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Designated by Order of the Court for the publication of court and other legal notices, the Franklin County Legal Journal (USPS 378-950), 100 Lincoln Way East, Chambersburg, Franklin County, PA 17201–2291, contains reports of cases decided by the various divisions of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District of Pennsylvania and selected cases from other counties.

Commonwealth of Pennsylvania
v. Ismael Figueroa-Serrano, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Fulton County Branch, Criminal Law Case No. 3-2019

HOLDING: Defendant's *Petition for Post-Conviction Collateral Relief,* filed May 5, 2021, is **DISMISSED**.

HEADNOTES

Criminal Law; Burden of Proof; Date of Offense

1. It is the duty of the prosecution to fix the date when an alleged offense occurred with reasonable certainty unless the date is unknown or the offense is part of a continuing course of conduct. *Commonwealth v. Devlin,* 460 Pa. 508, 333 A.2d 888 (Pa. 1975); *Commonwealth v. Jette*, 818 A.2d 533, 535 (Pa. Super. 2003); Pa. R. Crim. P. 560(b).

2. The purpose of advising a defendant of the date when an offense is alleged to have been committed is to provide him with sufficient notice to meet the charges and prepare a defense. *Commonwealth v. Gibbons*, 5687 Pa. 24, 784 A.2d 776 (Pa. 2001); *see also Commonwealth v. Alston*, 539 Pa. 202, 651 A.2d 1092 (Pa. 1994).

3.The Commonwealth is afforded a reasonable measure of flexibility when faced with the special difficulties involved in ascertaining the date of an assault upon a young child. *Commonwealth v. Groff*, 378 Pa. Super. 353, 362, 548 A.2d 1237, 1240 (1988); *see also Commonwealth v. Jette*, 818 A.2d 533, 535 (Pa. Super. 2003).

Criminal Law; Post-Conviction Proceedings; Ineffective Assistance of Counsel

4. In order to prevail on a claim for ineffective assistance of counsel, a PCRA petitioner to prove: (1) the underlying legal claim was of arguable merit; (2) counsel had no reasonable strategic basis for his action or inaction; and (3) the petitioner was prejudiced—that is, but for counsel's deficient stewardship, there is a reasonable likelihood the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973 (Pa. 1987).

5.In order to meet the prejudice prong of the *Strickland/Pierce* test, a PCRA petitioner bears the burden of showing that, after the PCRA court has considered the totality of the evidence before the jury, the decision reached would reasonably likely have been different absent the errors. *Strickland v. Washington*, 466 U.S. 668, 695-96, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984).

6.The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. . . . Evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination. *Strickland v. Washington*, 466 U.S. 668, 695-96, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984).

Appearances:
Travis Kendall, Esquire *for Commonwealth*
Mark Bayley, Esquire *for Defendant*

OPINION

Before Sponseller, J.

The instant PCRA concerns the question of whether the Commonwealth bears the burden of proving the exact date of an offense as charged in the information and, if so, whether Petitioner's counsel was ineffective for failing to suggest a jury instruction to that effect. For the reasons set forth below, we find that the Commonwealth is indeed required to fix the date of the offense with reasonable certainty, and that Petitioner's counsel erred in failing to suggest a jury instruction to that effect in response to the jury's question. However, because Petitioner has not shown that he suffered prejudice as a result of the error, his counsel was not ineffective and the Petition must be dismissed.

I. FACTS AND PROCEDURAL HISTORY

On January 2, 2019, Petitioner, who was on parole, was visited by his parole agent following a tip he received that Petitioner was in possession of a firearm. Petitioner is a felon and therefore was prohibited from possessing firearms. Upon questioning, Petitioner admitted to his parole officer that he was in possession of a firearm.[1] With the aid of Pennsylvania State Police, Petitioner's parole officer searched the residence and discovered a Marlin .22 caliber rifle located in the closet of Petitioner's infant daughter's room. Petitioner was arrested.

That same day, Trooper Jeffrey Beal filed a Criminal Complaint charging Defendant with a single count of unlawfully possessing a firearm, a second degree felony.[2] In the box provided for "Offense Date," Trooper Beal wrote, "01/02/19 / APPROX. 1015 HRS."[3] On the following page in the box provided for "Acts of the accused associated with this Offense," Trooper Beal began with, "On the above time and date. . ." and then proceeded to describe the offense.[4] In the Affidavit of Probable Cause, Trooper Beal described the events of January 2, 2019, and makes no reference to any other

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1 It is disputed whether Petitioner admitted to possessing the firearm in question or whether he admitted to possessing a pellet gun located in the same closet. Nevertheless, it was Petitioner's admission that prompted the parole agent's search of his premises.

2 18 §6105(a)(1).

3 Criminal Complaint, filed January 2, 2019, at 1 (unpaginated.)

4 *Id.* at 2 (unpaginated.)

date or time that Petitioner may have possessed a firearm.[5] In Petitioner's criminal docket where his charges are listed, in the box provided for "Offense Dt.," the offense date is listed as "01/02/2019."[6] On the Bill of Information, filed on January 31, 2019, the Attorney for the Commonwealth wrote, "The Fulton County District Attorney by this information charges: that on (or about) January 2, 2019, in said county. . ." and then provides the applicable offense.

The case was brought to a jury trial on December 18, 2019.[7] Petitioner was represented at trial by counsel. The question of constructive possession arose at trial, as the rifle was located in the infant's bedroom, not in a location that exclusively controlled by Petitioner. Petitioner's defense, summarized, was that he did not know the rifle was in the closet and that it had been deliberately put there by his girlfriend to entrap him. To refute this theory and to prove constructive possession, the Commonwealth put on evidence to show that, at several times in the past, Petitioner had possessed the gun in question. Three witnesses testified that Petitioner had been in possession of the rifle in late 2017,[8] summer of 2018,[9] late 2018,[10] and during buck season of 2018,[11] which we note occurs in late November and December.

During deliberations, the jury sent back a question, asking, "Do the current charges apply to other times he may have possessed the firearm?" After having discussed the matter at sidebar, the Commonwealth suggested that the Court send back an instruction as to the specific offense, but it did not contain any instruction regarding the relevant time period. Petitioner's trial counsel agreed with the Commonwealth's suggestion, and the Court sent back the instruction on the specific offense only. Petitioner was thereafter convicted. Petitioner timely filed a post-sentence motion on January 8, 2020, which was denied. Petitioner then appealed his conviction to the Superior Court, which affirmed Petitioner's conviction on February 4, 2021.

Petitioner timely filed the instant action, pursuant to the Post Conviction Relief Act, on May 5, 2021. The Commonwealth responded on May 19, 2021. A hearing occurred on the issue on August 24, 2021, at

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5 *Id.* at 4 (unpaginated.)

6 *Id.* at 7 (unpaginated.)

7 This trial was fully transcribed. *See Transcript of Proceedings of Jury Trial,* December 18, 2019 (hereafter "T.P.").

8 Testimony of Levi Starliper, *T.P*. p. 62.

9 Testimony of Laura Mae Keefer, *T.P.* at 44-45.

10 Testimony of Jessica Moore, *T.P*. at 53-55.

11 Testimony of Laura Mae Keefer, *T.P.* at 45-46.

which time this Court Ordered briefs to be filed. The Commonwealth timely filed their brief on October 1, 2021; Petitioner filed his brief on October 12, 2021. This matter is now ripe for decision.

II. ISSUES

Petitioner argues that his counsel was ineffective for failing to suggest that this Court use Pennsylvania Suggested Standard Criminal Jury Instruction 3.19 (hereafter "Instruction 3.19") in responding to the jury's question. Instruction 3.19 would have been read as follows:[12]

> The information alleges that the crime was committed on January 2, 2019. You are not bound by the date alleged in the information. It is not an essential element of the crime charged. You may find the defendant guilty if you are satisfied beyond a reasonable doubt that he committed the crime charged [in and around] [on or about] the date charged in the information even though you are not satisfied that he committed it on the particular date alleged in the information.
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> Pa. SSJI (Crim) 3.19.

Petitioner argues that he was prejudiced by his attorney's failure to suggest the jury instruction and claims that, had the instruction been given, the outcome of the trial likely would have been different. The Commonwealth argues that the jury instruction is "legally erroneous" because they were not required to prove the date as an element of the offense, therefore Petitioner's counsel cannot be ineffective for failing to request the instruction.

III. ANALYSIS

A. The Commonwealth's Burden to Prove the Date of the Offense.

The Pennsylvania Suggested Standard Criminal Jury Instructions are a tool created by the Pennsylvania Bar Institute and are "intended to accurately reflect the law of Pennsylvania and provide meaningful guidance to courts in the critical task of instructing jurors in the performance of their constitutional duty."[13] They are only suggestions, and "they carry no official

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12 Like all suggested standard jury instructions, Instruction 3.19 includes certain words or phrases that may be chosen by the trial judge where applicable. For the sake of clarity, we have included the unquestionably applicable words ('he' rather than 'she' and 'information' rather than 'indictment') as well as the applicable date.

13 PA-JICRIM INTRO 3D, Pa. SSJI (Crim), Intro 3d.

imprimatur of the Supreme Court of Pennsylvania.[14] Nevertheless, they are intended to be accurate, and our research indicates that Instruction 3.19 is, indeed, an accurate statement of the law.

Pa. R. Crim. P. 560(b) requires the Commonwealth to provide "the date when the offense is alleged to have been committed if the precise date is known. . . . provided that if the precise date is not known or if the offense is a continuing one, an allegation that it was committed on or about any date within the period fixed by the statute of limitations shall be sufficient." Furthermore, it is the duty of the prosecution to "fix the date when an alleged offense occurred with reasonable certainty. . . ." *Commonwealth v. Jette*, 818 A.2d 533, 535 (Pa. Super. 2003) (citation omitted). The purpose of so advising a defendant of the date when an offense is alleged to have been committed is to provide him with sufficient notice to meet the charges and prepare a defense. *Commonwealth v. Gibbons*, 5687 Pa. 24, 784 A.2d 776 (Pa. 2001); *see also Commonwealth v. Alston*, 539 Pa. 202, 651 A.2d 1092 (Pa. 1994).

In the instant case, the Commonwealth was, indeed, aware of the precise date of the offense. Therefore, in accordance with the above law, Trooper Beal repeatedly included the date of January 2, 2019, as the date of the offense. At trial, the Commonwealth sought to prove only that Petitioner had constructive possession over the firearm on January 2, 2019, and Petitioner's trial counsel focused his defense entirely around the events of that date. The Commonwealth did not charge Petitioner with having possessed the firearm any of the four previous times, providing such evidence only to prove constructive possession. In the Commonwealth's theory of the case, evidence that he had previously possessed the rifle supported their argument that Petitioner constructively possessed the rifle on January 2, 2019.

Both the Commonwealth and Petitioner are correct that the Commonwealth may be granted a certain amount of leeway regarding the date of the offense. However, they both appear to rely on old law that has since been superseded by more stringent standards. The Commonwealth only enjoys such leeway as allowed by Rule 560(b) – they need to provide an date fixed with reasonable certainty unless the date is unknown or the offense is part of a continuing course of conduct.

This change was effectuated as a result of the Pennsylvania Supreme Court's decision in *Commonwealth v. Devlin*, 460 Pa. 508, 333 A.2d 888 (Pa. 1975).[15] *Devlin*, in turn, interpreted *Commonwealth v. Levy*, 146 Pa.Super.

14 *Id.*

15 We note that, while *Devlin* has been questioned by the Third Circuit Court of Appeals, it remains law in Pennsylvania. Furthermore, we note that the *Devlin* standard is actually *more* lenient to the Commonwealth than federal standards, which the Third Circuit notes "focus *exclusively* on whether a variance [between testimony and the date charged

564, 23 A.2d 97 (Pa. Super. 1941), finding that the Pennsylvania Superior Court had properly stated the applicable law.

> 'It may be conceded that in the prosecution of crimes of the kind here involved the Commonwealth is not required to prove their commission on the date laid in the indictment, but, failing in that, we think it has the burden, in order to sustain a conviction, of proving their commission upon some other date, fixed with reasonable certainty and being within the prescribed statutory period . . . .
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> In other words, where a particular date or day of the week is not of the essence of the offense, the date laid in the indictment is not controlling, but some other reasonably definite date must be established with sufficient particularity to advise the jury and the defendant of the time the Commonwealth alleges the offense was actually committed, and to enable the defendant to know what dates and period of time he must cover if his defense is an alibi....'
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> 'We do not understand the rule of the cases to be that the Commonwealth need not prove any date at all, but can sustain a conviction merely by proving that the offense must have been committed upon some unshown date within the statutory period. Our attention has not been called to any case so holding.'

Devlin, 460 Pa. 508, 512-513, citing *Levy*, 146 Pa.Super. 564, 569-570.

In finding that *Levy* required the date of the commission of the offense be 'fixed with reasonable certainty,' the *Devlin* Court subsequently found that the Commonwealth's showing that the crime in question had occurred "on any single day within a fourteen-month period" did not meet the standard. In reversing the conviction, the Court wrote:

> Therefore, we cannot enunciate the exact degree of specificity in the proof of the date of a crime which will be required or the amount of latitude which will be acceptable. Certainly the Commonwealth need not always prove a single specific date of the crime. Any leeway permissible would vary with the nature of the crime and the age and condition of the victim, balanced against the rights of the accused. Here, the fourteen-month span of time is such an

in the criminal information] violates the defendant's due process rights." *Real v. Shannon*, 600 F.3d 302 (3rd Cir. 2010) (emphasis in original), *citing Williams v. Taylor*, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

egregious encroachment upon the Petitioner's ability to defend himself that we must reverse.

Devlin[,] 460 Pa. 508 at 516 (citations omitted.)

The Commonwealth cites to *Commonwealth v. Weimer*, 167 A.3d 78 (Pa. Super 2017), which held that that the trial court did not need to charge the jury that it was required to determine the exact date that the offenses were committed in a case regarding the sexual abuse of three minor children. However, *Weimer* is just one of many post-*Devlin* cases in which the Commonwealth was allowed "a reasonable measure of flexibility when faced with the special difficulties involved in ascertaining the date of an assault upon a young child." *Commonwealth v. Groff*, 378 Pa. Super. 353, 362; 548 A.2d 1237, 1240 (1988); *see also Jette, supra*. In such cases, this leeway has been granted pursuant only to the *Devlin* balancing test regarding the nature of the crime and the age of the victim. These exceptions are not applicable to the circumstances of the instant case.

This is not a case involving the abuse of a child, nor is it a case in which the Commonwealth alleges the offense was part of continuing conduct, nor is it a case in which the date of the offense was unknown. The Commonwealth was able to provide a date certain for the offense in question and they did so. Had the Commonwealth presented the evidence of Petitioner's prior possession of the firearm at trial for the express purpose of using those instances to prove the instant charge, such conduct would have been a clear violation of Petitioner's due process rights, as he was given no notice to defend against these previous instances. Petitioner had been notified only of charges stemming from acts performed on January 2, 2019, and could not have raised a defense. Indeed, such conduct would amount to a bait and switch, putting Petitioner on notice of one date only to try him for another.

The Commonwealth, therefore, is simply incorrect in stating that the instruction is "legally erroneous" and that it does not matter whether Petitioner was convicted for possession of the rifle "on some occasion prior to January 2, 2019" or if they convicted him based on the Commonwealth's theory of the case.[16] The law clearly requires that the date be fixed "with reasonable certainty" to protect Petitioner's due process rights, giving rise to the "on or about" or "in and around" language found in Instruction 3.19.

With the applicable law established, we find that Instruction 3.19 would have been the appropriate response to the jury's question. We admit that we, too, had been unaware of Instruction 3.19. Indeed, until this case arose, this Court had never before seen it utilized. Although standard jury

16 *Commonwealth's Brief* at 4.

instructions are merely suggestions, they also carry substantial persuasive value given the careful nature of their curation and their generally-accepted statewide use. Had Petitioner's trial counsel suggested we use Instruction 3.19, we would have done so. Therefore, we must move on to the substance of Petitioner's ineffectiveness claim against his trial counsel.

B. Ineffectiveness of Counsel in Failing to Suggest an Applicable Jury Instruction.

The test for ineffective assistance of counsel was first laid out in the landmark United States Supreme Court decision in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and applied in Pennsylvania in *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973 (Pa. 1987). The *Strickland/Pierce* test requires a PCRA petitioner to prove: (1) the underlying legal claim was of arguable merit; (2) counsel had no reasonable strategic basis for his action or inaction; and (3) the petitioner was prejudiced—that is, but for counsel's deficient stewardship, there is a reasonable likelihood the outcome of the proceedings would have been different. *Pierce*, 515 Pa. at 158–59, 527 A.2d at 975.

It is on this final prong that this decision turns. Following the above analysis, it is indisputable that the underlying legal claim was of arguable merit – giving Instruction 3.19 would have been appropriate under the circumstances.[17] Furthermore, at the PCRA hearing held on August 24, 2021, Petitioner's trial counsel admitted that he had no reasonable basis for failing to request Instruction 3.19 and simply did not know it was available. Petitioner easily meets these two prongs. But the final hurdle is the highest, and stumbling at any of the three is fatal to Petitioner's ineffectiveness claim. *Commonwealth v. Williams*, 594 Pa. 366, 378, 936 A.2d 12, 19-20 (Pa. 2007) (citation omitted.)

The Court in *Strickland* spent considerable time devising this third prong, which the Pennsylvania Supreme Court summarized in *Pierce* as follows:

> *Strickland's* major thrust is directed at establishing the rule that ineffective assistance mandates relief only where it has been established by the defendant that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Often referred to as the "judgmental

17 In a footnote, Petitioner claims that there is an argument that Petitioner's trial counsel was ineffective for failing to request Instruction 3.19 as part of our initial instructions, "as the reasons for such an instruction were cognizable at the close of the Commonwealth's case." *Petitioner's Brief* at n. 26. Petitioner did not otherwise raise this argument within his brief. As we have found that requesting Instruction 3.19 would have been an appropriate response to the jury's question, we need not reach a decision on whether Instruction 3.19 should have been given with the other instructions.

> approach," the commanding intent of *Strickland* is to burden the defendant with the task of proving actual prejudice.
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> *Pierce* at 157-158.

Petitioner, therefore, bears the burden of proving actual prejudice, showing that there is a *reasonable probability* that the result of the proceeding would have been different. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Strickland*, 466 U.S. 668, 693, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674 (1984) (citation omitted.)

The final paragraph on this issue in *Strickland* serves as a direct instruction to the PCRA Court on how we are required to view the finder of fact:

> In making this determination, a court hearing an ineffectiveness claim must consider the **totality of the evidence** before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would **reasonably likely have been different** absent the errors.

Strickland, 466 U.S. 668, 695-96, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984).

The standard is clear – it is Petitioner's burden to prove that, after we consider the totality of the evidence before the jury, that the decision reached would reasonably likely have been different absent the errors. In doing so, it is clear to this Court that the evidence against Petitioner is overwhelming.

The Commonwealth's theory of the case is fairly straightforward. The mother of Petitioner's girlfriend became upset with Petitioner and, knowing Petitioner illegally had a firearm in his possession, used that information to get him out of the house.[18] She tipped off his parole officer, who made an unannounced visit.[19] When confronted, Petitioner admitted possession of the gun in his infant daughter's closet.[20] As further proof that the firearm was possessed by Petitioner and not anyone else in the house, the Commonwealth presented three witnesses who all testified that, at some point in the past, they had seen Petitioner with the firearm.[21] This included Petitioner's possession of the firearm for deer hunting – a practice one typically performs with one's *own* gun. This also included testimony that Petitioner, who is a tattoo artist, had received the firearm in exchange for a tattoo.[22]

Petitioner's trial counsel tried valiantly on Petitioner's behalf to refute this evidence, claiming that Petitioner had been the hapless victim of a conspiracy and that there was a misunderstanding surrounding which firearm he admitted to possessing. The jury nevertheless believed the testimony of Petitioner's mother and girlfriend, despite trial counsel's attacks on their credibility. Taken together, the evidence was sufficient to show that, beyond a reasonable doubt, Petitioner was guilty of illegally possessing a firearm on January 2, 2019.

The Court in *Strickland* is clear about how we should view the jury's decision on the evidence:

> In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. **The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards**

18 Testimony of Laura Mae Keefer, *T.P*. at 46-47.

19 Testimony of Michael Ruggiero, *T.P*. at 23-25.

20 Testimony of Michael Ruggiero, *T.P.* at 25-26.

21 *See* n. 8-11, *supra*.

22 Testimony of Levi Starliper, *T.P.* at 62.

> **that govern the decision.** It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, **evidence about the actual process of decision, if not part of the record of the proceeding under review,** and evidence about, for example, a particular judge's sentencing practices, **should not be considered in the prejudice determination.**

Strickland v. Washington, 466 U.S. 668, 695-96, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984).

We are therefore to assume that the jury, in finding Petitioner guilty, properly followed the law, making a reasonable, conscientious, and impartial decision. We are not to consider evidence about the process of their decision in the prejudice determination unless it is part of the record. Therefore, we assume that the jury reasonably and conscientiously made their decision based on the evidence they heard. This case is of the kind referred to in *Strickland* as having "overwhelming record support," less likely to be affected by errors than a case weakly supported by the record.

In attempting to show prejudice, Petitioner claims only that "the jury's question itself provides adequate proof of a reasonable likelihood that a different result could have occurred had the proper instruction on timing been provided. It is difficult to imagine why the jury would have submitted its question if, at the time it did so, there was unanimous agreement that the evidence provided in relation to events on January 2, 2019 supported all elements of the charge beyond a reasonable doubt."[23]

This argument requires us to speculate about what the jury may have been thinking during its deliberation. We can find no other circumstances in which it would be appropriate for the trial judge to speculate about what a jury may have been thinking, and Petitioner provides no authority to suggest that we should do so here. Furthermore, the only suggestion in the record about what was in the jury's mind was the mere fact that they asked a question. Why they asked the question, how deliberations had proceeded up to that point, and how the answer to the question affected their decision is simply not included in the record. Therefore, we find that Strickland would prohibit us from speculating about the jury's decision-making process.

Furthermore, Pennsylvania law is completely silent on the matter of

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23 *Petitoner's Brief* at 8-9 (unpaginated.)

responding to jury questions, and the process this Court utilized in responding to this jury question does not appear to be codified in Pennsylvania and may simply be standard procedure within our judicial district. Neither the Pennsylvania Rules of Civil Procedure nor the Pennsylvania Rules of Criminal Procedure discuss the process of jury questions, and an exhaustive search of Pennsylvania law revealed no authority on the topic. However, several other states have jury instructions related to the procedure for sending back questions, and still others have considerable case law surrounding how these questions should be answered.

For example, Tennessee has made available a jury instruction stating: "If a question arises during deliberations and you need further instructions, please print your question on a sheet of paper, knock on the door of the jury room, and give the question to my court officer. I will read your question and I may call you back into the courtroom to try to help you. Please understand that I may only answer questions about the law and I cannot answer questions about the evidence." 8 Tenn. Prac. Pattern Jury Instr. T.P.I.-Civil 15.19 (2021 ed.). This trial Court's practice is akin to that of Tennessee, reading the question aloud on the record and calling the jury back if necessary. It is also our practice to inform the jury that some questions cannot be answered and we did so in this case.[24] We find, therefore, that there was nothing improper regarding our handling of the question itself.

The State of Illinois has had cause to develop considerable case law on the issue of jury questions, and we found these authorities useful in reaching our decision. The Supreme Court of Illinois summarized their standard as follows:

> In a civil case, it is within the sound discretion of the trial court to allow or refuse a jury's request for clarification of instructions. Having correctly instructed the jury, it is not error for the trial judge to leave standing the original instructions. However, the trial court's discretion gives way to a duty to respond where the original instructions are incomplete and the jurors are clearly confused.

Kingston v. Turner, 115 Ill.2d 445, 463, 505 N.E.2d 320, 328 (Ill. 1987).

In analyzing the jury confusion prong, the Illinois Supreme Court went on to find that "if the asking of a question alone were enough to show such confusion on the part of a jury, then trial courts would have no discretion but would be obligated to answer all relevant questions posed

24 *See T.P.* at 91-92.

by a jury during its deliberations." *Id*.

Pennsylvania does not appear to have *any* standards regarding juror questions and, unlike in Illinois, there is no authority suggesting that Pennsylvania juries are entitled to have certain questions answered.[25] Furthermore, even under the exacting standards set forth by Illinois courts, Petitioner could not meet his burden, as he has presented no evidence to suggest that the jury was confused beyond the mere fact that they asked a question.

Assuming, *arguendo*, that we *should* speculate about why the jury asked such a question, we disagree with Petitioner that it is "difficult to imagine" a scenario in which the jury would ask such a question without having reached unanimous agreement. We can imagine several. For example, the jury may not have even reached the ultimate question before realizing that one or more of the jurors were unsure about the weight they should give to the evidence of prior possession. The jury may have tentatively reached a verdict, but wished to get clarification on an issue that had been raised among them before officially making their decision. The jury may have been genuinely confused and, upon receiving no answer, reasonably chose to ignore the evidence of prior possession and find Petitioner guilty based solely on the evidence related to January 2, 2019. It is not a foregone conclusion, by any legal or practical standard, that the mere fact that a jury asked a question should undermine their ultimate verdict.

We emphasize that, had the jury heard any actual argument by the Commonwealth that they should find Petitioner guilty based on the prior evidence, our decision would be different. As discussed above, such an argument would be tantamount to a "bait and switch" and would be a violation of Petitioner's due process rights. However, in the instant case, the jury was never told – not by the Court via an erroneous instruction, nor by the Commonwealth during its case in chief, nor by Petitioner's counsel in response to the submitted evidence – that they could find Petitioner guilty based solely on prior acts of possession. To the contrary, the thrust of evidence presented by both the Commonwealth and by Petitioner's counsel was directed toward the events of January 2, 2019, and a reasonable and conscientious jury would decide the facts only as they were presented.

Lastly, we reiterate that the *Strickland* standard puts the onus on Petitioner to prove that that the decision reached would "reasonably likely have been different" absent the errors. We agree that there is a possibility that the result may have been different had Instruction 3.19 been provided, but as discussed above, the Court in *Strickland* eschewed this lower standard.

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25 Illinois does carry such a presumption. *See People v. Childs*, 159 Ill.2d 217, 228, 201 Ill.Dec. 102, 636 N.E.2d 217, 228, 201 Ill.Dec. 102, 636 N.E.2d 534 (1994).

Virtually every act or omission of counsel would meet such a test, which is why the Court in *Strickland* chose the more stringent approach and placed the burden on Petitioner to show a reasonable likelihood. A showing that the error could have conceivably influenced the outcome is simply not sufficient to undermine the reliability of the result of the proceeding. As such, Petitioner's ineffectiveness claim must be rejected.

IV. CONCLUSION

In consideration of the foregoing, we find that we find that the Commonwealth is indeed required to fix the date of the offense with reasonable certainty, and that Petitioner's counsel erred in failing to suggest a jury instruction to that effect in response to the jury's question. However, because Petitioner has not shown that he suffered prejudice as a result of the error, his counsel was not ineffective and the Petition must be dismissed.

ORDER OF COURT

AND NOW, this 14th day of January, 2022, upon review and consideration of the Commonwealth's *Petition for Post-Conviction Collateral Relief*, filed May 5, 2021, the evidence of record, arguments of counsel, briefs submitted by both the Commonwealth and the Defense, and the applicable law,

IT IS HEREBY ORDERED that Defendant's *Petition* is **DISMISSED** for the reasons stated in the attached Opinion.

THE PETITIONER IS HEREBY ADVISED pursuant to Rule 907(4) of the Pennsylvania Rules of Criminal Procedure:

1. You have a right to appeal from the Court's decision disposing of your petition. If you choose to exercise that right, you must do so within thirty (30) days of the date of this order. Pa.R.Crim.P. 907(4); Pa.R.A.P. 903(a);

2. If counsel has been appointed to represent you, that appointment shall be effective throughout the post-conviction collateral proceedings, including an appeal from this Order. Pa.R.Crim.P. 904(F)(2);

3. If you are unable to pay the costs of filing and perfecting an appeal, you have the right to proceed *in forma pauperis*. Pa.R.Crim.P. 904(G).

Pursuant to the requirements of Pa.R Crim.P. I 14 (B)(J), (2) and (C)(I), (2), the Clerk shall promptly serve this Order or court notice on each party's attorney, or the party if unrepresented; and shall promptly make docket entries containing the date of receipt in the Clerk's office of the Order or court notice; the date appearing on the Order or court notice; and the date and manner of service of the Order or court notice.