NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. TYLER SCOTT KEYS, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1569 WDA 2013

Appeal from the PCRA Order Entered September 6, 2013
In the Court of Common Pleas of Erie County
Criminal Division at No(s): CP-25-CR-0001101-2010

BEFORE: BENDER, P.J.E., LAZARUS, J., and OTT, J.

MEMORANDUM BY BENDER, P.J.E.: **FILED AUGUST 19, 2014**

Appellant, Tyler Scott Keys, appeals from the trial court's September 6, 2013 order denying his petition for relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. We affirm.

In 2010, Appellant was convicted by a jury of first-degree murder, arson, aggravated assault, and recklessly endangering another person. He was sentenced on January 5, 2011, to a mandatory term of life imprisonment without the possibility of parole. He filed a timely direct appeal with this Court and we affirmed his judgment of sentence on March 15, 2012. ***Commonwealth v. Keys***, 47 A.3d 1245 (Pa. Super. 2012) (unpublished memorandum). Appellant did not petition for allowance of appeal with our Supreme Court.

On March 11, 2013, Appellant filed a timely *pro se* PCRA petition and counsel was appointed. On August 12, 2013, the PCRA court issued Pa.R.Crim.P. 907 notice of its intent to dismiss Appellant's petition, along with an opinion explaining its rationale for doing so. On September 3, 2013, the court issued an order denying Appellant's petition. Appellant filed a timely notice of appeal. Herein, he presents nine issues for our review:

> A. Whether trial counsel was ineffective by failing to argue that the trial court abused its discretion in allowing photographs of the victim to be shown to the jury?
>
> B. Whether both trial and appellate counsel were ineffective by not challenging the trial court's omission of a *corpus delecti* jury instruction?
>
> C. Whether trial counsel was ineffective for failing to request an imperfect self-defense jury instruction?
>
> D. Whether direct appellate counsel was ineffective in filing an ***Anders***[1] brief?
>
> E. Whether the trial court erred in allowing Dr. Vey to suggest the victim was an assault victim?
>
> F. Whether trial counsel was ineffective for failing to file a pre-trial [motion] *in limine* … to exclude introduction of a knife as irrelevant and/or in failing to object to the admission of that item given an insufficient foundation which permitted the inference that it may have been used as a weapon at some point during the incident?
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> G. Whether trial counsel was ineffective for failing to object to the Commonwealth['s] refreshing the recollection of a witness with the transcript of a witness statement?

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[1] ***Anders v. California***, 386 U.S. 738 (1967).

> H. Whether trial counsel was ineffective for failing to seek a change of venue or change of venire given the pervasive pre-trial exposure?
>
> I. Whether trial counsel was ineffective for failing to challenge the jury array as constituted and in failing to assert a ***Batson***[2] challenge during the *voir dire* process?

Appellant's Brief at 2 (unnecessary capitalization omitted).

We have reviewed the certified record, the briefs of the parties, and the applicable law. Additionally, we have reviewed the thorough and well-reasoned opinion of the Honorable Ernest J. DiSantis, Jr., of the Court of Common Pleas of Erie County. We conclude that Judge DiSantis' detailed discussion accurately addresses and disposes of the issues presented by Appellant.[3] Accordingly, we adopt his opinion as our own and affirm the order denying Appellant's petition on that basis.[4]

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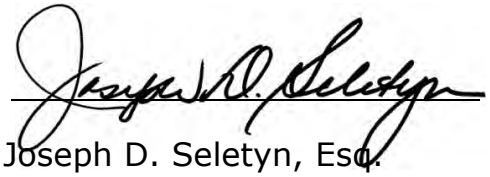
[2] ***Batson v. Kentucky***, 476 U.S. 79 (1986).

[3] We acknowledge, however, that in regard to Appellant's issue E, the court concluded that this claim – framed in terms of trial court error – was waived because it could have been presented on direct appeal. ***See*** PCRA Court Opinion, 8/12/13, at 16-17 (citing 42 Pa.C.S. § 9544(b)). However, our review of Appellant's petition (and his brief to this Court) reveals that he also asserted appellate counsel's ineffectiveness for not raising this claim on appeal; therefore, we disagree that it is waived. ***See*** Appellant's *Pro Se* Amended Petition, 6/24/13, at 2. Nevertheless, we ascertain no abuse of discretion in the court's alternative conclusion that Dr. Vey's characterization of the victim as an assault victim was appropriate, as it "was amply supported by the evidence." PCRA Court Opinion at 17. Moreover, we note that the thrust of Appellant's argument on appeal is that Dr. Vey should not have been permitted to testify that the victim suffered defensive wounds because "those same injuries … could have been deemed offensive in nature[,] corroborating [] [A]ppellant's account as the decedent being the aggressor." Appellant's Brief at 9. However, our review of the record

(Footnote Continued Next Page)

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/19/2014

(Footnote Continued) ———————————

confirms that during defense counsel's cross-examination of Dr. Vey, the doctor readily conceded that "what can be classified as a defensive wound could also be classified as an offensive wound depending on what occurs…." N.T. Trial, 11/9/10, at 251. He also agreed that the "defensive" wounds could have been "wounds that were [suffered] by the deceased when [she was] in an offensive posture…." Accordingly, the jury was made aware of Appellant's issue with Dr. Vey's opinion testimony regarding the victim's wounds. Thus, we conclude that Appellant has failed to prove he was prejudiced by the doctor's testimony in this regard, or by appellate counsel's failure to raise this claim on direct appeal.

[4] We note that Appellant's undeveloped arguments bolster our conclusion that the court's decision to deny his petition was not an abuse of discretion. In his brief, Appellant provides single paragraph discussions for his first eight issues, and a two-paragraph analysis for his ninth. In five of his issues (lettered A, C, D, E, and H, above), Appellant fails to cite to any legal authority to support his arguments. In three of his other issues (lettered B, F, and I, above), Appellant cites to one case in each, but does not provide any discussion of those decisions or how they apply to the facts at hand. In his most well-supported issue, lettered G, above, Appellant provides citations to two cases. Again, however, he does not proffer any meaningful discussion of the facts or holdings of those decisions and how they support his claims.

COMMONWEALTH OF PENNSYLVANIA, Appellee,	:	IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION
V.	:	
TYLER SCOTT KEYS, Appellant	:	NO. 1101 of 2010

OPINION AND NOTICE

This matter comes before the Court on Petitioner's *pro se* Petition For Post-Conviction Collateral Relief and counseled Supplement To Motion For Post Conviction Collateral Relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546.

I. BACKGROUND OF THE CASE[1]

This case involves arson and the murder of Peggy Sue Gaerttner ("victim"), which occurred on March 3, 2010, at 619 East 28th Street, Erie Pennsylvania. On that date, the victim resided in the downstairs apartment at 619 East 28th Street. Petitioner's cousin, Darryl Gibbs, resided in the upstairs apartment with his girlfriend.[2] Petitioner was staying at Gibbs' apartment on the day of the murder/arson, and approximately three days prior thereto. N.T. Trial (Day 1), 11/09/10, at 19-21, 25-27.

On the morning of March 3, 2010, Petitioner and Gibbs ate breakfast and played videogames. At approximately 2:20 p.m. or 2:25 p.m., Gibbs left the apartment for work, and Petitioner walked with him to the bus stop. Once at the bus stop, the

[1] The facts are derived from the trial testimony.

[2] Gibbs' apartment door was located at the back of the house. To access the basement from his apartment, Gibbs would have to walk out the apartment and use another staircase. The staircase, available to both tenants, was near the victim's apartment. Moreover, Gibbs and the victim had their own washers and driers in the basement. At the time of the murder, Gibbs' clothes dryer was not working. N.T. Trial (Day 1), 11/09/10, at 20, 28-30.

Petitioner continued walking to his old apartment in order to pick up his clothing. N.T. Trial (Day 1) 11/09/10, at 21-22, 26-27.

At approximately 3:30 p.m., Petitioner arrived at Kyle Bethea's home, located at 833 East 28th Street. Petitioner returned Bethea's book bag that he had previously borrowed. Petitioner did not appear to act out of character and stayed for approximately 10 minutes and left. During the visit, Bethea noticed red dots on Petitioner's socks and a cut to Petitioner's finger. N.T. Trial (Day 1) 11/09/10, at 59-60, 63,66.

At approximately 4:00 p.m., Gibbs called Bethea and asked him to check Gibbs' apartment to make sure Petitioner locked the door. Bethea arrived at Gibbs' house around 4:30.p.m. and saw smoke coming from the upstairs apartment. Bethea called 911 and then knocked on the front door. When no one answered, he went to the back of the house and checked Gibbs' door, which was ajar. Due to the smoke, he was unable to go to the upstairs apartment. N.T. Trial (Day 1) 11/09/10, at 61-62.

At approximately 4:30 p.m., Gibbs received a call from Bethea, informing him that his house was on fire. Gibbs called his grandfather for a ride, and 10 minutes later, his grandfather picked him up, got to the house, and saw the fire. N.T. Trial (Day 1) 11/09/10, at 23-24.

Between 4:30 p.m. and 5:00 p.m., Petitioner arrived at the home of the victim's sister, Barb Fletcher, located at 716 East 24th Street.[3] Petitioner went inside Fletcher's home and told her that he needed to speak with her. Fletcher, who was speaking with her landlord and paying her rent, told him to wait a minute. Petitioner waited for approximately 5 minutes and told her he was going to the store and would come back.

[3] Ms. Fletcher had known Petitioner for two years. N.T. Trial (Day 1) 11/09/10, at 68.

Petitioner and Shi'Dee Beason, who was outside on Fletcher's porch, left and did not come back. While inside Fletcher's home, Petitioner's demeanor was normal and she did not notice any injuries. N.T. Trial (Day 1) 11/09/10, at 67-72, 73, 75.

After Petitioner exited Fletcher's home, he asked Shi'Dee Beason to walk with him to a store, which was 3 minutes away. While walking, Beason noticed scratches on Petitioner's neck, blood all over his jacket, cuts on his pants by his ankle, and an injury to his knuckle. Petitioner told him he "got into it with a woman", defended himself, beat her up, killed her, and burned down the house. Beason asked Petitioner if he was joking around, and Petitioner replied, "No." Afterwards, Beason stopped walking with Petitioner and returned to Fletcher's house. N.T. Trial (Day 1) 11/09/10, at 35-37, 39-40, 44-45, 48, 50-53.

At approximately 5:00 p.m., the Erie Fire Department arrived at the scene. The fire was located primarily in the victim's bedroom, and "hot spots" were found there as well. After the fire was extinguished, the firefighters conducted a primary search and found nothing. After the smoke dissipated, they conducted a secondary search and again found nothing. After the secondary search, they discovered the victim's body in the hallway leading from the bathroom. The victim was face down with her knees in the bathroom (which was in close proximity to the bedroom). The main portion of her body was in the hallway pointing toward the dining room area. The firefighters moved the victim about 18 inches and determined that she was dead. When they found her, she

was covered in debris, including lath, plaster and portions of the ceiling that had burned out and fell onto her body. N.T. Trial (Day 1) 11/09/10, at 78, 80-83, 87, 90, 96.[4]

While at the scene, Erie Fire Department firefighter Mark Polanski observed a 10 inch long kitchen knife lying near the curb in the street at the end of the victim's driveway. The knife was in water that was running down the driveway. After his observation, Polanski placed the knife in the back of a parked pickup truck and later pointed it out to responding police officers. N.T. Trial (Day 1) 11/09/10, at 99-101, 104-105.

Erie Fire Department Chief Fire Inspector Guy Santone arrived on the scene at 5:29 p.m. Santone observed the victim's lower body in the hallway and her upper body in the dining room. He observed that the bedroom was completely destroyed. Based upon the burn and smoke patterns, along with interviews, he concluded that the origin of the fire was the southwest bedroom. Ultimately, Chief Santone subsequently concluded the cause of fire was the result of the lighting of ignitable liquid by a flame producing item. N.T. Trial (Day 1) 11/09/10, at 126, 128-129, 144-145, 151.

Detective Adam Digilarmo, of the Erie Police Department Crime Scene Unit, arrived while firefighters were still in the residence. Digilarmo entered as far as the dining room and noticed blood on a box and CD case. He observed blood on an archway and bloody fingerprints. While at the scene, he was given a large boning knife that was found by firefighter Polanski. Other knives were found at the scene, including

[4] Erie Fire Department firefighter Joseph J. Walko testified that when advancing the water line, his path was right over the victim's body. However, she was not noticed because the firefighters did not point the hose on the ground but rather at the bedroom. N.T. Trial (Day 1) 11/09/10, at 93.

a butcher knife which was found on the floor going back into the hallway. N.T. Trial (Day 1) 11/09/10, 163, 165-170.

Erie Police Department Detective Sergeant Barry Snyder arrived at the scene approximately one hour after the fire was extinguished. He observed the deceased victim, along with blood spatters in the residence. N.T. Trial (Day 1) 11/09/10, at 187, 194.

On the night of the incident, at approximately 8:00 p.m., Petitioner arrived at the Erie Police Department. Detective Snyder observed blood on Petitioner's vest and noticed that his hands had scrapes/cuts on the fingers and knuckles. Snyder observed that the wounds were minor and not bleeding. Moreover, Petitioner had a superficial cut on his right hand. He also observed right hand (scrapes finger/knuckles), a few scrapes to the palm of Petitioner's hand, scrape to left leg, and dried blood on Petitioner's hand. Snyder took photographs of Petitioner and a swab of the dried blood on his hand. N.T. Trial (Day 1) 11/09/10, at 188-193.

While at the police station, police seized his clothing, including Petitioner's flannel pants. Police obtained a swab from Petitioner's hands and fingernail and finger swabbings from Petitioner. (Also utilized was a fingernail clipping from the victim's body at the time of the autopsy. N.T. Trial (Day 1) 11/09/10, at 176-179.

On March 4, 2010, Detective Digilarmo returned to the scene and observed additional blood in the back hallway in the office room. He also observed a bloody hand print on a roll of paper towels in the kitchen, blood in the victim's bedroom, and blood and hairs on the side of a fax machine recovered from a bedroom. In the basement, he observed a white pillar with blood running down it (located beneath where the victim

was found). While at the scene, he took blood samples. N.T. Trial (Day 1) 11/09/10, at 171, 173, 175, 182.

The physical evidence was subsequently tested. It was stipulated at trial that the victim's DNA was found on the bottom of the fax machine, a swab from the blade of the recovered butcher knife, and on the lower left side of Petitioner's flannel pants. N.T. Trial (Day 1) 11/09/10, at 183-184.

On March 4, 2010, Dr. Eric Vey, a forensic pathologist with the Erie County Coroner's Office, performed an autopsy. He concluded that the victim's cause of death was due to exsanguination. Dr. Vey found that the victim bled to death both internally and externally, secondary to blunt force and sharp injury wounds with aspiration of blood into her lungs as a contributory factor. Dr. Vey concluded that the victim survived 10 or 15 minutes after her facial artery and facial vein in her neck were damaged from a stab wound. Moreover, Dr. Vey found that the victim had less than 2% carbon monoxide present in her lungs, indicating that the victim was not breathing at the time of the fire. N.T. Trial (Day 1), 11/09/10, at 197, 203, 247-249.

During the autopsy, Dr. Vey cataloged 72 different injuries. He found that the victim sustained numerous stab wounds, sharp force injuries, blunt force injuries, and defensive wounds. As Dr. Vey testified, he found:

> (1) Four stab wounds to the left lower back, right lower back, right upper back, and the right side of the neck. The stab wound to the victim's neck cut her facial vein and facial artery, and the cut went from the right to the left side of her neck. Dr. Vey found the wounds consistent with the knives presented at trial;
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> (2) Several sharp force injuries to the head. Dr. Vey found 26 categories of blunt force injuries (abrasions, contusions, and lacerations) to the victim's head. Included was a skull fracture and contusion to the victim's brain beneath a fracture, as well as hemorrhaging around the

> membranes that protect the brain. Dr. Vey concluded that, with a depressed skull fracture alone that's sufficient in magnitude to cause not only a skull fracture but depression of the skull fracture fragments below the plane of the skull and into the brain itself is sufficient to cause immediate incapacitation and loss of consciousness." *Id.* at 229. Dr. Vey found that the impact to the skull was consistent with an impact by an object with a corner, such as a fax machine;
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> (3) Several blunt force traumas to the extremities and trunk; and,
>
> (4) Defense wounds. Dr. Vey cataloged approximately 10 defensive wounds found predominantly on the victim's hands and also the left arm.

N.T. Trial (Day 1), 11/09/10, at 197, 203, 205- 206, 209-216, 218-239, 241-242, 245-246, 248, 272.

Additionally, Dr. Vey found that both of the victim's lungs collapsed and contained a speckled red pattern, indicating that she aspirated blood. Dr. Vey concluded that the stab wound to the victim's neck caused the blood aspiration. N.T. Trial (Day 1), 11/09/10, at 245-246.

At trial, Petitioner testified that he killed the victim in self defense. N.T. Trial (Day 2), 11/10/10, at 53, 59, 60-67, 69-75. On November 10, 2010, Petitioner was convicted of first-degree murder, aggravated assault, arson, and recklessly endangering another person. On January 5, 2011, Petitioner was sentenced to a term of life imprisonment at Count 1 (first-degree murder); 22 to 44 months' incarceration at Count 4 (arson), concurrent with Count 1; and 1 to 24 months' incarceration at Count 6 (REAP), consecutive to Count 1. Count 2 (aggravated assault) merged for sentencing purposes. On that same day, this Court ordered that Petitioner's post-sentence motion was due January 30, 2011. On January 28, 2011, Petitioner filed a Post-Sentence Motion, which this Court denied on January 31, 2011.

On February 24, 2011, Petitioner filed a Notice of Appeal. On April 12, 2011, the appeal was quashed. On April 19, 2011, Petitioner's appellate rights were reinstated. On April 20, 2011, Petitioner filed a Notice of Appeal. On May 10, 2011, appellate counsel filed a Statement of Intent to File an *Anders/McClendon* Brief. On May 17, 2011, this Court wrote the Superior Court, noting that in light of appellate counsel's representation that she would file an *Ander/McClendon* Brief, the Court would not be submitting a memorandum opinion pursuant to Pa.R.A.P. 1925(a).

On November 18, 2011, the Honorable Superior Court remanded the case to this Court for issuance of a 1925(a) opinion. On November 29, 2011, this Court wrote the Superior Court and requested clarification. In response, on December 5, 2011, the Honorable Superior Court directed this Court to address the following issue on appeal:

> **Whether there was insufficient evidence to find [Tyler Keys] guilty of Murder [of the First Degree] and Aggravated Assault despite his claim of self-defense.**

Superior Court Order, 12/05/11, quoting Appellant's *Anders* Brief at 5.

On March 15, 2012, the Superior Court affirmed Petitioner's judgment of sentence and granted counsel's motion to withdraw as counsel. *Commonwealth v. Keys,* 674 WDA 2011 (Pa. Super., March 15, 2012).

On March 8, 2013, Petitioner filed a *pro se* Petition For Post-Conviction Collateral Relief.[5] On March 11, 2013, this Court appointed PCRA counsel. On June 24, 2013, Petitioner filed a counseled Supplement to Motion For Post Conviction Collateral Relief.

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[5] Pursuant to the prisoner mailbox rule, Petitioner's *pro se* PCRA petition is deemed filed on March 8, 2013, the date he placed it in the hands of prison authorities for mailing (i.e., postmark date). *See, Commonwealth v. Fransen,* 986 A.2d 154, 156 n.5 (Pa. Super. 2009); *Commonwealth v. Castro*, 766 A.2d 1283 (Pa. Super. 2001); *Commonwealth v. Little*, 716 A.2d 1287 (Pa. Super. 1998).

As part of the supplement, PCRA counsel attached Petitioner's *pro se* PCRA petition, Pro-Se Amended PCRA Petition and Pro-Se Memorandum Of law In Support Of PCRA Petition. The counseled supplement does not raise or discuss any issues, but rather incorporates Petitioner's *pro se* filings.

II. LEGAL DISCUSSION

The purpose of the PCRA is to provide a means of obtaining collateral relief for persons who have been convicted of crimes they did not commit, or who are serving illegal sentences. 42 Pa.C.S.A. §9542; *see also, Commonwealth v. Carbone*, 707 A.2d 1145, 1148 (Pa.Super. 1998). A petitioner must demonstrate not only that an error has occurred, but also that the error prejudiced him or her. *See, Commonwealth v. Knox*, 450 A.2d 725, 728 (Pa.Super. 1982).

One will not be entitled to PCRA relief if the issues have been previously litigated or waived. See 42 Pa.C.S.A. §9544. An issue is previously litigated "if the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue[.]" 42 Pa.C.S.A. §9544(a)(2). An issue is waived "if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state post-conviction proceeding." 42 Pa.C.S.A. §9544(b).

Ineffective assistance of counsel claims are appropriately addressed under the Post-Conviction Relief Act, 42 Pa.C.S.A. §9541-9546. *See, Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002*); Commonwealth v. Rossetti*, 863 A.2d 1185 (Pa.Super. 2004).

The test for counsel ineffectiveness under the United States and Pennsylvania constitutions is the same: it is the performance and prejudice paradigm set forth by the

U.S. Supreme Court in its seminal decision in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *See, Commonwealth v. Bomar*, 826 A.2d 831, 855 (Pa. 2003); *Commonwealth v. Bond*, 819 A.2d 33, 41-42 (Pa. 2002); *Commonwealth v. Busanet*, 817 A.2d 1060, 1066 (Pa. 2002).

Counsel is presumed effective and to have acted in the best interests of his client, with the burden to prove otherwise upon the petitioner. *Commonwealth v. Singley*, 868 A.2d 403, 411 (Pa. 2005), *citing Commonwealth v. Jones,* 683 A.2d 1181, 1188 (Pa. 1996); *see also Commonwealth v. Miller*, 664 A.2d 1310, 1323 (Pa. 1995). The burden is on the petitioner to show, "by a preponderance of the evidence, ineffective assistance of counsel which, in the circumstances of the particular case, 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)(3); *see also Commonwealth v. Kimball*, 724 A.2d 326, 333 (Pa. 1999); *Commonwealth v. Jones*, 815 A.2d 598, 611 (Pa. 2002).

Therefore, to meet his burden, a petitioner must show that: (1) the claim is of arguable merit; (2) counsel had no reasonable strategic basis for his/her action or inaction; and (3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. *Strickland, supra*, at 694-95*; Kimball, supra*. "Reasonable probability" is defined as "a probability sufficient to undermine the confidence in the outcome." *Kimball, supra*, at 331, *citing Strickland, supra*, at 694). A failure to satisfy any prong of the test for ineffectiveness requires rejection of the claim. *Commonwealth v. Bryant*, 855 A.2d 726, 735-36 (Pa. 2004); *Jones, supra,* at 611 (Pa. 2002). Finally, "[a] PCRA court passes on witness

credibility at PCRA hearings, and its credibility determinations should be provided great deference by reviewing courts." *Commonwealth v. Johnson,* 966 A.2d 523, 539 (Pa. 2009) (citations omitted).

A. Whether appellate counsel was ineffective by failing to argue that the trial court abused its discretion in allowing photographs of the victim to be shown to the jury?

Petitioner claims the photographs of the victim admitted a trial were prejudicial-inflammatory, cumulative and not of essential evidentiary value that their need outweighed the likelihood of inflaming the jury. Pro se Petition, at 8(a). He further claims that because the victim's cause of death was not challenged, they were not relevant.

In the supporting memorandum, Petitioner claims trial counsel was also ineffective in failing to challenge the admission of photographs of blood on a pillar in the basement, blood on a butcher knife, blood on a box, CD case, archway, back hallway office room and blood on a roll of toilet paper. (Memorandum, at 10).

> The admission of photographs is a matter vested within the sound discretion of the trial court whose ruling thereon will not be overturned absent an abuse of that discretion. This Court has long recognized that photographic images of the injuries inflicted in a homicide case, although naturally unpleasant, are nevertheless oftentimes particularly pertinent to the inquiry into the intent element of the crime of murder. (the mere fact that blood is visible in a photograph does not necessarily render the photograph inflammatory). In determining whether the photographs are admissible, we employ a two-step analysis. First, we consider whether the photograph is inflammatory. If it is, we then consider whether the evidentiary value of the photograph outweighs the likelihood that the photograph will inflame the minds and passions of the jury. Even gruesome or potentially inflammatory photographs are admissible when the photographs are of such essential evidentiary value that their need clearly outweighs the likelihood of inflaming the minds and passions of the jurors.

Commonwealth v. Solano, 906 A.2d 1180, 1191-92 (Pa. 2006)(internal citations omitted). "Neither graphic testimony nor the pictures' gruesome nature precludes admissibility of photographs of a homicide scene." *Commonwealth v. Wright,* 961 A.2d 119, 138 (Pa. 2008)(citations omitted). Moreover, "the condition of the victim's body provides evidence of the assailant's intent, and, even where the body's condition can be described through testimony from a medical examiner, such testimony does not obviate the admissibility of photographs." *Commonwealth v. Rush,* 646 A.2d 557, 560 (Pa. 1994)(citations omitted)(emphasis added).

Here, this Court found the photographs of the victim were not inflammatory and reflected the extensive nature of her injuries. N.T. Motion In Limine, 11/08/10, at 3. Because this was a first-degree murder case, the nature of the injuries provided proof of both intent and malice. *Id.* Furthermore, the photographs taken at the scene accurately depicted the crime scene and the location of the victim's body. Because this Court did not abuse its discretion in determining the photographs were admissible, appellate counsel was not ineffective for failing to raise an issue as to their admissibility. Accordingly, this claim is meritless.

B. Whether both trial and appellate counsel were ineffective by not challenging this Court's omission of a corpus delicti jury instruction?

Petitioner claims this Court failed to instruct the jury that it must first be convinced beyond a reasonable doubt of the existence of the corpus delicti before it could consider Petitioner's extra-judicial admission/confession. Pro se Petition at 8(b). He asserts

Petitioner's admissions were admitted during the Commonwealth's opening and closing remarks, and during the examination of Commonwealth witness Shi-Dee Beason.[6]

> When reviewing a challenge to jury instructions, the reviewing court must consider the charge as a whole to determine if the charge was inadequate, erroneous, or prejudicial. The trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration. A new trial is required on account of an erroneous jury instruction only if the instruction under review contained fundamental error, misled, or confused the jury.

Commonwealth v. Fletcher, _____ Pa._____, 986 A.2d 759, 792 (2009) (internal citations and quotation marks omitted). "The relevant inquiry for [an appellate court] when reviewing a trial court's failure to give a jury instruction is whether such charge was warranted by the evidence in the case." *Commonwealth v. Baker,* 963 A.2d 495, 506 (Pa. Super. 2008).

"The purpose of the corpus delicti rule is to guard against 'the hasty and unguarded character which is often attached to confessions and admissions and the consequent danger of a conviction where no crime has in fact been committed'" *Commonwealth v. Edwards,* 903 A.2d 1139, 1158 (Pa. 2006)(citations and quotation omitted). "The corpus delicti rule provides that the Commonwealth bears a burden of showing that the charged crime actually occurred before a confession or admission by the accused can be admitted as evidence. 'The corpus del[i]cti is literally the body of the crime; it consists of proof that a loss or injury has occurred as a result of the criminal conduct of someone'". *Commonwealth v. Otterson,* 947 A.2d 1239, 1249 (Pa. Super. 2008)(citations omitted). Importantly, "the order in which evidence is presented is a

[6] Specifically, Beason testified that Petitioner told him that he "got into it with a woman", beat her up, defended himself, and burned down a house. N.T. Trial (Day 1), 11/09/10, at 35-37, 39-40, 44-45, 48, 50-53.

matter committed to the trial court's discretion, and its rulings will not be disturbed absent an abuse of that discretion." *Commonwealth v. Edwards,* 903 A.2d 1139, 1158-59 Pa. 2006)(citations omitted).

"In a homicide prosecution, '[t]he corpus delicti consists of proof that a human being is dead and that such death took place under circumstances which indicate criminal means or the commission of a felonious act[.]'" *Commonwealth v. Bullock,* 868 A.2d 516, 527 (Pa. Super. 2005)(citations and quotation omitted). The criminal responsibility of the defendant is not a requirement of the corpus delicti rule. *Id., citing Commonwealth v. Ahlborn,* 657 A.2d 518, 521 (Pa. Super. 1995).

Here, the Commonwealth's evidence, irrespective of Petitioner's out-of-court admissions, established that the victim died as a result of a homicide. Dr. Eric Vey, a forensic pathologist, testified that the victim suffered numerous stab wounds, sharp blunt force injuries, and defensive wounds. N.T. Trial (Day 1), 11/09/10, at 197, 203, 205-06, 209-16, 218, 239, 241-42, 245-26, 248, 272. He concluded the victim bled to death, secondary to blunt force and sharp injury wounds with aspiration of blood into her lungs.

In regard to the arson, the Commonwealth established through Chief Santone that the fire was caused by the lighting of ignitable liquid by a flame producing item. N.T. Trial (Day 1), 11/09/10, at 144-45. He theorized the fire was ignited by a human with an open flame *Id.,* at 280.

Based upon the above, this Court finds Petitioner's claim meritless. The Commonwealth established the corpus delicti of each crime through direct and circumstantial evidence independent of Petitioner's out-of-court admissions. Therefore,

an instruction was not required and counsel were not ineffective by failing to request one at trial or advancing this claim on direct appeal.

C. **Whether trial counsel was ineffective for failing to request an imperfect self-defense instruction and whether appellate counsel was ineffective for not raising trial counsel's ineffectiveness in that regard?**

On direct appeal, the Superior Court found the evidence presented at trial was sufficient for the jury to find that the 72 wounds evidence an unreasonable response by Petitioner to any provocation by the victim. *Commonwealth v. Keys,* 674 WDA 2011, at *7 (Pa. Super., March 15, 2012). Importantly, it concluded that the Commonwealth proffered sufficient evidence for a jury to find Petitioner's defense or self-sense disproven/overcome. *Id.,* at *8. Accordingly, Petitioner cannot succeed on this claim of ineffectiveness as the trial evidence did not support an imperfect self-defense instruction. *See Commonwealth v. Washington,* 692 A.2d 1024, 1028-29 (Pa. 1997)(finding that jury instructions regarding particular defense not warranted where evidence does not support such instruction).

D. **Whether direct appellate counsel was ineffective for filing an Anders brief?**

Petitioner claims that appellate counsel's *Anders*[7] brief was defective and failed to raise meritorious issues (admission of the victim's photographs, corpus delicti issue, error in allowing Dr. Vey to suggest the victim was an assault victim, and prosecutorial misconduct).

> Court-appointed counsel who seeks to withdraw from representing an appellant on direct appeal on the basis that the appeal is frivolous must:

[7] *Anders v. California*, 386 U.S. 783 (1967).

> (1) provide a summary of the procedural history and facts, with citations to the record;
>
> (2) refer to anything in the record that counsel believes arguably supports the appeal;
>
> (3) set forth counsel's conclusion that the appeal is frivolous; and
>
> (4) state counsel's reasons for concluding that the appeal is frivolous. Counsel should articulate the relevant facts of record, controlling case law, and/or statutes on point that have led to the conclusion that the appeal is frivolous.

Commonwealth v. Santiago, 602 Pa. at 178-179, 978 A.2d at 361. Our Court must then conduct its own review of the proceedings and make an independent judgment to decide whether the appeal is, in fact, wholly frivolous. *Id.* at 359 (citation omitted).

Commonwealth v. Washington, 63 A.3d 797, 800 (Pa. Super. 2013).

Here, the Honorable Superior Court determined on direct review that counsel properly complied with *Anders* and *Santiago*[8]. The Superior Court conducted its own review and independently concluded that the appeal was wholly frivolous. Therefore, Petitioner's claim is meritless. *See, Commonwealth v. Poplawski,* 852 A.2d 323, 327 (Pa. Super. 2004)(Counsel cannot be found ineffective for failing to pursue a baseless or meritless claim.).

E. Whether the trial court erred in allowing Dr. Vey to suggest the victim was an assault victim?

Petitioner claims this Court erred by allowing Dr. Vey to testify that the decedent was an assault victim, despite the fact that this Court sustained counsel's objection on this point. Petitioner claims this Court erred by allowing Dr. Vey to give an opinion as to defensive injuries which inferred that the victim was a victim of assault. *Pro-Se* Amended PCRA Petition, at 4(e). Because this claim could have been raised on direct

[8] *Commonwealth v. Santiago*, 978 A.2d 349, 350-51 (Pa. 2009).

appeal, it is waived. 42. Pa.C.S.A. § 9544(b). Moreover, although this conclusion was one for the jury to make – as it did – Dr. Vey's characterization was amply supported by the evidence.

F. Whether trial counsel was ineffective for failing to file a pre-trial in limine motion to exclude introduction of a knife as irrelevant and/or failing to object to its admission at trial for insufficient foundation to permit inference that it may have been used as the weapon at some point during incident?

"[A]" motion *in limine* is a procedure for obtaining a ruling on the admissibility of evidence prior to trial, which is similar to a ruling on a motion to suppress evidence, [therefore] our standard of review. . . is the same as that of a motion to suppress. *Commonwealth v. Mitchell,* 588 Pa. 19, 902 A.2d 430, 455 (2006). The admission of evidence is committed to the sound discretion of the trial court, and our review is for an abuse of discretion. *Commmonwealth v. Baumhammers,* 960 A.2d 59 (Pa. 2008).

It is firmly established, "questions concerning the admissibility of evidence lie within the sound discretion of the trial court, and [a reviewing court] will not reverse the court's decision on such a question absent a clear abuse of discretion." *Commonwealth v. Chmiel,* 558 Pa. 478, 493, 738 A.2d 406, 414 (1999), *cert. denied,* 528 U.S. 1131, 120 S. Ct. 970, 145 L.Ed. 2d 841 (2000).

"Typically, all relevant evidence, i.e., evidence which tends to make the existence or non-existence of a material fact more or less probable, is admissible, subject to the prejudice/probative weighing which attends all decisions upon admissibility." *Commonwealth v. Dillon,* 925 A.2d 131, 136 (Pa. 2007)(citations omitted). In particular, relevant evidence "may be excluded it its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations

of undue delay, waste of time, or needless presentation of cumulative evidence." Pa.R.E. 403. "'Unfair prejudice' means a tendency to suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially." Pa.R.E. 403 cmt.

"[E]vidence will not be prohibited merely because it is harmful to the defendant. [E]xclusion is limited to evidence so prejudicial that it would inflame the jury to make a decision based upon something other than the legal propositions relevant to the case." *Commonwealth v. Page,* 965 A.2d 1212, 1220 (Pa. Super. 2009) (citations and quotation marks omitted).

> This Court has long held that the prosecution need not establish that a particular weapon was actually used in the commission of a crime in order for it to be admissible at trial. Further, the Commonwealth need only lay a foundation that would justify an inference by the finder of fact of the likelihood that the weapon was used in the commission of the crime.

Commonwealth v. Edwards, 903 A.2d 1139, 1156-57 (Pa. 2006)(internal citations omitted)(emphasis added).

In *Commonwealth v. Williams*, 640 A.2d 1251 (Pa. 1994), the Pennsylvania Supreme Court held:

> A weapon shown to have been in a defendant's possession may properly be admitted into evidence, even though it cannot positively be identified as the weapon used in the commission of a particular crime, if it tends to prove that the defendant had a weapon similar to the one used in the perpetration of the crime. Any uncertainty that the weapon is the actual weapon used in the crime goes to the weight of such evidence.

Id., at 1260, *citing Commonwealth v. Coccioletti,* 425 A.2d 387 (Pa. 1981).

At the outset, this Court finds this issue undeveloped and, therefore, waived. Nevertheless, this Court finds that the knife (a large boning knife) was properly

introduced and admitted into evidence. Firefighter Mark Polanski testified that he observed the knife lying near the curb in the street at the end of the victim's driveway and that the knife was in water that was running down the driveway. N.T. Trial (Day 1), 11/09/10, at 99-101, 104-105[9]. A butcher knife was also found in the hallway of the victim's residence. *Id.*, at 169-70. Petitioner, however, testified that he never saw the boning knife, but recognized the butcher knife as the knife the victim used to threaten him with (and the knife he used to stab the victim). N.T. Trial (Day 2), 11/10/10, 93-94,98, 100. Even assuming the boning knife was not the murder weapon, it was related to the history of the police investigation of the crime scene. Furthermore, its admission did not prejudice the Petitioner.

G. Whether trial counsel was ineffective for failing to object to the Commonwealth's attorney refreshing the recollection of a witness with a transcript of a witnesses statement and whether appellate counsel was ineffective for failing to raise this claim on appeal?

Petitioner claims the Commonwealth used an 'improper/prejudicial procedure" to refresh the recollection of Shi'Dee Beason on direct examination by reading out loud a transcript from a video-taped statement "under use of prior inconsistent statements of a witness. . . although his trial testimony was not per-se inconsistent." Pro Se Amended PCRA Petition, at 4(f). Petitioner cites generally to the first day of testimony at pages 37-45. Petitioner further asserts that the Commonwealth failed to lay the proper foundation for admitting Commonwealth Exhibit 18 (the transcript of Beason's taped

[9] After Polanski's testimony, the Commonwealth moved for admission and it was admitted. *Id.*, at 102.

statement) and also Exhibit 17 (Beason's taped statement) because it was never shown at trial. *Id.*

Rule 612 of the Pennsylvania Rules of Evidence provides that a witness's memory may be refreshed with a writing or other item. Pa.R.E. 612 (a). To use a writing or other item to refresh memory, the following must be established: (1) the witness's present memory is inadequate; (2) the writing could refresh the witness's present memory; and, (3), the reference to the writing actually refreshes the witness's present memory. *Commonwealth v. Proctor*, 385 A.2d 383 (Pa. Super. 1978). The proper procedure to refresh one's own witness's recollection is to show the writing to the witness and after the witness's recollection is refreshed, direct examination may proceed with the witness testifying from present recollection. *Commonwealth v. Payne*, 317 A.2d 208 (Pa. 1974). The writing used to refresh is not evidence (exhibit) and is not given or read to the jury. *Payne.*

Rule 613 of the Rules of Evidence provides that a witness may be examined concerning his/her prior inconsistent statement. Pa.R.E. 613. Extrinsic evidence of the prior inconsistent statement is admissible if, during the witness's examination: (1) the statement, if written is shown to, or if not written, the contents disclosed to the witness; (2) the witness is given an opportunity to explain or deny making the statement; and, (3) the other party is given an opportunity to question the witness. Pa.R.E. 613 (1)(1)-(3).[10] Furthermore, a prior inconsistent statement of a witness is not excluded by the hearsay

[10] Pa.R.E. 613 also provides that a prior consistent statement is admissible to rehabilitate a witness's credibility if the opposing party is given an opportunity to cross-examine the witness about the statement and the statement is offered to rebut a charge of fabrication, bias, improper influence or motive, or faulty memory and the statement was made before that which has been charged existed or arose; or, having made a prior inconsistent statement, which the witness has denied or explained, and the consistent statement supports the witness's denial or explanation. Pa.R.E. 613 (c).

if the declarant/witness is subject to cross-examination and the prior statement was given under oath at a trial, hearing or other proceeding; is a writing signed and adopted by the declarant; or, is a verbatim contemporaneous recording of an oral statement. Pa.R.E. 803.1 (a).

At the time of Petitioner's trial, Rule 803.1 (3) provided[11]:

> Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory, providing that the witness testifies that the record correctly reflects that knowledge. If admitted, the memorandum or record may be read into evidence and received as an exhibit, but may be shown to the jury only in exceptional circumstances or when offered by an adverse party.

Pa.R.E. 803.1 (3). "Four elements are required for a hearsay statement to be admitted as a past recollection recorded: (1) the witness must have had firsthand knowledge of the event; (2) the written statement must be an original memorandum made at or near the time of the event and while the witness had a clear and accurate memory of it; (3) the witness must lack a present recollection of the event; and (4) the witness must vouch for the accuracy of the written memorandum." *Commonwealth v. Young,* 748 A.2d 166, 177 (Pa. 1999)(citation omitted).

At the time of Petitioner's trial, Rule 804 of the Rules of Evidence provided that:

> (b) Hearsay Exceptions. The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . .
>
> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered or, in a civil action or proceeding, a predecessor in interest, had an adequate opportunity and

[11] By order dated January 17, 2013, effective March 2013, revisions were made to various sections of the Rules of Evidence, including Sections 803.1 and 804.

similar motive to develop the testimony by direct, cross, or redirect examination.

Pa.R.E. 804 (b)(1).

During the direct examination of Shi'Dee Beason, the following occurred:

Q. Did he - - you don't remember him telling you about burning down a house?
A. No, he said, "I think I burned down a house."
Q. He thought he burned down a house?
A. Yes.
Q. And what part of the conversation did he say he thought he burned down a house?
A. When we was walking to the store.
Q. Did he talk to you about possibly killing a woman when he walked to the store?
A. No.
Q. Do you remember testifying at an earlier proceeding?
A. Yes.
Mr. Bauer: May I approach the witness, Your Honor?
The Court: You may.
Q. Do you remember when [defense counsel] was asking you questions at that proceeding?
A. Yes.
Q. And [defense counsel] is the gentleman sitting over there just in case you don't remember him. I wanted to show you Page 40. [Defense counsel], his question to you was: "Okay. Now, at one point [Petitioner] says to you from the statement that he burned a house down and beat up a woman and burned a house down, right?" And you answer was: "Uh-huh." Do you remember that?
A. Yes.
Q. Is that accurate?
A. I didn't - -
Q. Do you remember that statement?
A. Yeah. He said - - he - - he said he burned a house down.
Q. But in this statement he also said that he beat a woman and burned the house down.
A. It happened so long ago. I really don't remember.
The Court: I'm sorry, sir. I couldn't hear you.
Mr. Beason: I said it happened so long ago I really don't remember.
Q. He asked you another question on Page 41: Question was: "Okay. Now, when you say details of what happened, the comments you made were, 'beat up a woman,' 'burned a house down,' 'basically killed her,' and that he, 'defended himself.' Are those the details that you are talking about, or are there anymore?" Your answer was: "Those are the details I'm talking about." Do you remember that?
A. Yes, now I do.
Q. Now you do. Can you tell us then about this conversation with [Petitioner] about basically killing a woman, what he said to you that day?

A. He did tell me that he got into it with a woman and burned the house down.
Q. Can you - - did you ask him what he meant by getting into it with a woman?
A. No.
Q. You said you are having trouble remembering what happened?
A. Yes.
Q. Do you remember talking to the police officers after you talked to Mr. Keys?
A. Yes.
Q. Do you remember giving them a videotaped statement?
A. Hm-mm.
Q. Would you agree with me that that would be something at that time, the events would have been fresher in your head?
A. Probably.

Mr. Bauer: May I, Your Honor?

The Court: You may. [Defense counsel], if you need to move, you may do so.

[Defense counsel]: Your Honor, we would object at this point in time. There is also a transcript of that recording, and that hasn't been shown yet. Show that to Mr. Beason to see if that would refresh his recollection instead of playing the entire tape at this point.

The Court: Objection overruled. The recollection can be refreshed by really any item.

[Defense counsel]: Yes, Your Honor.

The Court: But I think we do probably need something on the record as to what you are about to show him.

Mr. Bauer: For the record, I'm about to show him his videotaped statement to the police officers in order to refresh his recollection as to what the conversation was between himself and [Petitioner].

The Court: Subject to some authentication at some point I'll allow you to do that.

Mr. Bauer: Well, Your Honor, I'm having some technical difficulties. Although I did view it this morning on this same TV, now it's now reading the disc.

. . .

Mr. Bauer: Your Honor, I'm going to approach with the copy of the transcript that's been transcribed in this case, with the Court's permission.
The Court: You may. And for the record, this is the transcript of the preliminary hearing, I take it?
Mr. Bauer: It's actually the transcript of the videotape that was made at the preliminary hearing because we also had it admitted at that level, Your Honor.
The Court: All right. I'll allow you to do that and then we will authenticate it and admit the document at a later time.

. . .

Q. Mr. Beason, I'm going so (sic) show you a copy of this transcript, and it's on Page 13. We are going to start - - because we already talked the first part about the house, I'm going to start with the question - - this is when the detectives were talking to you after this incident. The question was: "Did he say what he did

before? Or what did he say before he said, 'And I burned the house down'?" The answer was: "Yeah - - " this is you talking - - "he said, 'I beat this woman up, and then I burnt the house down.' And then he showed me his hands, and it was like a bone on his white meat. You could see he had blood all over his hands." The question was put to you: "So he said, 'I beat this woman up.'" Your answer was: "Yeah. He said, ' I beat this woman up.' He was like, 'I just basically killed this person.'" Do you remember those?
A. Yes, now I do.
Q. Do you remember telling the police that?
A. Yes.
Q. And you told the police that because that's what [Petitioner] told you?
A. Yes.
Q. The next time they're asking you questions about burning the house down you told the police you thought [Petitioner] was playing with you?
A. Yes.
Q. What do you mean by "playing with you?"
A. That I thought he was joking around.
Q. And when you asked him if he was playing with you, what did he tell you?
A. He said no.

. . .

N.T. Trial (Day 1), 11/09/10, at 37-45.

As Mr. Beason could not recall portions of his videotape statement to the police (which included the Petitioner's admissions), the prosecutor attempted to refresh his recollection with those statements. Although a witness's specific statements are generally not disclosed to the jury during the process of refreshing recollection, they can be disclosed if they are admissible for some other purpose. In this instance it was proper to read the specific statements to Mr. Beason because they were admissible as prior inconsistent statements. Both the videotaped statement and the transcript were also admissible as a past recollection recorded.[12] Therefore, Petitioner's claim of ineffectiveness is meritless.

[12] Under Pa.R.E. 607, a party may impeach his/her own witness.

H. Whether trial counsel was ineffective for failing to request change of venue(and/or venire) because of negative pretrial publicity?

Petitioner claims there was "overwhelming negative pre-trial publicity, which produced an inability to select an impartial jury". *Pro se* Amended PCRA Petition, at 4 (h). In support, Petitioner asserts that 8 selected jurors knew about the case before being selected and at least 5 of them "didn't think" the coverage would influence them. *Id.*

In determining whether a change of venue based on pretrial publicity should be granted, the following is relevant:

> The mere existence of pretrial publicity does not warrant a presumption of prejudice. If pretrial publicity occurred, its nature and effect on the community must be considered. Factors to consider are whether the publicity was sensational, inflammatory, and slanted toward conviction rather than factual and objective; whether the publicity revealed the accused's prior criminal record, if any; whether it referred to confessions, admissions, or reenactments of the crime by the accused; and whether such information is the product of reports by the police or prosecuting officers. If any of these factors exists, the publicity is deemed to be inherently prejudicial, and we must inquire whether the publicity has been so extensive, so sustained, and so pervasive that the community must be deemed to have been saturated with it. Finally, even if there has been inherently prejudicial publicity which has saturated the community, no change of venue [or venire] is warranted if the passage of time has significantly dissipated the prejudicial effects of the publicity.

Commonwealth v. Pappas, 845 A.2d 829, 844 (Pa. Super. 2004)(quotation and citations omitted).

Petitioner proffers no evidence that Petitioner's media coverage was extensive or emotionally charged. Furthermore, none of the jurors stated that the media coverage would influence their decision. Therefore, the ineffectiveness claim is meritless.

I. Whether trial counsel was ineffective for challenging the venire (sic)?

Petitioner claims trial counsel was ineffective for failing to challenge the venire because it did not represent a fair cross section of the community. However, he is actually challenging trial counsel's decision not to challenge the array. Petitioner claims that out of 55 jurors, only four represented minority groups (three African Americans and one Hispanic). Two of those minorities were stricken and two others were not examined. Petitioner challenges trial counsel's handling of a *Batson*[13] challenge.

In *Commonwealth v. Johnson,* 838 A.2d 663 (Pa. 2003), our Pennsylvania Supreme Court summarized the requirements for a challenge to the array of prospective jurors on the ground that such array does not reflect a fair cross section of the community. It stated:

> The Commonwealth notes that Appellant does not have the right to demand that specific numbers of minorities sit on the jury panel which judges him. *See Commonwealth v. Jones,* 452 Pa. 299, 304 A.2d 684 (1973); *Commonwealth v. Craver,* 547 Pa. 17, 27-28, 688 A.2d 691, 696 (1997)(" 'Defendants are not entitled to a jury of any particular composition, but the jury wheels, pools of names, panels, or venires from which juries are drawn must not *systematically* exclude distinctive groups in the community and thereby fail to be *reasonably* representative thereof.' " (quoting *Taylor v. Louisiana,* 419 U.S. 522, 538, 95 S.Ct. 692, 701, 42 L.Ed. 2d 690 (1975)(emphasis in original))).
>
> To establish a *prima facie* violation of the requirement that a jury array fairly represent the community, Johnson must show that:
>
> (1) the group allegedly excluded is a distinctive group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation of the number of such people in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury selection process. "Systematic" means caused by or inherent in the system by which juries were selected. *Craver,* 547 Pa. at 28, 688 A.2d at 696 (citing *Duren v.*

[13] *Batson v. Kentucky,* 476 U.S. 79 (1986).

> *Missouri,* 439 U.S. 357, 364, 366-67, 99 S.Ct. 664, 668-70, 58 L.Ed. 2d 579 (1979). Proof is required of an actual discriminatory practice in the jury selection process, not merely underrepresentation of one particular group. *See id.* at 27-28. 688 A.2d at 696. The defendant bears the initial burden of presenting *prima facie* evidence of discrimination in the jury selection process. *See Jones,* 452 Pa. at 312, 304 A.2d at 692.
>
> This Court has rejected various criminal defendant's attacks, on the basis that African-Americans were underrepresented, to the racial composition of a jury panel drawn from voter registrations lists. *See Commonwealth v. Bridges,* 563 Pa. 1, 18, 757 A.2d 859, 868 (2000); *Commonwealth v. Henry,* 524 Pa. 135, 144, 569 A.2d 929, 933 (1990). More recently, the reasoning and holdings of those cases have been extended to approve the usage of driver's license lists for purposes of jury selection. *See Commonwealth v. Johnson,* 572 Pa. 283, 305, 815 A.2d 563, 575 (2002) (plurality) ("Absent some showing that driver's license selection procedures are inherently biased, [the defendant] has failed to distinguish jury pool lists derived from voter registration records from those derived from driver's license registration lists"); *accord Commonwealth v. Cameron,* 664 A.2d 1364, 1369 (Pa. Super. 1995).

Id. at 682. (footnote omitted).

This Court takes judicial notice that in Erie County, potential jurors are drawn from a number of sources, including: (1) drivers' license and registration; (2) tax rolls; (3) voter registration; and, (4) public assistance programs, including the Department of Public Welfare. Furthermore, there were four minority citizens on this panel. N.T. Voir Dire, 11/08/10, at 134. As Petitioner fails to proffer any evidence or advance any argument demonstrating the systematic exclusion of minorities, this claim is meritless. Therefore, a challenge to the array would have been a futile gesture.

J. The Batson challenge[14]

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[14] In *Batson,* the U.S. Supreme Court held that "the Equal Protection Clause forbids [a] prosecutor to challenge potential jurors solely on account of their race." *Id.* at 89. We explained the framework for analyzing a *Batson* claim in our direct appeal opinion in *Commonwealth v. Harris,* 572 Pa. 489, 817 A.2d 1033 (2002):

> [F]irst, the defendant must make a *prima facie* showing that the circumstances give rise to an inference that the prosecutor struck one or more prospective jurors on account of race; second, if the *prima facie*

The Commonwealth asserted that the juror should be stricken for cause. The challenged African American juror had a longstanding relationship with Petitioner's aunt. She stated that it would be difficult for her to be fair and impartial. *Id.*, at 128-129, 133. Although a *Batson* challenge was made and discussed at trial, the juror was properly stricken for cause – not by use of a preemptory challenge - which was appropriate under the circumstances because she could not be fair and impartial. *See, Commonwealth v. Ingber,* 531 A.2d 1101, 1103 (Pa. 1987)(citation omitted) ("A

> showing is made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the juror(s) at issue; and third, the trial court must then make the ultimate determination of whether the defense has carried its burden of proving purposeful discrimination. *Batson,* 476 U.S. at 97, 106 S.Ct.1712.
>
> To establish a *prima facie* case of purposeful discrimination. . . the defendant [must] show that he [i]s a member of a cognizable racial group, that the prosecutor exercised a peremptory challenge or challenges to remove from the venire members of the defendant's race; and that other relevant circumstances combine[] to raise an inference that the prosecutor removed the juror(s) for racial reasons. *Batson,* 476 U.S. at 96, 106 S.Ct. 1712. . . .
>
> The second prong of the *Batson* test, involving the prosecution's obligation to come forward with a race-neutral explanation of the challenges once a *prima facie* case is proven, "does not demand an explanation that is persuasive, or even plausible." *Purkett v. Elem,* 514 U.S. 765, 767-68, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). Rather, the issue at that stage "'is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.'" *Id.*[(*quoting Hernandez v. New York,* 500 U.S. 352, 360, 111 S.Ct. 1859, 114 L.Ed. 2d 395 (1991) (plurality opinion))].
>
> If a race-neutral explanation is tendered, the trial court must then proceed to the third prong of the test, *i.e.,* the ultimate determination of whether the opponent of the strike has carried his burden of proving purposeful discrimination. *Purkett,* 514 U.S. at 768, 115 S.Ct. 1769. It is at this stage that the persuasiveness of the facially-neutral explanation proffered by the Commonwealth is relevant. *Id.*

Commonwealth v. Cook, 597 Pa. 572, 952 A.2d 594, 602-03 (2008), *citing Commonwealth v. Harris*, 572 Pa. 489, 817 A.2d 1033, 1042-43 (2002). (footnote 7 omitted). "[T] trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal and will not be overturned unless clearly erroneous." *Cook, supra.* (citations omitted).

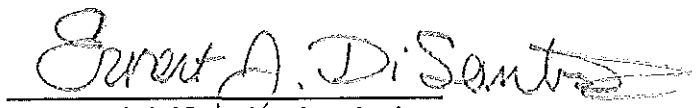
challenge for cause to service by a prospective juror should be sustained and that juror excused where that juror demonstrates through his conduct and answers a likelihood of prejudice.") Therefore, *Batson* does not apply. In comparison, the white juror that was selected was not, as Petitioner claims, "similarly situated". She did not know any of the victim's or Petitioner's family. Rather, in response to question number 17 of the juror questionnaire (inquiring whether she knew any firefighters) she responded that she knew the Chief of the Erie Fire Department Anthony Pol, who was neither a potential nor actual witness in this case. More importantly, she stated that this would not affect her ability to be fair and impartial. *Id.*, at 79. As such, there was no reason to strike her for cause or any other reason.

III. CONCLUSION

Based upon the above, this Court determines that the Petitioner has failed to establish grounds for PCRA relief. Therefore, it will issue the appropriate notice.

DATE: August 12, 2013

BY THE COURT:



Ernest J. DiSantis, Jr., Judge

Jack Daneri, Esquire
District Attorney

William J. Hathaway, Esquire
1903 West 8th Street, PMB #261
Erie, PA 16505

COMMONWEALTH OF PENNSYLVANIA, Appellee,	:	IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION
V.	:	
TYLER SCOTT KEYS, Appellant	:	NO. 1101 of 2010

NOTICE OF INTENT TO DISMISS PCRA WITHOUT HEARING PURSUANT TO PA.R.CRIM.P. 907(1)

AND NOW, this 12th day of August 2013, after a review of the record, Petitioner's *pro se* Petition For Post-Conviction Collateral Relief and counseled Supplement To Motion For Post Conviction Collateral Relief, and the reasons set forth in the accompanying opinion, this Court finds that the Petitioner has failed to establish that he is entitled to relief under the Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541, et. seq. ("PCRA"). The Petitioner is advised by the instant notice that the *pro se* Petition For Post-Conviction Collateral Relief filed on March 8, 2013 and counseled Supplement To Motion For Post Conviction Collateral Relief filed on June 24, 2013, will be dismissed within twenty (20) days from the date of this notice, pursuant to Pa.R.Crim.P. 907 (1).

BY THE COURT:

Ernest J. DiSantis

Ernest J. DiSantis, Jr., Judge

Jack Daneri, Esquire
District Attorney

William J. Hathaway, Esquire
1903 West 8th Street, PMB #261
Erie, PA 16505