NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA v. RICHARD MCCRACKEN Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1782 WDA 2016

Appeal from the PCRA Order October 20, 2016
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0008518-2011

BEFORE: DUBOW, SOLANO, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: FILED: September 15, 2017

Appellant, Richard McCracken, appeals from the order entered in the Allegheny County Court of Common Pleas denying his first Post Conviction Relief Act[1] ("PCRA") petition. Appellant alleges various claims regarding trial counsel's ineffectiveness. We affirm.

We adopt the facts and procedural history set forth by the PCRA court's opinion.[2] ***See*** PCRA Ct. Op., 1/12/17, at 1-3. Appellant raises the following issues for review:

---

* Former Justice specially assigned to the Superior Court.

[1] 42 Pa.C.S. §§ 9541-9546.

[2] We note the PCRA court's opinion states that Appellant was sentenced to two-and-one-half to six years' imprisonment for unlawful contact with a minor. ***See*** PCRA Ct. Op. at 2. However, Appellant was actually sentenced to two-and-one-half to **five** years' imprisonment on this charge.

> 1. Was trial counsel ineffective for not objecting to the improper inflammatory and prejudicial statement during Commonwealth's closing argument:
>
> [Victim] was failed by her whole maternal family. She needs you. You are all she has to stand up for her and for what [Appellant] did to her[.]
>
> 2. Was trial counsel ineffective when he cross-examined Commonwealth expert witness Dr. Jennifer Wolford and opened the door to testimony that a hymen can regrow itself[?] This testimony was extremely prejudicial to [Appellant's] defense and there was no trial strategy to engage in said cross-examination.
>
> 3. Was trial counsel ineffective when he did not challenge Dr. Wolford's testimony that 90% of the exams of sexual abuse victims are "normal" in several regards (a) where did those statistics come from (b) what does normal entail (c) of the 90% normal examinations, how many entail the regrowth/rehealing of the hymen[?]
>
> 4. Was trial counsel ineffective when he did not challenge Dr. Wolford on the basis/source of her opinion [regarding] the regrowth of the hymen, whether that opinion was generally accepted in the medical community, whether there were any other experts, treatises or professional publications that supported her position[?]
>
> 5. Was [t]rial [c]ounsel ineffective for failing to present expert testimony specifically that of Dr. Stephen Guertin, on behalf of [Appellant], to rebut the testimony of Commonwealth witness Dr[.] Jennifer Wolford?
>
> 6 Did the [PCRA] court have enough information from the certified record that enabled the court to write a 17 page opinion in the case[?]

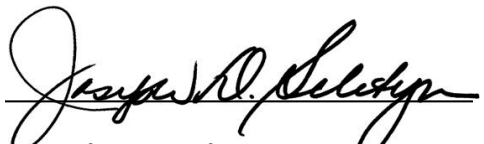
Appellant's Brief at 3-4 (citation to record omitted).

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Donna Jo McDaniel, we conclude the PCRA court's opinion comprehensively discusses

and properly disposes of the issues presented.[3] ***See*** PCRA Ct. Op. at 4-17. Accordingly, we affirm on the basis of the PCRA court's opinion.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 9/15/2017

[3] The PCRA court's opinion does not address Appellant's sixth and final issue, which alleges that the PCRA court erred in finding Appellant's fifth issue waived. However, in its opinion, the PCRA court concluded that, even if not waived, Appellant's fifth issue is meritless. ***See*** PCRA Ct. Op. at 16-17. Therefore, any challenge to the PCRA court finding waiver of Appellant's fifth issue is moot.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

vs.

RICHARD McCRACKEN

CRIMINAL DIVISION

CC No. 201108518

SUPERIOR CT. NO.
1782 WDA 2016

OPINION

Filed by:
Honorable Donna Jo McDaniel

Copies sent to:

Paul Gettleman, Esq.
2181 Armstrong Rd.
Portersville, PA 16051-3425

Michael Streily, DDA
Office of the District Attorney
401 Courthouse
436 Grant Street
Pittsburgh, PA 15219

Dated: January 12, 2017

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

v. CC: 201108518

RICHARD McCRACKEN,

Defendant

OPINION

The Defendant has appealed from this Court's Order of October 20, 2016, which denied his Post Conviction Relief Act Petition following a hearing. However, a review of the record reveals that the Defendant has failed to present any meritorious issues on appeal and, therefore, this Court's Order should be affirmed.

The Defendant was charged with Rape of a Child,[1] Unlawful Contact with a Minor,[2] Indecent Assault – Person Under 13 Years,[3] Statutory Sexual Assault,[4] Endangering the Welfare of a Child[5] and Corruption of Minors.[6] Following a jury trial held before this Court from

[1] 18 Pa.C.S.A. §3121(c) – 2 counts

[2] 18 Pa.C.S.A. §6318(1)

[3] 18 Pa.C.S.A. §3126(a)

[4] 18 Pa.C.S.A. §3122.1

[5] 18 Pa.C.S.A. §4304

[6] 18 Pa.C.S.A. §6301(a)(1)

December 13-14, 2011, the Defendant was convicted of one (1) count of Rape of a Child and the remaining charges.

Pursuant to this Court's Order, an evaluation by the Sexual Offenders Assessment Board (SOAB) was conducted, and the Defendant was found to be a sexually violent predator. Pursuant to the Commonwealth's Praecipe, a Sexually Violent Predator (SVP) hearing was held prior to sentencing on March 13, 2012, and this Court held that the Defendant was a Sexually Violent Predator. The Defendant was then sentenced to two (2) consecutive terms of imprisonment of ten (10) to twenty (20) years at the Rape of a Child and Unlawful Contact with a Minor charges, and a consecutive term of imprisonment of two and one half (2 ½) to six (6) years. A timely Post-Sentence Motion (captioned Post-Verdict Motion) was filed and was denied on March 15, 2012. The judgment of sentence was affirmed on August 27, 2013 and the Defendant's subsequent application for reargument or reconsideration was denied on October 25, 2013. Thereafter, the Defendant's Petition for Allowance of Appeal was denied by our Supreme Court on April 9, 2014.

No further action was taken until January 29, 2015, when the Defendant filed a counseled Post Conviction Relief Act Petition. After reviewing the Motion and the record, this Court Ordered an evidentiary hearing on the claims relating to Dr. Guertin's testimony only. On November 10, 2015, at the time scheduled for the evidentiary hearing, Attorney Gettleman presented a Motion to Compel Production of Records wherein he sought an Order compelling disclosure of the medical records from Victim's gynecological examination from the Commonwealth. After discussion, this Court directed Attorney Gettleman to continue his efforts to get the records directly from Children's Hospital of Pittsburgh and receive a definite response

from them before involving this Court. On April 29, 2016, Attorney Gettleman filed a "Motion to Proceed on PCRA Petition" wherein he indicated that counsel for UPMC had advised him that the records were missing and could not be located and asking this Court to resume proceedings on the PCRA Petition. That Motion was granted and the previously-referenced evidentiary hearing was rescheduled for October 20, 2016. At the conclusion of that hearing, this Court denied collateral relief. This appeal followed.

Briefly, the evidence presented at trial established that until she was almost ten (10) years old, Victim lived with her mother and two (2) younger brothers, in the Leetsdale area. The Defendant, who was Mother's boyfriend lived with another woman but would visit several times a week and occasionally spend the night Often, during his daytime visits, Mother would leave him to babysit Victim and her brothers, though Mother did not work. Victim testified that on several occasions, beginning when she was eight (8) years old and ending when she was almost ten (10) years old, the Defendant would tell her to pull down her pants and underwear and bend over a piece of furniture or a chair, etc. He would stand behind her and Victim would then feel pain in her "girlie parts" that felt like something pushing in and out. She was not able to see what was happening. She told the Defendant to stop, but he would not.

On appeal, the Defendant raises seven (7) claims of the ineffective assistance of trial counsel, although a careful examination of those claims reveals that several of the issues are essentially duplicative of each other. As such, this Court has combined and re-ordered the issues for ease of review, as follows:

Initially, this Court notes that in order to establish a claim for the ineffective assistance of counsel, "a PCRA Petitioner must demonstrate, by a preponderance of the evidence, that: (1) the underlying claim is of arguable merit; (2) no reasonable basis existed for counsel's action or inaction; and (3) there is a reasonable probability that the result of the proceedings would have been different absent such error." Commonwealth v. Gibson, 19 A.3d 512, 525-26 (Pa. 2011). "The law presumes that counsel was not ineffective, and the appellant bears the burden of proving otherwise...[I]f the issue underlying the charge of ineffectiveness is not of arguable merit, counsel will not be deemed ineffective for failing to pursue a meritless issue... Also, if the prejudice prong of the ineffectiveness standard is not met, 'the claim may be dismissed on that basis alone and [there is no] need [to] determine whether the [arguable merit] and [client's interests] prongs have been met.'" Commonwealth v. Khalil, 806 A.2d 415, 421-2 (Pa.Super. 2002). "With regard to the reasonable basis prong, [the appellate court] will conclude that counsel's chosen strategy lacked a reasonable basis only if the petitioner proves that the alternative strategy not elected offered a potential for success substantially greater than the course acutely pursued." Commonwealth v. Busanet, 54 A.3d 35, 46 (Pa. 2012).

1. Ineffective Assistance of Counsel re: Testimony of Dr. Jennifer Wolford

The Defendant first argues that trial counsel was ineffective in numerous respects with regard to the testimony of Dr. Jennifer Wolford. Specifically, he argues:

> 1. Trial counsel was ineffective when he cross-examined Commonwealth expert witness Dr. Jennifer Wolford and opened the door to testimony that a hymen can regrow itself. This testimony was extremely prejudicial to the petitioner's defense and there was no trial strategy to engage in said cross-examination.
>
> 2. Trial counsel was ineffective when he did not challenge Dr. Wolford's testimony that 90% of the exams of sexual abuse victims are "normal" in several

regards (a) where did those statistics come from (b) what does normal entail (c) of the 90% normal examinations, how many entail the regrowth/rehealing of the hymen.

3. Trial counsel was ineffective when he did not challenge Dr. Wolford on the basis/source of her opinion re the regrowth of the hymen, whether that opinion was generally accepted in the medical community, whether there were any other experts, treatises or professional publications that supported her position.

7. Trial counsel was ineffective when he failed to object to Dr. Wolford's testimony on direct examination that a hymen can heal itself, failed to request that Wolford's testimony be stricken and failed to request a curative instruction to the jury.

(Defendant's Concise Statement of Matters Complained of on Appeal Pursuant to Rule of Appellate Procedure 1925(b), p. 1-2).

At trial, the Commonwealth presented the testimony of Dr. Jennifer Wolford, the attending physician of the Division of Child Advocacy at Children's Hospital of Pittsburgh. Although Dr. Wolford never examined Victim, it was explained that Dr. Evan Kim, the physician who conducted Victim's examination, had since taken a new position and moved to Virginia and so was unavailable to testify. Under these circumstances, the substitution of Dr. Wolford's testimony was appropriate and was not met with any objection from defense counsel. Dr. Wolford was also qualified as an expert without objection from defense counsel.

During her direct examination, Dr. Wolford testified as follows:

Q. (Ms. Carey): And referring to Dr. Kim's evaluation of [Victim] could you tell the jury what the impressions were.

A. (Dr. Wolford): The vaginal exam showed that the mucosa, or lining of the vaginal area is pink. That is a normal color that we would describe in a typical exam of a 12-year old. No lesions or lacerations. So there were no cuts. There was no evidence of any bruising. And there was no redness. And then also, a key part of an exam for sexual abuse is to examine the hymen. That is the vaginal opening and it is shaped like a donut. It's a

circular area with a large hole in the middle. That showed no lacerations or tears.

And then additionally, as part of the protocol, Dr. Kim evaluates her anal area. No evidence of any tears.

Q. Now, in your experience as an expert in this area, when there is a laceration to that tissue, to the vaginal tissue anywhere around the genitals, how long will it take to begin to heal?

A. I sort of have a little bit of a list of what I look for. So you may see swelling of an area after an acute or recent sexual abuse. An edema or swelling usually will result [sic] within five days. If there is bruising in the area, we typically give a range of two to eight days until that resolves. If there were lacerations, let's say abrasions, so those would be scrapes along that area, very superficial scrapes, that would usually start to resolve within 48 hours. A hymenal tear or laceration to the opening of the vaginal area can heal, but that could take a bit longer. It can begin to heal within five days. It may take longer, but the vaginal hymen can heal itself. That part of your body can heal itself.

Q. So when you have what I will call a normal exam, no lacerations or bruising to report, does that tell you that this child was at that time sexually abused?

A. No. In our field of evaluation or sexual abuse, we know that 90 percent of exams are normal. As we can imagine, a woman's body is meant to stretch in that area. Both for having intercourse or later in life when having a baby come out. Everybody stretches differently and heals differently. It's commonly known in our community of physicians who work in child abuse, that 90 percent of these exams are normal. So a normal exam does not disprove nor support any history provided.

Q. I understand that there is a lot of - well, tell us about the hymen specifically. If someone is raped, vaginal intercourse, a child is raped, tell us what you would expect to see, if anything.

A. One of the common misconceptions is that a physician can evaluate a woman or a young girl to see if she is sexually active, consensual or against her will. That's a common misconception. And to use vulgar terms, people may have said, pop a cherry, but a hymen, as I mentioned, it is not a sheet of tissue that goes over the vaginal entrance. So having a hymen intact, there is not a sheet that goes over your vaginal entrance to

say that this young woman has never had intercourse. But, in fact the hymen, for lack of a better description, is a round area of pink tissue that's best described as a donut around the vaginal area. So through the center is how I can see into the opening of the vaginal area.
In a different child or different teenage girl doing a regular vaginal exam, I will use a speculum. A speculum can be inserted into a woman who has never had sexual intercourse.

...Q. And just to be clear, you said that 90 percent of - well, I'll let you state it. I don't want to put words in your mouth. You said something about 90 percent of sexual abuse examinations.

A. Sure. Again, it's commonly known that 90 percent of sexual abuse evaluations that we do have normal exams. It is not uncommon.

(Trial Transcript, pp. 150-153, 155).

Then, on cross-examination, the following occurred:

Q. (Mr. Donohue): Can you tell the jury what are the history of symptoms or physical signs of repeated sexual activity one examination of a female child? What would a doctor see?

A. (Dr. Wolford): Ninety percent of those exams are normal.

Q. And would repeated insertion of an object into an 11-year old girl's vagina reveal a normal hymen?

A. Quite possible.

Q. Possible?

A. Because the human body, particularly in that area, in the female area, is designed to stretch.

Q. What is a hymenal transection?

A. A transection, if we go back to the term donut, transection is simply a cut or laceration. If I were to see a hymenal transection during the examination, I may say there is a transection at 7:00. We sometimes use the clock face to localize.

Q. Isn't it important to look for transections located in the hymen?

A. It is.

Q. And it is important to make that notation there are some areas there, some transection and it could be accidental?

A. That is correct.

Q. And there is also medical documentation to support that conclusion, that areas at three to five and seven to nine on the hymen indicates an accidental effect, is that correct?

A. No. Most present between three and nine. Those are the most important transections that we look for.

Q. And why do you look for them in that particular area?

A. It's just because that's the posterior vaginal wall, and that is where we look for trauma. And the anterior side of the hymen because of the way a girl stands is -

Q. And the area between 9:00 and 7:00, those areas, when there is a transection in that part of the hymen, what does that indicate?

A. I don't use the term - I mention seven as the location, but between three and nine are the areas of transections that we most particularly look for. Again, that's her posterior area of her hymen.

Q. At what point does a woman's hymen stop regrowing?

A. I'm sorry. I cannot answer that with 100 percent certainty, but I will estimate that after she has reached menopause, she's at the peek [sic] of her development. And then you have a normal set of estrogen until you have menopause, but I expect if you are a fully-functioning female with a normal estrogen level, that the tissue can regrow itself.

Q. It can regrow itself?

A. That's right.

Q. But we don't know if it regrew itself in [Victim's] case, do we?

A. That's correct. By documentation, there is no way to know that.

Q. And we do know that he child has complained on repeated times over an 18-month period that something was inserted in her vagina that hurt really bad, caused her to cry and this occurred repeatedly. Did you understand that is the mechanism in this injury?

A. I do, sir.

Q. And you are telling us that will not cause a transection of a hymen in an 11-year old girl?

A. No, sir.

(T.T., p. 163-166).

As noted above, Dr. Wolford was qualified as an expert without voir dire or objection from the Defendant. As an attending physician sitting in for an absent Dr. Kim, she appropriately testified to the findings from Victim's medical examination and, having been qualified as an expert, she appropriately offered a medical explanation of those findings. Dr. Wolford testified appropriately and without objection on direct examination regarding the possibility of healing in the hymenal tissue, but did not use the word "regrow" until it was first used by defense counsel on cross-examination. Although the word "regrow" has been the subject of so much of the litigation in this matter, a review of the record in its entirety demonstrates clearly that counsel's use of the word did not impact the verdict. In light of the extensive and compelling testimony from Victim, there is no plausible argument that counsel's use of the word "regrow" caused the jury to convict the Defendant when it would otherwise have acquitted him - which is, in fact, what would be required to sustain a claim of ineffectiveness in this regard.

Neither is there a compelling argument that defense counsel was not prepared for Dr. Wolford's testimony or was somehow taken by surprise by her findings and medical

explanations. As this Court noted in its Opinion on the direct appeal of this matter, defense counsel "engaged in a spirited and articulate cross-examination [of Dr. Wolford], most of which concentrated on the issue of the hymen" (Trial Court Opinion, 7/24/12, p. 6). The cross-examination was well-prepared, well-thought out and well-executed. That it was ultimately not successful in securing an acquittal is not a reflection of counsel's failings, but rather simply a reflection of the overall strength of the Commonwealth's evidence and jury's belief in the Defendant's guilt. The fact that defense counsel may not have inquired as to the source of Dr. Wolford's 90% testimony or that he used the word "regrow" was not the cause of the guilty verdict and the Defendant has not established that the verdict would have been different had the 90% inquiry been made or the word "regrow" not used. Absent any such evidence, the Defendant has absolutely failed to establish his claim for the ineffective assistance of counsel. As such, this Court properly denied collateral relief. This claim is meritless.

2. *Ineffective Assistance of Counsel re: Commonwealth's Closing Argument*

Next, the Defendant argues that trial counsel was ineffective for failing to object to an "improper, inflammatory and prejudicial statement" made by Assistant District Attorney Carey during her closing argument. Again, this claim is meritless.

During his closing argument, defense counsel argued that Victim had fabricated the allegations and questioned her motives for doing so:

> MR. DeFAZIO: We have a little girl who is coming in testifying. And she had an opportunity three times that I'm aware of to tell the story. Once at Children's Hospital. Once at the preliminary hearing at the Leetsdale District Judge. And then in court yesterday.
>
> I don't know why she is making these allegations. If it's an attempt for attention or maybe the medication. It was too strong for her. Maybe hallucinations. I

don't know. I don't know. But we do know there are times when she told her story that created some questions.

(T.T. p. 249-250).

During the Commonwealth's closing argument, Assistant District Attorney Carey responded to defense counsel's statements:

MS. CAREY: [Victim] had nothing to gain. What she had to lose is half of her family, who chose to believe her mother's boyfriend, a convicted liar. They chose to believe her mother's boyfriend over a little girl...Not just the mother, the whole family. She had a lot to lose. Her family gave up on her and supporter her mother's boyfriend, who said he didn't do it. They don't know whether he did it or not. They are not there every minute.

Sexual offenders don't commit sexual offenses in front of people. This isn't' the kind of crime where you look for an audience. Her whole family failed her when she told. And then this is the part of my job I don't like. We put her through forensic interviews. She has to do the forensic interview. And then she has to come to a preliminary hearing and talk to a complete stranger.

I had to build a rapport with her in a couple of minutes. I'm going to help you, but you have to tell again these horrible details of this violent rape that you went through time after time after time. You don't have a mother here to hold your hand while you do it. Half of your family is not talking to you. But trust me. I need you to tell this magistrate what happened.

And then I will see you again in a couple of months downtown and you are going to have to tell 14 strangers. And the room is open to the public. And the defendant, the man who raped you, is going to be sitting there. You have to point him out and have to look at him at least once. And all the people that support him are going to fill the audience. Try to just look at me. I will get you through this. She had nothing to gain and everything to loose...

Dr. Jennifer Wolford told you that it's widely recognized that ten percent of sexual assault cases result in physical injury at the time of the medical examination. She doesn't work for us. She is at Children's Hospital. The Child Advocacy Center. Young children are sexually assaulted. They are raped.

And so, if you were raped or your loved one is raped and there is no physical signs left after the rape, the testimony is evidence. And we will put it on. And so if you believe [Victim] then you have to find this defendant guilty of the charges.

[Victim] was failed by her whole maternal family. She needs you. You are all she has to stand up for her and for what this defendant did to her.

The Commonwealth respectfully asks that you return a finding of guilt.

Thank you.

(T.T., pp. 264-266, 267-268).

"The phrase 'prosecutorial misconduct' has been so abused as to lose any particular meaning. The claim either sounds in a specific constitutional provision that the prosecutor allegedly violated or, more frequently, like most trial issues, it implicates the narrow review available under Fourteenth Amendment due process... However, 'the Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty'... The touchstone is the fairness of the trial, not the culpability of the prosecutor... If the defendant thinks the prosecutor has done something objectionable, he may object, and the trial court rules, and the ruling - not the underlying conduct - is what is reviewed on appeal. Where, as here, no objection was raised, there is no claim of 'prosecutorial misconduct' as such available. There is, instead, a claim of ineffectiveness for failing to object so as to permit the trial court to rule." Commonwealth v. Cox, 983 A.2d 666, 685 (Pa. 2009). To succeed on a claim of ineffective assistance of counsel based on trial counsel's failure to object to prosecutorial misconduct, the defendant must demonstrate that the prosecutor's actions violated a constitutionally or statutorily protected right, such as the Fifth Amendment privilege against compulsory self-incrimination or the Sixth Amendment right to a fair trial, or a constitutional interest such as due process... 'To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a

fair trial.'" Commonwealth v. Busanet, 54 A.3d 35, 65 (Pa. 2012), *internal citations omitted.* In addition, the prosecutor must be allowed to respond to defense counsel's arguments, and any challenged statement must be viewed not in isolation, but in the context in which it was offered... 'The prosecutor must be free to present his or her arguments with logical force and vigor,' and comments representing mere oratorical flair are not objectionable." Commonwealth v. Thomas, 54 A.3d 332, 337-8 (Pa. 2012), internal citations omitted.

A review of Ms. Carey's closing argument as a whole demonstrates no impingement on the Defendant's due process or other rights, but rather reflects her thoughtful response to defense counsel's allegations that Victim had fabricated the story for attention or because she was hallucinating. Ms. Carey's statements reflect the trauma and personal cost to Victim for coming forward and so weigh on her credibility. Ms. Carey's argument was both well-reasoned and artful, but in no way impinged on the Defendant's due process rights. The Defendant has utterly failed to establish that Ms. Carey's statements in her closing argument denied him the right to a fair trial, and so has failed to establish his claim for the ineffectiveness of trial counsel in this regard. This claim is also meritless.

3. *Ineffective Assistance of Counsel re: Dr. Guertin*

Finally, the Defendant argues that trial counsel was ineffective in failing to present expert testimony, specifically that of Dr. Stephen Guertin, on his behalf. However, as the Defendant has both failed to establish the merits of his claim and failed to present the appropriate record for a complete review of this claim, it should be denied.

"'Where a claim is made of counsel's ineffectiveness for failing to call witnesses, it is the appellant's burden tons how that the witness existed and was available; counsel was aware of, or

had a duty to know of the witness; the witness was willing and able to appear; and the proposed testimony was necessary in order to avoid prejudice to the appellant'... 'The mere failure to obtain an expert rebuttal witness is not ineffectiveness. Appellant must demonstrate that an expert witness was available who would have offered testimony designed to advance appellant's cause.'" Commonwealth v. Chmiel, 30 A.3d 1111, 1143 (Pa. 2011), internal citations omitted. "Prejudice in this respect requires the petitioner to 'show how the uncalled witness' testimony would have been beneficial under the circumstances of the case.'" Commonwealth v. Williams, 141 A.3d 440, 460 (Pa. 2016), internal citations omitted. "Additionally, trial counsel will not be deemed ineffective for failing to call a medical, forensic or scientific expert merely to critically evaluate expert testimony [that] was presented by the prosecution." Chmiel, *supra* at 1143.

Before this Court can reach an analysis of the Defendant's claim regarding trial counsel's failure to call Dr. Guertin, however, this Court must first address PCRA counsel's failure to provide the complete record necessary for an evaluation of this claim. Despite counsel's failure to produce an expert report from Dr. Guertin (which is discussed in greater detail, below), this Court did hold an evidentiary hearing on this claim. Nevertheless, when he prepared his Notice of Appeal, PCRA counsel failed to request a copy of the transcript of that hearing, as he is required to do pursuant to Pennsylvania Rule of Appellate Procedure 1911. That rule states, in relevant part:

> *Rule 191. Request for Transcript*
>
> *(a) General rule. The appellant shall request any transcript required under this chapter in the manner and make any necessary payment or deposit therefor in the amount and within the time prescribed by Rules 4001 et seq. of the Pennsylvania Rules of Judicial Administration.*

...(c) Form. The request for transcript may be endorsed on, incorporated into or attached to the notice of appeal or other document and shall be in substantially the following form:

[Caption]

A (notice of appeal) (petition for review) (other appellate paper, as appropriate) having been filed in this matter, the official court reporter is hereby requested to produce, certify and file the transcript in this matter in conformity with Rule 1922 of the Pennsylvania Rules of Appellate Procedure.

_____

Signature

(d) Effect of failure to comply. If the appellant fails to take the action required by these rules and the Pennsylvania Rules of Judicial Administration for the preparation of the transcript, the appellate court may take such action as it deems appropriate, which may include dismissal of the appeal.

Pa.R.A.P. 1911.

In interpreting Rule 1911, our Supreme Court has held that it is not the duty of the trial court to obtain the transcripts or provide a complete record for the appellate court. It stated "the appellant has a duty to frame what is needed...Of course, if a party is indigent, and is entitled to taxpayer-provided transcripts or portions of the record, he will not be assessed costs. But, that does not absolve the appellant and his lawyer of his obligation to identify and order that which he deems necessary to prosecute his appeal. The plain terms of the Rules contemplate that the parties, who are in the best position to know what they actually need for appeal, are responsible to take affirmative actions to secure transcripts and other parts of the record." Commonwealth v. Lesko, 15 A.3d 345, 410 (Pa. 2011).

Here, this Court ordered an evidentiary hearing on the Dr. Guertin matter for the simple reason that it wished to consider additional evidence on the claim and in fact took that evidence

into consideration when it denied relief. However, absent a record of that hearing, our appellate court is only left with the record of pleadings to evaluate this Court's ruling, and this Court is limited to the same in the preparation of its Opinion. Insofar as there is a record of pleadings from which an evaluation can be made, this Court does not demand that the claim be dismissed out of hand; that is a decision for the appellate court. Nevertheless, this Court does feel that its evaluation of the claim for the appellate court has been hampered by the lack of transcript. Neither does this Court feel that any attempts made by PCRA counsel to request the transcript following the filing of this Opinion would be satisfactory, inasmuch as this Court would still have been deprived of its opportunity to review the transcript and present a full analysis for the appellate courts.

Regardless, should the appellate courts wish to review this matter on the written pleadings only, this Court can provide the following limited analysis:

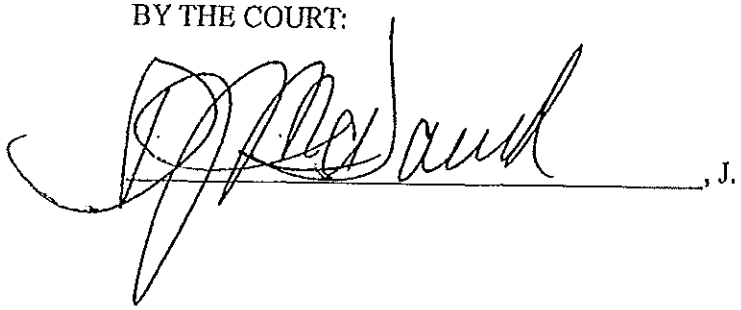
In support of his PCRA Petition, Attorney Gettleman presented first an unsigned copy of an "affidavit" from Dr. Guertin and then followed with a signed and notarized copy of the same affidavit. However, when this Court scheduled the evidentiary hearing, the pleadings reflect that Attorney Gettleman made efforts to obtain an official expert report and testimony from Dr. Guertin, but Dr. Guertin would not provide an opinion or testify without having reviewed the records from Brionna's gynecological examination at Children's Hospital. (See Defendant's Motion to Compel Production of Records, Images oof [sic] Gynecological Examination of [Victim], Paragraph 2 "Dr. Guertin advised that he could offer no opinion in this matter until and unless he reviewed the images of the gynecological examination of [Victim], the victim in this case.") It was eventually determined that the records were lost and

unable to be produced by UPMC and, as a result, no expert opinion was ever offered by Dr. Guertin.

Given the absence of any expert opinion from Dr. Guertin or any other medical expert in support of the Defendant, the Defendant has necessarily failed to establish the elements of a claim for the ineffective assistance of counsel for failing to present expert testimony. See Chmiel, *supra*. Counsel will not be deemed ineffective for failing to present expert testimony that does not exist. This claim is meritless.

Accordingly, for the above reasons of fact and law, this Court's Order of October 20, 2016, which dismissed his Post Conviction Relief Act Petition following a hearing, must be affirmed.

BY THE COURT:



, J.

January 12, 2017