counsel.

4. PCRA petition failed to prove arguable merit to claim that his direct-appellate counsel had an actual conflict of interest. Though appellate counsel was briefly a member of the public defender's office and petitioner was represented by the chief public defender at trial, appellate counsel was not involved in pretrial preparation or trial work, save for one single isolated memorandum; and chief public defender kept petitioner's file separate from the rest of the office.

5. PCRA petition failed to prove arguable merit to claim that his direct-appellate counsel had an actual conflict of interest. Appellate counsel's firm's former representation of murder victim at trial did not represent an actual conflict of interest, and petitioner put forth no facts how he was prejudiced by counsel's firm's representation of victim.

6. PCRA petition failed to prove arguable merit to claim that his direct-appellate counsel had an actual conflict of interest. Petitioner abandoned claim that appellate counsel's former service as law clerk to trial judge overlapped in time period during which petition was charged with sexually abusing murder victim.

[40] *Ineffective Assistance of Counsel: Failure to Object to Improper Polling of Jury*

1. Either party has the right to poll the jury following the rendering of the verdict.

2. A party must affirmatively request a polling of the jury.

3. Failure to request a jury poll—even in a capital case—is not ineffective assistance of counsel.

4. PCRA petition failed to prove arguable merit to ineffectiveness claim for trial counsel's failure to object to an alleged incomplete polling of the jury. Even if failing to request a poll were ineffectiveness, record showed that poll, requested sua sponte by trial judge, did not include Juror No. 2—the foreperson who signed the verdict slip and announced the verdict in open court.

[41] *Post-conviction relief: Claims of trial court error*

1. A PCRA petitioner cannot raise claims of trial court error in a PCRA petition.

2. Post-conviction claim that the trial court erred in overruling defense counsel's objections to allegedly inadmissible evidence could not be raised in a PCRA petition.

[42] *Post-conviction relief: Claims of prosecutorial misconduct*

1. A PCRA petitioner cannot raise independent claims of alleged prosecutorial misconduct in a PCRA petition.

2. A PCRA petitioner must raise any claims of prosecutorial misconduct as ineffective assistance of counsel for failure to take action against any alleged misconduct.

3. Post-conviction claim that prosecutor committed misconduct was meritless because claim was waived for trial counsel's failure to object.

[43] *Ineffective Assistance of Counsel: Failure to investigate juror misconduct*

1. In a post-trial inquiry into the validity of a jury's verdict, a juror cannot testify about any incident that occurred during deliberations; the effect of anything on that juror's or the jury's vote; or any juror's mental processes concerning the verdict.

2. A juror may testify about whether (1) prejudicial information not of record and beyong common knowledge and experience was improperly brought to jury's attention; or (2) an outside influence that was improperly brought to bear on any juror.

3. The use of ex parte juror affidavits by post-conviction counsel to impeach a jury's verdict is highly unethical and improper.

4. PCRA petitioner failed to show arguable merit to claim that jury improperly used petitioner's failure to testify against him. Jury was incompetent to render testimony in support of claim.

5. PCRA petitioner failed to show arguable merit to claim that jury was influenced by alleged fear of voodoo curse. Jury was incompetent to render testimony in support of claim.

6. PCRA petitioner failed to show arguable merit to claim that jury improperly concluded that petitioner was left-handed. Jury was incompetent to render testimony in support of claim. Even if jury was competent, handed-ness of petitioner was within common knowledge and experience of jurors.

7. PCRA petitioner failed to prove that trial counsel's actions in interviewing jurors was unreasonable. Counsel sent letters to jurors, who did not respond, and obtaining affidavits from jurors would have been unethical.

8. Post-conviction counsel's obtaining of ex parte unsworn declarations from jurors went against Supreme Court's prohibition of such methods.

Appearances:

Zachary I. Mills, Esq., *Attorney for the Commonwealth*

Keisha Hudson, Esq., *Attorney for the Defendant*

Jennifer Givens, Esq., *Attorney for the Defendant*

OPINION AND ORDER OF COURT

Before Grine, S.J., Specially Presiding

MEMORANDUM OPINION

Petitioner Albert Ezron Reid has been sentenced to death for the 1996 murders of his wife and her daughter. Reid's first petition under the Post Conviction Relief Act (PCRA) has been pending in this court for almost ten years. On July 17, 2013, the Court dismissed some of Reid's numerous post-conviction-relief claims. The Court found that Reid did not prove that his attorneys' performances were deficient. This opinion fully explains the Court's reasoning.

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BACKGROUND

The Supreme Court stated the facts of this case in its opinion affirming Reid's sentence on direct appeal. *Commonwealth v. Reid*, 811 A.2d 530 (Pa. 2002). The Court briefly summarizes the facts, and will restate other facts corresponding to individual claims as necessary.

Reid is a Jamaican national who was married to Carla Reid. The Reids had a tempestuous relationship and were estranged and living separately. Indeed, two separate court orders prohibited Albert from contacting Carla. The first was a final order entered under the Protection from Abuse Act, 23 Pa. C.S. § 6101, *et seq*. The second was a condition of his pretrial release on another case. In that other case, Carla Reid's 14-year-old daughter from a previous relationship, Deidra Moore, had accused Reid of sexually abusing her. At the time of the killings, Reid was awaiting trial on charges of aggravated indecent assault and indecent assault.

Sometime during the night of December 27, 1996, someone cut the phone line to Carla Reid's house and snuck inside and into the bedroom where she and Deidra were sleeping. The intruder then shot Carla Reid and Deidra Moore once each in their foreheads, killing them. The murders were discovered by Carla Reid's other young children in the morning.

Police suspected Reid, who consented to a voluntary interview by police and searches of the motel room where he was staying and his truck. Reid claimed alibi, but police officers uncovered incriminating evidence that pointed to him. Reid was taken into custody for violating the no-contact orders and was eventually charged with two counts of murder and burglary. Reid was represented by Robert D. Trambley, Esq., then the Chief Public Defender of Franklin County (who also represented him on the sexual-assault charges), and Stephen D. Kulla, Esq., a private practitioner, at pretrial, both phases of trial, and in his post-sentence motion.

After a trial before then-President Judge John R. Walker, the jury found Reid guilty of two counts of first-degree murder and one count of burglary.[1] On October 12, 1998, following the penalty phase, the jury returned two sentences of death. *See* N.T., 10/12/98 (Jury Trial Day 6, Death-Penalty Phase), at 949-53. For each murder, the jury found three aggravating circumstances: killing a witness to a felony or other murder to prevent her from testifying at that trial, killing while in perpetration of a felony (burglary), and conviction for another murder committed at the same time, 42 Pa. C.S. § 9711(d)(5), (6), and (11); and one mitigating circumstance: a lack of significant history of prior convictions, *id*. § 9711(e)(1). For each murder, the jury found that the aggravating circumstances outweighed the mitigating circumstance. *Id*. § 9711(c)(1)(iv). The Court formally imposed the sentences of death on October 21, 1998, with a concurrent 10 – 20 year sentence for the burglary conviction.

On October 21, 1998, Reid filed a post-sentence motion raising various claims of error. On May 18, 1999, the Court denied the motion. Reid's case was automatically sent to the Supreme Court for review. *Id*. § 9711(h). The Court appointed new counsel, David Yoder, Esq., to represent Reid on appeal. Mr. Yoder raised claims of trial-court error and challenged the effectiveness of Messrs. Trambley and Kulla. The Supreme Court unanimously affirmed

1 18 Pa. C.S. §§ 2502(a)(1) and 3502.

Reid's judgment of sentence on September 30, 2002, with two justices concurring. The court later denied rehearing. Reid, represented by Daniel Givelber, Esq., petitioned the United States Supreme Court for a writ of certiorari, which the Court denied on October 6, 2003. *Reid v. Pennsylvania*, 540 U.S. 850 (2003).[2]

On February 4, 2004, Reid, represented by current counsel, moved for a stay of execution, leave to proceed *in forma pauperis*, and appointment of federal habeas corpus counsel in the United States District Court for the Middle District of Pennsylvania, *Reid v. Beard*, No. 3:04-cv-258 (Caputo, J.). On February 6, 2004, that Court granted Reid's requests, and issued a stay of execution under 28 U.S.C. § 2251.

On September 22, 2004, Reid, represented by current counsel, filed a document entitled "Petition for Habeas Corpus Relief Under Article I Section 14 of the Pennsylvania Constitution and for Statutory Post-Conviction Relief Under the Post Conviction Relief Act" (PCRA Pet.).[3] For reasons which are unclear, the Commonwealth never filed a response. *Cf.* Pa. R. Crim. P. 906(E). On January 27, 2005, Reid filed exhibits in support of the PCRA Petition. On February 16, 2007, Reid filed a document entitled "Supplement to Petition for Habeas Corpus Relief Under Article I Section 14 of the Pennsylvania Constitution and for Statutory Post-Conviction Relief Under the Post Conviction Relief Act" (Supp. PCRA Pet.). On February 19, 2010, Reid filed a document entitled "Second Supplement to Petition for Habeas Corpus Relief Under Article I Section 14 of the Pennsylvania Constitution and for Statutory Post-Conviction Relief Under the Post Conviction Relief Act." The Commonwealth finally filed answers to the PCRA Petition and Supplemental PCRA Petition. It objected to the Second Supplemental PCRA Petition because its averments were not in numbered paragraphs. Therefore, Reid filed a Reformatted Second Supplemental PCRA Petition (Reform. 2d Supp. PCRA Pet.)

In the three filings, Reid advances a total of 19 Roman-numeraled claims, though there are many more sub-claims. Here is a complete list:

I. Reid's lawyers rendered ineffective assistance during the guilt phase of trial.

II. The Commonwealth committed *Brady*[4] violations.

III. The trial judge was partial and biased.

IV. The prosecutor injected his personal opinions into his summations.

V. The guilt-phase jury instructions were defective.

VI. The process for selecting prospective jurors unconstitutionally excluded minorities.

VII. Trial counsel failed to have portions of the trial record transcribed.

VIII. The use of certain evidence violated the Vienna Convention on Consular Relations.

IX. The court denied Reid his right to a public trial.

X. Reid was incompetent to stand trial.

XI. Trial counsel rendered ineffective assistance during the penalty phase.

XII. The Commonwealth's opening statement at sentencing and the Court's sentencing-phase jury instructions were unconstitutional.

XIII. Direct-appellate counsel had a conflict of interest.

XIV. The cumulative prejudicial effect of errors rendered the trial unfair.

XV. Lethal injection violates the First, Eighth, and Fourteenth Amendments.

XVI. The Court failed to properly poll the jury.

XVII. The Court improperly admitted testimony of Reid's prior bad acts.

XVIII. The Commonwealth committed prosecutorial misconduct by introducing inadmissible character evidence.

XIX. The Commonwealth and the Court committed an unwarranted intervention during the sentencing phase.

A PCRA hearing was delayed, because the assigned judge, the Honorable Shawn D. Meyers recused. The case was then assigned to the Honorable Richard J. Walsh. The Commonwealth moved for judgment as a matter of law on some of Reid's claims. On July 5, 2012, Judge Walsh granted the motion in part because there were no

2 Reid's conviction became final on October 6, 2004, or one year after the Supreme Court denied certiorari. See 42 Pa. C.S. § 9545(b).
3 Execution of Reid's sentence is stayed by the United States District Court for the Middle District of Pennsylvania. *See Reid v. Beard*, No. 3:2004-CV-258 (M.D. Pa. Feb. 4, 2004).
4 *Brady v. Maryland*, 373 U.S. 83 (1963).

genuine issues of material fact and Reid is not entitled to post-conviction relief on the following claims:[5]

- Part of Claim V (Jury Instructions) as it pertained to the consideration of evidence;

- Part of Claim V (Jury Instructions) as it pertained to the use of "restrain" in the Court's reasonable-doubt instruction;

- Claim VII (Violation of the Vienna Convention);

- Claim IX (Denial of the Right to a Public Trial);

- Part of Claim XII (Penalty-Phase Ineffective Assistance of Counsel) as it pertained to the jury being shown a photograph of Deidra Moore.

Judge Walsh was unable to hold a hearing on the remaining claims before he retired from the bench. The case was then passed to the undersigned. The parties agreed to bifurcate the hearing with respect to Reid's claims of ineffective assistance of counsel. On March 21, 2013, the Court heard the testimony of Reid's pretrial, trial, and appellate lawyers with an eye toward evidence that they provided deficient performance. The Court later heard evidence from Reid's expert witnesses, and the Parties are deposing non-expert witnesses. Reid hopes that the non-attorney witnesses will show that his lawyers' ineffectiveness prejudiced him.

DISCUSSION

As mentioned above, Reid originally advanced 19 numbered claims. Those claims include numerous sub-claims. Unfortunately, those claims are not enumerated in any list and, quite frankly, the Court has had a hard time keeping track of all the claims. By the Court's count, all three PCRA petitions include over 75 separate substantive requests for relief.

Some of the claims have merit. Others do not. Indeed, a few are frivolous. Somewhat ironically, Reid contends that his direct-appellate counsel was ineffective for failing to pursue the same strategy of raising every possible or probable claim. Courts have long decried this tactic as ineffectual advocacy. *See, e.g., Commonwealth v. Jones*, 815 A.2d 598, 600 (Pa. 2007) (plurality opinion) (quoting Smith v. Murray, 477 U.S. 527, 536 (1986)) ("This process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy."); *United States v. Hart*, 693 F.2d 286, 287 n.1 (3d Cir. 1982) (quoting Rugierro Aldisert, The Appellate Bar: Professional Competence and Professional Responsibility, A View from the Jaundiced Eye of One Federal Judge, Cap. Univ. L. Rev. 445, 485 (1982)) ("[W]hen I read an appellant's brief that contains ten or twelve points, a presumption arises that there is no merit to *any* of them."). The Court has not applied that presumption here, but instead has examined each claim individually.

The Court begins by reviewing the standards for relief under the PCRA. Then, I will move to the standards for relief for claims of ineffective assistance of counsel. The Court will discuss previous litigation, waiver, and claims of layered ineffective assistance of counsel. After laying the groundwork, the Court will address each claim dismissed by the July 17, 2013 order.

1. The Post Conviction Relief Act

[1] Reid's original, Supplemental, and Reformatted Second Supplemental PCRA petitions are entitled "Petition for Habeas Corpus Relief Under Article I, Section 14 of the Pennsylvania Constitution and for Statutory Relief Under the Post Conviction Relief Act." Reid purports to seek substantive relief under the Pennsylvania Constitution's Habeas Corpus Clause. He claims that if the PCRA limits the scope of relief available to him, it violates Pennsylvania's Suspension Clause, Pa. Const. art. I § 14, and several other State constitutional provisions. PCRA Pet. ¶ 14.

The Court will consider Reid's claims under the PCRA only, and I decline to address any claims under the State writ of habeas corpus. The PCRA is the "sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same . . . including habeas corpus and coram nobis." 42 Pa. C.S. § 9542. A petitioner cannot evade the scope of the PCRA by creatively titling his or her post-conviction relief petition. *Commonwealth v. Kutnyak*, 781 A.2d 1259, 1261 (Pa. Super. 2001). Thus, the PCRA applies even if a petitioner files a "petition for writ of habeas corpus," "petition to vacate illegal sentence," or any other similarly-titled document. By its terms, the PCRA subsumes the writ of habeas corpus. *Commonwealth v. Abu-Jamal*, 833 A.2d 719, 728 (Pa. 2003).

5 Additionally, Reid withdrew Claim XV in its entirety (constitutionality of lethal injection) "without prejudice."

It does not unconstitutionally suspend the writ. *Commonwealth v. Peterkin*, 722 A.2d 638, 642-43 (Pa. 1998); *see United States ex rel. Miller v. Russell*, 256 F. Supp. 857 (M.D. Pa. 1966) (holding that the predecessor to the PCRA did not unconstitutionally suspend the writ of habeas corpus), *cf. Felker v. Turpin*, 518 U.S. 651 (1996) (holding that the federal Antiterrorism and Effective Death Penalty Act does not unconstitutionally suspend the federal writ of habeas corpus).

The writ of habeas corpus is available only if PCRA does not provide a remedy. *Commonwealth v. Fahy*, 737 A.2d 214, 223-24 (Pa. 1999); *Peterkin*, 722 A.2d at 639-40. In this case, Reid alleges violations that undermined the truth-determining process at trial and on direct appeal. All claims are clearly PCRA claims, which the Court will consider under the PCRA only.

The PCRA provides a means by which persons who are serving illegal sentences or who did not commit the crimes for which they were sentenced may obtain post-conviction collateral relief. 42 Pa. C.S. § 9542. To be eligible for relief, a PCRA petitioner must (1) be serving a sentence, awaiting to serve the contested sentence, or awaiting execution of a sentence of death; (2) have been convicted or sentenced as a result of an enumerated set of errors; (3) show that the alleged errors are not waived or previously litigated; and (4) show that counsel's decision not to litigate the issue previously was not part of a rational, strategic, or tactical decision. *Id*. § 9543(a). Those enumerated errors include ineffective assistance of counsel or violations of the State or federal constitutions which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. *Id*.

PCRA claims are not merely regurgitated direct-appeal issues. *Commonwealth v. Rivers* 786 A.2d 923, 929 (Pa. 2001) (opinion announcing the judgment of the court (OAJC)). Rather, they are extraordinary assertions that the system broke down, depriving the petitioner of a fair hearing. *Id*. As such, and unlike at trial, a PCRA petitioner bears the burden of proof by a preponderance of the evidence. 42 Pa. C.S. § 9543.

1.1. Ineffective Assistance of Counsel

[2], **[3]** Ineffective assistance of counsel occurs when a defendant's lawyer performs deficiently and when that performance results in prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668 (1984). Pennsylvania courts use a tripartite test to evaluate claims of ineffective assistance of counsel. (1) The underlying legal claim must have arguable merit; (2) counsel must have no reasonable basis his or her action or inaction; and (3) counsel's unprofessional errors must have prejudiced the defendant. *Commonwealth v. Spotz* ("*Spotz VI*"), 18 A.3d 244, 259-60 (Pa. 2011) (citing *Commonwealth v. Pierce*, 527 A.2d 973 (Pa. 1987)); *Rivers*, 786 A.2d at 927 (OAJC). Pennsylvania's three-part *Pierce* test is the same as the federal, two-part *Strickland* test. *See Taylor v. Horn*, 504 F.3d 416, 452 n.28 (3d Cir. 2007). Ineffective assistance of counsel is an all-or-nothing proposition; the *Pierce* test is a tripod. Absence of any one of the legs causes the ineffectiveness claim to fall, and the Court may dismiss the claim without addressing the other two claims.[6] *Commonwealth v. Robinson, (Antyane)*, 877 A.2d 433, 439 (Pa. 2007).

1.1.1. Arguable Merit

A PCRA petitioner must prove that a claim of ineffective assistance of counsel has arguable merit. "Arguable merit" refers to the legal viability of the underlying claim.

1.1.2. Reasonable Basis

[4] A PCRA petitioner bears the burden of proving that his or her lawyer's actions had no reasonable basis. In reviewing counsel's actions, a court does not question whether counsel could have pursued other, more logical courses of action. *Commonwealth v. Chmiel*, 30 A.3d 1111, 1127 (Pa. 2011). Rather, a court examines whether counsel's actions had *any* reasonable basis, meaning that an un-chosen alternative offered a substantially greater potential for success. *Id*.

1.1.3. Prejudice

[5] "To establish the third, prejudice prong, the petitioner must show that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's ineffectiveness." *Id*. at 1127-28.

6 For some claims, courts presume prejudice. *United States v. Cronic*, 466 U.S. 648 (1984). Pennsylvania limits "per se" or "presumed" ineffectiveness claims to three situations: (1) failure to file a concise statement of errors complained of on appeal, Pa. R.A.P. 1925(b), which waives all appellate issues; (2) failure to file a requested petition for allowance of appeal; and (3) complete abandonment on appeal. *Commonwealth v. Brown*, (Charles), 18 A.3d 1147, 1156 (Pa. Super. 2011).

In this opinion, the Court has found that Reid cannot meet the first two prongs of the *Pierce* test. Therefore, it is unnecessary to discuss prejudice. *See Robinson*, (Antyane), 877 A.2d at 439.

1.2. Previous Litigation

[6] A PCRA petitioner cannot raise claims that were previously litigated. A claim is previously litigated if the highest court in which the petitioner could have had review as of right ruled on the merits of the issue. 42 Pa. C.S. § 9544(a)(2). Generally, a PCRA petitioner cannot re-litigate a claim raised previously with alternate theories to support that claim. *Commonwealth v. Lambert*, 797 A.2d 232, 239-40 (Pa. 2001). "Issue" in 42 Pa. C.S. § 9544(a)(2)

> refers to the discrete legal ground that was forwarded on direct appeal and would have entitled the defendant to relief. The theories or allegations in support of the ground are simply a subset of the issue presented. Stated another way, there can be many theories or allegations in support of a single issue, but ultimately, § 9544(a)(2) refers to the discrete legal ground raised and decided on direct review. Thus, at the most basic level, this section prevents the relitigation of the same legal ground under alternative theories or allegations.

Commonwealth v. Collins, 888 A.2d 564, 570 (Pa. 2005) (internal citations and footnote omitted). An issue is previously litigated if it was previously rejected on direct appeal and is merely repacked as an ineffective-assistance-of-counsel claim. An issue is not previously litigated if it is a discrete legal ground for relief.

1.3. Waiver

[7] A PCRA petitioner cannot raise claims that are waived. A claim is waived if the petitioner could have raised the claim, but did not do so, pretrial, at trial, on appeal, or in a prior post-conviction proceeding. 42 Pa. C.S. § 9544(b). Claims of ineffective assistance of counsel allow a PCRA petitioner to avoid waiver, but only to a point. An ineffectiveness claim is a discrete legal claim different from the underlying legal claim. *Collins*, 888 A.2d at 572-73. For example, if trial counsel failed to object to inadmissible evidence or an improper jury charge, those claims are waived. See Pa. R. Crim. P. 647(B); Pa. R.E. 103(a). However, in a post-conviction proceeding, a petitioner can challenge trial counsel's ineffectiveness for failing to object. Of course, ineffectiveness claims can also be waived if not raised at the appropriate time.

1.4. Layered Claims (Pet. ¶¶ 22-24)

[8], **[9]** When Reid was convicted and sentenced, new counsel had to raise prior counsel's ineffectiveness at the first available opportunity.[7] *Commonwealth v. Hubbard*, 372 A.2d 687 (Pa. 1977), *abrogated by Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002). Failing to raise prior counsel's ineffectiveness at the first opportunity waived the claim. *Hubbard*, 372 A.2d at 695 & n.6. Reid's first available opportunity to raise trial counsel's ineffectiveness was after the disposition of the post-sentence motion, when Mr. Yoder assumed representation of Reid. Because Reid was represented by new counsel on appeal at a time when appellate counsel was required to—and did—raise claims of claims of ineffective assistance of trial counsel, any claim regarding trial counsel's ineffective assistance of counsel is waived. *Commonwealth v. Tedford*, 960 A.2d 1, 13 (Pa. 2008); *Commonwealth v. Washington*, 927 A.2d 586, 595-96 (Pa. 2007). Claims that trial counsel were ineffective prevail only if the claims are layered. *Tedford*, 960 A.2d at 13.

A layered claim of ineffective assistance of counsel proceeds thus. First, a petitioner must satisfy the *Pierce* test for trial counsel. He must plead and prove that claims must have arguable merit, that no reasonable basis existed for trial counsel's actions or failure to act, and resulting prejudice. *Commonwealth v. McGill*, 832 A.2d 1014, 1022-23 (Pa. 2003). Like in an un-layered claim, failure to satisfy any one of the *Pierce* prongs defeats the claim that trial counsel was ineffective. *Id*. And in a layered claim, failure of the *Pierce* test for trial counsel also defeats the Pierce test for appellate counsel, too. *Chmiel*, 30 A.3d at 1128 (quoting *Commonwealth v. Ly*, 980 A.2d 61, 74 (Pa. 2009)); *McGill*, 832 A.2d at 1022-23. "However, if the petitioner has proved each of these three prongs relative to the performance of [trial counsel], the arguable merit aspect of the claim that [appellate counsel] was ineffective is *per se* established." *McGill*, 832 A.2d at 1023. Then, the petitioner must plead and prove that appellate counsel had no reasonable basis for failing to raise the meritorious claim that trial counsel was ineffective, and that the result of

7 Under current law, ineffectiveness claims must be deferred to collateral review, unless (1) the petitioner waives his state right to collateral review and (2) the claims are either extraordinary or good cause exists to address the claims on direct review. *Commonwealth v. Holmes*, No. 40 MAP 2010, --- A.3d ---, 2013 WL 5827027 (Pa. Oct. 30, 2013).

the proceeding (an appeal) would have been different had appellate counsel raised trial counsel's ineffectiveness. *Id*.

The Supreme Court handed down *McGill* almost a year before Reid filed his original PCRA Petition. PCRA counsel "in an abundance of caution" pleaded all claims of ineffective assistance of counsel as layered claims. However, in ¶¶ 22-24 of the original Petition, Reid argues that he should not have to prove layered ineffective assistance of counsel because Mr. Yoder was a member of the Franklin County Public Defender's Office at the time of trial.

A lawyer cannot raise his or her own ineffectiveness or the ineffectiveness of a member of the same firm. *Grant*, 813 A.2d at 733; *Commonwealth v. Green*, 709 A.2d 382, 384 (Pa. 1998). Reid fails to mention, however, that Mr. Yoder did not work directly on the vast majority of his case, and that he had left the Public Defender's Office by the time of the appeal. In the case Reid cites in support, the defendant had the same lawyer for trial and direct appeal. *See Commonwealth v. Williams*, 732 A.2d 1167, 1177 (Pa. 1999). Therefore, the Court rejects Reid's argument that this PCRA petition is the first time in which to challenge trial counsel's effectiveness. The Court discusses this issue fully, below, at Part 7. Under the law at the time, Mr. Yoder was required to raise claims of ineffectiveness on direct appeal. For those claims for which he did not, the Court employs a layered ineffectiveness analysis.

1.5. Credibility of Witnesses

[10] The PCRA Court must determine credibility and weigh the evidence. My findings are entitled to deference on appeal. *Chmiel*, 30 A.3d at 1127.

In this case, many years have passed since the trial and direct appeal.[8] The Court must weigh the testimony of Reid's two trial lawyers. One, Mr. Kulla, testified favorably to the Commonwealth. The other, Mr. Trambley, conceded every single point in favor of Reid. Mr. Kulla was argumentative, and blamed many of the problems in preparing for trial on his client. Mr. Kulla called Reid one of the most difficult clients that he has ever had. He refused to participate in pretrial preparation and was not helpful at trial. The record supports Mr. Kulla's testimony that Reid was, at best, a difficult client. Reid's relationship with his first court-appointed lawyer, David Keller, Esq., broke down, forcing the Court to appoint Mr. Kulla to replace Mr. Keller. Reid also attempted to represent himself at several points before and during trial. Finally, Mr. Kulla blamed some of the lack of preparation on Mr. Trambley's laziness. Mr. Kulla said that Mr. Trambley did not like to work after normal hours, and that Mr. Kulla did a lot of the legwork in preparing for trial. Again, the record contains some support for Mr. Kulla's testimony. For instance, he alone orally dictated the contents of the Commonwealth's investigative file for hours, and then shared the dictation with the investigator and Mr. Trambley.

In contrast, Mr. Trambley agreed wholeheartedly with every single ineffectiveness claim advanced by Reid. He conceded that he lacked a reasonable basis for every single one of his actions that Reid challenges. He even testified that Mr. Kulla acted unreasonably in some matters. And as is readily apparent, Mr. Trambley conceded that he had no reasonable basis for his actions even where even where a reasonable basis clearly exists. For example, Mr. Trambley conceded that he was ineffective for failing to ask the Court to instruct the jury using the law of other jurisdictions—a meritless claim. *See below*, Part 4.2. Mr. Trambley's submission negatively affects his credibility. Having failed to gain an acquittal or life sentence for Reid, it appears that he is now attempting to gain post-conviction relief.

Having laid out the legal framework, the Court now turns to Reid's distinct legal claims.

2. Claim 1: Failure to Properly Obtain Discovery and Perform Adequate Pretrial Investigation

In his first claim, Reid argues that his trial counsel were ill-prepared for trial because they failed to properly obtain discovery.[9]

[11], **[12]** Counsel has a general duty to investigate a case pretrial. *Commonwealth v. Johnson, (Raymond II)*, 966 A.2d 523, 535 (Pa. 2009). An unreasonable failure to do so is an abdication of a lawyer's responsibility and is therefore ineffective assistance of counsel. *Id*. The duty to investigate may include the duty to interview certain potential witnesses, although the failure to do so is not per se ineffectiveness. *Id*. at 535-36.

The reasonableness of counsel's actions, however, depends critically on the information supplied by the defendant. *Commonwealth v. Steele*, 961 A.2d 786, 822 (Pa. 2008) (citing *Commonwealth v. Peterkin*, 513 A.2d 373,

8 At several points in his Brief, Reid highlights his former lawyers' lack of memory. *See* Pet'r Reid's Post-Hr'g Br. 3 ("[F]or reasons that none of the testifying attorneys could remember, the hearing [on discovery] was canceled on June 13, 1997."), 42 ("While Mr. Yoder testified that he did not recall working on [Carla Reid's child-support] case . . . ."). It is somewhat ironic that Reid attacks witnesses' faulty memories, given that he did nothing to hasten the disposition of his PCRA petition for *six years*. Reid bears the burden of proof. Although the delay is not completely his fault, he cannot complain that the passing of years and dimmed memories frustrate his pursuit of favorable evidence.

9 This claim pertains to trial counsel's preparation for the guilt phase of trial. Counsel's preparation for the penalty phase is a separate claim (Claim XI).

383 (Pa. 1986)). A PCRA petitioner cannot refuse to cooperate with his attorneys or fail to divulge relevant information and then claim that his or her attorneys failed to adequately prepare for trial. *Commonwealth v. Howard*, 331 A.2d 845, 847 (Pa. Super. 1974). Also, a petitioner cannot refuse to cooperate regarding a particular trial strategy and then claim that counsel were ineffective for failing to pursue that course of action. *Commonwealth v. Uderra*, 706 A.2d 334, 340 (Pa. 1998) (counsel not ineffective for failing to investigate defendant's drug use and intoxication at time of murder when defendant only revealed drug use after trial had started); *Commonwealth v. Lester*, 722 A.2d 997, 1008 (Pa. 1997) (counsel not ineffective for failing to present diminished capacity defense when defendant refused to cooperate with counsel or psychiatrist).

2.1. Failure to Properly Obtain Pretrial Discovery (Pet. ¶¶ 46-74; Supp. Pet. ¶¶ 1-9)

Characterizing the case against Reid as "entirely circumstantial," Reid argues that his attorneys unreasonably failed to obtain discovery before trial in order to prepare to defend him.

The Court concludes that this claim fails as a whole, but will separately address the sub-claims with more specific explanations. Generally, Reid understates the evidence against him, which includes not only circumstantial evidence, but also his own statements. Second, Reid minimizes the work of his own attorneys and his utter lack of cooperation with them, which was the driving force behind their failure to obtain information.

2.1.1. Failure to Obtain Witness Statements Prior to Trial (Pet. ¶ 54; Supp. Pet. ¶ 3)

[13] First, Reid contends that his attorneys should have forced the Commonwealth to disclose its investigative file. The record reflects that trial counsel tried to do so via a motion to compel, but the hearing on the motion was canceled. Mr. Kulla testified that the District Attorney never allowed defense counsel in any case to retain discovery material, but sometimes granted permission to make copies of documents in the file. N.T., 3/21/13 (PCRA Hr'g Day 1), at 40. He did not follow through on the motion to compel discovery, because on June 3, 1998, the District Attorney gave the defense access to the Commonwealth's file. *Id*. at 46-48. Mr. Kulla testified that he spent half a day dictating a summary of the file, which was later compiled into a report. *Id*. He then gave this information to Paul Weachter, the defense investigator, and Mr. Trambley. *Id*.

Reid complains that his attorneys ineffectively failed to request permission to copy witness statements pretrial. This sub-claim lacks arguable merit, because trial counsel were not entitled to receive copies of witness statements until after the witnesses testified on direct examination at trial.[10] *See* Pa. R. Crim. P. 573(B)(2)(a)(ii) (pretrial disclosure of non-exculpatory eyewitness statements is discretionary—not mandatory); *Commonwealth v. Grayson*, 353 A.2d 428 (Pa. 1976) (holding that a defendant is entitled to receive pretrial witness statements after the witness testifies at trial).

Further, Reid's attorneys' actions under the circumstances were reasonable. They requested discovery and filed appropriate motions when denied access. When granted access, Mr. Kulla reviewed the file, made extensive notes, and coordinated with Mr. Trambley and his investigator. Therefore, Reid's claim cannot succeed.[11]

Reid asserts that trial counsel were deficient because they did not file an invited pretrial motion to address additional discovery issues. However, Reid fails to state how doing so would have helped him. Bald assertions that an attorney's pretrial investigation was inadequate—without providing the reasons why—simply do not support a claim of ineffective assistance of counsel. *Tedford*, 960 A.2d at 24-25.

2.1.2. Failure to Obtain Reid's Pretrial Release File (Pet. ¶¶ 58-60; Supp. Pet. ¶ 4)

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10 In federal criminal cases, the Jencks Act requires prosecutors to turn over witness statements at trial after the witnesses testify. *See* 18 U.S.C. § 3500; *Jencks v. United States*, 353 U.S. 657 (1957). Pennsylvania does not have a statute that mirrors the Jencks Act. Rather, the requirement to disclose testifying witness statements at trial is a common-law requirement emanating from a line of cases dating to the 1960s.

Under those cases, our Supreme Court has held that the Commonwealth must turn over, on request, pretrial statements of witnesses that have been (1) reduced to writing; (2) relate to the witness's trial testimony; and (3) are the witness's verbatim, signed, or adopted statement. *Commonwealth v. Appel*, 689 A.2d 891, 907 (Pa. 1997); *Commonwealth v. Brinkley*, 480 A.2d 980, 984-85 (Pa. 1984); *Grayson*, 353 A.2d at 429; *Commonwealth v. Johnson, (Vincent)*, 327 A.2d 632, 636 (Pa. 1974); *Commonwealth v. Smith, (E. Newbold)*, 208 A.2d 219 (Pa. 1965). Originally, some members of the Supreme Court believed that the requirement to disclose was constitutional. *Smith, (E. Newbold)*, 208 A.2d at 223-24 (plurality opinion). Other justices believed the requirement to be procedural and evidentiary. *Id*. at 229-30 (Roberts, J., concurring). In *Commonwealth v. Kontos*, 276 A.2d 830 (Pa. 1971), a majority of the court adopted the latter view. *Id*. at 831-33.

The duty to turn over witness statements is *not* a pretrial requirement. *E.g., Johnson, (Vincent)*, 327 A.2d at 636. Rather, a defendant has a right to see witness statements only after the witnesses testify at trial.

11 Insofar as the absence of witness statements at trial hampered cross-examination of specific witnesses, the Court addresses those claims, *infra*.

Next, Reid argues that his attorneys ineffectively failed to obtain his pretrial release file. Reid contends that information in it would have undermined the Commonwealth's case. Prior to his arrest in this case, Reid was on pretrial release for the sexual-abuse case. The pretrial release file contains information that Reid complied with his conditions and routinely checked in with his supervising officer. His pretrial release, however, was ultimately revoked. At trial, Reid's pretrial release officer, Carlton Smith, testified that Reid had violated a condition of his release but failed to specify which one. N.T., 10/6/98 (Jury Trial Day 2), at 235-38. Reid argues that Smith's unchallenged testimony insinuated that the violation was his contacting Carla. Reid claims that he was actually—and improperly—violated for failing to inform Smith that he had moved.

[14] This claim lacks arguable merit because whether Reid violated his pretrial release was collateral. The also contradicts the overwhelming evidence presented at trial—that Reid had impermissibly contacted Carla Reid.[12] Donnie Williams, a bouncer, testified that he saw both of the Reids on December 22, 1996—less than a week before the murders—at his bar. Williams testified that Albert was following an uncomfortable Carla around begging for her to take him back. N.T., 10/7/98 (Jury Trial Day 3), at 293-94. And Corporal Sheppard testified that Reid admitted to seeing Carla at various placed on December 20, 22, and 25, 1996. *Id*. at 523. As a result of his admissions to Corporal Sheppard, Reid was taken into custody. *Id*. Reid's argument about Smith's testimony therefore mischaracterizes the record.

This claim lacks arguable merit and trial counsel were therefore not ineffective for failing to obtain Reid's pretrial release file and use it at trial. Because trial counsel were not ineffective, direct-appeal counsel was not ineffective for failing to challenge trial counsel's ineffectiveness.

2.1.3. Failure to Obtain Carla Reid's Effects, Including Albert Reid's Immigration File (Pet. ¶¶ 61-69; Supp. Pet. ¶¶ 5-6)

Reid next argues that his attorneys should have accessed Carla Reid's personal effects discovered in her bedroom. Reid argues that information in it would have led to information useful for the guilt phase.

First, Reid notes that papers found in Carla's bedroom included the contact information for Marley and Fred Streete, who lived in Bristol, England. Reid argues that the Streetes could have given counsel the contact information for Reid's mother, Lasta Davis. Reid argues that David would have then told counsel that Carla told her that Deidra Moore's 1994 sexual assault allegations were not true.

This sub-claim lacks arguable merit. Reid fails to state how Lasta Davis's statements about what Carla Reid told her would have been admissible evidence. And whether the sexual assault allegations were true was collateral. Rather, the allegations were relevant only insofar as Reid had a motive to kill the victims—to silence them.[13]

Reid also cannot show that his attorneys' actions were unreasonable. Both of his trial attorneys testified that Reid did not cooperate with them. Mr. Kulla said that Reid adamantly refused to provide contact information for his family members. N.T., 3/21/13 (PCRA Hr'g Day 1), at 13-14, 109-110. Mr. Trambley said that what little information Reid provided was "vague." N.T., 3/22/13 (PCRA Hr'g Day 2, at 47-48). Instead of having his attorneys seek discovery of the contents of Carla's bedroom to find a paper listing the Streetes' names who, if called, could have given contact information for Reid's mother, Reid could have given counsel his mother's information himself. A PCRA petitioner cannot refuse to cooperate with his attorneys and then argue that they were ineffective for failing to find the information he withheld from them. *Steele*, 961 A.2d at 822.

Carla's papers also included Albert's Immigration and Naturalization Service (INS) alien registration number, or "A-number." Reid argues that his attorneys could have used his A-number to request his INS file, which allegedly had helpful information. The file stated that Carla Reid helped Albert to apply for lawful permanent resident status in 1995, i.e. after a first set of sexual-abuse charges had been filed. Reid fails to acknowledge that the INS file also contains unfavorable evidence, because it includes a letter from Carla Reid dated September 8, 1996 asking to revoke her petition because Reid was a danger to her and her children.[14,15] The Court notes that the pursuit, withdrawal, and subsequent reinstatement of sexual-abuse charges fits with arguments made by the Commonwealth at trial. *See* N.T., 10/5/98 (Jury Trial Day 1), at 25-26.

12 The exhibit provided by Reid at the PCRA hearing includes Smith's notes, but the notes end on December 18, 1996, and fail to state whether, how, or why Reid's pretrial release was revoked.

13 Reid fails to note the irony of using his trial for the murder of Deidra Moore to keep her from testifying that he sexually abused her to prove that he did not sexually abuse her.

14 In ¶ 69 of the original Petition, Reid claims that the prosecution violated the *Brady* Rule by coordinating with INS to have an immigration detainer placed on Reid or initiate deportation proceedings. Reid, however, fails to state how the prosecutor's attempt to initiate deportation proceedings suppressed material, exculpatory evidence.

15 In ¶ 55 of the original Petition, Reid claims that his attorneys were ineffective because they failed follow through on information that Carla Reid may have been involved in prostitution, drug trafficking, and interstate human trafficking. Reid fails to say how any of this information would have been admissible at trial.

As with the sub-claim regarding Lasta Davis's hearsay, Reid cannot fault his attorneys for failing to uncover his A-number. That information was within his possession and he refused to share it with his attorneys. *Steele*, 961 A.2d at 822.

Reid's trial counsel were not ineffective. Therefore, direct-appellate counsel was not ineffective for failing to raise trial counsel's ineffectiveness.

2.2. Failure to Properly Investigate and Cross-Examine Prosecution Witnesses (Pet. ¶¶ 75-110; Supp. Pet. ¶¶ 10-17)

Next, Reid argues that his attorneys failed to obtain information about—and therefore effectively cross-examine—several of the Commonwealth's key witnesses.

As with the general claim regarding discovery, the sub-claims regarding specific witnesses fail. Most of the claims lack arguable merit. Almost all fail the reasonable-basis prong. And none therefore entitle Reid to relief.

2.2.1. Mari "Dee-Dee" Jones (Pet. ¶¶ 76-89; Supp. Pet. ¶¶10-12)

[15], **[16]** Jones was a key witness, because she testified that she sold Reid a handgun shortly before the murders. Jones also gave varying stories to law enforcement regarding her actions. At trial, she testified that she and a friend first met Albert Reid at a bar just before Christmas in 1996. N.T., 10/7/98 (Jury Trial Day 3), at 342-45. She testified that Reid asked her about getting a gun, and that she owned one that she had bought in exchange for crack cocaine. *Id*. at 350-51. Jones lied to police about how she got the gun. *Id*. at 360-64. On cross-examination, Mr. Trambley attacked Jones for not telling the truth and for falsely implicating another person. *Id*. at 364-69. Jones also admitted that she was using crack at the time of the firearms-transactions. *Id*.

According to Reid, Mr. Trambley's cross-examination of Jones was inadequate. He failed to fully impeach her because he lacked her statements to police. He also lacked information that Jones had been cooperating with the prosecutor in an alleged attempt to surreptitiously secure a jailhouse admission from Reid. With this information, Reid argues that Mr. Trambley could have more effectively cross-examined Jones.

This claim lacks arguable merit. In his argument, Reid glosses over the questions actually asked of Jones while she was on the stand. While testifying, Jones admitted that she used crack, sold crack, bought a gun with crack, illegally sold a gun, and lied to the police. She also had odd beliefs about voodoo. Contrary to Reid's contention, his trial attorneys competently attempted to interview Jones pretrial. *See* N.T., 10/8/97 (Jury Trial Day 3), at 389.

Some of the information that Reid argues his attorneys should have used is clearly inadmissible. Reid's attorneys could not have questioned Jones about a prior drug arrest or her status as a county prison inmate. The sub-claim lacks arguable merit. The drug arrest and incarceration, being neither criminal convictions nor crimes of falsehood were inadmissible. Pa. R.E. 608(b); 609(a); *see* N.T., 3/21/13 (PCRA Hr'g Day 1), at 74. Even if those facts were relevant, Reid could not prove them using extrinsic evidence. Pa. R.E. 608(b).

Reid argues that his lawyers should have questioned Jones about her psychiatric treatment and fabrication of the fact that she had breast cancer caused by voodoo.

This sub-claim lacks also arguable merit, because the Court properly precluded further questioning about Jones' cancer. The evidence was clearly irrelevant. Whether Jones held delusional beliefs or incorrectly believed that she had cancer was a collateral matter.[16] Impeachment on collateral matters is not allowed. *Commonwealth v. Johnson, (Richard)*, 638 A.2d 940, 942 (Pa. 1994). Additionally, it was irrelevant. If Jones actually believed that she had cancer, her statements in support do not affect her character for truthfulness. Further, Jones' psychiatric records, even if trial counsel had them, would not have been admissible to impeach her. Pa. R.E. 608(b)(2). Finally, Reid's claim that his attorneys were ineffective for failing to seek a mistrial, *see* N.T., 10/8/98 (Jury Trial Day 4), at 544-46, when the Court precluded Jones' psychiatrist from testifying is frivolous for the above reasons.

Reid has failed to show that his trial counsel were ineffective for failing to obtain sufficient discovery about Mari Jones or for deficiently cross-examining her. His claim fails. Therefore, his claim that direct-appellate counsel was ineffective for failing to challenge trial counsel's ineffectiveness also fails.

2.2.2. Bonita Short (Pet. ¶¶ 90-94)

16 Reid has not argued that his attorneys were ineffective for failing to contest Jones's competency to testify.

[17], **[18]** Next, Reid claims that trial counsel failed to effectively cross examine Bonita Short. Short, Jones's cousin, was present when Jones gave Reid the firearm. N.T., 10/7/98 (Jury Trial Day 3), at 396-399. Reid argues that Short's testimony was essentially perjury, based on an unsworn declaration that his post-conviction counsel obtained from Short. In that declaration, Short claims that Jones told her to lie, that police threatened her if she did not testify, and that Jones was frequently in trouble with police. *See* Ex. A(6). The declaration is undated and appears to be signed by Short (the Court cannot be sure as the declaration was not made before a person authorized to administer oaths). Reid claims that, based in part on the declaration, that his attorneys unreasonably failed to discover impeachment evidence by interviewing Short.

In contrast, Mr. Kulla testified that he attempted to find Short by her address in Carlisle. N.T., 3/21/13 (PCRA Hr'g Day 1), at 68-69. When that was unsuccessful, he said that he sent their investigator, Paul Weachter, to try to find her. *Id*. That was unsuccessful, too.

This claim fails the both the arguable-merit and reasonable-basis prongs, because trial counsel's performance was not deficient. Reid's attorneys diligently attempted to contact Short before trial, but were unsuccessful. The Court finds that Mr. Kulla's testimony is more reliable than Short's unsworn declaration.[17] The Court also finds that Mr. Trambley's testimony is not credible on this point.

Because the trial counsel were not ineffective, direct-appeal counsel was not ineffective for failing to raise trial counsel's ineffectiveness on appeal.

2.2.3. Cassandra Utley (Pet. ¶¶ 95-99; Supp. Pet. ¶¶ 10-12)

Next, Reid claims that trial counsel failed to effectively cross-examine Cassandra Utley. Utley testified that she was present when Mari Jones bought a handgun from an unknown adult male for a "30 piece" of cocaine. N.T., 10/7/98 (Jury Trial Day 3), at 407-12. Reid argues that counsel should have (1) attacked Mari Jones's credibility through Utley because their stories were inconsistent and (2) questioned Utley about the fact that she recently had been incarcerated for violating probation in a drug case. Reid finds it "remarkable" that trial counsel never asked Utley about her status as an inmate at the Dauphin County Prison. Reid argues that the evidence could have shown bias or motive on Utley's part.

Counsel's actions, however, are quite unremarkable, because the Rules of Evidence prohibited mentioning Utley's incarceration. The matter was collateral, and had nothing to do with Utley's truthfulness. In addition, it was a specific instance of conduct that was not a prior conviction for a crime of falsehood. Pa. R.E. 608(b); 609(a). In addition, Mr. Kulla testified that he tried to find Utley in Carlisle. N.T.. 3/21/13, at 57. Finally, Reid's proposed item of impeachment was not material. Indeed, counsel's argument on this matter is difficult to follow because it is somewhat convoluted.

This claim lacks fails. Counsel were not ineffective for failing to cross-examine Utley about irrelevant and inadmissible matters. Therefore, neither was direct-appellate counsel ineffective in failing to raise an ineffectiveness claim on appeal.

2.2.4. Anthony Hurd (Pet. ¶¶ 100-05; Supp. Pet. ¶¶ 13-16)

Next, Reid argues that trial counsel failed to ask Anthony Hurd about the number of times that Reid allegedly asked to buy a gun from Hurd. Hurd testified that Reid did so three times, but that had only told police about two incidents. Compare N.T., 10/8/98 (Jury Trial Day 4) 500-03, with, PCRA Hr'g Pet. Ex. A(9), at 20.

This claim fails because Reid has not shown how his counsel were ineffective. Reid fails to show how questioning Hurd about a minor detail would have affected the outcome of the trial. Reid also makes issue in his original Petition with other minor details that are not of significance.

Trial counsel were not ineffective. Therefore, direct-appellate counsel was not ineffective for failing to raise

17 PCRA counsel characterizes Short's declaration as an "affidavit." An affidavit is (1) a sworn statement, (2) made before an officer authorized by law to administer oaths, and (3) certified by that officer. 1 Pa. C.S. § 1991; Black's Law Dictionary 66 (9th ed. 2009). Short's declaration fails all three of these conditions. First, it is made subject to the penalties of the federal, 28 U.S.C. § 1746, and state, 18 Pa. C.S. § 4904, statutes concerning *unsworn* declarations. Second, there is no indication that the declaration was made before an officer authorized to administer oaths. Third, the declaration contains no official seal. Fourth, although the Judicial Code defines "affidavit" to include an unsworn declaration, *see* 42 Pa. C.S. § 102, nothing indicates that any of the declarations provided in this case rely on that definition.

Our courts have criticized the reliance on unsworn declarations in post-conviction proceedings. *See Tedford*, 960 A.2d at 18 n.10; *Commonwealth v. Brown, (John)*, 872 A.2d 1139, 1168-70 (Pa. 2005) (Castille, J., concurring). The declarations lack the oath and certification to show that they are actually true and were actually made by the declarant. *Brown*, 872 A.2d at 1169. Whether the declarants could be subject to prosecution if the declarations are untrue is questionable. Id. at 1169 & n.9. A prosecutor would have a hard time proving that the declarant was the person who made and signed the declaration.

a meritless claim.

2.2.5. Corporal H. Wayne Sheppard (Pet. ¶¶ 106-10; Supp. Pet. ¶¶ 15-17)

The last of the witnesses whom Reid claims was not properly cross-examined is the affiant, Corporal Howard Wayne Sheppard of the Pennsylvania State Police. As the affiant, Corporal Sheppard coordinated the investigation. His testimony is somewhat lengthy, spanning 96 pages of the record of the guilt-phase portion of trial. N.T., 10/5/98, (Jury Trial Day 1), at 52-78; N.T., 10/6/98 (Jury Trial Day 2), at 211-24; N.T., 10/8/98 (Jury Trial Day 4), at 508-37, 541-47, 587-90; N.T., 10/9/98 (Jury Trial Day 5), at 716-31.

In the original Petition, Reid faults his attorneys for failing to cross examine Corporal Sheppard about the an inconsistency between his direct testimony and pretrial testimony about how he found the voodoo-curse note. At trial, Corporal Sheppard testified that the note fell out of the shoe, N.T., 10/6/98 (Jury Trial Day 2), at 215, while at pretrial hearings, he stated that he had to remove the item from the front of the inside of the shoe. At both pretrial and trial hearings, Corporal Sheppard consistently said that Reid denied ownership or knowledge of the note.

This claim is so *de minimis* that the Court cannot find that trial counsel's actions were unreasonable. Indeed, this is no claim at all, as the Court is unable to discern any material differences between Corporal Sheppard's testimony. Trial counsel not having been ineffective, direct-appellate counsel was not ineffective for failing to raise this claim as ineffective assistance of trial counsel.

2.3. Failure to Object to Prior-Bad-Acts Evidence (Pet. ¶¶ 111-20; Supp. Pet. ¶ 18)

[19] In the second part of Claim 1, Reid contends that his lawyers failed to object to evidence that Reid had previously physically abused Carla Reid and sexually abused Deidra Moore. Reid argues that the evidence was inadmissible; was introduced in violation of a pretrial order; that his trial counsel ineffectively failed to request offers of proof, object, or request a mistrial; and direct-appellate counsel ineffectively failed to raise trial counsel's ineffectiveness on appeal.

On October 2, 1998, the Court issued a pretrial order that countermanded a prior order dated September 23, 1998. The 9/23/98 Order had excluded testimony regarding Albert Reid's prior abuse of Carla and evidence that in 1994 Carla told a police officer that Albert was sexually abusing Deidra. The 10/2/98 Order ruled that evidence of prior abusive incidents of Carla Reid was relevant to show Albert Reid's ill will or malice. The Order allowed introduction of that evidence upon an offer of proof and, if hearsay, a showing that a hearsay exception applied. The Court further ruled that the allegations of sexual abuse were also admissible. The Court noted that a trial on allegations that Albert Reid sexually abused Deidra in 1994 was scheduled to begin two weeks after the murders, and that Reid was also awaiting a preliminary hearing on allegations that he abused Deidra in 1996. The Court ruled that the evidence was not hearsay, and allowed Reid to request a limiting instruction at trial.

At trial, the Court generally allowed the testimony, with a cautionary instruction to the jury. *See* N.T., 10/6/98, (Jury Trial Day 2), at 193-94. Carla Reid's sister, Lisa Gardner, testified that Albert and Carla's relationship was "argumental." *Id*. at 242-43. Once, Reid put a hunting knife to Gardner's throat and threatened to kill her and Carla. *Id*. at 243-46. Diana Brown, a friend of Carla's, testified that Albert was generally possessive and refused to let Carla associate with her friends. *Id*. at 264. She also testified about two specific incidents: a disturbance at a party after Carla had danced with another man and an occasion where Albert forcibly removed Carla from a bar. *Id*. at 264-68. Donnie Williams testified that he saw Albert physically abuse Carla several times. N.T., 10/7/98 (Jury Trial Day 3), at 291-94. Donna Ferguson, a longtime acquaintance of Carla, testified that she saw bruises on Carla's arms and saw Albert slap her in the face one time. *Id*. at 300-01. She also testified that Albert threatened to carve his name in her forehead. *Id*. at 302. Mr. Kulla, who cross-examined most of these witnesses, testified that he did not object because he believed that the evidence was admissible. Mr. Trambley agrees with Reid that he was ineffective.

Reid argues that the prior-bad-acts evidence was a "parade of irrelevant and highly prejudicial testimony." His lawyers never objected or requested offers of proof. He argues that several witnesses testified to matters outside the scope of the 10/2/98 order. Williams and Ferguson could not connect bruises on Carla's body to Albert. And Ferguson also testified that Albert threatened her—not Carla.

This argument fails because it lacks arguable merit. On direct appeal, the Supreme Court held that this Court properly allowed evidence of prior criminal charges filed against Albert by Carla. Reid, 811 A.2d at 550-51. Reid's arguments here are unsuccessful for several reasons.

> [E]vidence of prior bad acts is admissible where there is a legitimate reason for the evidence, such as to establish: 1) motive; 2) intent; 3) absence of mistake or accident; 4) a common scheme or plan; and 5) identity. The evidence may also be admissible to impeach the credibility of a testifying defendant; to show that the defendant has used the prior bad acts to threaten the victim; and in situations where the bad acts were part of a chain or sequence of events that formed the history of the case and were part of its natural development. In order for evidence of prior bad acts to be admissible as evidence of motive, the prior bad acts must give sufficient ground to believe that the crime currently being considered grew out of or was in any way caused by the prior set of facts and circumstances.

Reid, 811 A.2d at 550 (internal citations and quotations omitted). Evidence that the defendant previously abused his former paramour is admissible to prove ill will, motive, or malice. *Commonwealth v. Ulatoski*, 371 A.2d 186, 190 (Pa. 1977). And evidence that the defendant was accused of sexually abusing a victim is admissible to show motive to kill. *Commonwealth v. Dowling*, 883 A.2d 570, 577-78 (Pa. 2005).

All of the objected-to evidence was properly admitted. Reid's prior abuse of Carla evinced motive, ill will, or malice. In his original Petition and brief in support, Reid reproduces evidence out of context and fails to give the entire picture. Additionally, Reid's complaint that the evidence proffered was too remote in time must fail. Remoteness in time generally does not affect admissibility. Rather, it goes to the weight of the evidence. *Ulatoski*, 371 A.2d at 191; see Commonwealth v. Showers, 681 A.2d 746, 751-53 (Pa. Super. 1996) (finding that an 11-year, continuing history of dishonesty was admissible to attack testifying defendant's credibility).

Reid argues that Gardner should not have been able to testify that he put a knife to her throat because that had nothing to do with any prior alleged abuse of Carla. But Gardner testified that while he held the knife to her throat, he threatened to kill Carla. N.T., 10/6/98 (Jury Trial Day 2), at 243 ("He grabbed me and turned me around. He put a hunting knife to my throat and told [Carla] that he would kill me first and then he would kill her.").

Reid argues that Ferguson's testimony regarding his alleged threat to carve his name into her forehead was irrelevant. In context, however, that threat was made after Ferguson confronted Albert about abusing Carla.

Reid argues that Candy Williams's and Ferguson's testimony regarding bruises that they saw on Carla was not admissible because they did not connect the bruises to abuse by Albert. The law squarely forecloses Reid's claim. *Ulatoski*, 371 A.2d at 64-65 ("One could reasonably infer from the challenged testimony that [the victim's] injuries were inflicted by [the defendant]."). Here, both Candy Williams and Ferguson testified that they saw Albert physically abusing Carla—Williams repeatedly and Ferguson once. N.T., 10/7/98 (Jury Trial Day 3), at 319-20; *id*. at 299-300.

Reid argues that the testimony of a Women in Need member about a 1991 temporary PFA order was more prejudicial than probative and should have been objected to. As noted above, however, the decision to admit the evidence was well within the trial court's discretion. *Ulatoski*, 371 A.2d at 191.

[19] Donnie Williams's testimony that patrons at the bar where he worked said that he should watch out for Reid (who was stalking Carla around the bar) was not "rank hearsay." It was admitted not for its truth, but rather because it occurred. *Cf*. Pa. R.E. 801(c)(2).

In addition to lacking arguable merit, Reid's claim regarding the prior-acts evidence also fails the reasonable-basis prong. The record shows that—contrary to Reid's contention—his trial counsel had a standing objection regarding hearsay statements of prior bad acts. N.T., 10/6/98 (Jury Trial Day 2), at 183-84. In addition, Mr. Kulla said that he did not need to request offers of proof because he was already aware of the witnesses' testimony, having reviewed their statements. N.T., 3/31/13 (PCRA Hr'g Day 1), at86-87; N.T., 3/22/13 (PCRA Hr'g Day 2), at 84. Counsel were also able to cross-examine the various witnesses regarding their lack of knowledge and the fact that the mode of the murders, gunshots, conflicted with the prior-abuse evidence, which usually involved use or threat of use of fists and knives. In addition, counsel requested—and received—a cautionary instruction regarding evidence of the sexual-abuse charges. It was not unreasonable for counsel to fail to ask that the instruction also reference uncharged evidence of prior abuse of Carla.

This claim lacks arguable merit, and trial counsel's actions were reasonable. Because trial counsel were not ineffective, direct-appeal counsel was not ineffective for raising their ineffectiveness on direct appeal.

2.4. Ineffectiveness for Presenting Dr. Roh's Blood Spatter Testimony (Pet. ¶¶ 121-27; Supp. Pet. ¶ 19)

[20] Reid next argues that trial counsel were ineffective for presenting expert testimony regarding the victims' causes of death that "was inconsistent with their own theory of the case." The victims died of close-range gunshot

wounds to the heads. At trial, Reid argued that he could not have murdered Carla or Deidra, because firing a bullet into a body at close range spatters blood. Reid had no blood spatter on his body or any clothing recovered by police officers.

The Commonwealth's experts agreed that the distance from the barrel of the firearm to the crania of the victims was "close range." The forensic pathologist, Dr. Isadore Mihalakis, concluded that the shooter was one to two feet from the victims when the fatal shots were fired. Dr. Louis Roh, Reid's forensic pathologist, admitted on direct examination that the gun barrel was at least two feet from the victims' heads because no gunpowder residue was found on their skin. N.T., 10/9/98 (Jury Trial Day 5), at 675. Dr. Roh testified that he expected blood spatter would be found on the clothing or body of the shooter. *Id*. at 676-77. On cross-examination, Dr. Roh, confronted with a treatise on the subject, was forced to admit that back spatter does not travel very far, although it could travel up to a couple feet. *Id*. at 677.

Reid argues that Dr. Roh's testimony harmed him. He claims that his lawyers had Dr. Roh's report, which contended that the gunshots were "distant" and that a distant shot does not produce the blood spatter that was never found on Reid or his clothing. Thus, Dr. Roh contradicted the Commonwealth's expert, who had concluded that the victims were killed by a close-range gunshot.

The decision to call a witness cannot be evaluated in hindsight. *Commonwealth v. Speight*, 677 A.2d 317, 322 (Pa. 1996) (citing *Commonwealth v. Williams*, 640 A.2d 1251, 1264-65 (Pa. 1994)). Rather, all that the Court needs to determine is whether the course of action chosen by trial counsel at the time of trial had some reasonable basis designed to effectuate Reid's best interests. *Id*. If so, counsel is effective. *Id*.

The Court must reject Reid's claim, because trial counsel had a reasonable basis for calling Dr. Roh. Dr. Roh's testimony contradicted the Commonwealth's account of the shooting. Although his testimony contradicted itself, it still sowed doubt and confusion. If, as the Commonwealth proffered, the shooting occurred at one to two feet, then Dr. Roh's testimony highlights the lack of blood spatter. But if the shooting occurred farther away, Reid succeeded in contradicting the Commonwealth's theory of the manner of shooting. The Court does not find Mr. Trambley's account (that Dr. Roh was called to justify expenditures on him, *see* N.T., 3/21/13 (PCRA Hr'g Day 1), at 174-75) credible. And the Court does not find that defense counsel were ineffective merely because the Commonwealth successfully impeached their witness on cross-examination.

Because counsel had a reasonable basis for calling Dr. Roh as a witness, they were not ineffective. And because trial counsel were not ineffective, direct-appellate counsel was not ineffective for failing to challenge their effectiveness on appeal.

2.5. Failure to Adequately Challenge Gunshot Residue Evidence (Pet. ¶¶ 128-32; Supp. Pet. ¶ 20)

[21] Next, Reid argues that trial counsel ineffectively failed to challenge the Commonwealth's gunshot residue evidence. At trial, the Commonwealth presented the testimony of Alfred Schwobel, the manager of forensic science at a materials-analysis company. N.T., 10/8/98 (Jury Trial Day 4), at 595. Schwobel testified that the presence of three elements on Reid's jacket, lead, antimony, and barium, indicated that he had worn the jacket while discharging a firearm. *Id*. at 598-602, 606-07. Crucially, Schwobel testified that it was "highly unlikely" that the particles containing the three elements had been transferred by casual contact. *Id*. at 607.

In response, Reid's trial counsel presented the testimony of Lonnie Harden, a ballistics expert who also tested the jacket. N.T., 10/9/98 (Jury Trial Day 5), at 649-50. Harden testified that he did not find the presence of gunpowder or gunpowder residue on Reid's clothing. *Id*. at 652.

Reid now contends that his attorneys were ineffective because they did not present an alternate theory: that the particles became affixed to the jacket when Reid changed a car battery a few days prior to the murders. Reid argues that lead, barium, and antimony are common in auto-work, and that counsel could have discovered this fact if they had more competently investigated the case. In support of this evidence, Reid provided an unsworn declaration from 2004 of a person named Robert K. O'Brien who purported to be an expert witness. O'Brien stated that lead, antimony, and barium could be transferred by causal contact. Citing an article published in 2002—four years after Reid's trial—O'Brien stated that automotive brake linings are a source of lead, barium, and antimony. Notably, O'Brien did not state that he was available to testify at Reid's trial in 1998.

This claim is frivolous, and Reid is not entitled to post-conviction relief. *See Commonwealth v. Rega*, 933 A.2d 997, 1019 (Pa. 2007) ("Trial counsel will not be deemed ineffective for failing to pursue a meritless claim.");

Hackett v. Price, 212 F. Supp. 2d 382, 389 (E.D. Pa. 2001) ("Under *Strickland*, counsel cannot be ineffective for failing to raise meritless claims."), *rev'd on other grounds*, 381 F.3d 281 (3d Cir. 2004).

First, the claim lacks arguable merit.[18] As Mr. Kulla pointed out at trial, the O'Brien's declaration cites a scientific journal article that postdates Reid's trial. *See* N.T., 3/21/13 (PCRA Hr'g Day 1), at 94. The Court gives little weight to O'Brien's unsworn, unverified statements. Furthermore, Schwobel's trial testimony already contradicts Reid's proposed evidence. O'Brien stated that the presence of lead, antimony, and barium could have been caused by casual contact (from arresting police officers)—similar to Harden's conclusion that the presence of the chemicals was insignificant. Schwobel had ruled out casual contact. Finally, the declaration is of little use, as O'Brien stated that a conviction should not be based on gunshot-residue evidence alone. Cleary, that was not the case at Reid's trial.

Second, Reid has proved that trial counsel's actions were unreasonable. As Mr. Kulla noted, Reid never told his lawyers about his automotive work, so they did not know to investigate that as an alternative source and explanation for the chemicals. "[A] defendant cannot refuse to cooperate with counsel in preparation of a particular trial strategy and then later argue counsel's ineffectiveness for failing to pursue that course of action." *Commonwealth v. Bomar*, 826 A.2d 831, 860 (Pa. 2003); cf. *Commonwealth v. Szuchon*, 484 A.2d 1365, 1377 (Pa. 1984) (ruling that, in the context of waiver of the right to counsel, a defendant "must be prepared to accept the consequences of his stubborn obstinance"), *abrogated by Commonwealth v. Lucarelli*, 971 A.2d 1173 (Pa. 2009).

More importantly, trial counsel actually called an expert who gave a relevant opinion opposite that of the Commonwealth's expert—that the presence of the three chemicals was insignificant. The decision to use Harden as a rebuttal expert was not unreasonable. And courts have repeatedly held that counsel cannot be found ineffective for choosing between alternatives if there is some reasonable basis for counsel's choice. *Commonwealth v. Paddy*, 15 A.3d 431, 442 (Pa. 2011); *see also Washington*, 927 A.2d at 594 ("[W]e must examine whether counsel's decisions had any reasonable basis."); *Chmiel*, 30 A.3d at 1127 ("[A PCRA petition must prove that] an alternative not chosen offered a potential for success substantially greater than the course actually pursued."); (internal quotation omitted); *Spotz VI,* 18 A.3d at 260 (same). Reid has failed to prove that no competent lawyer would have chosen to proceed as his trial counsel did. *See Rega*, 933 A.2d at 1018-19.

Reid is not entitled to relief on his claim regarding gunshot residue. His trial attorneys were not ineffective for failing to raise the claim at trial, and his direct-appellate attorney was not ineffective for failing to raise trial counsel's ineffectiveness on appeal.

2.6. Failure to Challenge Laboratory Evidence (Pet. ¶¶ 136-41; Supp. Pet. ¶ 21)

Next, Reid argues that his attorneys ineffectively failed to rebut the Commonwealth's boot-print evidence. He contends that an effective lawyer would have impeached the testimony of Pennsylvania State Police Sergeant Dennis Loose with the preliminary-hearing testimony of the affiant, Corporal Sheppard.

Sergeant Loose was the supervisor of the latent print and automated fingerprint sections of the Pennsylvania State Police laboratory division. N.T., 10/8/98 (Jury Trial Day 4), at 576. State Police investigators had made casts of footprints found outside of Carla Reid's house. *Id*. at 580-81. Sergeant Loose compared the casts with four boot samples, and found that the outer dimensions of the print were consistent with the outer dimensions of a pair of Brahma work boots—Reid's. *Id*. On cross-examination, Sergeant Loose conceded that he could not definitively match the footprint to any one pair of boots. *Id*. at 586-87.

Reid argues that his attorneys were ineffective because the cross-examination was insufficiently thorough. He argues that they should have introduced Corporal Sheppard's preliminary hearing testimony. The Corporal testified that, to his memory, Sergeant Loose's tests showed that Reid's boot was a different size than that which made the footprints of the cast. N.T., 4/3/97 (Prelim. Hr'g), at 45-46. Next, Reid argues that counsel should have used Sergeant Loose's report, which does not mention evidence regarding the outer dimension of the footprint. Also, Reid argues that his attorneys should have introduced the forensic report of John Evans, which concluded that the vegetable matter collected from outside Carla Reid's house did not match that found on Reid's boots.

This claim lacks arguable merit. Trial counsel would have gained little by trying to impeach Sergeant Loose with Corporal Sheppard's preliminary hearing testimony. For one, Sergeant Loose—not Corporal Sheppard—was the expert who performed the tests. Second, Corporal Sheppard's testimony was merely his recollection of those

18 The Court addresses this claim only as it pertains to trial counsel's alleged failure to investigate other explanations for the chemicals found on Reid's clothing. Reid cannot show that trial counsel were ineffective for failing to call another expert witness. He has not met the test for ineffectiveness for failure to call a witness. That test requires proof that (1) the witness existed, and was (2) available and (3) willing to testify; (4) counsel knew or should have known of the witness's existence; and (5) resulting prejudice from the absence of the witness's testimony. *E.g., Chmiel*, 30 A.3d at 1143

tests. Third, the preliminary-hearing testimony does not qualify as a prior inconsistent statement because it is another person's declaration. *Cf*. Pa. R.E. 613(a). Indeed whether the Court would have allowed impeachment of Sergeant Loose with Corporal Sheppard's prior testimony is doubtful. Evans's report similarly would have been of little use, because Sergeant Loose testified that he discounted the cast of a footprint taken in a mulched bed, because it was not a good subject to compare with the boots. N.T., 10/8/98 (Jury Trial Day 4), at 583.

Reid cannot show that his attorneys were ineffective regarding the boot-print testimony. Therefore, the claim fails for trial counsel and direct-appellate counsel.

2.7. Failure to Call a Defense Expert in Voodoo (Pet. ¶¶ 142-44; Supp. Pet. ¶¶ 22-24)

[22], **[23]** Next, Reid argues that his attorneys should have called as a witness an expert in voodoo. At trial, the Commonwealth presented a note that state police found in Reid's motel room. (Commonwealth's Trial Exhibit 23.) The note was folded, wrapped in cellophane, and placed in a left shoe. N.T., 10/6/98 (Jury Trial Day 2), at 212-15. The Commonwealth, through an expert in voodoo, Dr. Rafael Martinez, presented evidence that the note was a death wish. The Commonwealth had deposed Dr. Martinez before trial and presented his video deposition to the jury. Trial counsel were not present for the deposition, because Reid had represented himself at the time. *Id*. at 222-24.

To counter the Commonwealth's evidence, counsel called a court-appointed expert in Jamaican Obeah, Dr. Monica Gordon. Dr. Gordon, who—like Reid—was Jamaican, had a Ph.D. in sociology and was an expert in Caribbean studies and religion. N.T., 10/9/98 (Jury Trial Day 5), at 686-87. She testified that voodoo is not practiced in Jamaica—from whence Reid emigrated. She testified that Jamaicans practice Obeah, and that the note in question was not necessarily a death wish, but that it was a passive request for a magical curse. *Id*. at 689, 693-94. Dr. Gordon testified that adherents to Obeah do not wish for physical harm and they do not actively participate in fulfilling their incantations. *Id*. On direct and cross-examination, however, Dr. Gordon testified that the note in question was contained characters that were "definitely voodoo symbolisms [sic]." *Id*. at 690, 699-700.

Reid argues that trial counsel were ineffective for failing to call an expert in Haitian voodoo. Such an expert could have testified that the symbols on the note were not a death wish, but were rather an attempt to control the people on the list. Pet. ¶ 144. Reid provided the unsworn declaration of Dr. Ina Fandrich, an expert in African, African-American, and Afro-Caribbean religions.[19] Pet'r's Hrg. Ex. A.8. ¶ 1. Dr. Fandrich opined that the note was not a death wish, contrary to Dr. Martinez's testimony. She also stated that leaving a spare bullet (a live .380 caliber round had been found at the murder scene) was not part of any voodoo tradition.

At the PCRA hearing, Mr. Kulla testified that he did not think to look for an expert in Haitian voodoo. His client, he said, was from Jamaica—not Haiti, and he had no indication that Reid understood French, the language of the note at issue. Rather, he called an expert in Jamaican culture and religion, his client being from Jamaica. N.T., 3/21/13 (PCRA Hr'g Day 1), at 103-05. For his part, Mr. Trambley testified briefly that he had no reasonable basis for not procuring a "better" expert. *Id*. at 182-84.

"The mere failure to obtain an expert rebuttal witness is not ineffectiveness. [A PCRA petitioner] must demonstrate that an expert witness was available who would have offered testimony designed to advance [his or her] cause." *Chmiel*, 30 A.3d at 1143 (internal quotation omitted).

The Court holds that trial counsel were not ineffective for failing to call an expert in Haitian voodoo. Even though trial counsel did not cross-examine the Commonwealth's expert,[20] they presented a qualified rebuttal expert. And trial counsel had a reasonable basis for calling Dr. Gordon instead of an expert in Haitian culture. Albert Reid is from Jamaica. Trial counsel had no idea whether he had been to Haiti or understood French. They actually procured an expert to rebut the Commonwealth's case. Indeed, some of the things which Reid's hypothetical expert in Haitian voodoo would have testified to mirror Dr. Gordon's actual testimony. Dr. Fandrich would have testified that the note is not a death wish but an attempt to control the people on the list, and spirits—and not adherents—cause the requested deed to be done. Dr. Gordon testified that someone who consults an Obeah practitioner does not actively participate in harming the "cursed" individual and that the work was done through "magic." *Compare* Pet. ¶ 144, *with* N.T., 10/9/98 (Jury Trial Day 5), at 694-95. Reid has the burden of showing that counsel ignored a path with a substantially greater chance of success. Indeed, much of the Dr. Gordon's testimony and Dr. Fandrich's proposed testimony overlaps. Reid cannot meet the reasonable-basis prong. The Court is unaware of any cases of ineffectiveness

19 Dr. Fandrich's declaration is dated September 23, 2004, and an identical version was filed as part of Reid's packet of exhibits on January 27, 2005. The declaration does not state whether Dr. Fandrich was available to testify at the time of Reid's trial in 1998

20 Because Reid represented himself at Dr. Martinez's deposition, he cannot raise a claim of ineffective assistance of counsel regarding her cross-examination. *Spotz VI*, 18 A.3d at 270-73 (refusing to consider a claim of ineffective assistance of counsel arising from a period when the defendant represented himself); *Szuchon*, 484 A.2d at 1377 (noting that a defendant who validly waives the right to counsel must be prepared to accept the consequences of his choice); *United States v. Schwartz*, 925 F. Supp. 2d 663, 681-82 (E.D. Pa. 2013) (same).

where a PCRA petitioner's lawyers called a qualified expert and the petitioner claims that they should have called a second, more-qualified expert. (Most ineffectiveness claims involve the failure to call *any* expert where one was needed. *See, e.g., Chmiel*, 30 A.3d at 1142-42 (addressing an argument that counsel was ineffective for failing to call a rebuttal expert in microscopic hair analysis).) Trial counsel were not ineffective. Therefore, any voodoo-expert claim on appeal lacked arguable merit, and direct-appeal counsel was not ineffective for failing to raise it.

2.8. Failure to Challenge the Chain of Custody and Seizure of Gloves (Pet. ¶ 145)

[24] Reid argues that counsel was ineffective for failing to challenge the chain of custody of the gloves seized from Reid's pickup truck on December 30, 1996. Trooper Kevin Scott of the Pennsylvania State Police seized two pairs of gloves from the cab of Reid's pickup truck (introduced as Commonwealth's Trial Exhibits 12 and 13). N.T., 10/8/98 (Jury Trial Day 1), at 118, 120-22.

A PCRA court cannot grant relief on claims that were previously litigated. 42 Pa. C.S. §§ 9543(a); 9544(a)(2); Rivers, 786 A.2d at 929 (OAJC); *see supra* § 1.2. On direct appeal, the Supreme Court addressed the constitutionality of seizing the gloves:

> Accordingly, as we find that [Reid] and the police were involved in a mere consensual encounter at the time [Reid] gave his consent, that [Reid] voluntarily consented to a search of his clothing, hotel room, and truck, and that Trooper Scott's search of [Reid] truck was within the confines of [Reid's] consent, the trial court properly denied [Reid's] motion to suppress the evidence obtained during those searches and [Reid's] claim fails.

Reid, 811 A.2d at 549. The constitutionality of the seizure of the gloves is previously litigated.

Reid's claim of ineffectiveness for failure to challenge the chain of custody of the gloves is patently frivolous. Reid offers only boilerplate assertions as to why counsel should have done so. At trial, counsel stipulated to that the evidence bag containing the gloves was not tampered with. N.T., 10/8/98 (Jury Trial Day 1), at 120. Finally, a challenge to the chain of custody goes to the weight of the evidence—not its admissibility. *Commonwealth v. Copenhefer*, 719 A.2d 242, 256 (Pa. 1998). And Reid failed to question any of his attorneys as to their course of action. Therefore he cannot meet the *Pierce* reasonable-basis prong and this ineffectiveness claim fails for trial and, therefore, direct-appellate counsel.

2.9. Failure to Obtain and Test Black Hair Samples (Pet. ¶ 145)

[25] In his petition, Reid pleaded that trial counsel were ineffective for failing to obtain and test black hair samples taken from Carla Reid's body and certain gloves that were not tested by State Police. Reid presented no evidence on this claim, and asked no questions of counsel about whether they had a reasonable basis for failing to test the hair samples and glove. Accordingly, because Reid failed to meet his burden, this claim fails for both trial and direct-appeal counsel. S*ee, e.g., Commonwealth v. Spotz ("Spotz V")*, 896 A.2d 1191, 1219-20 (Pa. 2006) (PCRA petitioner cannot succeed on a claim if he presents no supporting evidence).

3. Claim 4: Failure to Object to Alleged Prosecutorial Misconduct During the Commonwealth's Guilt-Phase Closing Argument

[26], **[27]**, **[28]** In his fourth claim, Reid contends that the Commonwealth committed prosecutorial misconduct during closing argument of the guilt phase. Reid argues that counsel were ineffective for failing to challenge remarks made by the late District Attorney, John Nelson. Reid highlights four specific episodes: personally vouching for witnesses' credibility and injecting personal opinion into the case; invoking the oath of office; arguing facts not in evidence; and improperly commenting on Reid's pre-arrest silence.

3.1. Vouching for Witnesses' Credibility (Pet. ¶¶ 210, 217-18; Supp. Pet. ¶¶ 52-56)

In the first subpart of Claim 4, Reid argues that the district attorney personally vouched for the credibility of witnesses. During closing argument, the district attorney spoke about the specifically about several witnesses. He said that various witnesses (Vonnie Turnbaugh, Anthony Hurd, and Mary Jones) had no motive to lie and had told the truth. N.T., 10/9/98 (Jury Trial Day 5), at 766, 774. The district attorney explained that Carla Reid told the truth to Marlena Campbell, a friend, the night before her murder when Carla said that she was scared of Albert Reid. *Id*. at

780; see N.T., 10/7/98 (Jury Trial Day 3), at 470-71. Finally, the district attorney spoke generally about the credibility of witnesses:

> BY MR. NELSON: I'll talk briefly about the believability of a witness.
>
> Has there been one single witness effectively impeached on this witness stand? I'd suggest to you none of the Commonwealth's witnesses. Mary Jones said right up front, yeah, I didn't tell the whole truth the first time. Hey, the cops come to talk to you, you are not necessarily going to volunteer that you sold a piece of crack to a guy for a gun. Not the kind of stuff you want to tell the police, but four days later her conscience is bothering her. And she said I have to tell you the truth, Randy Gutshall was not involved, it was me.
>
> Yeah, she uses crack. I told you that in the opening statement. It doesn't mean she's a bad person. Deep down inside she felt real bad, Corporal Sheppard told you on the stand when she found out what had happened to this firearm, and that's why she wanted to tell the truth.
>
> And you saw her on the stand. I mean, did she look like she was lying to you? I mean, when asked about doing crack she said, yeah, I did crack. She wasn't pulling any punches. She was looking you in the eye and telling you the truth, I do crack once in awhile [sic], I bought this for a $30 piece of crack, I thought it was a good deal, I would make some money, and I did make some money, three hundred bucks, $270 profit.
>
> You have the opportunity to see—you have had the opportunity to see these witnesses, and I ask you has any witness—is there any indication that any witness in this case called by the Commonwealth has any motive to lie?
>
> Nobody was offered any deals. Mary Jones wasn't offered any deals. Anthony Hurd wasn't offered any deals. Nobody was offered any deals and the law is if there were deals like that and we didn't tell you about them, then I'd be disbarred.
>
> I mean, you have the right to know that information and you didn't hear it because there wasn't any deals. A lot of these people were friends of the defendant but they came forward and they did the right thing, not because they got any deals. None of them did.
>
> Most of them had nothing to gain except they were subpoenaed and they wanted to tell the truth. Is everyone in this case called by the Commonwealth lying to you? Is it a huge coincidence that their testimony when you look at it all comes together and meshes and tells a story, and tells a true story.

N.T., 10/9/98 (Jury Trial Day 5), at 791-93.

A prosecutor cannot assert personal opinions about the credibility of witnesses. Pa. R.P.C. 3.4(c); *Commonwealth v. Rios*, 684 A.2d 1025, 1034 (Pa. 1996). This is so because a prosecutor's personal opinion on credibility may insinuate that facts not in evidence or governmental imprimatur support the defendant's guilt. *United States v. Young*, 470 U.S. 1, 18-19 (1985); *see also Commonwealth v. Kitchen*, 730 A.2d 513, 521 (Pa. Super. 1999) (holding that portions of an interrogation tape in which police officers opined that defendant was lying were properly excluded from evidence); *Commonwealth v. Reed*, 446 A.2d 311, 315 (Pa. Super. 1982) (reversing a conviction when the prosecutor insinuated that his office had investigated the credibility of government witnesses).

"However, a prosecutor's remark regarding the credibility of a witness for the Commonwealth does not constitute reversible error if it is a reasonable response to a prior attack on the credibility of that witness by the defense." *Rios*, 684 A.2d at 1034; *cf. Young*, 470 U.S. at 17-18 (holding that the prosecutor's argument, though improper, did not constitute plain error where it was a response to defense counsel's improper closing argument).

This sub-claim lacks arguable merit. The district attorney's argument was a reasonable response to defense counsel's attack on the witnesses' credibility. His statements that Mary Jones, Anthony Hurd, and Vonnie Turnbaugh "told the truth" were fair responses to specific charges that they were liars.

On cross-examination, Mr. Trambley asked Mary Jones whether she had sold drugs, illegally sold a gun, or made false reports to law enforcement. N.T., 10/7/98 (Jury Trial Day 3), at 369-71. Mr. Trambley also asked her how many times she spoke with the district attorney, noting that she refused to speak to defense counsel. *Id*. at 389. In closing, Mr. Kulla referred to Jones' story as a "fable." N.T., 10/9/98 (Jury Trial Day 5), at 745. The district attorney's summation was a reasonable response to an attack on Jones' credibility.

Mr. Kulla asked Mr. Hurd on cross-examination whether he had lied to get out of jail. N.T., 10/8/98 (Jury Trial Day 4), at 504-05. In closing argument, he reemphasized the point. N.T., 109/98 (Jury Trial Day 5), at 751-52.

Again, the district attorney's closing argument was a reasonable response to the attack on Hurd's credibility.

The district attorney's statement that Vonnie Turnbaugh "was not impeached" fairly states the evidence before the jury. Turnbaugh considered Reid a friend, and Mr. Trambley's cross-examination was limited to whether Turnbaugh clearly understood Reid's "thick" Jamaican accent. N.T., 10/6/98 (Jury Trial Day 2), at 196, 199-201.

Finally, the district attorney's remark regarding Marlena Campbell's testimony was merely an attempt to explain the excited-utterance exception to hearsay, *see* Pa. R.E. 803(2), to the jury. Campbell testified about what Carla Reid told her the night before her murder while they were in a bar, while Albert Reid's truck was parked outside of the bar, and while Carla Reid expressed her fear of Albert.

Additionally, the district attorney's general comments on the credibility of witnesses were not improper. Indeed, those comments mirror prosecutor's comments in other case in which courts rejected claims of prosecutorial misconduct. In *Rios*, the court found that the prosecutor's remark that a witness's identification testimony was "a mark of truth" and that [s]he is not trying to make stuff up to make the case better. She is telling the truth of what she knows." were reasonable responses to an attack on her credibility. *Rios*, 684 A.2d at 1034; *see also Chmiel*, 30 A.3d at 1181 ("Even an otherwise improper comment may be appropriate if it is in fair response to defense counsel's remarks").

Because this sub-claim lacks arguable merit, trial counsel were not ineffective. Because trial counsel were not ineffective, *a fortiori*, appellate counsel was not ineffective for failing to raise trial counsel's ineffectiveness on direct appeal. The sub-claim fails.

3.2. Invoking Oath of Office Injecting Personal Opinion into the Case (Pet. ¶¶ 209-10, 217-18; Supp. Pet. ¶¶ 52-56)

Next, Reid argues that the district attorney improperly vouched for the police's investigation and invoked his oath of office to convince the jury that none of the witnesses had received deals in exchange for testimony. This sub-claim overlaps with the previous sub-claim. In addition to the long excerpt of the closing argument reproduced above, the following passage is relevant:

> BY MR. NELSON: This is not a case where the police have been indicted and proven to be incompetent or shoddy or rushed to judgment. It simply didn't happen the way Mr. Kulla would have you believe.

N.T., 10/9/98 (Jury Trial Day 5), at 764-65.

A prosecutor responding to attacks on the credibility of an investigation is in a delicate situation. On one hand, a prosecutor cannot invoke the oath of office as a justification for the thoroughness of the investigation. On the other hand, in response to attacks on the credibility of the investigation, a prosecutor's invocation of an oath of office, or extra-record information, is harmless, albeit improper. *United States v. Pungitore*, 910 F.2d 1084, 1124-25 (3d Cir. 1990).

Mr. Kulla did not impugn the Commonwealth's investigation quite like Pugnitore's attorney (who invoked 1930s union-busting, the Japanese interment during World War II, McCarthyism, persecution of Vietnam-War protestors, and the Spanish Inquisition). *Pungitore*, 910 F.2d at 1122. However, he did attack the prosecution's investigation. Mr. Kulla argued that the decision to charge Reid with murder was made before any evidence was collected. N.T., 10/9/97, (Jury Trial Day 5), at 742-43. He argued that that the investigation focused on Reid, excluding other possible suspects. *Id*. He argued that the prosecution failed to explain how the other children in Carla Reid's household—some of whom were in the same room as the victims—were not awakened by gunshots. *Id*. at 744-45. Mr. Kulla attacked the lack of gunshot-residue testing on Reid's clothes other than his jacket. *Id*. at 746-47. And he argued that State Police troopers failed to collect relevant evidence from Albert Reid's motel room. *Id*. at 753-54.

The district attorney's response was reasonable, given the defense strategy to attack the completeness of the police investigation. In his original Petition, Reid selectively cited only the first sentence of the last paragraph of page 764 of the trial transcript. Reid omitted the second sentence, which clearly shows that the district attorney was attempting to rebut the defense's closing argument. The comment that the district attorney would be disbarred for failing to disclose deals is arguably improper, but it was a fair response to the defense insinuations that the Commonwealth had an understanding with certain of its less savory witnesses.

In all, this sub-claim lacks arguable merit. Trial counsel therefore were not ineffective. And appellate counsel was not ineffective for failing to raise trial counsel's ineffectiveness on direct appeal.

3.3. Arguing Facts Not in Evidence (Pet. ¶¶ 206-08; Supp. Pet. ¶¶ 52-56)

In the final sub-claim under Claim 4, Reid argues that the district attorney committed prosecutorial misconduct by referencing matters that were not in evidence. Reid refers to two items: a reference to studies that show children sleep more soundly than adults to explain why the other children in Carla Reid's house were not awakened by the murders; and an explanation that Reid probably disposed of the murder weapon in some rural area in Franklin County before police could recover it.

The passages are as follows:

> MR. NELSON: The acoustics expert. You hear the Commonwealth, even though it was apparently hearsay, we agree to let this man testify this morning that a .380 fired outside 20 feet away would make a loud noise.
>
> Well, I don't know that we needed an expert witness for that, but what difference does it make how loud this noise was?
>
> You can think of any number of reasons why these children may not have opened up at all or if they woke up in the middle of the night and may have been startled, fallen back asleep like Jonathan did when he thought his brothers were having a bad dream when they woke him. He went right back to sleep. He just told them, hey, mom and Dee Dee are dead. He thought they were dreaming He went right back to sleep.
>
> Common sense you've been startled in the middle of the night, sometimes you don't even know what woke you up. You have slept through a thunderstorm is my guess. Maybe the kids did wake up and if they did, wouldn't it be reasonable to think that in those few moments that they might have remained awake if they did see anything, that that might be a memory mother nature is helping them to suppress if they saw their mother and sister laying there dead in their beds?
>
> Are these people any less dead because the gun was loud? It makes no difference.
>
> You saw the photographs. They were shot in the head. Sure, the gun made noise but of what significance is it in the case? Draw on your own experience. If you have kids, they can sleep through TV programs, they can sleep through hollering and yelling, and there is scientific studies that it's clear, you know, kids sleep sounder than adults. They don't get up. Like, they mess around on the internet in the morning.

N.T., 10/9/98 (Jury Trial Day 5), at 761-62.

> By the way, what would be the first thing that Albert Reid did once he made his escape from that residence on Sollenberger Road? What would be the first thing the killer wants to do? Get rid of the gun.
>
> And there is a lot of area in Franklin County. There is a lot of roads between Sollenberger Road and the Rose Lawn Motel. There is a lot of fields. There is streams. There is cornfields. God knows where the gun went but you would think that would be the first thing you get rid of.
>
> And, yeah, it would have been real nice, in fact, we probably would have had this trial if we had found a gun and tied it to him and have the ballistics, but we do put a gun in his hand and we don't do it on the testimony of Mary Jones alone, not at all.

Id. at 772-73.

During the hearing, Mr. Kulla said that he does not normally object during closing arguments:

> When a jury is hearing closing arguments, and a defense attorney or prosecution attorney stand up and objects to them, it's two problems. One, you're possibly offending the jury, getting the jury angry at you, oh, my gosh we wanted to hear what the proponent says. He's standing up again objecting. It can be used against your client if you object during closing arguments. Second, same thing as before, the more you object to certain things, the jury wants to know why you are objecting to these things, and it brings that issue to their attention. They think more about it.

N.T., 3/21/13 (PCRA Hr'g Day 1), at 61-62. Mr. Trambley testified that he had no strategic reason for failing to object, even though he did not give the defense closing argument. N.T. 3/21/13, (PCRA Hr'g Day 1), at 184-85. Mr. Yoder did not recognize those statements as prosecutorial misconduct and did not raise them on direct appeal. N.T., 3/22/13 (PCRA Hr'g Day 2), at 32-33.

"Prosecutors are permitted to comment on the evidence or *appropriate inferences from it*, and to employ oratorical flair in their arguments." *Commonwealth v. Kennedy*, 959 A.2d 916, 923 (Pa. 2008) (emphasis added); *see Commonwealth v. Bricker*, 487 A.2d 346, 349-50 (Pa. 1985) (OAJC). The law bars a prosecutor from asserting a personal belief that the defendant is guilty or from arguing that the defendant is guilty because he associates with criminals. *Commonwealth v. Johnson, (Michael)*, 533 A.2d 994, 996 (Pa. 1987).

The Court finds that this sub-claim lacks arguable merit. As to the "scientific studies" which say that children sleep sounder than adults, Reid takes the statement out of context. It was an offhand remark in a longer colloquy urging the jurors to use their common sense. During his speech, the district attorney posited that the jurors may have slept through a thunderstorm, and that they may have kids and know—as a matter of common knowledge—that children sleep sounder than adults.

The remark about the gun was a fair inference from the evidence. In this case, the Commonwealth failed to recover a murder weapon. The district attorney's statement merely asks the jury to infer that after he committed the murders, Reid would have wanted to quickly dispose of the gun. The rural areas of Franklin County provided such an opportunity. The law allows a prosecutor to comment not only on the evidence, but also on fair inferences derivable from it. The district attorney's statements were exactly that—a fair inference explaining the lack of a murder weapon despite the fact that the Commonwealth also had evidence that Reid had recently fired a gun.

Because this sub-claim lacks arguable merit, trial counsel were not ineffective for failing to object to the district attorney's remarks. And because trial counsel were not ineffective, appellate counsel was not ineffective for failing to raise their failure to object on direct appeal.

3.4. Comments on Reid's Pre-Arrest Silence (Pet. ¶¶ 211-18; Supp. Pet. ¶¶ 52-56)

[29], **[30]**, **[31]** Next, Reid argues that the district attorney impermissibly and unconstitutionally commented on Reid's pre-arrest silence. Reid argues that the following comments violated his right not to testify.

On cross-examination of Corporal Wayne Sheppard, a Pennsylvania State Police trooper and the lead investigator, Mr. Trambley asked how Reid reacted upon learning of the deaths of his wife and stepdaughter. N.T., 9/5/98 (Jury Trial Day One), at 69-70. Corporal Sheppard testified that Reid became upset and kept repeating "Jesus Christ" over and over. *Id*. On redirect examination, the following occurred:

> BY MR. NELSON: Just one thing. They had asked you what Mr. Reid said to you that morning when you told him about these incidents. Did you ask him to make arrangements to take care of his children?
>
> A. [by Corporal Sheppard]: Yes, I did.
>
> Q. What did he say?
>
> A. No.
>
> MR NELSON: That's all.
>
> THE COURT: Let me ask you, Corporal Sheppard, when you told him that his wife, his estranged wife, and stepdaughter had been killed, did he ask you any questions about how they had been killed?
>
> THE WITNESS: No, he did not.
>
> THE COURT: Anybody else have any questions? Okay, you may return to the courtroom.

Id. at 77.

In the Commonwealth's closing argument, the district attorney referenced that exchange:

> MR NELSON: [Judge Walker] asked the question I forgot to ask When Corporal Sheppard said, Mr. Reid, I'm here to notify you that your wife and stepdaughter have been killed, Albert Reid didn't even ask how it had happened or what had happened. Why? Because he knew.
>
> That fact escaped me and Judge Walker was astute enough to ask that question, and it was the unasked question by Albert Reid that tells you something about what he knew when the police were there.
>
> And, of course, he's going to act upset. Anybody that plans these murders is cold-blooded enough to kill his stepdaughter and his wife when they lay sleeping in the house with five other kids, you know, to go to all of that trouble and you ditch the gun, you're going to put on an act when the police tell you about it.

Oh, no. But he forgot to say what happened to my wife? What happened to my stepdaughter?

N.T., 10/9/98 (Jury Trial Day 5), at 787.

This sub-claim lacks arguable merit. Under the law at the time of Reid's trial, a prosecutor could reference a defendant's pre-arrest silence. *Commonwealth v. McConnell*, 591 A.2d 288, 290 (Pa. Super. 1991) ("While appellant correctly notes that references to a criminal defendant's post-arrest silence are improper, a similar prohibition does not attach to a defendant's pre-arrest silence."); *Commonwealth v. Gumby*, 580 A.2d 1110, 1114 (Pa. Super. 1990).[21,22] Therefore, the Commonwealth was free to comment on Reid's failure to ask Corporal Sheppard how Carla Reid and Deidra Moore died.

Trial counsel also had a reasonable basis for not objecting during the closing. On cross-examination of Corporal Sheppard, Mr. Trambley opened the door to further questioning by asking the corporal about Reid's reaction upon being informed of Carla's and Deidra's deaths. Mr. Trambley stressed that Reid was upset. Showing that Reid was very upset when he found out that his wife and stepdaughter died is part of a reasonable trial strategy, even though it opened the door to subsequent questioning.

For the foregoing reasons, trial counsel were not ineffective in failing to object to the portion of the Commonwealth's closing argument which referenced Reid's failure to ask how the victims in this case died. Additionally, because trial counsel were not ineffective, appellate counsel was not ineffective for failing to raise trial counsel's ineffectiveness in this regard on direct appeal.

A prosecutor may strike hard blows, but not foul ones. *Berger v. United States*, 295 U.S. 78, 88 (1935). In this case, the Commonwealth's blows were fair—and not foul. A comparison of the district attorneys' conduct in this case with the cases cited by Reid is illustrative. In *Berger*, the federal prosecutor misstated facts during cross-examination, put words into witnesses' mouths, suggested—without proof—that witnesses had said certain things to him out of court, bullied and argued with witnesses, and conducted himself in a "thoroughly indecorous and improper manner." *Id*. at 84 & n.*. In this case, the district attorney did no such things, and as the Court stated above, his comments in closing were requests to draw fair inferences from the evidence. In *Johnson, (Michael)*, 533 A.2d at 996 , the prosecutor argued that the defendant was guilty because he associated with other criminals. In this case, many of Reid's associates were not upstanding citizens, but the district attorney did not ask for a verdict of guilty by association. In *Commonwealth v. Cherry*, 378 A.2d 800 (Pa. 1977), the prosecutor asked the jurors to imagine themselves as victims and to make an example of the defendant to keep the streets of Philadelphia from turning into the "wild west." The district attorney did not ask the jury to make an example out of Reid, and he did not ask them to put themselves in Carla Reid and Deidra Moore's shoes.

Reid carries his burden on none of the portions of Claim 4. Therefore, the claim must be denied.

4. Claim 5: Defective Guilt-Phase Jury Instructions

[32] In Claim 5, Reid challenges the Court's charge to the jury after the close of the guilt-phase evidence. Some general principles apply. Reid's trial counsel did not object to the charge. His direct-appellate counsel did not raise their ineffectiveness for failing to do so. Therefore, any claim of error must be presented as a layered claim of ineffectiveness.

Second, in evaluating jury instructions, a reviewing court

> read[s] the charge as a whole to determine whether it was fair or prejudicial. The trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration. For [Reid] to be entitled to a new trial, the jury instruction must have been fundamentally in error, or misled or confused the jury.

21 In *Commonwealth v. Molina*, 33 A.3d 51 (Pa. Super. 2011) (en banc), *allow. of app. granted*, 51 A.3d 181 (Pa. 2012), the en banc Superior Court held that the Commonwealth may not use a non-testifying defendant's pre-arrest silence to imply guilt. *Id*. at 53. Suspected of murder, the defendant in *Molina* refused to be interviewed by police, and the prosecutor rhetorically asked the jury "why?" during closing argument. *Id*. at 54. However, *Molina* is not relevant in Reid's case for two reasons.

First, the *Molina* decision post-dates direct review of Reid's conviction. *Molina* settled—at least temporarily—a previously unaddressed issue of law. "As noted by the parties herein, the issue presented has not been addressed by the United States Supreme Court or the Pennsylvania Supreme Court, and federal circuits and state appellate courts are divided on the question." *Id*. at 61. Reid's trial and appellate cannot be ineffective for failing to predict future developments or changes in the law. *Commonwealth v. Spotz ("Spotz VII")*, 47 A.3d 63, 122 (Pa. 2012); *Paddy*, 15 A.3d at 477 (Eakin, J., concurring).

Second, the *Molina* decision may be short-lived. The case is pending at the Pennsylvania Supreme Court, which ordered supplemental briefing and argument on the effect of *Salinas v. Texas*, 133 S. Ct. 2174 (2013).

22 This past Term in *Salinas*, the United States Supreme Court held that a defendant must affirmatively invoke his privilege against self-incrimination in a pre-arrest interview. *Griffin v. California*, 380 U.S. 609 (1965), does not apply, because a defendant does not have an unqualified right to refuse to answer police questions outside of a custodial interrogation. *Salinas*, 133 S. Ct. at 2179-80, 2184.

Commonwealth v. Wright, 961 A.2d 119, 145 (Pa. 2008). If the charge was proper, Reid's claim lacks arguable merit.

4.1. Reasonable Doubt (Pet. ¶¶ 221-23, 229-30)

[33] Reid challenges the Court's general charge on reasonable doubt, arguing that that the Court actually charged the jury that the Commonwealth "does not have to prove his guilt beyond a reasonable doubt."[23] N.T, 10/9/98 (Jury Trial Day 5), at 801.

The Court's charge on reasonable doubt immediately preceded the instructions on the specific offenses:

> In all criminal cases the law presumes the defendant is innocent until the proof of the case shows the contrary beyond a reasonable doubt. So this defendant as each and every charge that has been filed against him is presumed to be innocent until the Commonwealth shows his guilt beyond a reasonable doubt.
>
> Therefore, if you are satisfied of the defendant's innocence, you must acquit him. If you have a reasonable doubt as to his guilt, he is also entitled to be acquitted.A reasonable doubt is not a doubt that is fancied or conjured up in your mind to escape an unpleasant verdict. It must be an honest doubt arising out of the evidence itself, the kind of doubt that would restrain a reasonable person from acting in a manner of importance to himself.
>
> Thus, if you look at the evidence and scan it from the beginning to the end and keep in mind the credibility of the witnesses and desire to arrive only at the very truth in the case, if under these circumstances your mind cannot rest on the conclusion of guilt, that is a reasonable doubt and the defendant would be entitled to a verdict of not guilty as to each case where you find such a doubt.
>
> If the evidence leaves no such doubt in your mind, then the Commonwealth is justified in asking for a verdict of guilty as charged. The defendant is presumed innocent and has no burden to present any evidence on his behalf.
>
> The burden remains with the Commonwealth throughout the trial of the case and applies to each and every element of the offense to prove the case beyond a reasonable doubt. However, the Commonwealth is not bound to prove the case beyond a reasonable doubt, a shadow of a doubt, or to a mathematical certainty. It is entirely up to the defendant in every criminal trial whether or not to testify. He has an absolute right founded on the Constitution to remain silent. You must not draw any inferences of guilt or any other inferences adverse to the defendant from the fact that he did not testify.
>
> In other words, in our system of justice the Commonwealth has to prove his guilt beyond a reasonable doubt. The defendant has no burden on that.

N.T., 10/9/98 (Jury Trial Day 5), at 800-01.

As to the second claimed error, Mr. Trambley testified that he had no reasonable basis for failing to object. N.T., 3/21/13 (PCRA Hr'g Day 1), at 187. Mr. Kulla reviewed the charge. He opined that either the transcript is incorrect, or the Court misspoke and counsel missed the misstatement. N.T., 3/22/12 (PCRA Hr'g Day 2), at 62-63. The Commonwealth concedes that the instruction in the transcript is improper, but argues that that isolated error did not mislead or confuse the jury.

The Court agrees that the challenged sentence is wrong. It also makes no sense, and was probably either a misstatement or a typographical error in the transcription. However, the charge as a whole clearly instructs the jury that Reid is presumed innocent, the Commonwealth bears the burden of proof, and it bears that burden beyond a reasonable doubt. The isolated misstatement on the record was so minor that even the lawyers missed it. As a whole, the Court's charge on reasonable doubt was fair and did not prejudice Reid. The Court properly informed the jury ten times of the proper burden of proof. Therefore, this claim lacks arguable merit, and trial counsel were not ineffective. Because trial counsel were not ineffective, direct-appeal counsel was not ineffective in turn for failing to raise this claim on direct appeal.

4.2. Number of Witnesses (Pet. ¶¶ 224, 229-30)

[34] Second, Reid argues that the Court's charge to the jury on the number of witnesses "guarantee[d] a

23 Reid had also challenged the use of the word "restrain" in the instructions, a claim which Judge Walsh dismissed as meritless.

verdict for the Commonwealth" and directed a guilty verdict. Reid contends that the instruction was "incredible" because it told the jury that they must decide the case based on the number of witnesses called by each side if they were of equal credibility. Pet. ¶ 224. The Commonwealth presented 49 witnesses, and Reid 14. The instruction, Reid argues, "unconstitutionally altered the prosecution's burden of proof." *Id*.

> The charge at issue is as follows:
>
> THE COURT: You should not be influenced by fear, favor nor by prejudice or sympathy. I want you to understand that the number of witnesses offered by one side or the other side does not in itself determine the weight of the evidence.
>
> It is a factor, but only one of many factors, which you should consider; whether the witnesses appear to be biased or unbiased; whether they are interested or disinterested persons, are among the important factors which go to the reliability of their testimony, along with those rules governing credibility which I just discussed with you.
>
> The important thing is the quality of the testimony of each witness. In short, the test is not which side brings the greater number of witnesses or presents the greater quantity of evidence, but which witness or witnesses and which evidence you consider more worthy of credit and belief.
>
> Even the testimony of one witness may outweigh that of many and carry more weight than the testimony of many other witnesses if you have reason to believe his or her testimony in preference to others.
>
> It may happen that one witness standing uncorroborated by telling a story so natural and reasonable in its character in a manner so sincere and honest as to command belief, although several witnesses or equal apparent respectability may contradict him.
>
> The manner and appearance of the witnesses, character of their testimony, and its inherent probability may be of such to lead the jury to believe his or her testimony and accept it as to the truth of the transaction to which it relates.
>
> The question for the jury is not which side are the witnesses more numerous, but what testimony do you believe, on which side is the preponderance of the evidence after considering the accuracy of the witnesses; their truthfulness or lack of it; their opportunity for observation; the probability or improbability of their testimony and their interest in the outcome of the case and manner of their appearance on the stand.
>
> Obviously, however, where the testimony of the witnesses appears to you to be of the same quality, the weight of number does assume significance which you may not ignore.

N.T., 10/9/98, (Jury Trial Day 5), at 809-810.

Mr. Trambley said that he had no reason for failing to object to the number-of-witnesses instruction. N.T., 3/21/13, (PCRA Hr'g Day 1), at 188. Mr. Kulla did not understand the excerpt which Reid's counsel showed to him at the hearing and he did not remember whether or why he would not have objected to the instruction. N.T., 3/22/13 (PCRA Hr'g Day 2), at 64-65.

Under Pennsylvania law, the court may instruct the jury on how to weigh the number of witnesses where the defense has presented evidence and has presented significantly less witnesses than the Commonwealth. *See Commonwealth v. Flick*, 97 Pa. Super. 169, 176-77 (1929). The Court's charge in this case appears to be modeled after the charge given in *Braunschweiger v. Waits*, 36 A. 155, 156 (Pa. 1896) and cited approvingly for use criminal cases in Flick, 97 Pa. Super. at 176-77 and *Commonwealth v. Wolfe*, 81 Pa. Super. 512, 514-15 (1923).

In arguing that the instruction was unconstitutional, Reid cherry-picks portions of the charge and mischaracterizes them. Read in context, this instruction tells the jury that it should not decide the case based on the number of witnesses called by either side, *unless* it considered all of the witnesses to be equally credible. In that unlikely circumstance, the jury could take into account the fact that the Commonwealth called more witnesses than the defense.

This claim lacks arguable merit. "This is an example of the unfairness of choosing an isolated sentence or extract from a charge and attempting to give it a meaning contrary to the thought expressed in the charge as a whole." *Flick*, 97 Pa. Super. at 176. In reviewing a jury charge, a court does not look at isolated passages, but rather must consider the challenged portion in context. *Wright*, 961 A.2d at 145. Read in context, the charge on the number of witnesses does not have the strained meaning assigned to it by Reid. Because the charge was not improper, Reid's

trial attorneys had a reasonable basis for not objecting. And because trial counsel were not ineffective, direct-appellate counsel was not ineffective for failing to raise trial counsel's ineffectiveness on appeal.

4.3. Progression Charge (Pet. ¶¶ 225, 229-30; Supp. Pet. ¶¶ 58, 60)

[35], **[36]** Next, Reid claims that the Court's instruction to the jury on how to consider the degrees of homicide was improper. Reid argues that the progression charge was unconstitutional, that trial counsel were ineffective for failing to objection, and that direct-appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness. He contends the charge coerced any juror who might have had a reasonable doubt about first-degree murder. That juror, Reid argues, would have voted to convict on first-degree murder even though he or she thought that second-degree murder was the appropriate verdict.

A progression charge instructs the jury to consider the most serious charge (first-degree murder here) first. The jury must unanimously vote to convict or acquit. If the jury votes to convict, it is finished. If it votes to acquit, it moves to the next serious charge (second-degree murder in this case) and unanimously votes to convict or acquit, and so on. See, e.g., *Commonwealth v. Loach*, 618 A.2d 463, 464 (Pa. Super. 1992) (en banc). The opposite of a progression charge is a transition charge, which allows a jury to consider a lesser-included offense if it cannot agree to a verdict on the greater offense. *See generally United States v. Tsanas*, 572 F.2d 340 (2d Cir. 1978) (per Friendly, J.) (comparing progression and transition charges and discussing the pros and cons of each).

This is the relevant portion of the jury charge given at trial:

> THE COURT: Now, I've prepared two other verdict slips. One for Deidra Moore, and one for Carla Reid, and you will notice it says, to wit, October blank 1998, we, the jurors empaneled in the above case, find the defendant, Albert Reid, in the death of Deidra Moore.
>
> First think you go to is first degree murder. You may remember my charge of first degree murder. If you want me to give you any of that charge on first degree murder you must send me a note. I can give you anything I gave you in the charge over again.
>
> . . . .
>
> When you arrive at either a verdict of—a unanimous verdict of either guilty or not guilty you write it in. If you come to a unanimous verdict of first degree murder, you ignore the second and third.
>
> If you come to a unanimous verdict of not guilty to first degree, then you should consider second degree. And when you arrive at a unanimous verdict, if you arrive at a unanimous verdict of guilty there, you don't go to third.
>
> If you arrive at a unanimous verdict of not guilty, you go to third. When you are done with third, you are done with the verdict slip. Do you follow me on that?
>
> You start off with first. Consider first. When you arrive at a unanimous verdict of either guilty or not guilty, you write that in. If it's guilty, you stop.
>
> If it's not guilty, you go to second, and if second is not guilty, you go to third.

N.T., 10/9/98 (Jury Trial Day 5), at 814-15.

At the hearing, Mr. Trambley agreed with Reid that he had no reason for failing to object to the Court's charge. N.T., 3/21/13 (PCRA Hr'g Day 1), at 188-89. Mr. Kulla said that he did not object because he believed that the charge was legally correct. N.T., 3/22/13 (PCRA Hr'g Day 2), at 65-66.

"[W]hen a defendant is charged with greater and lesser included offenses, the vast majority of jurisdictions in the United States either authorize or require the use of a progression charge." *Commonwealth v. Hallman,* 67 A.3d 1256, 1263 n.6 (Pa. Super. 2013). Pennsylvania courts have repeatedly and unanimously found that progression charges are proper. Id. at 1262-63; *Loach*, 618 A.2d at 471; *Commonwealth v. duPont*, 730 A.2d 970, 985 (Pa. Super. 1999); *Commonwealth v. Hart*, 565 A.2d 1212 (Pa. Super. 1989). The Supreme Court has held that an attorney does not render ineffective assistance by failing to object to a progression charge. *Washington*, 927 A.2d at 611; *cf. Holiday v. Varner*, 176 F. App'x 284, 288 (3d Cir. 2006) (state court not unreasonable in concluding that counsel was not ineffective for failing to object to progression charge).

Reid cites no binding authority in support. Instead, he relies on irrelevant cases from other jurisdictions. *See, e.g., Cantrell v. State*, 469 S.E.2d 660, 662 (Ga. 1996); *State v. Thomas*, 533 N.E.2d 286 (Ohio 1988); *State v. Duff*, 554 A.2d 214 (Vt. 1988), *overruled by State v. Powell,* 608 A.2d 45 (Vt. 1992); *State v. Ogden*, 580 P.2d 1049 (Or.

App. 1978), *superseded by statute*, Or. Rev. Stat § 136.460. Those cases may be law in their respective jurisdictions,[24] but they are not Pennsylvania law. Nor do they bind Pennsylvania courts with respect to the federal Constitution.

"[Reid] cites no Pennsylvania or United States Supreme Court authority for the proposition that a progression charge violates due process, obliging counsel to object. Counsel cannot be deemed ineffective for failing to advance the change in the law. Thus, because trial counsel could not have been ineffective for this reason, [Reid's] claim of appellate counsel's ineffectiveness necessarily fails." *Washington*, 927 A.2d at 611. In fact, Reid's progression-charge argument is meritless. Mr. Trambley's testimony to the contrary—that he should have objected—is not credible, and the Court gives it no weight.

5. Claim 6: Failure to Allege that Franklin County's Method for Selecting Jurors Systematically Excluded Minorities (Pet. ¶¶ 231-44)

[37] Reid argues in his sixth claim that counsel were ineffective for failing to properly raise a claim related to jury selection. Reid faults Franklin County's method of selecting prospective jurors, because the venire panel had only one African-American and no Hispanics. (Reid is of African heritage.) Reid argues that Franklin County's selection of prospective jurors disproportionately excluded minorities.

During jury selection, Reid's attorneys challenged the array, which the Court rejected on the record. N.T., 9/30/98 (Jury Selection Day 3), at 437-38. Counsel did not, however, move to change venue or venire. In post-sentence motions, Reid's attorneys again challenged the array. The Court rejected the challenge, because Reid failed to show systematic exclusion of minorities from jury panels. 5/28/99 Opinion 2-3. Mr. Yoder did not raise the claim on appeal, however, because he believed that Franklin County's method for selecting juries passed constitutional muster, based on his experience as Judge Walker's clerk. N.T., 3/22/13 (PCRA Hr'g Day 2), at 34-35.

The method of assembling jury arrays is a matter of state law. An array, however, must be composed of a "fair cross-section" of the community and cannot systematically exclude distinctive groups of the community. *Duren v. Missouri*, 439 U.S. 357 (1979). To show that the array does not represent a fair cross-section, a defendant must show that (1) the group allegedly excluded represents a distinct community; (2) the representation of that group in venire panels is not fair and reasonable in relation to its numbers in the community; and (3) the underrepresentation is due to systematic exclusion. "Systematic" means caused by or inherent in the system. *Id*. at 366-67; *Commonwealth v. Johnson, (Raymond I)*, 838 A.2d 663, 682 (Pa. 2003) ("Proof is required of an actual discriminatory practice in the jury selection process, not merely under-representation of one particular group.").

Mr. Yoder was correct, and this claim lacks arguable merit. African-Americans and Hispanics are distinct communities. However, Reid failed to present any evidence that African-Americans' and Hispanics' representation on venire panels was unfair and unreasonable in relation to their numbers in the community. Reid's petition cites census data from 2000—two years after Reid's trial. Reid presented no evidence on Franklin County's method of jury selection at the PCRA hearing. He presented no evidence regarding the racial makeup of venires in Franklin County during the time of Reid's trial. Additionally, he presented no evidence to satisfy the *Duren's* third prong—that minorities' exclusion was systematic. Instead, he relied on conclusory allegations that using voting rolls combined with drivers' licenses improperly excludes minorities. The Supreme Court has repeatedly found that such a method is permissible. *Commonwealth v. Romero*, 938 A.2d 362, 374 (Pa. 2007) (plurality opinion); *Commonwealth v. Robinson, (Harvey)*, 864 A.2d 460, 486-87 (Pa. 2004); *Johnson, (Raymond I)*, 838 A.2d at 682-83; *Commonwealth v. Smith, (Wayne I)*, 694 A.2d 1086, 1094-95 (Pa. 1997). Reid claims mere under-representation, and did not prove actual discrimination. As Reid failed to show unfair exclusion of minorities, or systematic exclusion thereof, his claim fails.[25]

Trial counsel actually litigated this claim, to an extent. Mr. Yoder did not on direct appeal, and he was not ineffective for failing to do so. The claim lacks arguable merit for the reasons above. And Mr. Yoder had a reasonable basis for not raising the claim—he thought it would be unsuccessful. Reid's lawyers were not ineffective for failing to challenge the method of selecting the array.

6. Claim 7: Failure to Have Sidebars Transcribed (Pet. ¶¶ 245-58; Supp. Pet. ¶¶ 63-67)

24 As should be apparent by the preceding citation-sentence, some of those cases are not good law even in their respective states.

25 Reid also argues that Franklin County should have drawn prospective jurors from "cities" within the County as opposed to the county at large to increase minority representation. This contention is patently frivolous. State law does not allow such an arrangement, drawing pools from the boroughs of the County would actually distort the cross-representation of jury pools, and Reid has no right to request an increased minority presence on his jury. *Johnson, (Raymond I)*, 838 A.2d at 682. Finally, Reid argued that the residents of Chambersburg had an increased interest in being on the array because the incidents giving rise to the case occurred within "city" limits. The murders actually occurred in Hamilton Township.

[38] In his seventh claim, Reid argues that previous counsel were ineffective for failing to have significant portions of the record transcribed. Those significant portions are many of the discussions between counsel and the Court at sidebar.

Mr. Trambley testified that he has no tactical reason for failing to have the sidebars transcribed. He said that at that time, the court reporter needed to step up to the side of the bench to hear the discussion, i.e. no microphones were placed on the bench where the sidebars took place. N.T., 3/21/13 (PCRA Hr'g Day 1), at 134; N.T., 3/22/13 (PCRA Hr'g Day 2), at 50-52. Mr. Kulla said that, to his recollection, he thought sidebars were being transcribed. N.T., 3/21/13 (PCRA Hr'g Day 1), at 44-45, 66.

This claim lacks arguable merit, as the Supreme Court recently rejected an identical argument in *Commonwealth v. Sepulveda*, 55 A.3d 1108, 1149-50 (Pa. 2012). Many of the off-the-record sidebar conferences were of an administrative nature. Further, trial counsel could have placed any objections on the record, and actually did so in several cases.

> The PCRA court found that "off-the-record and sidebar conferences were either of an administrative nature or were not relevant to matters of record." The court also observed that counsel could have placed any objections into the record, and there was no indication that the court had ever denied counsel the opportunity to place any argument or objections that were raised at sidebar on the record. Finally, the court had previously noted at the PCRA hearing that "if it had been matters of consequence it would have been transcribed. If it was a matter of court record, it was put on the record. Side conferences between counsel were not."
>
> Insofar as appellant raises a claim of trial court error in failing to transcribe sidebar conferences, it is waived because appellant failed to raise this issue at trial and on direct appeal. *See Commonwealth v. Marshall*, 812 A.2d 539, 551 n.14 (Pa. 2002) (incomplete transcript claim must be raised on direct appeal). To the extent appellant raises this claim as one of trial counsel's ineffectiveness, he has failed to establish the merit of the claim.
>
> The U.S. Supreme Court has recognized that adequate and effective appellate review is impossible without a trial transcript or adequate substitute and has held that the States must provide trial records to indigent inmates. *See Bounds v. Smith*, 430 U.S. 817, 822, (1977) (citing *Griffin v. Illinois*, 351 U.S. 12 (1956)). This Court has similarly concluded that a criminal defendant is entitled to "a full transcript or other equivalent picture of the trial proceedings" in order to engage in meaningful appellate review. *Marshall*, 812 A.2d at 551 (quoting *Commonwealth v. Shields*, 383 A.2d 844, 846 (Pa. 1978)). However, in order to "establish entitlement to relief based on the incompleteness of the trial record, [appellant] must first make some potentially meritorious challenge which cannot be adequately reviewed due to the deficiency in the transcript." *Id*.
>
> Appellant spends much time developing his claim in terms of federal law in order to establish his right of appeal and his right to independent appellate review of his sentence. Appellant also stresses that federal law requires a "full and accurate" record of the proceedings. This Court does not disagree with these well-settled precepts. Indeed, they are mirrored in our case law. *See Shields, supra*. Yet, it is clear that the federal case law appellant invokes is inapposite: it is directed at guaranteeing an indigent defendant with a full transcript, an argument not raised herein. Appellant goes too far when he extrapolates that a "full and accurate" record includes all sidebars, regardless of their substance. Appellant has cited to no controlling federal or state authority, in existence at the time of trial, which required the court to transcribe all sidebar conferences.

Commonwealth v. Sepulveda, 55 A.3d 1108, 1149-50 (Pa. 2012) (some internal citations omitted or altered).

The cases which Reid cited in support do not stand for the proposition which he advances. None hold that failure to transcribe sidebars is reversible error or ineffective assistance of counsel. *Bounds*, 430 U.S. 817, involved prisoners' access to law libraries to help them prepare appeals and habeas corpus petitions. *Mayer v. City of Chicago*, 404 U.S. 189 (1970), held that the state must provide transcripts free of costs to indigent misdemeanants so that they can appeal their convictions. *Entsminger v. Iowa*, 386 U.S. 748 (1967), involved a state statute that denied indigent defendants the notes of testimony of his trial for purposes of appeal. In *Simmons v. Beyer*, 44 F.3d 1160 (3d Cir. 1995), the entire transcript of voir dire was missing. *Evitts v. Lucey*, 469 U.S. 387 (1985) merely extended *Strickland* to appeals. And *Dobbs v. Zant*, 506 U.S. 357 (1993) (per curiam) dealt with a newly discovered sentencing transcript.[26]

26 In *Commonwealth v. Bricker*, one justice concurred in in the result (a new trial), stating that failure to transcribe sidebars precluded effective appellate review of claims of prosecutorial misconduct and ineffective assistance of counsel. *Bricker*, 487 A.2d at 355 (Hutchinson, J., concurring).

In this case, the transcript of jury selection 637 pages, and the trial transcript is 956 pages. Reid's claim that "significant" portions of the trial transcript are missing is grossly exaggerated.

Because this claim lacks arguable merit, the Court need not address whether counsel had a tactical or strategic reason for failing to have sidebars transcribed. The claim fails. Further, because trial counsel were not ineffective, appellate counsel was not ineffective for failing to raise trial counsel's ineffectiveness on direct appeal.

7. Claim: 12: Direct-Appeal Counsel Labored Under a Conflict of Interest (Pet. ¶¶ 394-405; Supp. Pet. ¶¶ 91-96)

[39] Reid argues in his twelfth claim that Mr. Yoder could not effectively represent him on appeal, because he had multiple conflicts of interest. Reid contends that Mr. Yoder's work in the Franklin County Public Defender's Office prevented him from challenging prior counsel's effectiveness on appeal. Reid also argues that Mr. Yoder had a conflict because he represented Carla Reid in a child-support matter in 1996. Finally, Reid argues that Mr. Yoder had a conflict of interest because he was Judge Walker's law clerk while Reid's sexual-abuse charges were pending and assigned to Judge Walker.

At the March 2013 PCRA hearing, Mr. Yoder testified about his employment with the Franklin County Public Defender's Office during Reid's trial. To the best of his memory, Mr. Yoder only worked on one aspect of Reid's case—the applicability of the Vienna Convention. N.T., 3/22/13 (PCRA Hr'g), at 40 ("I do not remember either being assigned or volunteering to do work beyond my raising of the issue as evidenced in Exhibit T, with regard to Mr. Reid's status as a citizen of another nation."). Mr. Yoder also testified that Messrs. Trambley and Kulla kept their files separate from the rest of the Public Defender's Office, and that their preparation did not involve other members of the office. *Id*. at 40-41. Trial counsel did not raise the Vienna-Convention claim at trial, and Mr. Yoder did not raise it on appeal. Current counsel raised the claim in PCRA proceedings, and the Court dismissed it without a hearing. Mr. Yoder does not recall representing Carla Reid in a child-support matter.[27] *Id*. at 41. In fact, he testified that one of the partners in the firm, Janice Hawbaker, Esq., told her that she was upset about the murders, Carla Reid being a former client. *Id*. Mr. Yoder said that he did not know that the firm represented Carla Reid while he was employed there. *Id*.

7.1. Former Member of the Public Defender's Office

A county public defender's office is treated as one law firm, and one member of the public defender's office cannot argue the ineffectiveness of another member of that office. *Commonwealth v. Smith, (Wayne II)*, 995 A.2d 1143, 1150 (Pa. 2010); *Commonwealth v. Green*, 709 A.2d 382, 384 (Pa. 1998). However, this prohibition applies only to lawyers who are currently members of the public defender's office at the time of the allegation of ineffective assistance. *See Commonwealth v. Torres*, 721 A.2d 1103 (Pa. Super. 1998) (per Eakin, J.) (holding that a current public defender could not challenge the effectiveness of a former public defender on appeal). And only an actual conflict of interest that adversely affects an attorney's performance results in a complete denial of the right to counsel. *Cuyler v. Sullivan*, 446 U.S. 335, 348-49 (1980). To show an actual conflict of interest, a PCRA petitioner must demonstrate that (1) counsel actively represented conflicting interests and (2) those interests adversely affected counsel's performance. *Spotz VI*, 18 A.3d at 267-68; *Tedford*, 960 A.2d at 54.

Reid's sub-claim lacks arguable merit. No conflict of interest existed. While Mr. Yoder was employed by the Public Defender's Office, he was not involved in pretrial preparation, trial preparation, save for one single memorandum about the applicability of the Vienna Convention. At the time of the appeal, Mr. Yoder was in private practice. On appeal, he was free to raise claims of ineffective assistance of his former associates, and he did.[28]

7.2. Former Representation of Carla Reid

Mr. Yoder's firm's representation of Carla Reid followed by his representation of Albert Reid was not a conflict of interest. This is not a close question, as it fails both portions of the conflict-of-interest test. First, Mr. Yoder did not actively represent conflicting interests. At the time of Albert Reid's appeal, Carla Reid was a former client. She was dead. Second, Albert Reid presented no evidence that Mr. Yoder's former representation of Carla Reid adversely affected Mr. Yoder's performance on appeal. Carla Reid's child-support case is not the same proceeding

27 At the PCRA hearing, Mr. Yoder did not recall ever representing Carla Reid. To impeach Mr. Yoder, Reid attached a letter to his brief. The letter is dated September 18, 1996, purports to be signed by William Kaminski, Esq., and purports to confirm his representation of Carla Reid in the child-support matter. Mr. Yoder's name appears nowhere on the letter—not even on the letterhead. The Court questions whether this document is proper impeachment evidence. As it was not presented at the PCRA hearing, shown to Mr. Yoder, or even written by him, it is not a prior inconsistent statement. *Cf.* Pa. R.E. 613. Rather, it appears to be collateral and hearsay.

28 Even if Mr. Yoder's former employment with the Public Defender's Office prevented him from challenging trial counsel's effectiveness, the proper remedy would be to consider all of his effectiveness-of-counsel claims un-waived, i.e. eliminate the necessity of layering those claims—not the restoration of direct-appeal rights. *See Smith*, 995 A.2d at 1150.

as Albert Reid's capital murder appeal for killing her. Nor are they substantially related. In the PCRA petitions and briefs, Albert Reid cites no law in support of his argument, and his allegations are conclusory and spurious. Indeed, it is logically hard to see *how* Mr. Yoder's representation of Carla Reid prejudiced Albert Reid. Conflict-of-interest rules are designed to protect the former client (Carla) by preventing the lawyer from using confidential information to benefit the current client (Albert). Finally, the Supreme Court rejected an identical claim in *Spotz VI. Spotz VI*, 18 A.3d at 267-68.

Albert Reid's allegations of a conflict of interest lacks merit. Reid's argument ignores the legal environment in which he was tried. Franklin County was, and still is, to some extent, a small legal community. Reid has put forth no other evidence than Mr. Yoder's prior representation of Carla Reid in an unrelated matter. As noted above, that evidence is insufficient as a matter of law to show a conflict of interest.

7.3. Former Law Clerk to Judge Walker

Reid abandoned the claim that Mr. Yoder had a conflict of interest due to his prior work as Judge Walker's law clerk. Mr. Yoder's clerkship ended in July 1996, N.T., 3/22/13 (PCRA Hr'g Day 2), at 41, and the sexual-abuse charges were not filed until August 1996. The Court would have denied relief on this claim had it not been abandoned.

8. Claim 16: Failure to Object to Alleged Improper Polling of the Jury (Supp. Pet. ¶¶ 97-104)

[40] In his sixteenth claim, Reid contends that the Court improperly polled the jury, because Juror No. 2 was never polled.

In this case, after the jury rendered its verdict as to guilt, the Court *sua sponte* polled the jury as to their verdicts on all three convictions (two counts of first-degree murder and burglary). N.T., 10/9/98 (Jury Trial Day 5), at 818-21. All jurors affirmatively agreed with the verdict, except Juror No. 2 was never polled.[29] The record shows that Juror No. 2, Charles Tillis, was the foreperson who signed the verdict slips and read the verdicts in open court when prompted by the clerk. Reid's lawyers did not object. So, this claim must be raised as ineffective assistance of counsel.

Pennsylvania has long recognized the right of either party to poll the jury. *Commonwealth v. Martin*, 109 A.2d 325, 327 (Pa. 1954). Both a defendant and the Commonwealth may request a poll before the verdict is recorded, which must be granted. Pa. R. Crim. P. 648(G).[30] The purpose of polling the jury is to determine, before it is too late, whether the jurors all agree on the verdict, or whether coercion caused one juror to vote with the rest. *Martin*, 109 A.3d at 328. However, failing to request a poll by itself—even in a capital case—is not ineffective assistance of counsel. *Commonwealth v. Rush*, 838 A.2d 651, 660 (Pa. 2003).

In this case, trial counsel did not request to poll the jury. There is no arguable merit to this claim, given that counsel failed to request the poll in the first place. Had no polling taken place at all, Reid would still have no claim. *Rush*, 838 A.2d at 660. And the record contains no doubts that the jury's verdict was unanimous. When prompted by the clerk, eleven of the jurors unanimously affirmed their verdicts in open court. N.T., 10/9/98 (Jury Trial Day 5), at 818. Juror No. 2 was the foreperson. In that capacity, he signed the verdict slips and announced the verdict in open court. Because trial counsel were not ineffective for raising the omission of Juror No. 2, direct-appellate counsel was not ineffective for raising trial counsel's effectiveness on appeal.

9. Claim 17: Trial Court Error in Overruling Trial Counsel's Objection to Inadmissible and Highly Prejudicial Evidence (Supp. Pet. ¶¶ 105-27)

[41] In claim 17, Reid contends that the trial court committed error in overruling trial counsel's objections to allegedly inadmissible and highly prejudicial testimony. This claim is similar to a previously-raised claim, but here Reid raises trial court error in admitting allegedly irrelevant, hearsay, and highly prejudicial evidence. Reid argues that the Court violated its own pretrial order in *limine* limiting the type of prior-acts evidence that could be admitted at trial.

This claim is meritless, because Reid cannot raise claims of trial court error in a PCRA petition. Claims of trial-court error are not cognizable under the PCRA. *Spotz VI*, 18 A.3d at 299 (finding that the PCRA court properly rejected a claim of trial court error); *Paddy*, 15 A.3d at 449 n.11 (finding that the trial court improperly considered

29 The same thing happened after the jury returned the death sentences. N.T., 10/12/98 (Jury Trial Day 6 and Penalty Phase), at 949-52. Reid has not challenged the polling of the jury at the penalty phase

30 At the time of Reid's trial, Rule 648(G) was numbered Rule 1120(F).

petitioner's claims of ineffective assistance of counsel as trial-court error claims.). Rather, the claim must be raised as ineffective assistance of counsel and it was, above. The Court has already addressed this claim in the context of ineffective assistance of counsel and sees no need to repeat that discussion here.

10. Claim 18: Prosecutorial Misconduct in Introducing Evidence of Reid's Character (Supp. Pet. ¶¶ 128-32)

[42] In his eighteenth main claim, Reid argues that the District Attorney committed prosecutorial misconduct.[31] He argues that the prosecutor violated norms of due process and "evidentiary procedures known by [sic] any first-year law student." Reid argues that the prosecutor committed misconduct by (1) using prior bad acts impermissibly as propensity evidence; (2) arguing this propensity evidence in closing; and (3) purposefully violating pretrial rulings limiting the presentation of evidence.

Like claims of trial court error, Reid cannot raise independent claims of prosecutorial misconduct in a PCRA petition:

> The phrase "prosecutorial misconduct" has been so abused as to lose any particular meaning. The claim either sounds in a specific constitutional provision that the prosecutor allegedly violated or, more frequently, like most trial issues, it implicates the narrow review available under Fourteenth Amendment due process. *See Greer v. Miller*, 483 U.S. 756, 765 (1987) ("To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial.") (internal quotation marks omitted); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) ("When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them."). However, "[t]he Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty." *Mabry v. Johnson*, 467 U.S. 504, 511 (1984). The touchstone is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 219 (1982). If the defendant thinks the prosecutor has done something objectionable, he may object, the trial court rules, and the ruling—not the underlying conduct—is what is reviewed on appeal. **Where, as here, no objection was raised, there is no claim of "prosecutorial misconduct" as such available.** There is, instead, a claim of ineffectiveness for failing to object, so as to permit the trial court to rule. *Cf. id*.

Tedford, 960 A.2d at 28-29 (emphasis added).

As a stand-alone claim, this issue is both waived and previously litigated. No independent claim of "prosecutorial misconduct" exists when trial counsel failed to object. *Tedford*, 960 A.2d at 29; 42 Pa. C.S. § 9544(b) (waived claims barred). As an independent issue, the claim is meritless. As a derivative claim of ineffective assistance of counsel, the claims fail, as detailed above. *Cf. Tedford,* 960 A.2d at 29-35 (addressing claims of ineffective assistance of counsel for failure to object to prosecutorial misconduct).

11. Claim 21: Failure to Investigate Alleged Juror Misconduct (Reform 2d Supp. Pet. ¶¶ 1-8)

[43] The final of Reid's 21 main PCRA claims concerns alleged misconduct committed by the jury. Reid has obtained unsworn declarations from several jurors. From those declarations, Reid argues that the jurors committed misconduct. He alleges that they considered his silence (his refusal to testify at trial) against him. Reid also alleges that the jurors improperly considered extra-record evidence. One juror apparently based his verdict on Reid's purported left-handedness. Another was scared that Reid would put a voodoo curse on them. Reid contends that his lawyers were ineffective for failing to interview jurors post-trial, and that direct-appeal counsel was ineffective for failing to raise trial counsel's ineffectiveness on appeal.

To support his claim, Reid attached two declarations to the Reformatted Second Supplemental Petition. Those declarations—taken more than a decade after the trial in this case—are his source that jurors considered "extra-record evidence" and were subject to "outside influences."

Since Reid first advanced these claims in 2010, the Commonwealth has vigorously protested Reid's use of juror declarations. It argues that doing so is highly unethical and improper under Pennsylvania law. The Commonwealth further argues that, under the rules of evidence, jurors are not competent witnesses to impeach the verdict and the declarations should be given no weight.

31 The July 17, 2013 Order characterizes this claim as ineffective assistance of counsel for failure to object to prosecutorial misconduct. Actually, Reid raises this claim as an independent, stand-alone ground—not a derivative ineffectiveness claim. *See* Supp. Pet. ¶132.

Pennsylvania Rule of Evidence 606(b) provides that:

> **(1) Prohibited Testimony or Other Evidence.** During an inquiry into the validity of a verdict, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
>
> **(2) Exceptions.** A juror may testify about whether:
>
> (A) prejudicial information not of record and beyond common knowledge and experience was improperly brought to the jury's attention; or
>
> (B) an outside influence was improperly brought to bear on any juror.

Pa. R.E. 606(b).

"Under no circumstances may jurors testify regarding their subjective reasoning processes." *Commonwealth v. Steele*, 961 A.2d 786, 808 (Pa. 2008). The use of ex parte juror affidavits compiled by post-conviction counsel in response to undisclosed questions is "highly unethical and improper."[32] *Tedford*, 960 A.2d at 39. For over 200 years, the Pennsylvania Supreme Court has condemned the practice of interviewing jurors *ex parte* post-trial and using their statements to impeach the verdict. *Commonwealth* ex rel. *Darcy v. Claudy*, 79 A.2d 785, 786 (Pa. 1951); F*riedman v. Ralph Bros*., 171 A. 900, 901 (Pa. 1934) ("Jurors cannot impeach their own verdict."); *Cluggage's Lessee v. Swan*, 4 Binn. 150, 158 (Pa. 1811) (opinion of Yeates, J.) ("I frankly confess, that I feel the utmost repugnance to such testimony . . . ."). "Certainly such post-trial statements by jurors are not to be given any weight on even an application for a new trial, much less a petition for a writ of habeas corpus." *Darcy*, 79 A.2d at 786.

Rule 606(b) allows limited juror testimony on whether the jury was subject to outside influences or whether it considered extraneous information. "Under the exception to the no impeachment rule, a juror 'may testify only as to the existence of the outside influence, but not as to the effect this outside influence may have had on deliberations.'" *Commonwealth v. Messersmith*, 860 A.2d 1078, 1085 (Pa. Super. 2004) (quoting *Carter* ex rel. *Carter v. U.S. Steel Corp*., 604 A.2d 1010, 1013 (Pa. 1992) (plurality opinion)). "Under no circumstances may jurors testify about their subjective reasoning processes." *Id*. So, for example, jurors may testify that they viewed a television broadcast about a trial. *Carter* ex rel. *Carter*, 604 A.2d at 1013 (plurality opinion). But they may not testify if, or how, the news coverage affected their deliberations. *Id*. at 1013-14.

This claim lacks arguable merit, and the declarations advanced by Reid are exactly the sort of testimony barred by Rule 606. Reid's attempts to place the testimony within the exception at Rule 606(b) is tendentious and unavailing. First, the jurors' statements about the effect of Reid's failure to testify are inadmissible. Rule 606(b) does not allow a juror to testify about Reid's silence on the jury's deliberations.[33] The same goes for the jurors' statements about the alleged voodoo curse. Jurors would be able to testify whether Reid *actually* cursed them, but they are incompetent to testify how any alleged incantation affected their verdicts.

Second, the jurors' speculation about Reid's left-handedness[34] is also outside of Rule 606(b)'s exception. Rule 606(b)(2)(A) allows testimony if "prejudicial information not of record and *beyond common knowledge and experience*" was brought to the jury's attention." (emphasis added). "The qualification of 'common knowledge and experience' [recognizes] that all jurors bring with them some common facts of life." Pa. R.E. 606 *Comment*. Reid baldly asserts that the jurors acted as criminologists. In contrast, they merely evaluated evidence at trial and applied their common knowledge and experience. At any rate, the Court cannot consider any evidence of the effect of Reid's handedness on the jury's deliberations.

Third, Reid also cannot meet *Pierce's* reasonable-basis prong. Mr. Kulla testified that, after trial, he sent letters to every single juror. None responded. N.T., 3/22/13 (PCRA Hrg' Day 2), at 77-78. Mr. Kulla could not do ethically do anything more to investigate potential juror misconduct.

The cases cited by Reid in the Reformatted Second Supplemental Petition are irrelevant. *Ross v. Oklahoma*, 487 U.S. 81 (1988), involved the use of a peremptory challenge to remove a juror who should have been struck for cause on the grounds that he would have automatically voted for the death penalty. *Irving v. Dowd*, 366 U.S. 717 (1961), concerned the lack of a venue-change in a notorious serial-murder prosecution where 8 of the 12 chosen

32 The fact that the declarations here are unsworn does not matter.

33 The Court notes that it instructed the jury on Reid's silence, N.T., 10/9/98 (Jury Trial Day 5), at 801, and the jury is presumed to follow instructions. *E.g., Chmiel*, 30 A.3d at 1147. Additionally, federal courts have held that courts cannot consider jurors' testimony that they held the defendant's failure to testify against him under the similar federal version of Rule 606(b). *United States v. Stewart*, 433 F.3d 273, 307 (2d Cir. 2006); *United States v. Rutherford*, 371 F.3d 634, 639-40 (9th Cir. 2004).

34 Reid's evidence in support is an unsworn declaration of an investigator who interviewed a juror, i.e. hearsay within hearsay.

jurors said at voir dire that they thought the defendant was guilty. *Turner v. Murray*, 476 U.S. 28 (1986) and Ristaino v. Ross, 424 U.S. 589 (1976) involved the issue of a jury's potential for racial bias in cases with African-American defendants and white victims. And *Commonwealth v. Ingber*, 531 A.2d 1102 (Pa. 1987) held that a trial court committed reversible error in refusing to excuse for cause a prospective juror, a relative of a police officer, who said she would be more likely to believe law-enforcement witnesses.

Reid's juror declarations are not allowed by the Rules of Evidence. The Court has concerns about the manner in which the declarations were obtained. In his petition, Reid accuses the jurors of violating their oaths and lying to the Court during voir dire. Reform. 2d Supp. Pet. ¶¶ 4-9. In other words, Reid accuses the jurors of committing crimes. The Court cannot tell from the declarations, obtained ex parte, whether Reid's investigators informed the jurors of their right to refuse to speak to them. For these exact reasons, the Supreme Court's has historically and repeatedly condemned the post-trial interviewing of jurors as unethical and improper.

For the preceding reason, Reid has also failed to show that trial counsel unreasonably failed to interview the jurors post-trial. The "no impeachment" rule would have made such interviews fruitless, frivolous, and unethical. Because trial counsel was not ineffective for failing to pursue this meritless claim, appellate counsel was not ineffective for failing to raise it on direct appeal.

CONCLUSION

The Court has addressed seriatim the issues dismissed by the July order. In all of these claims and sub-claims, Reid has failed to carry his burden of proving that his lawyers rendered ineffective assistance of counsel. He has either failed to show that the underlying claims have arguable merit, that his attorneys' actions were unreasonable, or both. The Court has made specific findings as the claims apply to trial counsel and direct-appellate counsel.

The next stage in this case is to address the un-dismissed claims. That will be done after the Parties are finished gathering evidence to support and rebut those remaining claims.

An Order follows.

ORDER OF COURT

AND NOW THIS 7th DAY OF January, 2014, the Clerk of Courts is ordered to file and serve the attached Opinion, which supports the Court's July 17, 2013 Order. For the record, the Court notes that the Parties are currently deposing fact witnesses relative to the un-dismissed claims of Defendant's PCRA Petition and Supplemental Petitions.

Pursuant Pa. R. Crim. P. 908(E), the Clerk of Courts shall immediately serve a copy of this Opinion and Order of Court upon the Defendant via certified mail, return receipt requested, and record in the docket the certified mail receipt number, and the date on which the return receipt is returned. The Clerk shall otherwise comply with the requirements of Pa. R. Crim. P. 114.