

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

BRYANT WHITNEY,

Appellant

IN THE SUPERIOR COURT  
OF  
PENNSYLVANIA

No. 1948 EDA 2017

Appeal from the PCRA Order Entered June 15, 2017  
In the Court of Common Pleas of Philadelphia County  
Criminal Division at No(s): CP-51-CR-0014495-2008

BEFORE: BENDER, P.J.E., KUNSELMAN, J., and STEVENS, P.J.E.\*

MEMORANDUM BY BENDER, P.J.E.:

**FILED MAY 1, 2019**

Appellant, Bryant Whitney, appeals from the post-conviction court's June 15, 2017 order denying his first, timely petition filed under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. After careful review, we affirm.

On appeal, Appellant sets forth the following four claims in his "Statement of the Questions Involved" section of his brief:

1. Was Appellant deprived of a fair trial when trial counsel failed to preclude "bad character" evidence, to wit, the testimony of Detective Smith of the Fugitive Squad that his squad targets "violent criminals" who have open arrest warrants?
2. Was Appellant denied a fair trial when trial counsel failed to secure a jury instruction concerning the fact, established at

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\* Former Justice specially assigned to the Superior Court.

trial, that the shooting victim was on probation at the time of the shooting?

3. Was Appellant denied the effective assistance of counsel when, at his second trial, evidence of bad acts was admitted that was excluded at the first trial and further denied the effective assistance of counsel when, after it was ruled that evidence of bad acts that was excluded at the first trial *would* be admitted, counsel erred by failing to move *in limine* and pursuant to [Pa.R.E.] 403 and 404, to limit the evidence to a shooting over a “dispute” rather than over a “drug” dispute?
4. Was Appellant ... denied the effective assistance of counsel when, upon being sentenced to consecutive terms of imprisonment on three weapons charges involving a single act of possession, counsel failed to seek reconsideration of sentence on the grounds that such a sentencing scheme was as a matter of law “unreasonable” and/or because it violated Pennsylvania Constitution’s Double Jeopardy protection?

Appellant’s Brief at 5 (emphasis in original). We note that in his “Argument” section, Appellant adds a fifth claim, stating that he “has shown prejudice under a ‘cumulative error’ standard.” ***Id.*** at 23 (unnecessary capitalization and emphasis omitted). We remind Appellant that Pennsylvania Rule of Appellate Procedure 2116 plainly directs that “[n]o question will be considered unless it is stated in the statement of the questions involved or is fairly suggested thereby.” Pa.R.A.P. 2116(a). Notwithstanding Appellant’s error in this regard, we will not deem his fifth claim waived, as he presents a clear argument that enables our meaningful review of it. **See** Appellant’s Brief at 23-25.

We begin by recognizing:

“In reviewing the propriety of an order granting or denying PCRA relief, an appellate court is limited to ascertaining whether the record supports the determination of the PCRA court and whether the ruling is free of legal error.” ***Commonwealth v. Johnson***, ...

966 A.2d 523, 532 ([Pa.] 2009). We pay great deference to the findings of the PCRA court, “but its legal determinations are subject to our plenary review.” **Id.**

**Commonwealth v. Matias**, 63 A.3d 807, 810 (Pa. Super. 2013).

In this case, we have reviewed the certified record, the briefs of the parties, and the applicable law. Additionally, we have reviewed the thorough and well-crafted opinion of the Honorable Anne Marie B. Coyle of the Court of Common Pleas of Philadelphia County. We conclude that Judge Coyle’s extensive, well-reasoned opinion accurately disposes of the issues presented by Appellant.<sup>1</sup> Accordingly, we adopt her opinion as our own and affirm the order denying Appellant’s PCRA petition for the reasons set forth therein.

Order affirmed.

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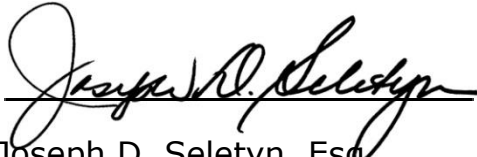
<sup>1</sup> However, we disagree with one aspect of Judge Coyle’s decision. After rejecting Appellant’s first and second issues on their merits, Judge Coyle suggested that Appellant may have also waived those issues by not presenting them as layered ineffectiveness claims. **See** Trial Court Opinion, 8/20/18, at 10, 12. For instance, in discussing Appellant’s first issue, Judge Coyle stated:

[T]his meritless claim [was] not ... raised within Appellant’s direct appeal by his succeeding appellate counsel.... No direct assertion of ineffectiveness of initial appellate counsel stemming from the lack of objection has been raised within the instant PCRA. Arguably, it was therefore waived.

**Id.** at 10; **see also id.** at 12 (stating a similar waiver analysis). It is well-settled that ineffectiveness claims should be deferred until review under the PCRA. **See Commonwealth v. Holmes**, 79 A.3d 562 (Pa. 2013) (reaffirming the holding in **Commonwealth v. Grant**, 813 A.2d 726 (Pa. 2002)). Thus, appellate counsel could not be deemed ineffective for failing to challenge trial counsel’s ineffectiveness on direct appeal. Accordingly, it would have been inappropriate for Appellant to present layered claims of ineffectiveness for either of his first two issues. Therefore, we do not adopt Judge Coyle’s conclusion that Appellant’s failure to do so waived these claims.

J-S08008-19

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 5/1/19



## **I. FACTS AND PROCEDURAL HISTORY**

Appellant Bryant Whitney had been initially arrested because of events that reportedly occurred on June 16, 2008 about 7:00 p.m., when Appellant, along with two other unnamed cohorts settled an illegal drug business dispute with the victim, Robert Jackson, by rapidly firing a reign of bullets at him in a crowded daylight parking lot of the Fresh Grocer shopping center located at 54th and Chester Avenues in Philadelphia as the victim attempted to enter his previously parked vehicle after shopping in the grocery store.

Although the intended target and victim, Robert Jackson, inexplicably lived after being shot fourteen times in various parts of his torso and groin, he was rendered permanently paralyzed from the waist downward from the bullets' severance of his spine and he was never be able to walk on his own accord again. Mr. Jackson reportedly endured multiple painful operations and faced significant resulting health problems and a shortened life span from this violent assault.

This victim's survival of this attempted execution was directly attributed to the quick concentrated efforts of the responding police officers and the rendered medical care. The obviously extreme severity of the victim's resulting injuries had never been debated. The admitted video feed of this premeditated shooting obtained from the outside parking lot vividly displayed for the convicting jury, the fearful flight of multiple innocent bystanders in this residential Philadelphia neighborhood who had been endangered by Appellant's concerted heinous actions.

Just after the shooting, the complainant did not cooperate with law enforcement. Not until the victim's brother was shot and killed and Appellant's brother was charged with that homicide did he cooperate. On August 28, 2008, the victim identified Appellant without hesitation as one of the

men who repeatedly shot him from a group of photographs displayed by an investigating detective. He had also positively identified Appellant at the subsequent preliminary hearing. In January of 2010, a jury trial was convened before the now retired Honorable John J. O'Grady, Jr. as then sitting Judge of the Court of Common Pleas for the First Judicial District Criminal Division as the presiding jurist. During this trial, the victim again positively identified Appellant as one of the shooters. A mistrial had been declared midstream after a detective testified to previously undisclosed data.

The trial court's ruling following that mistrial, that a new trial had not been barred by double jeopardy, was directly appealed by Appellant's trial counsel. On February 28, 2012, the Superior Court of Pennsylvania affirmed the trial court's ruling. Commonwealth v. Whitney, 46 A.3d 828 (Pa. Super 2012) (table) (1586 EDA 2010). The Supreme Court of Pennsylvania denied *allocatur* on August 21, 2012. Commonwealth v. Whitney, 50 A3d 692 (PA. 2012) (table) (62 EM 2012).

After several listings in other courtrooms, on March 24, 2014, a second jury trial convened with "this Court," the Honorable Anne Marie B. Coyle Court of Common Pleas for the First Judicial District Criminal Division, as the presiding jurist. Prior to this trial beginning, Colin Hueston, Esquire, as trial counsel for Appellant, orally argued motions *in limine* seeking to exclude any trial reference to Appellant's involvement within the illegal drug trade. Counsel argued that this information was not admissible pursuant the Pa. Rule of Evidence 404 and that the Commonwealth was estopped by a previous, unclear exclusionary ruling entered by Judge O'Grady within the first jury before the declaration of a mistrial.

After a full and fair hearing, this trial Court denied in part and granted in part the motion *in limine* and limited introduction of evidence of any references to Appellant's drug trade involvement

to proof of motive and intent and identification of the perpetrator; and provided a corresponding cautionary jury instruction. It had been fully admitted by all parties that there had been a significant change of circumstances and testimony from the victim that had occurred well after the first trial. Review of the ruling was therefore warranted.

The transcribed record reflected that during prior proceedings, that although the victim had repeatedly identified Appellant as one of the perpetrators known to him, Mr. Jackson had not revealed that he had been the intended target and that the underlying motive for the shooting had been the illegal drug business dispute between Appellant and the victim that had begun one week prior to the shooting. As a result of this, this Court permitted the complainant to testify in a limited manner as to his prior drug dispute with the Appellant. In addition, Appellant, by and through his trial attorney, had exercised free reign to illuminate for the jury the complainant's previous criminal activities.

On March 27, 2014, the jury found Bryant Whitney guilty of Attempted Murder F1, Violation of The Uniform Firearms Act: Firearms Not To Be Carried Without a License F3 ("VUFA 6106"), Violation Uniform Firearms Act: Carrying a Firearm In Public in the City of Philadelphia M1 ("VUFA 6108"), and Possession Of An Instrument of Crime M1. Per agreement between all parties due to the Defendant's previous conviction of an enumerated felony offense, this Court sitting as the fact finder subsequent to recording of the jury verdicts found the Defendant guilty of the bifurcated single offense of Violation Uniform Firearms Act: Person Not To Possess, Use, Manufacture, Control, Sell or Transfer Firearms F2 ("VUFA 6105").



On May 29, 2014, this Court sentenced Bryant Whitney to periods of state supervised confinement calculated as follows: Attempted Murder: twenty years to forty years; Aggravated Assault: No Further Penalty; Conspiracy F1: No Further Penalty; Violations Uniform Firearms Act: Person Not To Possess, Use, Manufacture, Control, Sell or Transfer Firearms F2 ("VUFA 6105"): five years to ten years; Violation of The Uniform Firearms Act: Firearms Not To Be Carried Without a License F2 ("VUFA 6106"): three and one-half years to seven years; Carrying a Firearm In Public in the City of Philadelphia M1 ("VUFA 6108"): two and one-half years to five years ; and Possession Of An Instrument of Crime M1: two and one-half years to five years.

Each sentence imposed on each charge was directed to be served consecutively to each other and consecutively to any other sentence that the Defendant had been serving. Thus, the aggregate sentence imposed by this Court was a minimum term of state supervised confinement of thirty- three and one-half years to a possible maximum term of sixty-seven years. During the second trial and sentencing hearing, Appellant had been continually represented by Colin Hueston, Esquire.

On July 1, 2014 Appellant, by and through his subsequently court appointed appellate counsel, Michael P. Marryshow, Esquire, filed a timely Notice of Appeal. On October 7, 2014, this trial Court ordered Appellant to file a 1925(b) Statement. The Statement was timely filed on October 27, 2014, containing five enumerated claims of error all concentrated upon the sentence imposed.

The Superior Court of Pennsylvania affirmed the trial Court's Orders of Sentence on November 13, 2015 and issued a Non-Precedential Memorandum Opinion docketed under 1948 EDA 2014. Appellant's Petition For Allowance of Appeal docketed under 678 EAL 2015 was denied by the Pennsylvania Supreme Court on March 30, 2016.

On June 24, 2016, Jules Epstein, Esquire and Susan M. Lin of Kairys, Esquire, of Rudovsky, Messing an& Feinberg, LLP, entered their appearance as privately retained attorneys on behalf of Appellant and filed a “Counselled Petition For Post-Conviction Relief Pursuant to 42 Pa.C.S.A. §9543 And Memorandum Of Law” hereinafter referred to as “PCRA.” On April 4, 2017 the Commonwealth of Pennsylvania, by and through the District Attorney of Philadelphia, and Assistant District Attorney Daniel F. Creedon, IV, Esquire, filed a Motion To Dismiss. Appellant, by and through his appellate attorneys filed a “Reply To Commonwealth’s Motion To Dismiss Motion To Amend The PCRA Petition on April 20, 2017.

After conducting a thorough review of the trial record, this Court dismissed Appellant’s petition on June 15, 2017.<sup>1</sup> Attorneys Epstein and Lin filed a timely Notice of Appeal.

## II. STANDARD OF REVIEW

The law in Pennsylvania presumes that trial counsel was effective. Commonwealth v. Rollins, 558 Pa. 532, 738 A.2d 435 (1999); Commonwealth v. Quier, 366 Pa.Super. 275, 531 A.2d 8, 9 (1987). Therefore, when a claim of ineffective assistance of counsel is made, it is the petitioner’s burden to prove such ineffectiveness; that burden does not shift. Commonwealth v. Cross, 535 Pa. 38, 634 A.2d 173, 175 (1993), *cert. denied*, 115 S.Ct. 109, 130 L.Ed.2d 56 (Pa. 1994); Commonwealth v. Marchesano, 519 Pa. 1, 544 A.2d 1333, 1335-36 (1988); Commonwealth v. Tavares, 382 Pa.Super. 317, 555 A.2d 199, 210 (1989), *appeal denied*, 571 A.2d 382 (Pa. 1989).

In determining whether counsel rendered ineffective assistance, the reviewing court must

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<sup>1</sup> The dismissal occurred more than twenty days after Petitioner was served with notice of the forthcoming dismissal of his PCRA petition. Pa. R. Crim. P. 907.

ascertain whether the issue underlying the claim has arguable merit. This requirement is based upon the principle that counsel will not be found ineffective for failing to pursue a frivolous claim or strategy. Second, if the petitioner's claim does have arguable merit, the court must determine whether the course chosen by counsel had some reasonable basis designed to serve the best interest of the petitioner. If a review of the record reveals that counsel was ineffective, the court must determine whether the petitioner has demonstrated that counsel's ineffectiveness worked to his prejudice. Commonwealth v. Miller, 605 Pa. 1, 987 A.2d 638 (2009); Commonwealth v. Hutchinson, 521 Pa. 482, 556 A.2d 370 (1989); Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987); Commonwealth v. Pendola, 416 Pa.Super. 568, 611 A.2d 761 (1992), *appeal denied*, 629 A.2d 1378 (Pa. 1993). Failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim. Commonwealth v. Hudson, 2003 PA Super 104, 820 A.2d 720, 726 (2003).

In order to establish prejudice, a petitioner must show that "counsel's ineffectiveness was of such magnitude that the verdict essentially would have been different absent counsel's alleged ineffectiveness." Commonwealth v. Howard, 538 Pa. 86, 645 A.2d 1300, 1308. *See also* Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In the context of a PCRA claim, petitioner must not only establish ineffective assistance of counsel, he must also plead and prove that counsel's stewardship "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." *See* 42 Pa.C.S.A. §9543 (a)(2)(ii); Commonwealth v. Rowe, 411 Pa.Super. 363, 601 A.2d 833 (1992).

When applying the reasonable standards of review set forth in this Commonwealth of Pennsylvania, Appellant failed to demonstrate any legitimate basis for the relief requested.

### III. DISCUSSION

#### A. Ineffective Assistance Claim- Lack of Objection To Detective Duties.

Appellant argued that his trial counsel was ineffective for failing to preclude “bad character evidence in the form of testimony of Detective Smith that he had been assigned to the Fugitive Squad and that his squad targets fugitives who are violent criminals who have open warrants.” *See* PCRA Section 10a. A reasonable contextual review of Detective Smith’s transcribed sworn testimony, however, demonstrated that no objectionable, let alone inadmissible or prejudicial, “bad character” evidence had been even introduced at trial. Hence, trial counsel could not be faulted for raising a meritless objection to its introduction.

In this case, contrary to Appellant’s mischaracterization of the evidence, the transcribed record reflects that on March 26, 2014, Detective Patrick Smith, after being duly sworn, identified himself as a County of Philadelphia Detective assigned to the F.B.I. Violent Crime Task Force. Detective Smith was asked and answered the following series of questions by the prosecuting Assistant District Attorney:

Q. Good morning detective.

A. Good morning.

Q. I want to take you back to 2008. In September of 2008, were you working in the same capacity as you announced for the record?

A. Yes, it was.

Q. And that’s a member of what, detective?

A. I’m a member of the F.B.I. violent crimes fugitive task force.

Q. And when you hear the word fugitive, does that mean you basically track people down?

A. Yes, violent criminals.

Q. And would that be for people who have open warrants?

A. For open warrants, correct.

Q. If I take you back—strike that. If you work for the F.B.I. does that also mean that you can go outside the jurisdiction of Philadelphia?

A. Yes. I’m in the same capacity as an F.B.I. agent, sworn in under the same

guidelines as the F.B.I.

Q. How long have you been in that position?

A. I was assigned there January 3, 2005.

Q. Detective Smith, I want to take you back to a specific date, that's September 4, 2008. Were you working as fugitive task force officer for the F.B.I. on that date?

A. Yes, I was.

Q. An on September 4, 2008 at approximately, I believe 11:30 in the morning, were you in Atlantic City, New Jersey looking for anybody?

A. Yes, I was.

Q. Who were you looking for?

A. The defendant Mr. Whitney.

(N.T., 3/26/14, pp. 10-12.)

Within this initial exchange, Detective Smith had introduced himself and in so doing had provided a broadly descriptive sketch of his job that did not individually besmirch Appellant's character in any manner. Detective Smith further testified that his duties included searching for and apprehending people based upon arrest warrants charging violent offenses. He further explained that his position as an F.B.I. Agent within that described task force, enabled him to search for and apprehend Appellant in the State of New Jersey after Appellant had fled the Commonwealth of Pennsylvania. In this case, there was no debate that this Detective had been armed with a valid arrest warrant for Appellant and that the arrest warrant had listed violent felony graded offenses, including Attempted Murder, Aggravated Assault and weapons violations. Thus, the Detective performed his duties consistently. The testimony was perfectly permissible.

Moreover, zero prejudice flowed from the lack of a meritless objection of Appellant's trial counsel to the Detective's reference to his job description or title. Appellant did not meet his burden of proving that the insertion of an objection from his trial counsel during the Detective's introduction or testimony would have altered his fate utilizing any reasonable test of performance. Thus,

Appellant's claim was properly dismissed.

Similarly, this meritless claim had not been raised within Appellant's direct appeal by his succeeding appellate counsel Michael P. Marryshow, Esquire. No direct assertion of ineffectiveness of the initial appellate counsel stemming from the lack of objection has been raised within the instant PCRA. Arguably, it was therefore waived.

**B. Ineffective Assistance Claim- Jury Instruction Victim's Prior Criminal Record.**

Appellant next claimed that his trial counsel had been ineffective for failing to "secure a jury instruction concerning the fact, established at trial, that the shooting victim was on probation at the time of the shooting and when he ultimately identified petitioner as the shooter. The instruction would have permitted (and indeed required) the jury to consider this in assessing the credibility of the witness." *See* PCRA Paragraph 10b. Within the supporting Memorandum, counsel for Appellant cites Commonwealth v. Borders, 520 A.2d 758 (1989) as the authority for a broadly stated principle that "an accused is entitled to show that his/her accuser is on probation or parole.

Without debating the limited holding and circumstances in Borders, Appellant neglects the transcribed record that unequivocally reflects that both the prosecutor and Appellant's trial counsel during the course of this trial, exposed every aspect of the complainant's criminal history well beyond what would normally have been deemed admissible. The jury was provided with full knowledge of the complainant's prior criminal record, including his progress, or lack thereof, under probationary supervision, his testimony during the violations hearing before his supervising judge, and his admitted drug dealing activities. In addition, this jury was duly informed by this Court within the myriad of final instructions that it was entirely within their province to consider all relevant

circumstances relevant to evaluating credibility of all witnesses presented. There had been no reason for any request for a special instruction that singularly highlighted one undisputed aspect of the complainant's character. Therefore, trial counsel could not be faulted for not asking the trial Court to fashion a special jury instruction solely concentrating upon the undisputed fact that the complainant had been under probationary supervision in the past.

Appellant had not demonstrated that he had been prejudiced in any way because his trial counsel had not requested that a special instruction be given. Appellant failed to prove that counsel's act or omission adversely affected the outcome of the proceedings. Appellant did not even identify what instruction should have been requested by within his PCRA petition. "Such an undeveloped argument, which fails to meaningfully discuss and apply the standard governing the review of ineffectiveness claims, simply does not satisfy Petitioner's burden of establishing that he is entitled to any relief." Commonwealth v. Abdul Salaam, 570 Pa. 79, 84, 808 A.2d 558, 560 (2001). As previously stated, Appellant has once again failed to satisfy requisites of an ineffectiveness claim.

Except for these broad allegations, Appellant has not provided this Court with any factual or legal support for his claim. Claims of ineffectiveness when presented in a vacuum are not sufficient for post-conviction relief. Commonwealth v. Velasquez, 387 Pa. Super. 238, 563 A.2d 1273 (1989), *appeal denied*, 583 A.2d 793 (Pa. 1990). A petitioner alleging ineffectiveness must allege specific facts that show how counsel's course of conduct worked to deprive him of his right to effective representation. Commonwealth v. Lassen, 442 Pa. Super. 298, 645 A.2d 999, 1007 (1995).

As previously stated, counsel vigorously challenged the Commonwealth's evidence. Appellant's claim must still be rejected because the evidence of Appellant's guilt was overwhelming.

Counsel will not be deemed ineffective for failing to make a meritless objection. Commonwealth v. Spotz, 587 Pa. 1, 96, 896 A.2d 1191 (2006). Similarly, this meritless claim had not been raised within Appellant's direct appeal by his succeeding appellate counsel Michael P. Marryshow, Esquire and no fault has been cited against appellate counsel for not raising this matter within the direct appeal, this claim was therefore waived. Regardless of waiver, in light of all these circumstances, Appellant is not entitled to relief on this claim.

**C. Ineffective Assistance Claims: Admission of motive evidence.**

Within the PCRA paragraphs 10c and 10d, Appellant cited multiple faults of both his trial counsel and his direct appeal counsel to either failing to raise or failing to preserve, claims related to the introduction of evidence that the motive for the subject shooting stemmed from an ongoing illegal narcotics distribution dispute between the victim and Appellant. Appellant circuitously criticized his trial counsel for not adding a "law of the case" doctrine within his arguments to the trial Court and then stated that "to the extent that his trial counsel did properly preserve this issue," his first appellate counsel had not preserved this claim within the direct appeal. Likewise, Appellant claimed that he had been denied a fair trial because his trial counsel had "failed to file a motion *in limine* to limit the evidence to a shooting over a "dispute" instead of a "drug" dispute after the trial Court permitted admission of the "drug dispute" motive."

At the core, each of the above claims fail because this Court acted well within its discretion to admit the evidence in the form of limited testimony from the victim that approximately one week before Appellant and his cohorts attempted to assassinate him, he had a very hostile dispute with Appellant over the mishandling of the illegal narcotics sales or profits. It was acknowledged by all



parties that the victim testified as to a change of heart concerning the reason he had been the intended target of Appellant instead of an innocent bystander when he was shot fourteen times by three people who clearly aimed at him singularly. Although he was quite reluctant to even cooperate at all with law enforcement, the victim, Robert Jackson, had identified Appellant as one of the shooters to investigators which led to Appellant's arrest. Mr. Jackson also later positively identified Appellant at a preliminary hearing and similarly during the first trial that resulted in the mistrial. He had never wavered as to the identity of Appellant as one of the three shooters who paralyzed him. Within that prior time frame, however, Mr. Jackson had portrayed himself as an innocent bystander instead of the intended target and had not revealed the actual motive for the shooting as it related to the illegal drug trade dispute with Appellant until after the first jury trial resulted in a mistrial. The timing of the significant changes of circumstances was not disputed. Rather it was actively admitted by all parties.

It was acknowledged on the record that after the first trial was held, Robert Jackson's brother had been murdered; Appellant's brother had been charged with that homicide; and Appellant's brother had been found not guilty by a different jury for killing Mr. Jackson's brother. Additional retaliatory actions that followed from each of those events also directly related to the drug trade disputes. The timing of the victim's change of mind was also admitted.

It was further acknowledged by all parties before this Court within the motions *in limine* that subsequent to the above horrific events, a *Daisey Kates* hearing concerning the victims' alleged probation violation was conducted before the now retired, Honorable Christopher Wogan, as then sitting Judge of the Court of Common Pleas for the First Judicial District Criminal Trial Division. It was during this hearing, or close thereto, that the victim, Robert Jackson revealed that he had been

the intended target of this shooting that permanently paralyzed him due to his dispute with Appellant directly rooted within the illegal drug trade.

Based upon these disclosed facts, evidence of Appellant's illegal drug involvement was admitted on a limited basis to prove intent, motive and identification of the Appellant as one of the shooters pursuant to Pa. Rule of Evidence 404(b)(2). In great detail, this Court explained the basis for the discretionary evidentiary rulings and referenced this supporting rule of evidence including similarly situated explanatory holdings found within *Commonwealth v. Fisher*, 769 A2d 116 and *Commonwealth v Edwards*, 903 A. 2d 1139. This Court strictly limited the Commonwealth's ability to reference Appellant's illegal drug activity within the victim's testimony to conform to the rules of evidence to prove motive, intent, planning, and identity of the perpetrator and to explore the victim's change from his earlier reluctance to cooperate and version of events. (*See* Notes of Testimony 3/25/2014 pages 4-17.) In addition, this Court offered and complied with the defense request to provide a limiting cautionary instruction to the jury restricting their review of this information for the limited purpose as stated. (N.T., 3/27/14, pp. 17-18.)

Within this PCRA claim, Appellant asserted that a "law of the case" doctrine applied to bar this Court's evidentiary ruling concerning the motion *in limine* argued by Appellant's trial counsel as it related to the introduction of testimony concerning Appellant's involvement in a drug dispute with the victim which motivated the shooting and which had occurred one week following this dispute. The instant PCRA essentially stated that a pretrial evidentiary ruling in 2010 had been entered by the Honorable John J. O'Grady, Jr. as the presiding jurist of the first jury trial which had resulted in a mistrial. This assertion then leaped to the far-reaching conclusion that the previous evidentiary ruling

would be binding upon any related evidentiary rulings entered by this Court in the 2014 jury trial. This logic is completely flawed. This broad assumption incorrectly gauged this Court's ability to decide evidentiary matters in a separate jury trial. Judge O'Grady's evidentiary ruling, if it actually occurred, had been certainly applicable to the trial for which he had presided. A subsequent trial court absolutely has the discretion and ability to independently assess these evidentiary matters in a separate trial four years later particularly in view of admittedly significant change of circumstances which had been duly noted.

Moreover, the instant PCRA misstated the transcribed trial record by inferring that Appellant's trial counsel did not robustly debate the evidentiary issues within the motion *in limine* and include within his arguments that the evidence should not be admitted as it was prejudicial and that the trial court had been "estopped" by the prior judge's direction in the first trial. As this record amply demonstrated, Appellant's trial counsel dutifully preserved all aspects of this claim within the motion *in limine*. While trial counsel did not use the terminology "law of the case doctrine" he argued basically the same legal concepts as set forth in the PCRA claim. Indeed this Court addressed, on the record, each of Appellant's trial counsel's raised arguments during the explanation of the resulting evidentiary ruling. (N.T., 3/25/2014, pp: 4-16). Thus, this PCRA claim of trial counsel's ineffectiveness lacked any factual and legal basis.

In addition, the pursuit of a claim within this PCRA, that Appellant's trial counsel had been ineffective because he had not specifically suggested deletion of the word "drug" from reference of the underlying dispute between Appellant and the victim, defied all credulity after this Court explicitly ruled to the contrary. That type of request of deletion following this Court's detailed

instruction and evidentiary ruling would have been dutifully denied by this Court. Thus, the outcome of this trial would not have been impacted by a request to eliminate the one word which had been specifically permitted after objections had been raised. Appellant's trial counsel, and appellate counsel for that matter, cannot have been faulted for failing to raise or preserve the meritless claims. No prejudice had been proven.

**D. Ineffective Assistance Claims; Sentence included consecutive terms.**

The final individual PCRA claim recited within paragraph 10e was that Appellant had been denied effective assistance of counsel because he had failed to seek reconsideration of the sentence on the grounds that it had been "unreasonable" and a violation of "double jeopardy protection" because the imposed periods of confinement for the related weapons offenses had run consecutively to each other. Appellant's trial counsel had however timely filed a Post-Sentence Motion Seeking Reconsideration of Sentence on June 8, 2014 which quite succinctly recited the argument, among others, that the imposed Order of Sentence had been "unreasonable." The Statement of Errors Complained of On Appeal filed on Appellant's behalf in the direct appeal similarly raised the same argument, among other claims, that the Order of Sentence was unduly harsh and unreasonable. This Court cordially invites Appellant's PCRA attorneys to actually read the filed pleadings from the trial record before carelessly raising spurious arguments.

Moreover, the claim that trial counsel had been ineffective for failing to argue that the acknowledged discretionary aspects of the imposed sentence had violated the protections afforded by the Commonwealth of Pennsylvania's "double jeopardy" clause is legally flawed at its core. Because each of the offenses at issue were defined differently, the respective sentences did not merge and

therefore “double jeopardy” protection did not apply. Since “double jeopardy” protection did not apply to the instant matter, particularly at the time the Motion For Reconsideration had been filed, zero ineffective assistance of counsel flowed from the decision not to include an invalid legal philosophy.

As recited succinctly within the Commonwealth’s Motion To Dismiss the PCRA, “Trial counsel could not be ineffective for failing to anticipate future-possibly never occurring-developments in the law and raise a novel double jeopardy claim at sentencing. *See Commonwealth v. Jones*, 811 A.2d 994, 1005 (Pa. 200) (“Counsel cannot be faulted for failing to advance a novel legal theory which has never been accepted by the pertinent courts. *Commonwealth v. Todaro*, 701 A.2d 1343, 1346 (PA. 1997) ((Counsel stewardship must be judged under the existing law at the time of trial and counsel cannot be deemed ineffective for failing to predict future developments or changes in the law”).”*See Commonwealth’s Motion To Dismiss Pages 23 and 24.*

Moreover Appellant fails to show any prejudice from the manner in which the discretionary aspects of the Order of Sentence had been duly challenged by Appellant’s trial counsel and his initial appellate counsel. This Court firmly and painstakingly addressed each of Appellant’s post-sentence challenges within the written Rule 1925(a) Opinion submitted on February 6, 2015 in response to Appellant’s direct appeal as follows:

“DISCUSSION

**Defendant Claim: “1. The imposition of the mandatory minimum sentence of twenty to forty years on the attempted murder conviction constituted an illegal sentence because the facts necessary for imposition of the mandatory minimum were not established beyond a reasonable doubt.”**

The logic of this claim as to an unreasonable application of a mandatory minimum sentence is unclear and without merit. The ability of the Court

to implement a sentence up to twenty to forty years was due to the serious bodily sustained by the victim. The victim's state of permanent paralysis was not debated. The jury was presented with ample evidence that the Defendant along with others in a concentrated conspiracy acted in a manner that vividly identified their specifically formed specific intent and conscious purpose to kill Robert Jackson. They successfully shot him fourteen times in his torso and groin. Serious bodily injury clearly resulted from the shooting. The twenty to forty year sentence is a legal penalty.

Each one of the fourteen successful firings qualified as an elemental "substantial step" toward the commission of what was intended to a First Degree Murder of Robert Jackson. The jury has sound evidence upon which to find this defendant of the crime of Attempted Murder with the permissible potential statutory sentence of twenty to forty years of incarceration. This Court appropriately sentenced the Defendant within the recommended sentencing range of 114-480 months for the Attempted Murder.

**Defendant Claim: "2. The court's sentence was manifestly unreasonable pursuant to 42 Pa. C.S.A. Section 9781(d)(1)&(3) as the consecutive sentences violated the sentencing code and sentencing guidelines as being unfair and unduly harsh for the crimes that were committed."**

This is a challenge to this Court's discretionary aspects of the sentence. The Court may run the sentences concurrently or consecutively. With regard to the discretionary aspects of the sentencing, there is no automatic right to appeal. See Commonwealth v. Cook, 941 A.2d 7 (Pa.Super.2007). The sentencing court's exercise of discretion in imposing consecutive as opposed to concurrent sentences is not viewed as raising a substantial question that would allow the granting of allowance of appeal in our Commonwealth. Commonwealth v. Marts, 889 A.2d 608 (Pa.Super.2005). Under 42 Pa. C.S.A. § 9781(b) an appeal may be granted at the discretion of the appellate court only where it appears that there is a substantial question that the sentence imposed is not appropriate under this chapter.

The "imposition of a sentence is vested in the discretion of the sentencing court and will not be disturbed absent a manifest abuse of discretion." Commonwealth v. Smith, 543 Pa. 566, 673 A.2d 893, 895(1996). This standard reflects that the sentencing court is "in the best position to determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it." Commonwealth v. Ward, 524 Pa. 48, 568 A.2d 1242, 1242 (1990).

The controlling statute 42 Pa. C.S.A. § 9781(d)(1) and (3) provides, in relevant part that in reviewing the record the appellate court shall have regard for:

(1) The nature and circumstances of the offense and the history and characteristics of the defendant; and ... (3) The findings upon which the sentence was based. 42 Pa. C.S.A. § 9781 (d)(1) and (3).

As the record reflects this Court succinctly noted its thorough evaluation of all relevant factors and incorporated into the record its review of the applicable sentencing guidelines, the Presentence and Psychological Reports that it had previously requested to be completed by the County Probation Department, and all proffered information by both parties. All significant aspects of the defendant's background, his minimal work history, his criminal actions and his apparent lack of remorse and propensity for future violence were highlighted. This Court demonstrated that it was very well acquainted with the uniquely compelling facts of this case having presided over the trial and clearly identified the relevant findings upon which the sentence was based. (See N.T. 5/29/14, p.16-20).

This Court concisely acknowledged that it was disturbed by the malicious and merciless method by which this crime was conducted as well as by the underlying reason for execution attempt. The gravity of the offenses were extreme. "This was a planned execution. But for the quick thinking of officers and medical science, Mr. Jackson would be dead. That was your intent. You and your co-conspirators did everything possible to make that happen. Fourteen shots into a human body normally results in the death of a human being. That didn't occur for whatever reason in this case." (N.T. 5/29/14, p17). The underlying dispute was economically rooted in the illegal drug trade. The victim and the defendant had been middle management peddlers of illegal narcotics. The defendant apparently blamed the victim for a shortage. The defendant chose to settle this dispute by ambushing the victim in a public parking lot. He and his co-conspirators ruthlessly riddled Robert Jackson with bullets.

The defendant's choice a public grocery parking lot in daylight evidenced a cold and calculated careless disregard of the lives of innocent men women and children shopping for groceries or working at the store. As this Court simply stated: "You chose a location where people, men, women, children, go to shop. At this location you placed everybody in jeopardy that was remotely around. The negative effect of this type of behavior in this area is immeasurable." (N.T. 5/29/14, p17-18).

As the Presentence Investigation Reports reflected and the Court considered, the Defendant's history vividly exhibited a hardened middle aged individual who had been seemingly immune to considerable earlier rehabilitative efforts. Contrary to many unfortunate persons who commit crimes, this Defendant had a solid and stable family life. He was older and should have known better. He was not drug addicted. He had been afforded every opportunity to be productive. He sold drugs to make easy money. He had six prior arrests. His previous felony conviction for drug dealing of cocaine earned him a four to eight year state sentence of incarceration. He had been on parole for that offense just shy of one year before committing this heinous shooting. The risk of the Defendant's violent recidivism was very high.

Interestingly, the Defendant has objected to this Court's recognized

discretionary ability to run the sentencing for each charge consecutively but failed to mention that this Court also agreed to enter no further penalty to the merged first degree felony charges of Aggravated Assault and the inchoate offense Conspiracy. Thus, by this Court agreeing that the offense of First Degree Aggravated Assault (With Serious Bodily Injury Caused) merged and that multiple convictions of inchoate offenses prevented imposition additional penalties for Conspiracy, the Defendant was spared the exposure to additional sentence of incarceration of twenty to forty years. This Court's determination regarding the effect of the lack of penalty for those two felony offenses demonstrated its careful deliberation of all relevant sentencing factors.

Pursuant to 42 Pa. C.S.A. Section 9781(d)(1) &(3), this Court was well within its discretionary right to impose the sentences consecutively. The Defendant has not raised any substantial question that the consecutive sentences imposed were inappropriate or contrary to a fundamental norm underlying the sentencing code.

**Defendant's claim: "3. The sentence is unreasonable because the sentencing court disregarded the rehabilitative needs of the defendant in violation of 42 Pa. C.S.A. Section 9721 (b) and focused solely on the punishment of the defendant."**

This claim belies the fact that the record reflects this Court's analysis of the defendant's rehabilitative needs or his prospects for rehabilitation along with the other relevant factors before imposing the sentence. The general principles that the sentence imposed upon the Defendant should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact of the life of the victim and on the community, and the rehabilitative needs of the defendant were followed.

As the Defendant does not assert that his sentence was inconsistent with the protection of the public or that it did not properly reflect the gravity of the offense to the impact of the life of Robert Jackson and the community, this Court will address the singular claim that the rehabilitative needs of the Defendant were not considered.

A Presentence Investigation Report (PSI)<sup>2</sup> was ordered and reviewed

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2 See Commonwealth v. Devers, 519 Pa. 88, 101-102 (Pa. 1988) ("Where pre-sentence reports exist, we shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors. A pre-sentence report constitutes the record and speaks for itself. In order to dispel any lingering doubt as to our intention of engaging in an effort of legal purification, we state clearly that "sentencers" are under no compulsion to employ checklists or any extended or systematic definition of their punishment procedure. Having been fully informed by the pre-sentence report, the sentencing court's discretion should not be disturbed. This is particularly true, we repeat, in those circumstances where it can be demonstrated that



in detail by this Court; the reports detailed the defendant's background and noted that the Defendant has been incarcerated a significant amount of time in the past 15 years. (N.T. 5/29/14, p.18). These investigative reports identified the Defendant as violent individual who had reached a Level 5 Offender status under Section 303.11 of the Sentence Guidelines and thus deserving of a punishment commensurate with the gravity of the subject offenses. Thus, this Court reasonably determined that Defendant's claim of potential for rehabilitation to be relatively "poor." This Court explained, "You've already have been on parole. You've been in the State. That had no bearing and effect. And the types of crimes that you had before indicate quite clearly you were going to continue what you wanted to do any way." (N.T. 5/29/14, p.18).

This Court agreed with the Commonwealth's argument that "This Defendant has shown, although being sentenced to a fairly lengthy State prison sentence, four to eight years for a possession with intent to deliver and I think one to two on the conspiracy, he's on State parole, and he's out on the streets in broad daylight committing a shooting like this. That shows me, Your Honor, and it should show the Court that he is not capable of rehabilitation." (N.T. 5/29/12, p.12). The Court was correctly alarmed by the Defendant's cold-hearted lack of remorse.

Individualized consecutive standard sentences upon the Defendant were imposed after careful consideration of all relevant sentencing factors including the paramount need for protection of the public, the gravity of the offense, and the Defendant's poor prospect of rehabilitation. This was a vicious attempted murder in the public parking lot of a supermarket during which Defendant and others shot Robert Jackson fourteen times in the stomach and groin leaving him permanently paralyzed from the waist down. The Defendant had showed no remorse and took no responsibility for his actions. The sentence was reasonable pursuant to 42 Pa. C.S. §9721.<sup>3</sup>

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he judge had any degree of awareness of the sentencing considerations, and there we will presume also that the weighing process took place in a meaningful fashion. It would be foolish, indeed, to take the position that if a court is in possession of the facts, it will fail to apply them to the case at hand").

3 Under "42 Pa. C.S. §9721 (b) General Standards. -In selecting from the alternatives set forth in subsection (a), the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact of the life of the victim and on the community, and the rehabilitative needs of the defendant. The court shall also consider any guidelines for sentencing and resentencing adopted by the Pennsylvania Commission on Sentencing and taking effect under section 2155 (relating to publication of guidelines for sentencing, resentencing and parole and recommitment ranges following revocation). In every case in which the court imposes a sentence for a felony or misdemeanor, modifies a sentence, resents an offender following revocation of probation, county intermediate punishment or State intermediate punishment or resents following remand, the court shall make as a part

**Defendant's claim: "4. The sentence is excessive, manifestly unreasonable and unduly harsh as the sentence given defendant's age of 46 years amounts to a virtual life sentence considering the seriousness of the offense and the length of imprisonment."**

This claim is inherently illogical because its underlying premise is that this Defendant should receive a lesser sentence because he committed this heinous offense in his middle age rather than as a youthful offender. Frankly in this case the opposite is true. Given the Defendant's age, station in life and stable family background his actions were far more serious. As the Court stated, "You are no spring chicken. You know better. You're 46 years old. This is not a situation where I have a very young man who did something without forethought. This was a planned execution. But for the quick thinking of officers and medical science Mr. Jackson would be dead. You and your co-conspirators did everything possible to make that happen. Fourteen shots into a human body normally results in the death of a human being. That didn't occur for whatever reason in this case." (N.T. 5/29/14 p.17) This middle aged individual chose callously exposed the public to extreme danger. Thus, Defendant's fourth claim does not raise a substantial question that the sentence imposed was inappropriate or contrary to a fundamental norm underlying the sentencing code this claim is without merit. Matters relating to the discretionary aspects of sentencing are not appealable as of right. Commonwealth v. Fremd, 860 A.2d 515,524 (Pa.Super.2004).

**Defendant's claim: "5. The sentences running consecutive is unduly harsh and manifestly unreasonable where the combined sentence aggregates to 33 ½ to 67 years which amounts to a life sentence and/or will subject defendant to the discretion of the state parole board for the rest of his life where the sentence far exceeds the punishment for the crimes."**

The Defendant chose to criminally act at a relatively later point in his life. The sentencing consequences of his actions flow from the points in time following his actions. His sentence should not be reduced because he committed the offense later rather than earlier. This illogical claim is essentially duplicative of Defendant's previous arguments and similarly fails to raise a substantial question necessitating appellate review. The sentencing court reasonably acted within the parameters of 42 Pa. C.S.A. § 9721. The sentencing court exercised proper discretion when it imposed its sentence or consecutively to other sentences being imposed at the same time or to sentences already imposed. Commonwealth v. Graham, 541 Pa. 173, 184, 661 A.2d 1367, 1373(1995).

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of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed."

The Superior Court of Pennsylvania affirmed the Court's Orders of Sentence on November 13, 2015 and issued a Non-Precedential Memorandum Opinion docketed under 1948 EDA 2014. Appellant's Petition For Allowance of Appeal docketed under 678 EAL 2015 was denied by the Pennsylvania Supreme Court on March 30, 2016. As such, Appellant has not proven any prejudice within the claims presented necessitating the relief requested.

**E. Ineffective Assistance Claims: Cumulative Analysis.**

Within his PCRA claim at paragraph 15, it is asserted that the cumulative prejudice flowed from the various alleged acts of ineffective assistance described within PCRA paragraphs 10a, 10b, 10c, and 10d. As correctly noted within the *Commonwealth's Motion To Dismiss*, "This claim is plainly meritless because the Pennsylvania Supreme Court has consistently held that "no number of failed claims may collectively warrant relief if they fail to do so individually." Commonwealth v. Spatz, 18 A.3d 244, 321 (Pa. 2011) (citations omitted); accord Commonwealth v. Lopez, 854 A.2d 465, 471 (Pa. 2004) ("no number of failed claims may collectively attain merit if they could not do so individually") (citation omitted). Because none of Appellant's claims merit relief individually, the cumulative effect of those purported errors cannot entitle him to relief." See *Commonwealth Motion To Dismiss*, Page 24.

It is well settled that Sixth Amendment claims of ineffective assistance of counsel are governed by the familiar two-prong test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. Second, the defendant must show

that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.* at 687, 104 S.Ct. 2052; see Williams v. Taylor, 529 U.S. 362, 390–91, 120 S.Ct. 1495 (2000).

Under Strickland's first prong, Appellant must show that counsel's performance was deficient. The proper standard for attorney performance is that of “reasonably effective assistance”-Appellant must show that trial counsel's representation fell below an objective standard of reasonableness considering all the circumstances. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. Counsel's reasonableness must be assessed on the facts of the particular case, viewed as of the time of counsel's conduct. *Id.* at 689, 104 S.Ct. 2052. In the context of ineffective assistance based on counsel's failure to investigate, the court must determine whether counsel exercised “reasonable professional judgment.” Wiggins v. Smith, 539 U.S. 510, 522–23, 123 S.Ct. 2527 (2003).

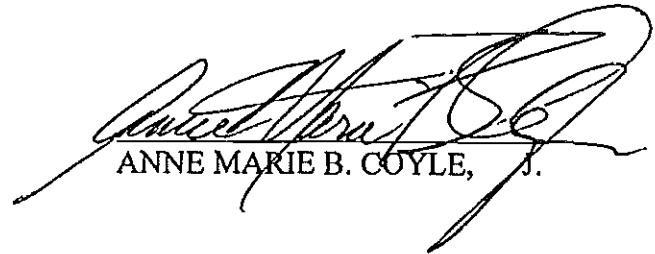
Counsel is never ineffective for failing to make a frivolous objection or motion. Commonwealth v. Groff, 356 Pa.Super. 477, 514 A.2d 1382, 1386 (1986), *appeal denied*, 531 A.2d 428 (Pa. 1987); Commonwealth v. Davis, 313 Pa.Super. 355, 459 A.2d 1267, 1271 (1983). Similarly, counsel is never ineffective for failing to raise a frivolous issue in post-verdict motions or on appeal. Commonwealth v. Thuy, 424 Pa.Super. 482, 623 A.2d 327, 355 (1993).

In the instant matter, Appellant has not demonstrated that any of the ineffective assistance defining prongs pronounced in Strickland or any other reasonably interpreting appellate cases in this Commonwealth had been met either individually or collectively to justify the relief requested.

#### IV. CONCLUSION

Appellant has failed to demonstrate any basis for relief. In the absence of any meritorious challenge that can be found in the reviewable record, Appellant has failed to articulate his allegations in accordance with the requisites of a claim predicated upon counsel's ineffectiveness. No relief was due. For the foregoing reasons, Appellant's request for post-conviction collateral relief was properly dismissed.

BY THE COURT:



ANNE MARIE B. COYLE, J.