NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
MICHAEL THOMAS RICKSGERS,	:	
Appellant	:	No. 2013 WDA 2011

Appeal from the PCRA Order entered on November 28, 2011
in the Court of Common Pleas of Butler County,
Criminal Division, No. CP-10-CR-0000153-1994

BEFORE: STEVENS, P.J., MUSMANNO and ALLEN, JJ.

MEMORANDUM BY MUSMANNO, J.: Filed: February 12, 2013

Michael Thomas Ricksgers ("Ricksgers") appeals from the denial of his first Petition for relief pursuant to the Post Conviction Relief Act ("PCRA"). ***See*** 42 Pa.C.S.A. §§ 9541-9546. We affirm.

The PCRA court has set forth the relevant underlying factual and procedural history in its Opinion, which we adopt for the purpose of this appeal. ***See*** PCRA Court Opinion, 11/28/11, at 1-4.

On November 28, 2011, the PCRA court denied Ricksgers's amended PCRA Petition. Ricksgers filed a timely Notice of appeal. The PCRA court ordered Ricksgers to file a Pennsylvania Rule of Appellate Procedure 1925(b) concise statement. Ricksgers filed a timely Concise Statement.

On appeal, Ricksgers raises the following questions for our review:

1. Did the PCRA court err in concluding that [Ricksgers's] counsel was of [*sic*] ineffective assistance for failing to explain

a plea offer made by the district attorney's office prior to trial?

2. Did the PCRA court err in concluding that defense counsel's failure to call a third party witness who had had a similar experience to [Ricksgers] for which he was being tried could not have been the result of defense counsel's strategic plan?

3. Did the PCRA court err in concluding that defense counsel's failure to call [Ricksgers's] mother and other identified witnesses to the stand [did] not demonstrate ineffective assistance of counsel?

4. Did defense counsel's failure to provide testimony demonstrating [that the] victim had recently changed her shift to spend more time with her husband and children resulting in a reduction in pay constitute ineffective assistance of counsel?

5. Did defense counsel's failure to respond properly to [Ricksgers's] notice that [a] member of the jury had hard feelings for [Ricksgers] constitute ineffective assistance of counsel?

6. Did defense counsel's failure to inform [Ricksgers] that he might be sentenced to life in prison without the possibility of parole if convicted by the jury following trial constitute ineffective assistance of counsel?

Brief for Appellant at iv (capitalization omitted).

> This Court's standard of review regarding a PCRA court's order is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. Great deference is granted to the findings of the PCRA court, and these findings will not be disturbed unless they have no support in the certified record.

Commonwealth v. Carter, 21 A.3d 680, 682 (Pa. Super. 2011) (citations and quotation marks omitted).

In his first claim, Ricksgers contends that his defense attorneys were ineffective for failing to inform him of a plea offer in a timely manner. Brief for Appellant at 2. Ricksgers also argues that he was not informed by his attorneys that he could have been sentenced to life in prison if convicted by the jury. ***Id***. Ricksgers asserts that his testimony, along with his mother's testimony, demonstrates that he was unaware of the potential life sentence until after he was convicted of first-degree murder. ***Id***. at 3, 4.[1] Ricksgers claims that there was no reasonable basis for the conduct of counsel and that he was prejudiced by their actions. ***Id***. at 4. Ricksgers further claims that the PCRA court's credibility findings were not supported by the record. ***Id***.

The PCRA court has set forth the relevant law, addressed Ricksgers's claims and concluded that the claims are without merit. ***See*** PCRA Court Opinion, 11/28/11, at 4-6, 8-10; ***see also*** N.T., 7/21/11, at 90-91 (wherein Ricksgers testified that he was informed about the plea offer and rejected the offer). We decline Ricksgers's invitation for this Court to re-weigh the evidence in his favor. ***See Commonwealth v. Spotz***, 47 A.3d 63, 112 (Pa. 2012) (stating that appellate courts will defer to the credibility determinations of the PCRA court, where such findings have support in the record). Moreover, Ricksgers has not cited to any pertinent case law that

[1] We note that this claim is raised as the sixth question in the Statement of Questions Presented. However, because Ricksgers argues this claim as part of his first contention in the Argument section, we will address the claim here.

would support his claims. ***See*** Pa.R.A.P. 2119(a). Thus, we adopt the sound reasoning of the PCRA court for the purpose of this appeal. ***See*** PCRA Court Opinion, 11/28/11, at 4-6, 8-10.

In his second claim, Ricksgers contends that his attorneys' failure to present Mary Hallman ("Hallman") as a witness undermined the truth-determining process and caused him prejudice. Brief for Appellant at 5, 7. Ricksgers argues that Hallman would have testified that she slept with a loaded gun and, on one occasion, had accidently fired it while she slept. ***Id***. Ricksgers asserts that his counsel failed to investigate Hallman and failed to inform Ricksgers of Hallman's existence. ***Id***. Ricksgers claims that Hallman was not a "nut case," but a professional who had sleep disorders. ***Id***. at 6. Ricksgers has not cited to any pertinent case law, other than the requirements to prove ineffective assistance of counsel, to support his claims. ***See*** Pa.R.A.P. 2119(a).

The PCRA court has set forth the relevant law, addressed Ricksgers's claim and determined that it is without merit. ***See*** PCRA Court Opinion, 11/28/11, at 6, 10-14. We adopt the sound reasoning of the PCRA court for the purpose of this appeal. ***See id***. at 10-14.

In his third claim, Ricksgers contends that his attorneys should have called his mother, Nancy Buzzella, as a witness at trial to rebut the Commonwealth's case-in-chief. Brief for Appellant at 7-8. Ricksgers also takes issue with the defense witnesses presented by his attorneys. ***Id***. at 9-

11. Ricksgers argues that the attorneys had "no idea what they were doing[.]" ***Id***. at 11.

In his sixth claim in the argument section, Ricksgers contends that his trial counsel was ineffective for failing to present several witnesses who could refute the Commonwealth's theory that the victim had negative feelings toward guns. ***Id***. at 17, 18-19. Ricksgers argues that counsel should have presented witnesses who would have testified that the victim owned a gun and knew how to use it. ***Id***. at 17-18.[2]

The PCRA court has addressed Ricksgers's claims and determined that they are without merit. ***See*** PCRA Court Opinion, 11/28/11, at 14-16. We adopt the sound reasoning of the PCRA court for the purpose of this appeal. ***See id***.

We note the following as an addendum. With regard to Ricksgers's claim pertaining to the defense witnesses presented at trial, Ricksgers did not raise this claim in his PCRA Petition. Thus, this claim is waived on appeal. ***See Commonwealth v. Rainey***, 928 A.2d 215, 226 (Pa. 2007) (stating that claims not raised in PCRA petition are waived). In any event, Ricksgers has not demonstrated that he was prejudiced by his attorneys' actions in presenting the witnesses in question for the defense. Based upon the foregoing, Ricksgers is not entitled to relief on his third claim raised on appeal.

[2] We note that this claim was raised as part of the third question in the Statement of Questions Presented.

In his fourth claim, Ricksgers contends that his attorneys were ineffective for failing to provide testimony that the victim had changed her work schedule to spend more time with Ricksgers. Brief for Appellant at 11-12. Ricksgers argues that this testimony would have demonstrated that the victim did not want to get away from Ricksgers. ***Id***. at 12.

The PCRA court has addressed this claim and determined that it is without merit. ***See*** PCRA Court Opinion, 11/28/11, at 19-22. We adopt the sound reasoning of the PCRA court for the purpose of this appeal. ***See id***.

In his fifth claim, Ricksgers contends that his trial counsel was ineffective for failing to remove a juror who Ricksgers indicated had a bias against him. Brief for Appellant at 14. Ricksgers alleges that he had worked for the juror briefly and quit the job before its completion. ***Id***. Ricksgers asserts that he was prejudiced by the failure to remove the juror, as the juror could have impacted the entire jury's decision in the case. ***Id***. at 15. Ricksgers claims that the PCRA court could not determine, with certainty, the impact that juror had on the outcome of the trial. ***Id***. at 15-16.

The PCRA court has addressed this claim and determined that it is without merit. ***See*** PCRA Court Opinion, 11/28/11, at 23-25. We adopt the sound reasoning of the PCRA court for the purpose of this appeal. ***See id***.

Based upon the foregoing, the PCRA court did not err in denying Ricksgers's PCRA Petition.

Order affirmed.

S63017/12

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA — CRIMINAL DIVISION

vs.

C.A. No. 0153 of 1994

MICHAEL THOMAS RICKSGERS

For the Commonwealth: Richard A. Goldinger, Esq., District Attorney
For the Defendant: Edith Lynne Sutton, Esq.

Judge William R. Shaffer

November 28, 2011

MEMORANDUM OPINION AND ORDER OF COURT

In the early morning hours of December 26, 1993, Buffalo Township and Freeport police officers were dispatched to the defendant's home. The defendant had telephoned Armstrong County 911 and reported that his wife had been shot in the leg accidently with a handgun. Seconds before police arrived at the home, the defendant again telephoned 911 and reported that the victim was severely injured. He reported that he did not know if the victim had been shot in the leg or the back. He reported that he woke up with the gun in his hand. When the police arrived, the defendant stated that his wife was severely injured. Officer Richard Healy, of the Buffalo Township Police Department, spoke with the defendant, who informed him that the victim was in the bedroom. Officer Healy entered the bedroom to check the victim and found no pulse. Paramedics, the Coroner, and Pennsylvania State Police then arrived. Thereafter, Janet Ricksgers was pronounced dead.

Officer Healy asked the defendant what had happened. The defendant stated that he had been asleep and woke up because he heard a bang. He stated that he stood

up beside the bed and dropped a gun on the floor. State Police arrested Ricksgers and took him into custody.

The defense strategy at trial was to put forth the notion that the defendant suffered from severe sleep apnea, a condition which precluded him from breathing properly in his sleep and which caused him to take actions in his sleep which he did not intend, including shooting the victim. The Commonwealth, on the other hand, presented the testimony of the victim's friends, co-workers, and family members, who testified that Janet Ricksgers told them that she was planning to initiate divorce proceedings against the defendant right after Christmas. She was waiting until after Christmas because, she stated, she wanted the couple's two children to enjoy the holidays. While the defense attempted to exclude such testimony prior to trial, the Commonwealth argued that the decedent's statements were evidence of her state of mind, and circumstantially, of the defendant's motive. The Honorable John H. Brydon admitted the testimony pursuant to the state of mind exception to the hearsay rule.

The defense presented expert testimony concerning the condition suffered by the defendant. The Commonwealth presented an expert, Dr. Nofzinger, as a rebuttal witness. The defense expert testified that sleep apnea could have caused the defendant to shoot his wife accidently or unintentionally in his sleep. The prosecution's expert testified that sleep apnea could not result in such unintentional behavior. The jury convicted the defendant of first degree murder. Judge Brydon sentenced the defendant on January 12, 1995 to serve a life sentence. A post sentence motion was filed and was denied on May 23, 1995. The Pennsylvania Superior Court

affirmed the judgment of sentence by Memorandum and Judgment dated April 3, 1996. A Petition for Allowance of Appeal was denied by the Pennsylvania Supreme Court on September 24, 1996. An application for reconsideration was denied by the Supreme Court on February 12, 1997.

A *pro se* Motion for Post Conviction Collateral Relief was filed by the defendant on February 17, 1998. On March 5, 1998, Judge Brydon dismissed the defendant's motion without a hearing. The defendant filed a Notice of Appeal. After other counsel was appointed and petitioned to withdraw from representing the defendant, Attorney David Defazio was appointed to represent the defendant on September 29, 1998. By Memorandum filed October 18, 2000, the Pennsylvania Superior Court reversed the dismissal of the defendant's Motion for Post Conviction Collateral Relief. Following remand, Judge Brydon scheduled a hearing on the defendant's Post Conviction Relief Act motion for February 16, 2001 before the Honorable Martin O'Brien. On November 27, 2000, upon consideration of a motion filed by the Commonwealth, the Honorable Marilyn Horan directed "that the defendant shall submit a signed certification as to each intended witness intended to be called at the Evidentiary Hearing." Prior to the scheduled hearing, the Commonwealth filed a motion averring that the defendant had not submitted the signed certification. Upon consideration of the motion, on January 31, 2001 Judge O'Brien continued the evidentiary hearing and indicated that it was to be rescheduled not less than thirty days after the certification had been filed.

No further action was taken by Attorney Defazio on behalf of the defendant following Judge O'Brien's January 31, 2001 Order. The defendant filed a letter that is

time-stamped March 19, 2010 inquiring into the status of Attorney Defazio. Upon receipt of the letter, the Court conducted a review of the limited electronic record that was immediately available as the file maintained by the Clerk of Courts had been placed in storage. The Court appointed Attorney Sutton to represent the defendant. Attorney Sutton filed an Amended Petition under the Post Conviction Relief Act that is presently before the Court following an evidentiary hearing. The Amended Petition alleges that trial counsel was ineffective in several ways.

In evaluating the ineffectiveness claims made by the defendant in the Amended Petition, the Court is guided by the following principles. To be eligible for relief under the Post Conviction Relief Act, the petitioner must plead and prove by a preponderance of the evidence that his conviction resulted from the ineffective assistance of counsel which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. 42 Pa. C.S.A. § 9543(a)(2)(ii). Counsel is presumed to be effective, and the defendant bears the burden of proving otherwise. *Commonwealth v. Steele*, 599 Pa. 341, 360, 961 A.2d 786, 796 (2008)(citing *Commonwealth v. Hall*, 549 Pa. 269, 701 A.2d 190, 100-01 (1997)); *Commonwealth v. Washington,* 592 Pa. 698, 712, 927 A.2d 586, 594 (2007)(citing *Commonwealth v. Rollins*, 558 Pa. 532, 738 A.2d 435, 441 (1999)). As the United States Supreme Court has noted:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged

> conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland v. Washington, 466 U.S. 668, 689-90, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)(quotation and citations omitted).

The Pennsylvania Supreme Court notes that to overcome the presumption that trial counsel was effective, a defendant:

> must establish three elements: (1) the underlying claim has arguable merit; (2) counsel had no reasonable basis for his action; and (3) the petitioner was prejudiced by the ineffectiveness. *Commonwealth v. Pierce,* 515 Pa. 153, 527 A.2d 973, 975-76 (1987). In determining whether counsel's actions were reasonable, we do not question whether there were other more logical courses of action which counsel could have pursued: rather, we must examine whether counsel's decisions had any reasonable basis. *Rollins,* 738 A.2d at 441.

Commonwealth v. Rios, 591 Pa. 583, 599-600, 920 A.2d 790, 799 (2007). If the defendant fails to meet any of the three distinct prongs of the above test, the ineffectiveness claim may be disposed of on that basis alone, without a determination of whether the other two prongs have been met. *Steele*, 961 A.2d at 797 (citing *Commonwealth v. Basemore,* 560 Pa. 258, 744 A.2d 717, 738 n. 23 (2000)). Thus, if the defendant has not demonstrated that counsel's act or omission adversely affected the outcome of the proceedings, the claim may be dismissed on that basis alone and the court need not first determine whether the first and second prongs have been met. *Commonwealth v. Albrecht,* 554 Pa. 31, 720 A.2d 693, 701 (Pa.1998)(citing *Commonwealth v. Travaglia*, 541 Pa. 108, 661 A.2d 352, 357 (Pa. 1995). In order for

the prejudice prong of the ineffectiveness standard to be met, the defendant must show that there is a reasonable probability that but for the act or omission in question the outcome of the proceeding would have been different. *Commonwealth v. Wallace* 555 Pa. 397, 724 A.2d 916, 921 (1999). The burden of proving ineffectiveness remains on the party alleging it; that burden does not shift. *Commonwealth v. Cross*, 535 Pa. 38, 43, 634 A.2d 173, 175 (1993).

To prevail on a claim of trial counsel's ineffectiveness for failure to call a witness during trial, the defendant must prove:

> (1) the witness existed; (2) the witness was available; (3) trial counsel was informed of the existence of the witness or should have known of the witness's existence; (4) the witness was prepared to cooperate and would have testified on appellant's behalf; and (5) the absence of the testimony prejudiced appellant. Trial counsel's failure to call a particular witness does not constitute ineffective assistance without some showing that the absent witness' (sic) testimony would have been beneficial or helpful in establishing the asserted defense.

Commonwealth v. Chmiel, 585 Pa. 547, 622, 889 A.2d 501, 545-46 (2005), *cert. denied*, 127 S.Ct. 101, 166 L.Ed.2d 82 (2006)(citations omitted). *See*, *Commonwealth v. Bryant*, 579 Pa. 119, 855 A.2d 726, 746 (2004); *Commonwealth v. O'Bidos*, 849 A.2d 243, 250 (Pa. Super. Ct. 2004). The failure to call a witness is not *per se* ineffectiveness of counsel, for such a decision implicates matters of trial strategy. *Commonwealth v. Auker*, 545 Pa. 521, 681 A.2d 1305, 1319 (1996).

The Court must first address the stewardship of the defendant's case by Attorney Defazio. At the hearing on the Amended Petition, Attorney Defazio testified that he did not file an amended petition under the Post Conviction Relief Act, or a certification as to the witnesses to be called at an evidentiary hearing, because the

defendant failed to furnish him with information about certain individuals that were potential witnesses. The defendant's testimony, on the other hand, if believed, showed a lack of attention on the part of Attorney Defazio. In any case, the handling of this matter by Attorney Defazio is unacceptable. Following remand by the Superior Court on October 18, 2000, there was virtually no action taken by Attorney Defazio with respect to this case until this Court ordered him replaced by Attorney Sutton on March 31, 2010. Nothing at all was filed of record by Attorney Defazio after October 18, 2000. Whatever the reasons for the inaction of Attorney Defazio, his failure to take any actions that appear of record with respect to the defendant's petition for nearly a decade cannot be construed as anything but improper. In fact, it is conceivable that such a delay may have caused severe prejudice to the defendant's interests. It appears from the Court's research that, sadly, Attorneys Ceraso and Green passed away in November of 2000 and January of 2008 respectively. The Court and the defendant are thus without the benefit of their testimony in evaluating the defendant's claims.

Present counsel is thus faced with a difficult task in demonstrating that trial counsel did not act reasonably in taking the various decisions that the defendant now claims were done so in error. It is an unenviable task. Nevertheless, the defendant has not pleaded the ineffectiveness of Attorney Defazio, aside from an unspecific oral motion to amend made at the prompting of the Court at the time of the evidentiary hearing. N.T. 07/21/2011, 62. Relief, therefore, is not due the defendant based on the performance of Attorney Defazio and the burden remains on the defendant to prove all three prongs of the *Strickland/Pierce* test. As the defendant raises in his Amended

Petition ten discrete claims of ineffective assistance, the Court will address those claims *seriatim*, with the exception of the defendant's eighth claim which will be addressed along with the defendant's first claim.

I. Ineffective Assistance of Counsel—Failure of Defense Counsel to Inform Defendant of Plea Offer Made by District Attorney in a Timely Fashion Prior to Trial

The defendant first claims that trial counsel was ineffective for failing to consult with the defendant as to his desire whether or not to accept a plea offer of third degree murder in a timely fashion prior to trial. Only long after the trial when reviewing documents did the Defendant learn that a plea offer had been made by the Prosecution in March of 1994. He was only informed of this by his attorneys the week of November 14, 1994 when the trial was beginning. Amended Petition, 3. The defendant's Amended Petition goes on to claim that this delay was not only a:

> violation of the Client/Attorney duty, it removed a knowing and thoughtful response to the Plea Offer in light of the fact that all of the work in preparing for trial had been accomplished and incredibly, as the result of even further ineffectiveness of his defense counsel, Defendant did not know that he could receive life in prison if found guilty... Defendant Ricksgers would have taken a plea to Third Degree Murder if he had been informed early on in a knowing fashion.

Amended Petition, 3.

The defendant's eighth claim of ineffectiveness, which, as mentioned above, will be addressed here since it is intertwined with the defendant's first claim of ineffectiveness, is that trial counsel was ineffective in that they failed to inform the defendant that he faced the possibility of being sentenced to life in prison if he was

found to be guilty at trial. The defendant testified at the time of the hearing that it was his understanding that he would face an incarceration sentence of ten to twenty years if he were found guilty.

With respect to these claims, even if we were to find that counsel did not inform the defendant of a plea offer until a time close to the start of trial, the Court cannot but conclude that the defendant has failed to demonstrate how that action caused prejudice. The Court finds incredible the defendant's testimony that he was unaware of the sentence he was facing if he went to trial. At the time of the hearing, the defendant admitted that trial counsel informed him of a plea offer. The defendant testified that he consulted with Attorney Ceraso about the offer and decided to reject it and proceed to trial. The defendant testified that he thought that by rejecting the offer and proceeding to trial he would be subject to the same term of incarceration if convicted as he would have been had he accepted the plea offer. The defendant's testimony in that regard is simply unbelievable. The Court likewise finds it inconceivable that the defendant would have accepted the plea offer at any time prior to trial. Thus, the Court finds the defendant has failed to demonstrate prejudice with respect to this claim.

With respect to the eighth claim raised in the defendant's motion, that trial counsel was ineffective for failing to inform the defendant of the potential sentence he faced if found guilty, while the testimony supporting this claim is incredible, it is also unclear how such a failure on the part of counsel caused prejudice to the defendant. In his amended petition, the defendant claims:

> Defense Counsel's ineffectiveness with regard to their complete lack of insuring a knowing decision as to the trial's potential outcome as to

> sentencing and the plea process by Defendant constitutes a serious undermining of the truth-determining process and certainly forestalled any reliable adjudication of guilt or innocence in this matter.

Amended Petition, 15. It is unclear how a potential sentence faced by the defendant could have undermined the truth-determining process, given that the defendant was convicted following a jury trial. In any case, the defendant has failed to prove that it did so. The claim, therefore, fails.

II. Ineffective Assistance of Counsel—Failure of Defense Counsel to Call a Witness with Personal Experience as to Firing a Weapon in Bed While Sleeping

The defendant's second claim is that trial counsel was ineffective for failing to call as a witness Mary Hallman. Ms. Hallman, who testified at the time of the hearing on the defendant's motion, suffers from night terrors and narcolepsy and in the past fired a .38 caliber weapon while asleep in bed. The basis of this claim is that the testimony of Ms. Hallman would have countered the testimony of the Commonwealth's expert, who had indicated that no research conducted by him supported the theory that anyone had ever fired a gun in bed while sleeping. Amended Petition, 5. The defendant claims that had "defense counsel permitted Ms. Hallman to testify on behalf of Defendant Ricksgers her testimony would certainly have counteracted the Prosecution's expert witness's testimony indicating that not only could the accident have occurred as averred by Defendant Ricksgers, but that it had in fact happened to Ms. Hallman." Amended Petition, 5.

The defendant argues in his Amended Motion that the refusal to call Ms. Hallman was not the result of any strategic or tactical decision. This is so, the

defendant maintains, because: "Providing a disinterested third party's testimony as to her personal experience would only have enhanced Defendant's position in averring that the shooting of his wife was accidental and not an intentional shooting." Amended Petition, 6. Therefore, the Amended Petition continues, "by not including this testimony, Defense Counsel could not legitimately claim that their refusal to utilize this witness was for any strategic or tactical decision on their part in providing a defense." Amended Petition, 6.

At this point, the Court will set forth at some length testimony given by the defendant at the time of the hearing on the defendant's Amended Petition. The Court does so because the defendant's testimony reflects light not only on the present claim of ineffectiveness, but on the following claims as well. Most of the defendant's claims must be denied based on a failure of the defendant to demonstrate that defense counsel did not have a reasonable strategic basis for their decisions at trial. The following testimony speaks to that notion:

> Q: Okay, were there witnesses that could have been called by your attorneys that would have refuted testimony?
>
> A: I believe there was.
>
> Q: Do you know who?
>
> A: Miss Hallman. Some friends of ours that own a business from Saxonburg. Maybe there was someone that I worked with, some doctors, but for some reason, I was told, I believe when I asked them about that they said they didn't need them at this time. So, for whatever reason they decided not to call them.

N.T. 07/21/2011, 70-71. Counsel then questions the defendant concerning certain individuals, including Maxine Radovitch, Jim Bogacz, and Deb Bogacz. The defendant also testified to his decision not to testify as follows:

Q: Did you ever tell your attorneys that you wanted to testify in your own behalf?

A: Yes, I did.

Q: Why did you want to testify?

A: I had nothing to hide, nothing to lie about.

Q: What did they say when you said you wanted to testify in your own behalf?

A: Mr. Ceraso looked me dead in the eye. He said if you get up in the witness stand they will tear you apart. It did, it scared me a bit, because honestly you see what the district attorney does to people on TV, and the thing is they can't make you say something that's not true, but I was still scared, and that's why I decided not to.

N.T. 07/21/2011, 75. With respect to Mary Hallman, the witness who is the basis of the present claim of ineffectiveness, the defendant testified as follows:

Q: And did you, when did you learn of Mary Hallman?

A: I don't remember the year, but I'm guessing it was sometime four or five years after I was convicted and in prison in Somerset.

Q: How did you learn of her?

A: She sent me a fifteen-page, I believe it was a fifteen-page notarized statement about what she had been through and what happened to her and that she had talked to the district attorney, and she had talked to my attorneys, and neither of them were interested, and I couldn't understand why. So, I started keeping in touching with her to see, and she told me any time that I needed her that she would be there.

N.T. 07/21/2011, 77. Regarding many of the witnesses that the defendant now claims should have been presented by trial counsel, the defendant testified as follows:

Q: Did your mother ever offer to testify at your trial?

A: Yes, she did.

...

Q: Did you ask your attorneys to use your mother at trial?

A: I asked them for her and several other people, and they said we don't need these people. They said not for, I believe it was the word was strategy that we were using, or I think it was strategy that we were using.

N.T. 07/21/2011, 78.

While it is clear that Ms. Hallman existed and was available to testify at the time of trial, and that trial counsel knew of her desire to testify on behalf of the defendant, the above testimony by the defendant supports the notion that Attorneys Green and Ceraso based their decision to forgo calling Ms. Hallman as a witness on a strategy reasonably designed to further the interests of the defendant. In any case, the defendant has failed to demonstrate that the failure to call Ms. Hallman as a witness was not the result of a reasonable strategic decision. The testimony of Ms. Hallman, while credible, was simply of very limited value relative to the defendant's case. While Ms. Hallman may have previously fired a weapon while suffering from a sleep disorder, that disorder was dissimilar to any sleep disorder suffered by the defendant. Ms. Hallman's testimony was that she suffered from night terrors and narcolepsy. The defense strategy at trial, however, was to portray the defendant as having sleep apnea. The relevant testimony of Dr. Nofzinger, which the defendant claims is countered by the testimony of Ms. Hallman, is as follows:

> I searched the data base back to 1966, trying to review any case reports and any evidence that this might have been reported some place else. I could find no cases in which somebody had sleep apnea and in one of their arousals was associated with shooting someone during their sleep.

N.T. 11/17/1994, 64. Calling Ms. Hallman as a witness would not have countered this assertion given the different medical conditions suffered by her and the defendant. Thus, the Court cannot conclude that the defendant has met his burden of demonstrating that the decision of trial counsel to forgo calling Ms. Hallman to testify at trial was not reasonable.

III. Ineffective Assistance of Counsel—Failure of Defense Counsel to Call a Witness with Credible Testimony as to Defendant's Sleep Problems, the Use of a Gun by the Victim, and to Contradict Testimony Regarding a Purse Searched at the Crime Scene

The third claim raised by the defendant is that trial counsel was ineffective for failing to call as a witness at trial the defendant's mother, Nancy Buzzella. The defendant claims that Mrs. Buzzella "had critical information to aid in her son's defense concerning Defendant's sleep problems, the use of a gun by the decedent as well as information that clearly demonstrated the evidence allegedly taken from decedent's purse was not taken from the purse she was currently using." Amended Petition, 7. The defendant claims in the Amended Petition that Mrs. Buzzella removed the purse from the scene prior to the defendant being arrested. She did this to protect credit cards and other valuables that were in the decedent's purse. Defense Counsel was made aware of this at every stage of the trial preparation by both Mrs. Buzzella and the defendant, the Amended Petition continues, yet they failed to utilize this testimony or evidence. This was not done even when the prosecution put a Pennsylvania State Trooper on the stand who testified that he had gone through the

decedent's purse on the morning following her death. Additionally, the defendant notes that the, "Prosecution used testimony of a cousin of the decedent to demonstrate that Ms. Ricksgers did not like guns." Amended Petition, 8. At the time of the evidentiary hearing, Mrs. Buzzella testified to, among other things, taking a purse on the morning of the killing in order to secure the medical cards of the defendant's children. Mrs. Buzzella also testified to an encounter with the victim in which the victim mentioned that she kept a gun.

The Court finds that the defendant has failed to demonstrate that counsel's decision to not call as a witness Mrs. Buzzella was not the result of a reasonable strategy designed to further the defendant's interests. Just because Mrs. Buzzella may have been able to testify at trial as to a few relatively minor points made by various witnesses presented by the Commonwealth does not mean that Counsel could have had no reasonable basis for choosing not to call her as a witness. The Court further finds that even if Mrs. Buzzella had been called as a witness, there is not a reasonable probability that the outcome of the defendant's trial would have been different. With respect to the purse, for instance, inside was found a receipt from 1988, more than four years before the December 26, 1993 shooting. That fact alone supports the notion that either the purse was not the decedent's current purse, or that the victim tended to keep things for a very long time. In either case, Mrs. Buzella's testimony would have been of minimal value regarding the purse. Similarly with respect to the testimony that the victim did not like guns and did not want them in the house, that was not an issue of central importance to the case. In any case, the testimony of Mrs. Buzzella did not demonstrate that the victim did, in fact, like guns. Again, while this

claim must fail because the defendant did not prove counsel did not have a reasonable basis for not calling Mrs. Buzzella as a witness, the claim must also fail because the defendant has failed to demonstrate prejudice.

IV. Ineffective Assistance of Counsel—Failure of Defense Counsel to Utilize Information Provided by Defendant as to the Money that had been Refunded by Attorney Woncheck

The fourth claim raised by the defendant is that trial counsel was ineffective in the manner in which Attorney William Woncheck was utilized as a defense witness. The basis of this claim, as is set forth in the Amended Petition, is as follows:

> In 1988, the decedent went to Attorney [Woncheck] concerning a possible divorce from the Defendant. At the time she provided the sum of $250 as a retainer to him, which was borrowed from a family member. This attorney was called as a defense witness wherein Defense counsel utilized the witness to demonstrate that the divorce action was commenced years before. However, this evidence had already been shown by the Prosecution's witness State Police Officer Paul Montag....When questioned as to whether or not he was still under a retainer, Attorney Woncheck should have been questioned by Defense Counsel as to the money returned from the retainer years before the death of the decedent and the trial. Defense counsel should also have required Attorney Woncheck to provide financial records which would have demonstrated that he had refunded $150 of the $250 and was therefore not under retainer to the decedent at the time of her death.

At the time of the hearing, the defendant testified concerning Attorney Woncheck:

> Q: Okay. Do you remember Attorney [Woncheck] being put on as a witness for the defense?
>
> A: I remember attorney, or, yeah, Attorney [Woncheck] being there, but I didn't know that he was, I never really paid attention to him being a witness for the defense. I thought that he was for the prosecution, and I found out that he was, when I looked through the trial transcripts he was for the defense.

Q: So, instead of all these other people that you suggested they decided to put Attorney Woncheck on?

A: Yes.

Q: And did you ever tell your attorneys prior to the trial that Woncheck had actually, he is the attorney just for the court record, he is the attorney who represented your wife when?

A: In 1988 when she decided she wanted a divorce or she thought she did.

Q: And so she paid him a retainer?

A: Yes.

Q: And she stopped that divorce action, right?

A: She stopped it, yes.

Q: Did she get the bulk of that money back from Mr. [Woncheck]?

A: Yes.

N.T. 07/21/2011, 79-80. The defendant went on to testify that he informed trial counsel of that fact and that trial counsel did not use that information.

At trial, Attorney Woncheck testified that on March 17, 1988 he was retained by Janet Ricksgers so that she could institute divorce proceedings. Attorney Woncheck went on to testify, however, that that was the only time he saw Mrs. Ricksgers, but that his office was later instructed to halt the divorce proceedings. According to the trial testimony of Attorney Woncheck, he was available to Mrs. Ricksgers at all times after 1988.

With respect to this claim, the Court finds that the actions of trial counsel in utilizing Attorney Woncheck as a witness did not in any way cause prejudice to the

defendant. In other words, it is inconceivable that the results of the trial would have been different if Attorney Woncheck had testified and presented evidence that a portion of the retainer from 1988 had been returned. In fact, the testimony actually presented at trial seems to this Court to be more favorable to the defendant than would testimony that a portion of the retainer had been returned. Thus, the Court also finds the defendant has failed to prove that trial counsel's questioning and use of Attorney Woncheck as a witness was not the result of a strategic decision designed to further the interests of the defendant. In either case, the Commonwealth presented at trial the testimony of Agnes Smith, an aunt by marriage of the victim who worked as a legal assistant for Attorney Steven Langton. Ms. Smith testified that the victim contacted her just prior to Christmas in 1993:

Q: And could you tell us the basis of the conversation in terms of what she inquired about?

A: Well, she knew that I worked for an attorney and she wanted to know if the attorney handled divorces.

Q: Okay.

A: I said yes he did.

Q: Okay. Did she schedule a specific appointment at that time?

A: No. She said as soon as the holidays were finished that she was going to be calling me back to schedule an appointment concerning getting a divorce.

Q: Okay. Did she discuss with you any specific plans that she may have had concerning leaving and actually separating from the defendant, Mike Ricksgers?

A: Yes, she did. She had mentioned that right after the holidays she was going to be leaving the state and she said she had a place to go to that she and the children would be safe.

N.T. 11/15/1994, 65-66. When viewed together with the testimony of Attorney Woncheck, it is inconceivable that the finder of fact could have in any way been under the impression that the victim had contacted Attorney Woncheck in 1993 in order to further divorce proceedings. As that is the case, it is clear that no prejudice resulted from counsel's failure to delve into the financial records of Attorney Woncheck.

V. Ineffective Assistance of Counsel—Defense Counsel's Failure to Provide Testimony Demonstrating Victim had Recently Changed her Shift to Spend More Time with her Husband and Children Resulting in a Reduction in Pay

The defendant's fifth claim of ineffectiveness is that trial counsel failed to elicit testimony demonstrating that the victim, Janet Ricksgers, had shortly before the killing changed her work schedule in order to spend more time with her children and the defendant.

Regarding this claim, Nancy Buzzella testified as follows:

Q: Okay. Now, at some point around this time your daughter-in-law had either changed her shift at work or was about to change her shift at work, were you aware of that?

A: She mentioned it to me, but I wasn't aware when it took place.

Q: Why was she going to change her shift at work?

A: So she could spend more time with her family.

Q: Do you know by changing that shift she was going to lose some pay?

A: No, I don't know that.

Q: Okay. Did you inform defense counsel about this information?

A: Yeah, we talked about different things about her changing shifts and her time to spend with the family.

N.T. 07/21/2011, 37. The defendant also testified to the victim changing her shift:

Q: Now, I talked to your mother a little bit on the stand if you recall about your wife wanting to change shifts at work?

A: Yes.

Q: Did you wife, in fact, change her shift at work?

A: Yes, she did.

Q: Why did she change her shift at work?

A: It was shortly after we moved out to Freeport. We just bought another place out there. We wanted to build a house on the back of the property. She thought it would be a good idea which I also thought it would be a good idea for her to change shifts so that we could be together with each other and the kids more often. She was going to work as I was coming home from work. I worked daylight. She worked second shift, and we really got to see each other on the weekend or called each other on the phone at night, or she would leave for work early and stop at my job site and see me for a little bit before she had gone to work, and it was going to cost us a lot more, but it's something that we needed to do. We wanted to start doing things together now that we were out there.

Q: So, she did change shifts?

A: Yes.

Q: And did she lose wages? Did her wages go down as a result of that shift change?

A: We lost a lot more, it cost us for [a] babysitter during the day that we both worked we had to pay maybe for eight or nine hours a day plus I didn't, they did lose a little bit in changing from second shift to first.

Q: She believed it was worth it to have more time with you and the children together as a family unit?

A: Yes.

Q: Did you ever tell this to your attorneys?

A: Several times.

N.T. 07/21/2011, 81-82.

Similarly to the claim above, the Court finds that the defendant has failed to demonstrate that trial counsel's failure to present evidence that the victim had at a time just prior to the killing changed her shift at work in order to spend more time with her family was not the result of a reasonable strategic decision designed to further the interests of the defendant. As is noted above, the defendant's testimony, given at the time of the hearing on the Amended Petition, supports the notion that counsel's decision to forgo calling various witnesses, including the defendant's mother, was a strategic decision.

The Court can only speculate as to the reasons for such a choice, if the victim had, in fact, changed her shift in order to spend more time with the defendant. It is highly likely, however, based on the police reports submitted into evidence by the defendant at the time of the hearing, that the persons who could have testified to the defendant changing her shift, if that had happened, may also have been subjected to testifying concerning their knowledge of various other matters that would have been highly detrimental to the defense. For instance, Defendant's Exhibit E, a supplemental police report prepared by Trooper Christopher Walsh, refers to several interviews conducted of the victim's co-workers. Lester Allen, for instance, reported that:

> the victim was one of his better friends at work and they often took their lunch breaks together. ALLEN stated that the victim had told

> him in the past that the accused had beat her up. ALLEN stated that the victim had said that she was going to leave the accused. ALLEN further stated that the victim had told ALLEN during the summer that her husband said that he would kill the victim if she ever left him.

Georgie Rodkey, another co-worker of the victim, reported:

> that she had known the victim for approximately 3 years. RODKEY stated that the victim had a lot of problems at home. RODKEY stated that she had seen bruises on the victim's body in the past. RODKEY further stated that approximately two weeks ago the victim had told her that the accused had threatened the victim. RODKEY stated that the victim had been talking about going to a cousin's [place] in [Ohio] in order to get away from the accused. RODKEY also stated that two weeks ago the victim was talking about divorcing her husband. RODKEY stated that the victim told her that the accused said that if the victim left him he would kill her.

According to Joseph Ostroski, another co-worker:

> the victim wanted to get divorced from the accused. OSTROSKI stated that she had left him one other time and the accused hunted her down. As a result of that, the victim was afraid of the accused. OSTROSKI stated that the accused used to beat the victim up. OSTROSKI stated that the victim would come to work with bruises on her body...OSTROSKI stated that the week of Thanksgiving 1993 the victim told OSTROSKI that her father was going to pay for her to get a divorce from the accused.

Again, the Court can only speculate as to the reasons underpinning the decision by counsel to forgo calling witnesses to demonstrate that the victim had changed her work schedule. The defendant has not demonstrated that such a choice, however, was not reasonably designed to further the defendant's interests.

VI. Ineffective Assistance of Counsel—Defense Counsel's Failure to Respond Properly to Defendant's Notice that a Member of the Jury had Hard Feelings for Defendant

The defendant's sixth claim is that trial counsel was ineffective for permitting juror number seven to serve on the jury. According to the Amended Petition, "juror number 7 was someone with whom he had worked with for years before and that when he left his employment there had been hard feelings." With respect to this claim, the defendant testified at the time of the hearing as follows:

> Q: Was there a juror selected that you knew had a negative image of you?
>
> A: I felt he did, yes.
>
> Q: What happened?
>
> A: They had called Rex Kallner, and the name for the minute it didn't register, and when I started thinking about it, I knew I had worked for this man previously. I was a kid, a young guy. You don't tell me nothing. I thought I knew everything, and I worked for him for maybe all of three days, four days at most, and it was hard work, and he kept belittling me and belittling me and riding me, and I told him I had enough of it. I told him he could take his job and put it somewhere and walked off and I'd be back for my pay, but to this day I didn't know if I got paid or not, and I tried to explain to them that it, there would be sour grapes. I walked off in the middle of pouring concrete and wall being put up, they would not be happy. I explained this to Mr. Ceraso. His explanation was after they had already accepted him it's too late. Once again I thought they know what they're doing. There's a reason for them picking him.
>
> Q: And he remained on the jury?
>
> A: He stayed on the jury.

N.T. 07/21/2011, 63-64. The defense submitted into evidence Exhibit D, a juror list dated November 14, 1994. Rex Kallner is listed as juror number seven. On cross-examination, the defendant testified as follows:

Q: You have raised in your petition about juror number seven knowing you and not liking you or having a, bias against you or something like that?

A: Felt it could have been like that.

Q: How long prior to your trial did you work for this gentleman?

A: Some years before that.

Q: Do you know how many years?

A: No.

Q: Was it ten years?

A: It could have been.

Q: And you said you were a young man when you worked for him?

A: Yeah. I would say twenties. Somewhere around the twenties.

Q: Do you recall during your trial if the jurors were asked if they knew anybody, any of the parties involved with these proceedings?

A: I don't remember them saying that or asking them that.

Q: Do you think it's possible that even if it were true that you worked for this gentleman that he didn't remember you?

A: Very possible. I can't say that it isn't.

Q: Okay.

A: I only went under the assumption that I remembered him he would remember me.

Q: At what point did you point that out to Attorney Ceraso and Attorney Green, hey he doesn't like me?

A: Right after we were picking them right after we picked them?

Q: He had already been picked and you pointed that out to him?

A: Yes.

N.T. 07/21/2011, 100-101. We note the defendant was born on October 4, 1954. N.T. 07/21/2011, 47. The notes of testimony from November 14, 1994 do not include the individual voir dire proceedings that were conducted at that time. N.T. 11/14/1994, 36.

The Court finds the defendant has not demonstrated that Attorney Green and Attorney Ceraso were ineffective with respect to their handling of jury selection. The evidence presented at the time of the hearing did not demonstrate that juror number seven was aware of any relationship with the defendant prior to trial, let alone that he harbored resentment that adversely affected the outcome of the trial.

VII. Ineffective Assistance of Counsel—Defense Counsel's Failure to Investigate and Address a Missing Typewritten Statement Signed by Defendant

The defendant's seventh claim is introduced in the Amended Petition as follows:

> Defendant informed his attorneys that the State Police had provided him with a [typewritten] version of his statement on the morning of 12/26/93. Despite reading the document and signing it, the document mysteriously never reappeared before, during or after the trial. The Pennsylvania State Police denied it ever existed. At the very least Defense Counsel should have called the jury's attention to the fact that this had occurred to the Defendant's detriment and further indicated that important evidence was being withheld.

With respect to the missing statement the defendant testified as follows:

Q: Now, there's been a lot of discussion about a missing statement. Could you explain to the court about what statement was missing?

A: I was taken to the Pennsylvania State Police Barracks. I sat in there for what seemed like hours, and finally Officer Walsh, it was a red-haired officer, and his partner came down and got me and took me out of the day room, maybe ten feet away, they took me out of that day room into a room on the left. They sat me down. Officer Walsh handed me this letter. This note. Piece of paper. He said I want you to read this, and if it's true and correct as to the way you said things happened, he said I want you to sign and date it. I signed it, and I asked him for a pen first. I signed it, and I was confused, and I even asked him what the day was, and he told me the date, and I put the date on it. When I asked for that letter before trial, during trial, and after trial, that letter never appeared anywhere. It was a statement, I thought it was a statement that they wanted from me, and that's the impression I had that it was a statement to the state police. My statement as to what happened.

Q: And did some of the statements on that differ from what some of the different officers on the stand said?

A: No, oh, from what they said, yes, but my statement never changed. It hasn't. It still hasn't after seventeen years it hasn't.

Q: That typewritten document never reappeared?

A: No, they said I must have been mistaken as to what I signed, but I know what I signed because I read it in the state police barracks.

Q: Did your attorneys ever mention that during trial?

A: I don't believe they did.

Q: Do you know why not?

A: I don't know. I have no idea.

N.T. 07/21/2011, 69-70. On cross-examination, while being questioned about the note, the defendant testified that he informed his trial counsel of the missing letter

prior to trial. It was not until after trial, the defendant testified, that his attorneys made an inquiry concerning the missing letter. According to the defendant, trial counsel maintained that the defendant must have been mistaken regarding the statement and had only signed a waiver of rights form. N.T. 07/21/2011, 103-05. With respect to the contents of the purported missing statement, the defendant testified:

> I believe what I told him was as I had been telling them that I woke up to a pop what sounded like a loud pop. Jumped up and I turned the light on, and the gun was laying in bed. I reached down and swept it out, and I tried to help my wife. They said I didn't. But I did. I even told them that the phone on the bed did not work right all the time so I went to the kitchen to make the phone call from a brown phone that worked. I called, they told me I called twice. I only remember calling one time. So, they got there. They put me in the back of the state police car, and they took me to the state police barracks, but I gave them every bit of what had happened. I detailed it for them, and nothing had changed. It still hasn't.

N.T. 07/21/2011, 111. Appended to the defendant's *pro se* Motion for Post Conviction Collateral Relief, introduced into evidence as Defendant's Exhibit A, is a letter from Corporal Walsh to then First Assistant District Attorney David Hepting. The letter is dated April 17, 1997 and the substantive portion states:

> As I advised you during our telephone conversation on April 17, 1997, I have reviewed the investigative report for the Commonwealth vs. Michael T. Ricksgers. Mr. Ricksgers is mistaken in his belief that he had signed a typewritten letter describing how he said the events of December 26, 1993 had occurred. The only documents that Mr. Ricksgers signed were a Waiver of Rights and Consent to Search Form and two Rights Warning and Waiver Forms.

Regarding this claim, the Court must first note that the reliability of the defendant's memory is highly questionable with respect to the events that took place on the morning of December 26, 1993. As an example of this, the defendant testified

that he remembered calling 911 only one time following the shooting. Commonwealth's Exhibit 17, an audio tape recording of the calls made to Armstrong County 911 on the morning of December 26, 1993, demonstrates that the defendant made two calls to 911. Such a mistake, in the Court's view, makes the likelihood that the defendant is mistaken with respect to the purportedly missing statement quite high. With such a consideration in mind, the Court finds the defendant has not proven that a typewritten statement was signed by him at the State Police Barracks on the morning of the killing.

Even if such a statement were taken, it is unclear precisely how the purportedly missing statement could have helped the defense. The Court finds that the defendant, therefore, has failed to prove that the actions of counsel in failing to investigate and utilize the purportedly missing statement caused prejudice. The substance of the missing statement as it concerns the events surrounding the killing of the victim, as testified to by the defendant, was that he:

> woke up to a pop what sounded like a loud pop. Jumped up and I turned the light on, and the gun was laying in bed. I reached down and swept it out, and I tried to help my wife. They said I didn't. But I did. I even told them that the phone on the bed did not work right all the time so I went to the kitchen to make the phone call from a brown phone that worked.

N.T. 07/21/2011, 111. At trial, Officer Richard Healey of the Buffalo Township Police Department testified that while on the scene on the morning of December 26, 1993, he asked the defendant what had happened. According to Officer Healey, the defendant:

> more or less started going into an explanation that he was at his mother-in-law's or something. That they had gotten home and he was

> having problems sleeping. He had gotten home. They readied up the trailer, put the kids to bed, and they went to bed approximately one hour before I was summoned to the residence. And that then he had gotten out—or he had heard—or he was asleep, he heard a bang, woke up, and stood up beside the bed, dropped the gun on the floor, heard his wife making, like, she like oww-ed three times. He turned on the light and then proceeded to call Butler, proceeded to call for an ambulance.

N.T. 11/15/1994, 88. On cross-examination, Officer Healey testified that, minutes after his conversation with the defendant, he authored a report in which he recorded that the defendant stated: "I shot her. I don't know how, if I shot her. I was dreaming about something." N.T. 11/15/1994, 93-94. The substance of the purportedly missing statement, if it existed, was testified to by the Commonwealth's witness. Trooper Andrew Kamerer, likewise, testified to statements made by the defendant while in custody on the morning of the shooting. According to Trooper Kamerer, the defendant stated:

> We got the gun because she is by herself out here. A gun big enough to stop anything...I just don't understand this. I don't know if I was dreaming someone was trying to break into the house or not and shot...I wanted to leave the gun in the drawer but she said it wouldn't do us any good there if somebody broke in, we put it between the headboard and the mattress.

N.T. 11/15/1994, 131-32. Again, given that the above statements were testified to by the Commonwealth's witnesses, it is unclear how the statement of the defendant could have affected the outcome of the trial. The defendant, therefore, has failed to prove the ineffectiveness of counsel with respect to that statement, even if it existed.

IX. Ineffective Assistance of Counsel for Failure to Cross-Examine Properly the Prosecution's Expert and Refute his Testimony Concerning Other Similar Cases

The defendant's ninth claim is based on the notion that trial counsel did no research in preparation for trial. The Court finds the defendant has not introduced sufficient evidence to substantiate this claim.

X. Ineffective Assistance of Counsel—The Cumulative Effect of the Ineffective Assistance of Counsel Listed Above Coupled with Violations Listed in this Paragraph When Taken as a Whole Amount to the Denial of the Defendant's Right to a Fair and Impartial Trial

Finally, the defendant claims that the cumulative effect of the ineffectiveness claims addressed above, coupled with several other claims that are listed, when taken as a whole, amount to a denial of defendant's right to the effective assistance of counsel. The Pennsylvania Supreme Court has held that "no number of failed claims may collectively warrant relief if they fail to do so individually." *Commonwealth v. Washington*, 592 Pa. 698, 927 A.2d 586, 617 (2007). The defendant has not set forth claims, evidence, or argument that convince this Court relief is due based on the cumulative errors of counsel. The Court also finds that the defendant has failed to prove the ineffectiveness of trial counsel based on the allegations contained in Claim X of the Amended Petition.

The Court must reiterate its deep concern at the handling of the defendant's collateral attack by Attorney Defazio. Such inaction in the handling of a case is

simply unacceptable. It remains, however, the defendant's burden to demonstrate that trial counsel rendered ineffective assistance. The defendant has failed to meet that burden.

Accordingly, the Court enters the following: