*No.*

In The

# Supreme Court of the United States

ZACHARY WITMAN,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

On Petition for a Writ of Certiorari
to the Superior Court of Pennsylvania

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

1. Whether *Miller v. Alabama* established a categorical ban on imposing a type of punishment – a mandatory sentence of life imprisonment without the possibility of parole – on a class of individuals – juvenile offenders – and therefore stated a substantive rule that should be applied retroactively?

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES AND RULES

## OPINIONS BELOW

The Order of the Supreme Court of Pennsylvania denying petitioner Zachary Witman's petition for allowance of appeal appears at 84 A.3d 1064 (Pa. 2014), and is set forth in App. 1.

## JURISDICTION

The judgment of the Pennsylvania Supreme Court was entered on January 23, 2014. (App. 1). This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 Pa.C.S.A. §1102(a) (since revised) provides in pertinent part:

> (a) First degree.--
>
> (1) A person who has been convicted of a murder of the first degree shall be sentenced to death or to a term of life imprisonment….

61 Pa.C.S.A. § 6137, provides in pertinent part:

> (a) General criteria for parole. –
>
> (1) The board … may release on parole any inmate to whom the power to parole is granted to the board by this chapter, except an inmate … serving life imprisonment ….,

## STATEMENT OF THE CASE

Tragedy struck the Witman family on October 2, 1998. Thirteen-year-old Gregory Witman, was brutally murdered just seconds after he came home from school. His 15-year-old brother Zachary, a popular A-student with no history of disciplinary problems, had stayed home from school that day, feeling sick to his stomach. Zach spent the day sleeping, watching television, and playing with his dogs.

At about 3:05-3:06 p.m., Gregory got off the school bus, a few blocks from his home. At 3:09 p.m., Greg's best friend, Erynn Jeffrey, called the Witman home. Someone picked up the phone and hung up without speaking. Erynn told the police and later

testified at Zach's trial that she could tell it was the downstairs phone because it was a flip phone and she could hear the phone click when the person hung up. Erynn called back at 3:15 p.m. Zach answered and told her that Greg was not yet home from school. Zach sounded perfectly normal, not out of breath. Erynn testified that she could tell that Zach was on an upstairs phone because, when he hung up, it did not have the distinctive click of the downstairs flip phone.

At 3:17 p.m., Zach called 911, screaming, "Oh my God. Oh my God. I just came downstairs. My brother, his throat is all cut up." In tears, he told the 911 operator that he had been sleeping upstairs, heard a noise, came downstairs and found his brother bleeding, his throat cut and his head just "hanging." The 911 operator instructed Zach to move Greg's body. He did what he was told, crying, "oh my God, I just moved him, and his head practically came off."

At about 3:24 p.m., emergency medical personnel, responding to Zach's call, found him in the garage, hysterical, hyperventilating, flailing and waving his hands. He begged to speak to his mother and repeatedly said that he had come downstairs and found his brother in the laundry room, bleeding. Zach was having trouble breathing and was taken to the emergency room, where he was treated for hysteria and "acute grief." Both the EMT who took him to the hospital and the emergency room doctor noticed that he had a minor cut oozing blood on his left hand. The emergency room doctor found no evidence of bruises or contusions and toxicology reports showed no alcohol or drugs in Zach's system.

Zach had no criminal record, no history of violence, no school record of disciplinary problems. To all accounts he was a good kid and had a close and loving relationship with his younger brother. Yet he instantly became the sole suspect. The police found a small pocket knife, determined to be the murder weapon, and a pair of bloodied soccer gloves buried in the Witman's backyard. Zach's DNA was not found on the gloves, despite his oozing cut. The police were not able to trace either the knife or the gloves to anyone in the Witman household. Still they were convinced that the knife belonged to Zach because he had a collection of pocket knives, along with collections of toy metal cars, watches, Pez dispensers and old cameras.

Because Zach was charged with murder, he was presumptively to be tried as an adult in criminal court. To be transferred to juvenile court he had to establish by a preponderance of the evidence that the transfer would "serve the public interest." 42 Pa.C.S.A. § 6322(a). Zach moved for decertification and was extensively examined and tested by psychiatrists and psychologists. Most of the mental health experts agreed that, while Zach was immature for his age, he had no history of violence and that there was nothing to suggest that he was a liar, or manipulative, or had psychopathic or sociopathic tendencies. There was no evidence that he suffered from a mental disease or defect. Several experienced psychiatrists recommended that he be sent to juvenile court because he was uniquely amenable to treatment, given, among other factors, his age, his lack of pathology, his intelligence, the absence of any evidence of drug or alcohol abuse, the absence of any disciplinary problems or criminal history, his ability

to form interpersonal relationships, the fact that domestic crimes are rarely repeated, and the fact that he had at least five years remaining for treatment in a juvenile facility.

The trial court went through Pennsylvania's statutory factors, characterizing it as a "close question" and a "close call." Nevertheless, the court denied transfer, emphasizing that, in prior cases, only juveniles who had "accepted responsibility" for their actions were transferred to juvenile court, and concluding that Zach's receptiveness to rehabilitation was questionable given that he denied the crime.

At trial, the prosecution conceded that it had no motive – that Zach and Greg had a good relationship and that there was no explanation for why Zach would brutally murder his younger brother. The prosecution's case rested primarily on the testimony of a "blood spatter" witness who analyzed the blood on Zach's sweatshirt and, on the basis of an experiment she conducted with a blood-soaked sponge, concluded that Zach must have been near Greg when he was stabbed. Yet there was no blood on Zach's hair or face, and no evidence that Zach had done anything to clean up in the few minutes before the EMT personnel arrived.

On May 21, 2003, Witman was convicted by a jury of first degree murder. (Hon. John C. Uhler). On July 8, 2003, he was sentenced, as required by Pennsylvania law, to life in prison without the possibility of parole. Zach's conviction was upheld on direct appeal. *Commonwealth v. Witman*, No. 1889 MDA 2004, at 6.n3, 8-9, n.5. (Pa. Super. 2005); (R.1773a) On May 12, 2005, the Pennsylvania

Supreme Court denied Zach's Petition for Allowance of Appeal; on December 12, 2005, this Court denied his Petition for a Writ of Certiorari.

On November 22, 2006, Zach filed a state Petition for Post-Conviction Relief asserting numerous claims of ineffectiveness of counsel, as well a claim that his Eighth Amendment rights were violated by the mandatory sentence of life imprisonment without parole for a crime that he allegedly had committed when he was 15 years old. After an evidentiary hearing, the trial court granted the Petition, vacating Zach's conviction on the ground that counsel was constitutionally ineffective. *Commonwealth v. Witman,* CP-67-CR5411-1998 (December 21, 2007). The trial court did not address all of Zach's ineffectiveness claims nor did it address the Eighth Amendment issue.

On March 16, 2009, the Superior Court reversed solely on the grounds that Zach had failed to establish prejudice. It remanded for consideration of the remaining issues. *Commonwealth v. Witman*, 972 A.2d 565 (Pa. Super. 2009). The Pennsylvania Supreme Court denied review. *Commonwealth v. Witman*, 982 A.2d 1228 (Pa. 2009).

Upon remand, the PCRA court denied Zach's remaining claims. Specifically, as to the Eighth Amendment issue, it held that the "issue is currently before the United States Supreme Court in *Sullivan v. Florida*, 08-7621 and *Graham v. Florida* 08-7412, and, therefore, any decision or comment by this Court is premature." *Commonwealth v. Witman,* CP-67-CR5411-1998 (April 26, 2010). (App. 2)

On December 9, 2011, the Superior Court affirmed. Relying on state law precedent, it held that it was not cruel and unusual punishment to sentence a juvenile to life imprisonment without the possibility of parole. C*ommonwealth v. Witman*, No. 797 MDA 2010 (December 9, 2011). (App. 71)

On April 9, 2009, Witman again petitioned the Pennsylvania Supreme Court for allowance of appeal, raising, among other issues, his Eighth Amendment claim. Because of the pendency of cases in this Court and the Pennsylvania Supreme Court raising the same or similar Eighth Amendment claims, the Pennsylvania Supreme Court stayed consideration of his Petition.

On October 30, 2013, a divided Pennsylvania Supreme Court held that *Miller v. Alabama*, 132 S.Ct. 2455, 2469 (2012), was a procedural rule and was not retroactive. *Commonwealth v. Cunningham*, 81 A.3d 1 (Pa. 2013), *petition for cert. filed* (February 26, 2014) (No. 13-1038). On January 23, 2014, the Supreme Court of Pennsylvania summarily denied Zach's Petition for allowance of appeal. (App. 1)

## REASONS FOR GRANTING THE PETITION

### CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT OVER THE FUNDAMENTAL QUESTION WHETHER *MILLER V. ALABAMA* IS A SUBSTANTIVE OR PROCEDURAL RULE AND WHETHER IT APPLIES RETROACTIVELY TO A JUVENILE CHALLENGING ON COLLATERAL REVIEW A MANDATORY SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

At the age of 15, petitioner Zachary Witman, charged with a murder he vehemently denied committing, was compelled to make a choice that would be difficult at any age but is nearly impossible for a child: if he admitted that he had killed his younger brother, it would show he could be "rehabilitated" and he likely would be transferred to juvenile court. But if he maintained his innocence, he would face trial and sentencing as an adult. Zach maintained his innocence, was convicted, and received the only sentence available under Pennsylvania law: life in prison without the possibility of parole.

Though the evidence against Zach was purely circumstantial and the violent crime was inexplicable and bewildering, the court could not consider any mitigating factors in setting the sentence. It could not consider Zach's age or maturity; his ability to appreciate risk and consequences; the apparent randomness of the crime; his family and home environment; and whether he could be treated and rehabilitated. It could not even consider the wishes of Zach's parents, also victims of the crime, who supported Zach throughout, and who, were they

allowed to speak at sentencing, would have begged for a lesser sentence, describing their 15-year old son to the court and explaining why he did not deserve to be sent away for life.

In *Miller v. Alabama*, 132 S.Ct. 2455, 2469 (2012), this Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." Were Zach still on direct appeal, his mandatory sentence of life without parole would be unconstitutional and Zach would have to be resentenced by a court that would have to give individualized consideration to his age at the time of the crime and other mitigating circumstances. But, by the time *Miller* was decided, Zach had exhausted his direct appeals, and though he raised the Eighth Amendment issue in 2006 in his first PCRA, at the present time, he is not entitled to the benefit of the *Miller* rule because the Pennsylvania Supreme Court has held that *Miller* is a procedural rule and is not retroactive. Were Zach in Nebraska or Texas or Massachusetts or Iowa, or any of the other states that have concluded that the rule is substantive, his sentence would be vacated.

This conflict must be resolved. There cannot be two separate rules on so fundamental an issue with so many lives at stake. Zach's case presents a particularly compelling set of circumstances for resolving the conflict: Zach was just 15 when the crime was committed; the trial court, though denying decertification to juvenile court, considered this a very "close" case and found that most of the subjective factors mitigated in favor of him being tried as a juvenile; and his parents, also victims of the crime,

are his most ardent supporters. Had the trial court been permitted to engage in individualized sentencing, it is doubtful Zach would have received the "harshest possible penalty." *Miller*, 132 S.Ct. 2469.

*A. This Court Should Resolve the Conflict in the Lower Courts as to Whether Miller Applies Retroactively*

1. The *Miller* Analysis.

*Miller* relied on two strands of cases: first, the Court cited precedent that placed "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Miller*, 132 S.Ct. at 2463. In particular, the Court relied on its prior cases that have held that juvenile offenders are inherently different from adults: *See Roper v. Simmons*, 543 U.S. 551 (2005) (prohibiting death penalty for those under 18 when the crime occurred); and *Graham v. Florida*, 560 U.S. 48 (2010) (prohibiting life without parole for juveniles found guilty of non-homicides).[1] Juveniles have "diminished culpability and heightened capacity for change," so imposition of the harshest possible punishment without consideration of these differences "poses too great a risk of disproportionate punishment." *Miller*, 132 S.Ct. at 2469.

Second, the Court referred to its long line of precedent prohibiting the *mandatory* imposition of the

1 The Court also citied to its decisions prohibiting the execution of "mentally retarded" defendants, *Atkins v. Virginia*, 536 U.S. 304 (2002); and prohibiting imposition of the death penalty for crimes not resulting in death, *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

death penalty, and requiring that the sentencing body be allowed to consider the characteristics of the defendant and other mitigating factors before it imposes the ultimate punishment. *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Sumner v. Shuman*, 483 U.S. 66 (1987): *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

Melding these two strands of precedent, the Court concluded that because life without parole shares many of the characteristics of the death penalty, a *mandatory* sentencing scheme that requires imposition of the harshest penalty on a juvenile, without consideration of the myriad factors that make juveniles different from adults, runs afoul of both sets of principles.

2. The Conflict over Whether *Miller* is Retroactive.

In *Miller*, the Court foreclosed the imposition of a category of punishment – mandatory life in prison without the possibility of parole – on a specific class of defendants – those under eighteen at the time of the crime. As the Court put it, "we *require* [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 2469 (emphasis added). Yet the Court also stated that the decision did not "categorically bar a penalty for a class of offenders or type of crime" but instead, "mandates only that a sentencer follow a certain process – considering an offender's youth and attendant characteristics before imposing a particular penalty." *Id.* at 2471.

The lower courts have struggled with the meaning of this language and, because retroactivity is now largely dependent on whether a new rule is characterized as substantive or procedural, *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004), have disagreed over whether *Miller* states a "new" rule that should be applied retroactively to those whose appeals were final when *Miller* was decided.[2]

Under *Teague v. Lane*, 489 U.S. 288, 301 (1989), a "new rule" does not apply to cases on collateral review, subject to two exceptions. First, a "new rule" should be applied retroactively if it "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Id.* at 307 (citations omitted). Second, it should be applied retroactively if it "requires the observance of 'those procedures that… are "implicit in the concept of ordered liberty."'" *Id.* (citations omitted). The second exception is "reserved for watershed rules of criminal procedure." *Id.* at 311.

In *Schriro*, this Court refined the analysis, differentiating between substantive and procedural rules:

> New "substantive" rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms...as well as constitutional determinations that place particular conduct or persons

2 *Teague v. Lane*, 489 U.S. 288, 301 (1989), defined a new rule as one that "was not *dictated* by precedent existing at the time the defendant's conviction became final." (emphasis in original)

> covered by the statute beyond the State's power to punish. … Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal;' " *or faces a punishment that the law cannot impose upon him*.

*Schriro*, 542 U.S. at 352. (citations omitted) (emphasis added). New procedural rules do not apply retroactively unless they constitute a watershed rule – that is, a rule "without which the likelihood of an accurate conviction is *seriously* diminished." *Id*. at 352, *quoting Teague*, 489 U.S. at 313 (emphasis in original).

The state and federal courts are divided over whether the rule announced in *Miller* is a "new rule" and if so, whether it is substantive or procedural, and if procedural, whether it is so fundamental that it must be deemed a "watershed" rule. The disagreement is pervasive: the state court decisions are often by sharply divided panels; in Florida, different districts have come to opposite conclusions; two panels of the Court of Appeals for the Fifth Circuit have disagreed over the fundamental analysis.

Seven state courts, including four of last resort, have read *Miller* as a "categorical ban" on the mandatory imposition of a sentence of life without parole on a juvenile and have thus determined that *Miller* is a new substantive rule that must be applied retroactively: Texas, *Ex parte Maxwell*, __ S.W.3d __, 2014 WL 941675 (Tex. Crim App 2014); Nebraska, *State v. Mantich*, 287 Neb. 320, 842 N.W.2d 716

(2014); Illinois, *People v. Davis*, __ N.E.3d __, 2014 WL 1097181 (Ill. 2014); California, *In re Rainey*, 224 Cal App.4th 280, 168 Cal. Rptr.3d 719 (1st Dist. App. 2014); Massachusetts, *Diatchenko v. District Attorney*, 466 Mass 655, 1 N.E.3d 720 (2013); Iowa, *State v. Ragland*, 836 N.W.2d 107, 115 (Iowa 2013); Mississippi, *Jones v. State*, 122 So.3d 698 (Miss.2013).

Four state courts, three of last resort, have decided the rule is procedural because, in their view, it only prohibits a particular sentencing scheme: Pennsylvania, *Commonwealth v. Cunningham*, 81 A.3d 1 (Pa. 2013), *petition for cert. filed* (February 26, 2014) (No. 13-1028) (2013); Louisiana, *State v. Tate*, 130 So.3d 829 (La. 2013), *petition for cert. filed* (Feb 26, 2014)(No. 13-8915); Minnesota, *Chambers v. State*, 831 N.W.2d 311 (Minn. 2013); *People v. Carp*, 298 Mich. App. 472 828 N.W.2d 685 (2012), *appeal granted*, 838 N.W.2d 873 (Mich. Nov. 6, 2013) (No.146478).

Florida is in turmoil. The First and Third Districts have concluded that *Miller* is a new procedural rule. *Geter v. State*, 115 So.3d 375 (Fla. 3d DCA 2012); *Gonzalez. v. State*, 101 So. 3d 886 (Fla 1st DCA 2012) The Second District has held that Miller is retroactive and has certified the conflict to the Florida Supreme Court, *Toye v. State*, __ So.3d __ 2014 WL 228639 (Fla. 2d DCA 2014).

The federal district courts are also split. Several have determined that *Miller* is retroactive. *See, e.g., Songster v. Beard*, No. 04 c.v. 5916 (E.D. Pa. Sept 6, 2012); *Hill v. Snyder*, 2013 WL 364198 (E.D. Mich. 2013); *Alejandro v. United States*, 2013 WL 4574066 (S.D.N.Y. 2013). Several have determined it

is procedural. *Thompson v. Roy*, 2014 WL 1234498 (D. Minn. 2014); *Sanchez v. Vargo*, 2014 WL 1165862 (E.D. Va. 2014); *Martin v. Symmes*, 2013 WL 5653447 (D. Minn. 2013): *Johnson v. Ponton*, 2013 WL 5663068 (E.D. Va. 2013).

No federal court of appeals has yet faced the issue directly. However, in the context of second or successive habeas petition under 28 U.S.C. §2244, the Circuits must determine whether the petitioner has made a *prima facie* showing that *Miller* is a new rule "made retroactive to cases on collateral review by the Supreme Court." Applying this *prima facie* standard, the First, Second, Third, Fourth and Eighth Circuits have authorized second or successive petitions raising *Miller* claims. *Evans-Garcia v. United States*, 744 F.3d 235 (1st Cir. 2014); *Wang v. United State*s, No. 13-2426 (2d Cir. July 16, 2013); *In re Pendleton*, 732 F.3d 280 (3d Cir. 2013); *In re James*, No. 12-287 (4th Cir. May 10, 2013); *Johnson v. United States*, 720 F.3d 720 (8th Cir. 2013). The Eleventh Circuit has concluded that *Miller* is not retroactive. *In re Morgan*, 713 F.3d 1365 (11th Cir. 2013). And different panels of the Fifth Circuit have reached opposite conclusions. *Compare In re Simpson*, 2014 WL 494816 (5th Cir. 2014) (*prima facie* case of retroactivity) *with Craig v. Cain*, 2013 WL 69128 (5th Cir. 2013) (*Miller* not retroactive).

This Court should resolve this conflict without further delay. Without question, *Miller v. Alabama* states an important principle of constitutional law. From now on, in recognition of just how different juveniles are from adults, every juvenile charged and convicted of a homicide *must* receive individualized consideration at sentencing. *No* juvenile may be

sentenced to life without parole without consideration of his age, the circumstances of the offense, and the possibility for rehabilitation, among other factors. And, as this Court has said, while there may be *some* occasions where the life without parole is an appropriate sentence for a juvenile, it expects that imposition of this "harshest possible penalty" will be "uncommon." *Miller*, 132 S.Ct. at 2469.

Yet, unless this Court resolves the conflict, for the thousands of defendants, like Zach, who were juveniles when they allegedly committed the crime, but whose appeals were final before *Miller* was decided, whether they are doomed to die in prison will depend not only on the fortuitous circumstance of *when* they were convicted, but also on *where* they were convicted.

Zach's case provides a perfect vehicle for resolving this conflict. Zach was an especially immature 15-year old at the time of the crime. He had no criminal history. The psychological testing conducted during the decertification hearing revealed no sociopathic tendencies. There was no motive for the crime. The evidence was all circumstantial. His parents, also victims, would have advocated for a lesser sentence. If Pennsylvania fundamentally misinterpreted the *Miller* decision, as we believe it did, and if *Miller* is a substantive rule that must be applied retroactively, Zach will undoubtedly benefit from a new sentencing hearing where the court can consider his age and other factors in setting the appropriate sentence.

*B. This Court Should Resolve a Seeming Conflict Within Its Own Decisions as to Whether this Court's Application of a New Rule to a Petitioner on Collateral Review Constitutes an Implicit Holding that the Rule Should be Applied Retroactively*

*Miller* was a consolidated decision. Miller's Eighth Amendment claim was presented on direct appeal. But the Court also decided *Jackson v. Hobbs*, involving a juvenile who was collaterally challenging his life sentence without parole. The Court reversed the judgment of the Arkansas Supreme Court and remanded Jackson's case to that Court for "further proceedings not inconsistent with this opinion." *Miller*, 132 S.Ct. at 2475. The exact same remedy was announced for Miller. The Court did not distinguish between the two cases.

In *Teague*, the Court ruled that retroactivity should be "treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule*, evenhanded justice requires that it be applied retroactively to all who are similarly situated*." *Teague*, 499 U.S. at 300 (emphasis added).

*Teague* went further. The Court recognized that if it applied the "new rule" in Teague's case regardless of whether it was retroactive, it would lead to this very inequity. The Court found a "more principled way of dealing with the problem." *Id.* at 316. "*We can simply refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated.*" *Id.* (emphasis added)

*Teague*, by its very words, appears to hold that, if the Court applies a new rule to a case on collateral review, it is implicitly deciding that the rule is retroactive.

The Court, however, has not strictly adhered to this principle. In *Chaidez v. United States*, 133 S.Ct. 1103 (2013), the Court held that *Padilla v. Kentucky*, 559 U.S. 356 (2010), requiring defense counsel to advise his client about the risk of deportation in pleading guilty, was a new procedural rule and failed to even address that it had applied the rule to Padilla's collateral challenge to his conviction.

And in *Tyler v. Cain*, 533 U.S. 656, 662-63 (2001), in deciding whether a new rule has been "made retroactive to cases on collateral review by the Supreme Court," under 28 U.S.C. §2244(b)(2)(A), the Court held that a new rule is not "made retroactive to cases on collateral review" unless "the Supreme Court *holds* it to be retroactive." (emphasis added)

As the post-*Miller* cases vividly demonstrate, the lower courts are now divided on the significance of this Court applying a new rule to a petitioner in a collateral proceeding: does even-handed justice require that similarly situated defendants, whose convictions are final, be treated similarly? Is application of a rule to the petitioner before the Court an indication of the Court's view that the rule is either not "new" or is otherwise retroactive? Or is application of a rule to a case on collateral review no longer relevant in assessing the retroactivity of that rule in later cases?

In *Miller*, the Court did not distinguish between Jackson and Miller. Thus, many of the courts that have addressed the retroactivity question, relying on *Teague*, have considered the Court's application of the same rule to Jackson either an implicit ruling that it considered the rule substantive, or, at the very least, a significant factor to be considered in the analysis. *See, e.g., Ragland*, 836 N.W.2d at 116; *Mantich*, 287 Neb. at 337-38, 842 N.W2d at 728-29; *Diatchenko*, 466 Mass. at 666; 1 NE.3d at 281; *Davis*, 2014 WL 1097181 at *9; *Cunningham*, 81 A.3d at 22-23 (Baer, J. dissenting).

The courts that have concluded that *Miller* is not retroactive have largely ignored this aspect of the *Teague* holding, reasoning that because this Court did not expressly address retroactivity, its application of the rule to Jackson was of no significance. *Cunningham*, 81 A.3d at 6; *Carp*, 828 N.W.2d at 712-13; *Symmes*, 2013 WL 5653447 at *15; *Vargo*, 2014 WL 1165862 at *8.

The continued viability of *Teague's* "more principled" approach is very much in question. In *Miller*, this Court decided the case before it on direct appeal and the case before it on collateral review without drawing any distinction. Under *Teague*, that would imply that the Court considered the *Miller* rule retroactive. Under *Chaidez*, it is unclear if it has any meaning whatsoever. The lower courts have struggled to make sense of this conflict. This case presents a perfect opportunity for this Court to clarify whether applying a rule to a petitioner on collateral review implies that the rule is retroactive.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 15, 2014

# APPENDIX

**IN THE SUPREME COURT OF PENNSYLVANIA**
**MIDDLE DISTRICT**

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA, Respondent | : | No.5 MAL 2012 |
| | : | Petition for Allowance |
| v. | : | of Appeal from the |
| | : | Order of the Superior |
| | : | Court |
| ZACHARY PAUL WITMAN, Petitioner | : | |

**ORDER**

**PER CURIAM**

**AND NOW,** this 23rd day of January, 2014, the Petition for Allowance of Appeal is **DENIED.**

A True COPY, Elizabeth E. Zisk
As Of *1/23/L014*
Attest: Elizabeth E. Zisk
Chief Clerk
Supreme Court of Pennsylvania

IN THE COURT OF COMMON PLEAS
OF YORK COUNTY, PENNSYLVANIA

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA, | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| v. | : | |
| ZACHARY PAUL WITMAN Petitioner | : | No. CP-67-CR-0005411-1998 |

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OPINION

Before the Court is the following Petition for Post Conviction Relief pursuant to 42 Pa CSA Section 9452 et sea which was filed by the Petitioner Zachary P Witman on November 22 2006 and is on remand from the Pennsylvania Superior Court.[1] The Petition asserts:

[1] The instant matter was remanded by the Pennsylvania Superior Court on March 16 2009 which by Memorandum Opinion reversed and remanded the matter for this Court review of the remaining PCRA issues presented by the Petitioner.

a Petitioner was denied the effective assistance of counsel as guaranteed under the United States and Pennsylvania Constitutions when trial counsel told the jury he would establish lack of motive through specific acts in his opening statement Notes of Testimony May 07 2003 page 245 and later tried to offer evidence of lack of motive but failed to articulate an evidentiary basis for admitting such evidence instead improperly conceding that the evidence was admissible only as traditional character evidence (Notes of Testimony May 07 2003 page 2624 May 16 2003 page 177804)

b Petitioner was denied the effective assistance of counsel as guaranteed under the United States and Pennsylvania Constitutions when trial counsel failed to provide the proper evidentiary basis to admit exculpatory statements Petitioner made to an emergency room physician when such statements were admissible for the truth as excited utterances or under the medical exception to the hearsay rule and then were admitted not for the truth but for a limited reason only (Notes of Testimony May 16 2003 page 1625 162816368)

c Petitioner was denied the effective assistance of counsel as guaranteed under the United States and Pennsylvania Constitutions when trial counsel withdrew a previously made motion in limine to exclude the subjective conclusions of the Commonwealth blood spatter expert on the erroneous ground that he had violated a civil procedure rule and though invited to conduct a Frye hearing by the trial judge refused to do so the expert conclusions were based on novel, non reproduces and non-reproducible out-of-court experiments which were never peer

reviewed and which would fail the Frve test for admissibility the expert testified to the ultimate conclusion in the case usurping the jury function and trial counsel then failed to cross-examine the expert about her experiment. (Notes of Testimony May 12 2003 page 64503 May 14 2003 page 10902 1230907 130526)

d Petitioner was denied the effective assistance of counsel as guaranteed under the United States and Pennsylvania Constitutions when trial counsel after having successfully obtained a ruling upheld on appeal suppressing Petitioner socks consented to the admission of the socks without advising Petitioner or obtaining Petitioner consent.[2]

e Petitioner was denied the effective assistance of counsel as guaranteed under the United States and Pennsylvania Constitutions when trial counsel failed to move in limine to exclude evidence of a presumptive blood test luminol testing though the evidence was not probative because among other things the photographs of the luminol never turned out the witnesses were testifying from memory without photographs or notes the Commonwealth never established that the substance illuminated was blood or dated the substance illuminated and never established that footprints that illuminated and led to the buried knife and soccer gloves and back to the victim house were the size of gait of or otherwise

[2] This issue as presented by the Petitioner was the sole issue addressed by the Trial Court in its Grant of a New Trial on December 21 2007 The Pennsylvania Superior Court reversed and remanded the matter for further development and resolution of the remaining issues as presented within.

matched Petitioner footprints (Notes of Testimony May 08 2003 page 3567 3812 May 09 2003 page 415 449 57809 May 12 2003 page 753 770 May 13 2003 page 904)

f Petitioner was denied the effective assistance of counsel as guaranteed under the United States and Pennsylvania Constitutions when trial counsel failed to properly elicit from its own witness the precise time at which the witness had seen an unidentified white van driven by a stranger near the crime scene misstated the evidence about when the witness had seen the van and then failed to establish that the Commonwealth rebuttal witness could not be the driver of the van and failed to obtain phone records in order to corroborate the exculpatory evidence of a critical defense witness about when she had called the victim house (Notes of Testimony May 12 2003 page 7016 727 May 13 2003 page 90109 May 16 2003 page 170109 May 19 2003 page 18717)

g Petitioner was denied the effective assistance of counsel as guaranteed under the United States and Pennsylvania Constitutions when trial counsel failed to seek nuclear DNA testing of an unidentified hair found in the victim neck wound though the hair did not belong to the Petitioner or the victim and the hair had a root and could be subjected to nuclear DNA testing failed to object when the Commonwealth argued that the hair belonged to the victim mother and failed to introduce forensic evidence that would refute the premise that a hair could be found in the wound that had been deposited before the crime took place (Notes of Testimony May 13 2003 page 9602 972 May 14 2003 page 1132 1133 May 210063 page 16524 16724 May 19 2003 page 2003)

h Petitioner was denied the effective assistance of counsel as guaranteed under the United States and Pennsylvania Constitutions when trial counsel failed to introduce the testimony of forensic experts including in fiber experts to testify to the presence or absence of fiber transfer between Petitioner sweatshirt and the bloody gloves and to whether Petitioner fingerprints would be found on the bloodied gloves if Petitioner had taken them off to bury them ii soil experts to determine whether soil transfer should have been found on certain items of clothing such as Petitioner sweatshirt and to testify that the soil in the victim backyard was too common to be conclusively matched to the soil found on other evidentiary items including Petitioner socks and a towel used to wipe his hands and iii DNA experts to testify to the limitations of mitochondrial DNA testing and to testify whether nuclear DNA testing could be done on an unidentified hair found in the victim neck wound and if so the results of such testing and to rebut the Commonwealth claim that mitochondrial DNA testing established that the hair belonged to the victim mother (Exhibit Four Report of Dr. Henry Lee and Timothy Palmbach)

FACTUAL AND PROCEDURAL HISTORY

To provide context to the instant proceeding we will present a factual and procedural history for review As we address each allegation we will further reference those portions of pretrial and trial transcripts pertinent to each issue raised by the Petitioner and in particular the ineffective assistance claims against trial counsel, David M McLaughlin Esquire.

On October 02 1998 thirteen year old Gregory Witman got off the school bus at about3:05 or 3:06 pm Several of the children who got off the bus with him testified that they reached their homes about 3:10 pm and they further testified that no one in the area saw anything or anyone unusual (Notes of Trial Testimony May 07 2003 page 38 512 57 62 69 731 801845 97 10341178 1289 1312 144 149 150)

On this same day Gregory Witman was killed in his home in New Freedom Pennsylvania sometime after he returned home from school between approximately :30 pm and 1:37 pm The victim brother the Petitioner who had stayed home from school on the date in question placed a call to 911 at 3:17 and 31 seconds requesting emergency assistance his call was terminated at 3:24 and 59 seconds (Notes of Trial Testimony May 12 2003 page 695). The 911 operator learned from the Petitioner that he thought his brother was dead whereupon the 911 operator directed the Petitioner to move the body and turn the victim on his back The recorded conversation suggested that the Petitioner complied with this directive Volunteer firemen who were dispatched at approximately 3:19 pm were the first to respond to the call Notes of Trial Testimony May 08, 2003 page 2978. Upon their arrival the Petitioner was standing in the garage and was still on the portable phone actively engaged in conversation with the 911 operator Notes of Trial Testimony May 08 2003 page1556 158 2578 Police officers from the Southern Regional Police Department including Chief of Police James C Childs III and Detective Roger F Goodfellow arrived on scene at approximately 3:30 pm (Notes of Trial Testimony May 08 2003 page 165 16709 173

2739256 May 12 2003 page 7016) Officer Sean Matthew Siggins of the Southern Regional Police Department was the first law enforcement officer to arrive on scene at approximately 3:19 pm Officer Siggns observed the Petitioner standing in an open garage and in an obvious excited state Blood was visible on the telephone as well as on the Petitioner hands and shirt although no blood was observed on the Petitioner face or hair (Notes of Trial Testimony May 08 2003 page 2402; Pre-trial Hearing February 18 1999 page 16, 23)
After speaking with the Petitioner Officer Siggins walked to the doorway in the garage which led to the laundry room inside the home where he observed the vsictim body lying on the laundry room floor (Notes of Trial Testimony May 08 2003 page 240; Pre-trial Hearing February 18 1999 page 18)

June Catherine Weigle one of the responding EsMT for the Rose Fire Company approached the Petitioner who was standing in the garage in an attempt to calm him down Ms Weigle observed that the Petitioner hands were bloody and that he had blood on his sweatshirt and his socks (Notes of Trial Testimony May 09 2003 page 482) The Petitioner informed Ms Weigle that when he rolled the victim body over to see if he was still breathing per the instructions of the 911 operator that the victim head nearly fell off Following this conversation Ms Weigle placed the Petitioner in the back of the ambulance and tried to wash the blood off his hands using a white towel and saline solution which was later collected for testing (Notes of Trial Testimony May 09 2003 page 486 and 491) During this procedure Ms Weigle noticed a small cut on the inside of the Petitioner left hand ring finger located on the upper

portion between the knuckle and the nail towards the middle finger which was oozing a small amount of blood. When questioned about the cut the Petitioner stated "Oh, I must have cut it yesterday... Oh, when I rolled my brother over I hit something sharp." (Notes of Trial Testimony May 09 2003 page489 490 492)

The Petitioner was transported via ambulance to the emergency room at the York Hospital accompanied by Ms Weigle and Nate Kirshman an EMT (Notes of Trial Testimony May 09 2003 page 5326) The Petitioner appeared to be very agitated and kept pulling at his sweatshirt which was subsequently removed by Ms Weigle which was ultimately placed in a paper bag In addition the Petitioner requested that Ms Weigle remove his socks which she did observing splatters or droplets of blood on the top of the socks This item was also placed in a paper bag by Ms Weigle(Notes of Trial Testimony May 09 2003 page 4936) The Petitioner continued to breathe very rapidly repeating "I' m a good boy, I'm a good boy. I'm allowed to stay home when I'm sick." He further stated that he should have gone to
school because then he would have walked home with his brother and that his brother would not be dead if he had gone to school (Notes of Trial Testimony May 09 2003 page 496 497)

Chief James C Childs III of the Southern Regional Police Department arrived at approximately 330 pm and upon his arrival he first met with Officer Siggins regarding his observations and instructed him to canvass the neighborhood Chief Childs observed the victim body from the doorway which led from the garage into the laundry room and returned to his vehicle to radio County Control to have the Coroner

and the Chief County Detective dispatched to the scene (Notes of Trial Testimony May 08 2003 page 2568) Chief Childs further instructed the Deputy Fire Chief to assign a firefighter to mark a police area with crime scene tape for the purpose of establishing the perimeters of the crime scene and to seal the area off from unauthorized persons In addition a list was maintained upon the instruction of Chief Childs of all persons who entered the crime scene (Notes of Trial Testimony May 08 2003 page 2589)

Chief Childs proceeded to conduct a security sweep of the premises to determine if anyone else was inside the home While conducting the security sweep Chief Childs indicated that he saw droplets of blood on the linoleum kitchen floor (Notes of Trial Testimony May 08 2003 page 262) In the hallway he testified to seeing large amounts of blood on the floor as well as a broken table a jacket a book bag and a key ring neck chain As the protective sweep continued he proceeded into the family room into a formal room and finally into the foyer where he observed blood on the front door and on the walls Chief Childs was able to again see the book bag and the broken table. (Pre-trial Motion Hearing February 18 1999 page667) He then went upstairs observing that all the doors were closed except for the bathroom door through which he could see a towel on the floor He went into the bathroom quickly scanned all of the upstairs rooms before returning to the first floor Chief Childs went through a formal dining room and kitchen before exiting through a door that led to the outside of the Witman home where he radioed for further

assistance.[3] (Pre-trial Motion Hearing February 18 1999 page678)

Prior to the Petitioner being transported by ambulance to the York Hospital Chief Childs along with Detective Roger F Goodfellow who arrived at approximately 3:30 pm (Notes of Trial Testimony May 12 2003 page 704) approached the ambulance together to speak with the Petitioner Both individuals identified themselves as police officers and asked if the Petitioner could help us with the incident The Petitioner gave a brief statement before becoming visibly upset and continued to ask Chief Childs to contact his mother.[4] At an Omnibus Pre-trial Hearing Chief Childs testified concerning the statements made by the Petitioner:

> At this point he told me he the Defendant was upstairs sleeping He heard the front door open heard the front door close He heard what appeared to be a struggle And the whole time

[3] Chief Childs made the request to have the Pennsylvania State Police Crime Scene Investigation Unit respond to the scene as well. (Pre-trial Motion Hearing March 31 1999 page 148)

[4] Chief Childs indicated that he was able to contact the Petitioner mother at her place of employment requesting that she was needed at her residence because of an accident which had occurred with her youngest. The Petitioner father had been in Chicago and was returning that evening arriving at Baltimore Washing International Airport Chief Childs was able to contact the Baltimore Washington Airport Police asked them to check on incoming flights from Chicago after which it was determined which flight he was on. The airport police were able to contact Mr Witman after his plane arrived at which time he contacted Chief Childs by phone (Notes of Testimony May 08 2003 page2634)

> he's talking to me and relaying this his voice was elevating lowering quivering And each time he would talk I would have to ask him to calm down and try to speak softly and more clear so I could understand what he was saying He then said he heard what appeared to be a struggle He came downstairs observed blood on the floor of the hallway went out into the kitchen and found his brother laying on the floor I then asked him did he see anyone or hear anything He said no and all he kept saying at that point that his brother was suffering just suffering just suffering and repeatedly saying that.
>
> He started to become physically upset again where his voice was screaming. He asked to call his mother. He was worried about his dad I reassured him that we would take care of contacting his parents and then he looked at me and said would you please call my mother.
>
> ****
>
> I said I would call his mother. How do I get in touch with her? He then told me that her phone number is on the refrigerator door on a piece of paper. (Pre-trial Motion Hearing, February 18 1999 page712)

Officer James S Boddington Southern Regional Police Department arrived at the scene after hearing the radio call from Officer Siggins Chief Childs instructed Officer Boddington to follow the ambulance to the hospital and obtain the clothing for evidence which was being worn by the Petitioner and also the items which had been removed by EMT Weigle (Notes

of Trial Testimony May 09 2003 page 541) After obtaining the requested items Officer Boddington returned to the items to police headquarters placed them into the evidence locker and later turned the items over to Detective Goodfellow (Notes of Trial Testimony May 09 2003 page 545)

Detective William R Clancy Jr employed as a detective with the York County District Asttorney Office arrived at the York Hospital at approximately 520 pm Upon his arrival Detective Clancy met with Officer Boddington as well as Dr Scott McCurley an emergency room physician on call who had treated the Petitioner in an attempt to determine his physical and mental condition Notes of Trial Testimony May 12 2003 page 6601 After interviewing Dr McCurley Detective Clancy had the occasion to meet with the Petitioner speaking with him for approximately twenty 20 minutes. Detective Clancy introduced himself told the Petitioner that he was safe and began by discussing sports (Notes of Trial Testimony May 12 2003 page 6601) According to Detective Clancy the Petitioner indicated that he had been home sick from school and that he had slept most of the day that he had heard some noises and he thought it was his brother returning home from school He had been asleep and he came down to check on the noise saw blood at the front door and found his brother in the laundry room (Notes of Trial Testimony May 12 2003 page 6634) Detective Clancy returned to the crime scene located in the town of New Freedom at approximately 730 pm to relay the information to the investigators on the scene that he had obtained from the Petitioner (Notes of Trial Testimony May 12 2003 page 671)

Later in the evening a decision was made to run a test with Luminol a chemical that will illuminate dried blood that is not visible to the human eye Pennsylvania State Trooper Ralph Maiolino mixed the Luminol and took the photographs while Pennsylvania State Trooper Douglas Woodcock did the spraying (Notes of Trial Testimony May 09 2003 page 4114) There were footprints leading from the family room into the screened porch area The footprints led out the back door of the screened room and down the stairs into a grass area beside a hot tub which was located next to multiple pine trees At the bottom of the pine trees there appeared to be a small mound of fresh dirt (Notes of Trial Testimony May 09 2003 page 346715 page 5778May 12 2003 page 7736) Detective Goodfellow raked the area and discovered a small knife with an insignia from NAPA City Motor Parts along with knit Adidas soccer gloves (Notes of Trial Testimony May 09 2003 page 3712 3767 May 12 2003 page 783 May 13 2003 page8567)

The Petitioner was arrested on October 10 1998 and a Criminal Complaint was filed on the same date charging the Petitioner with a violation of 18 Pa. C.S.A. Section 2501(a). Information were filed by the Commonwealth of Pennsylvania on January 01 1998 charging the Petitioner with Criminal Homicide Murder of the First Degree (18 Pa. C.S.A. Section 2502(a)) Criminal Homicide Murder of the Third Degree 18 Pa. C.S.A. Section 2502(c)) Criminal Homicide Voluntary Manslaughter Unreasonable Belief (18 Pa. C.S.A. Section 2503(b)),and Criminal Homicide Involuntary Manslaughter (18 Pa. C.S.A. Section 2504(a)) The Petitioner was formally arraigned on January 08 1999. Following arraignment several Omnibus Pre Trial Motions were filed by the

Petitioner including a Petition to Retain Juvenile Court Jurisdiction pursuant to 42 Pa. C.S.A. Section 65322(a),[5] along with several Motions to Suppress evidence seized by the Commonwealth without a search warrant This Court rendered its initial findings on the suppression issues on
May 7 1999 which findings were appealed by the Commonwealth of Pennsylvania and addressed in part by the Pennsylvania Superior Court by Opinion on March 28 2000 This Court initially concluded that the seized sweatshirt having been observed by Chief Childs at the scene was not subject to suppression as a result of the plain view doctrine and correspondingly the pants socks and underwear having not been testified to have been observed at the scene or seized pursuant to a search warrant were inadmissible as a violation of the Fourth Amendment.

The Pennsylvania Superior Court concluded based upon the exceptions to the constitutional requirements necessitating a search warrant that "[a]ll evidence seized inside the house and on the property as a result of the initial sweep search mother consent and father consent are admissible for use at trial. Likewise the 911 recording and transcript are admissible for use at trial." No decision was tendered by the Superior Court involving the pants underwear and socks However the Superior Court concurred with the suppression of the items later seized by way of search warrants arising from deficiencies in the affidavits supporting probable cause and the

[5] The Petition to Retain Juvenile Court Jurisdiction was filed by the Defendant on February 12. 1999 A Hearing on this Petition was held on May 13 1999 and by Opinion and Order dated June 10, 1999 the Petition was DENIED and REFUSED.

description of the items to be seized No ruling was made surrounding the pants socks or underwear *Commonwealth of Pennsylvania v Zachary P Witman,* 750 A.2d 327 (Pa. Super. 2000)[6]

After an exhaustion of appeals surrounding the seized items the instant proceeding was again on a trial track and a Status Conference was held in this Court chambers on February 27 2002 anticipatory to the firm trial date of April 01 2002 On March 19 2002 the Commonwealth filed a late Motion in Limine surrounding the admission of the Petitioner white socks pants underwear and included other items in the Motion which were not identified by this Court as being at issue in light of the prior Superior Court Opinion This Court refused the issuance of a Rule to Show Cause sought by the Commonwealth and denied the Motion in Limine by Order based upon its earlier entered preemptive Order issued on March 18 2002.[7] The Commonwealth appealed this Court Order on March 20 2002 certifying that the suppression of the

[6] After the issuance of the Pennsylvania Superior Csourt Opinion the Trial Court scheduled a status conference on April 18 2000 at which time this Court advised the parties that No determination was made however by the Superior Court relative to this court holding relative to the seizure of the apparel worn by the Defendant In addition the Superior Court in its Opinion provided guidance on an issue which had not been previously ruled upon The Defense has given notice to the court of their intention to further appeal the Superior Court opinion The apparel issue related to items worn by the Petitioner which included his pants and socks.

[7] This Order reaffirmed this Court previously stated position surrounding the suppression of the white socks pants and underwear.

aforementioned evidence terminated or substantially handicapped its prosecution. By Memorandum Opinion dated February 03, 2003, the Pennsylvania Superior Court excluded the Petitioner pants and underwear from admission at trial reasoning that because the taking of the clothes from the hospital was done without consent without a warrant and without placing the Petitioner under arrest the seizure was therefore unconstitutional as violative of the Petitioner's Fourth Amendment Rights. SEE *Commonwealth of Pennsylvania v Silo,* 389 A.2d 62 (Pa. 1978) Defense counsel had withdrawn its objection to the presentation of the socks as evidence before the Pennsylvania Superior Court.

Trial was scheduled to commence on May 05 2003 with jury selection in Montgomery County The selected Jury began hearing testimony on May 07 2003 until its conclusion on May 21 2003 On May 21 2003 the Petitioner was convicted of First Degree Murder in the death of his thirteen-year-old brother Gregory. On July 08 2003, the Petitioner was sentenced to life in prison without the possibility of parole Post Sentence Motions were filed by defense counsel on July 17 2003 and by Opinion and Order dated November 031 2003, the Post Sentence Motions for New Trial and/or Transfer to Juvenile Court were denied The Petitioner appealed to the Pennsylvania Superior Court on November 26 2003 and the Judgment of Sentence was affirmed by the Superior Court on January 11 2005 The Pennsylvania Supreme Court denied the Petition for Allowance of Appeal on May 12 2005 and the United States Supreme Court denied the Psetitioner Writ of Certiorari on December 12 2005.

The Petitioner by and through defense counsel filed a timely PCRA Petition on November 22 2006. An Evidentiary Hearing was held before this Court on February 02 2007 wherein the claims raised in the Petition were fully and thoroughly explored The Court granted a New Trial in an Opinion and Order dated December 21 2007 based solely on Trial Counsel ineffectiveness in allowing the Petitioner socks to be admitted into evidence during the trial deeming trial counsel decision to introduce the socks as ineffective and which subsequently impacted the jury decision The Commonwealth flied a timely appeal on December 27 2007 and by Memorandum Opinion dated March 16 2009 the Pennsylvania Superior Court reversed the grant of a new trial[8] and the instant matter was remanded to this Court for consideration of the Petitioner remaining arguments set forth in his PCRA Petition.

APPLICABLE LEGAL STANDARDS

42 Pa. C.S.A. Section 9543 provides, in part, as follows:

[8] The Superior Court summed up its reasoning in this way: "In sum we find that at trial appellee socks served at most as corroboration for better much more incriminating evidence We find that even if the socks had not been entered into evidence the remaining evidence of guilt was overwhelming and appellee would still have been convicted Since there is no reasonable probability that the result at trial would have been different had the socks not been admitted there can be no finding of prejudice to appellee and therefore no finding of ineffective assistance of trial counsel."

(a) General rule To be eligible for relief under this subchapter the petitioner must plead and prove by a preponderance of the evidence all of the following:
(1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:
(i) currently serving a sentence of imprisonment probation or parole for the crime
(ii) awaiting execution of a sentence of death for the crime or
(iii) serving a sentence which must expire before the person may commence serving the disputed sentence

(2) That the conviction or sentence resulted from one or more of the following
(i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which in the circumstances of the particular case, so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place.
(ii) Ineffective assistance of counsel which in the circumstances of the particular case so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
(iii) ******
(iv) ******
(vii) ******
(viii) ******
(3) That the allegation of error has not been previously litigated or waived

(4) That the failure to litigate the issue prior to or during trial. during unitary review or on direct appeal

could not have been the result of any rational strategic or tactical decision by counsel
(b) Exception -- ******
(c)Extradition -- ******

Pursuant to 42 Pa. C.S.A. Section 9543(a)(2(i), the Petitioner asserts primarily ineffectiveness of counsel claims under both the Sixth Amendment to the United States Constitution and under Article 1 Section 9 of the Pennsylvania Constitution asserting that his counsel ineffectiveness undermined the truth-determining process.

The standard of review for claims based on counsel ineffectiveness is the same whether the issue is raised on direct appeal or in a PCRA proceeding *Commonwealth of Pennsylvania v Kimball,* 555 Pa. 299, 724 A.2d 326 (1999). In both cases a petitioner must show "by a preponderance of the evidence ineffective assistance of counsel which in the circumstances of the particular case so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." *Id* at page 333.
Put simply:

> [W]ere the petitioner has demonstrated that counsel ineffectiveness has created a reasonable probability that the outcome of the proceedings would have been different then no reliable adjudication of guilt or innocence could have taken place.

*Id.* [A] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v Washington,* 466 U.S. 668,694, 104 S.Ct. 2052, 80 2L.Ed.2d 674 (1984). SEE ALSO

*Commonwealth of Pennsylvania v Wallace,* 555 Pa. 497, 407, 724 Ad.2 916, 921 (1999).

"The test for counsel ineffectiveness is the same under both the Pennsylvania and Federal Constitutions it is the performance and prejudice test set forth in *Strickland*." *Commonwealth of Pennsylvania v Spotz,* 582 Pa. 207 870 A.2d 822, 829, *cert. Denied* 126 S.Ct. 564 (2005), quoting *Commonwealth of Pennsylvania v Gribble,* 863 A.2d 455, 460 (Pa. 2004)(citations omitted)(citing cases). The Pennsylvania Supreme Court has set forth three 3 elements to the test: Petitioner must show that "(1) the underlying claims is of arguable merit; (2) counsel performance lacked a reasonable basis and (3) the ineffectiveness of counsel caused him prejudice." *Commonwealth of Pennsylvania v Williams,* 587 Pa 304 899 A.2d 1063 (2006). SEE ALSO *Commonwealth of Pennsylvania v Pierce,* 515 Pa. 153, 527 A.2d 973 (1987); *Commonwealth of Pennsylvania v Hawkins,* 586 Pa. 366, 894 A.2d 716 (2006).

Counsel is not "ineffective if the particular course chosen by counsel had some reasonable basis designed to effectuate his client interest." *Williams,* 899 2Ad at 1063-1064, quoting *Commonwealth of Pennsylvania v Rivera,* 565 Pa. 289, 773 A.2d 131, 140 (2001), *cert denied* 535 U.S. 955 (2002). The Court views the alternatives available to trial counsel and determines if the alternative not chosen offered a potential for success substantially greater than the course actually pursued SEE *Commonwealth of Pennsylvania v Brown*, 544 Pa. 406, 425, 676 A.2d 1178, 1186, *cert. denied* 519 U.S. 1043 (1996*); Commonwealth of Pennsylvania v Howard*, 553 Pa. 266, 274, 719 A.2d 233, 237 (1998).

Further the Petitioner is not entitled to relief due to the cumulative effect of the alleged errors and instances of ineffective assistance of counsel. The Supreme Court of Pennsylvania has stated that "no number of failed claims may collectively attain merit if they could not do so individually." *Commonwealth of Pennsylvania v Williams*, 532 Pa. 265 615 A.2d 716, 722(1992). SEE ALSO *Commonwealth of Pennsylvania v Bracey,* 568 Pa. 264, 795 A.2d 935 (2001); *Commonwealth of Pennsylvania v Fisher*, 572 Pa. 105 813A2d 761 (2002). This principle applies equally to the instant case.

DISCUSSION

> Petitioner was denied the effective assistance of counsel as guaranteed under the United States and Pennsylvania Constitutions when trial counsel told the jury he would establish lack of motive through specific acts in his opening statement and later tried to offer evidence of lack of motive but failed to articulate an evidentiary basis for admitting such evidence instead improperly conceding that the evidence was admissible only as traditional character evidence.[9]

The Petitioner avers that trial counsel was ineffective in failing to offer evidence of his loving relationship with his brother to show lack of motive. The Petitioner further argues that trial counsel was

[9] The Pennsylvania Superior Court ruled that trial counsel had failed to properly preserve this issue but that it could be raised in a subsequent post-conviction proceeding.

unaware that this evidence was admissible as substantive evidence as opposed to character evidence and simply conceded his argument to have the evidence admitted During his opening statement defense counsel raised lack of motive as a key issue in the case:

> I was actually glad to hear Mr Kelley admit that the Commonwealth does not have a motive There is zero motive in this case They have no motive for why Zachary Witman would murder his brother Now ladies and gentlemen, I 'm not going to say that motive has to be proven Judge Uhler will tell you at the end of the case motive is not an element of any crime and the Commonwealth does not have to prove motive but ladies and gentlemen that doesn't mean that motive is not important. Human experience teaches us that people do not ordinarily kill other people particularly in this manner without a motive … So it's not like we say well motive doesn't matter. Motive does matter, and there is no motive … The evidence will show you ladies and gentlemen that in fact he loved his brother. [Notes of Trial Testimony May 07 2003, page 25 and 26].

At trial Attorney McLaughlin sought to introduce specific conduct between the Petitioner and the victim to show the nature of their relationship. This was first attempted during the cross examination of Elizabeth Beck a friend of the Petitioner.

**Q** Now in that period of time did you ever see Zachary beat up Gregory?

**Attorney Barker** Objection, Your Honor. … This is beyond the scope of direct first of all. Second of all, we're going into a realm of character evidence which is not being presented in the proper fashion.
**Attorney McGlaughlin** Did you ever witness any event – Well, 'm sorry.
**The Court** Are you withdrawing or -
**Attorney McGlaughlin** No, Your Honor.

**The Court** I'll sustain the objection.
**Attorney McGlaughlin** Miss Beck, did you ever witness any events whereby Zachary harmed or beat up Gregory?
**Attorney Barker** Objection, Your Honor. It's the same question in a different form.
**Attorney McGlaughlin** Your Honor in the sense that she entitled to testify as to what she witnessed.
**The Court** I'll permit it, let's proceed.
**The Witness** No
**Attorney McGlaughlin** In fact, they got along pretty well as brothers, didn't they?
**Attorney Barker** Objection.
**The Court** I'll sustain that objection.
**Attorney McGlaughlin** Very well Your Honor
**The Court** You may call the witness back appropriately if you wish to present character witnesses.
**Attorney McGlaughlin** Understood, Your Honor.
[Notes of Trial Testimony May 07 2003 page 62 and 63]

The Petitioner asserts that at no time during this colloquy did trial counsel indicate that his questioning was intended to elicit relevant evidence pertaining to the Petitioner lack of motive rather trial counsel accepted this Court ruling that his line of

questioning was simply in the nature of character evidence.

Defense counsel further attempted to return to this area of questioning during the defense case. Before Ronald Witman took the stand the Commonwealth requested a full offer of proof as it related to Mr Witman testimony.

**Attorney McGlaughlin** I think the reason why we're here is I want to offer testimony about his building of the soccer net in late August of 1998 with his two boys There is a receipt to verify the purchase of the materials that I would mark and ask to - and show it to him … I'll ask about the last vacation that they took on Labor Day of that year…
*****
**Attorney Barker** Your Honor we would also specifically object to any references regarding the building of the soccer net and to the vacations that they took how that has no relevance to this particular case. It is not probative of any material fact and furthermore the only thing it goes to would be the character the specific events of the family We have a case that is directly on point We feel that this matter *Commonwealth of Pennsylvania v Van Horn* and I've opened it up to the page in question page 4. I have provided a copy previously to counsel.
**The Court** All right. Okay. What do you hope to elicit on the Labor Day weekend?
**Attorney McGlaughlin** Just that was their last vacation before this incident. There was testimony that they took they went they went camping and frankly the camping aspect is more important than the timing of it because it shows that they were out in remote areas.

**The Court** Well again I will strike any reference that they got along great they were good boys and because that definitely would be treading upon the character issue.
**Attorney McGlaughlin** And I have agreed with them in essence about that?
**The Court** The what is relevant about that? What is relevant and time sensitive about building the soccer goal?
**Attorney McGlaughlin** Well it shows a activity that both he and the boys shared together. Your Honor I mean it's like you can't just present your case in a vacuum.
**The Court** I understand that and given the juxtaposition of Labor Day weekend which I think is in September to this incident if there was activities such as they fished they pitched a tent I can see that getting in but the you are going pretty far afield.
**Attorney McGlaughlin** It is only about a week and a half to two weeks prior to that is late August 23rd What's that eight days nine days?
**Attorney Barker** Your Honor essentially I mean we do have a reversal of fields here concerning the fact if we were to offer it in typical cases we call them victim impact testimony not probative towards any central issue and now we have in essence through the juxtaposition the defense offering basically the same thing to show when there been nothing established we have not introduced any evidence regarding any prior bad relationship between the two of them In fact in our opening we said there was no motive.
**Attorney McGlaughlin** They did say no motive We concede that.
**The Court** My gut reaction is that inasmuch as there is a no assertion by the Commonwealth that there's any problem involved certainly going to the

traditional character response if done properly in answer.
**Attorney McGlaughlin** If I can get anybody to do it.
**The Court** I think the issue of going into the soccer as well as the camping can open Pandora box potentially and have a scenario that I would be called upon to strike things I will agree with the Commonwealth to keep those two out.
[Notes of Trial Testimony May 16 2003 page 1774-1779].

The Petitioner asserts that since lack of motive is both relevant and admissible the claim that the proffered testimony should not have been excluded and that this exclusion violated his constitutional right to present a defense[10] is of "arguable merit" Moreover there was no "reasonable basis" for counsel to limit his offer of proof to character evidence.
With respect to whether csounsel acts or omissions were reasonable defense counsel is accorded broad discretion to determine tactics and strategy *Commonwealth of Pennsylvania v Thomas* 744 A.2d 713, 717 (Pa. 2000) The test is not whether other alternatives were more reasonable employing a

[10] Evidence of an absence of motive is a defense among other things it negates *mens rea* casts doubt on identity and otherwise is supportive of a claim of innocence When the accused denies that he committed the act then absence of all motive on his part for committing it is a very material fact in his favor *Commonwealth of Pennsylvania v Buccieri* 153 Pa. 535, 544 A.2d 228, 232 (1893); *Commonwealth of Pennsylvania v Green,* 611 A.2d 1294, 1299 (Pa. Super 1992).

hindsight evaluation of the record but whether counsel decision had any reasonable basis to advance the interest of the defendant C*ommonwealth of Pennsylvania v Pierce,* 527 A.2d 973, 975 (Pa. 1987); *Commonwealth of Pennsylvania v Blackwell,* 647 A.2d 915, 916 (Pa. Super 1994) To satisfy this prong of the test the defendant must prove that counsel strategic decision was so unreasonable that no competent lawyer would have chosen it or that the alternatives not chosen offered a potential for success substantially greater than the tactics utilized *Commonwealth of Pennsylvania v Albrecht,* 511 A.2d 764, 776 (Pa. 1986); *Commonwealth of Pennsylvania v Clark,* 626 A.2d 154, 157 (Pa. 1993).

In response the Commonwealth argues that the Petitioner fails to meet his burden in establishing this issue was of arguable merit by demonstrating the testimony was not inadmissible due to (1) remoteness (2) comprising inadmissible hearsay and (3) containing speculative lay opinion More importantly the Petitioner cannot establish prejudice because the proffered testimony was merely cumulative of the lack of motive conceded by the Commonwealth at trial which trial counsel argued extensively in opening and closing in an attempt to establish reasonable doubt Testimony of this nature was admitted at trial during the cross-examination of Elizabeth Beck and Theresa Miller further demonstrating the lack of prejudice suffered by the Petitioner and in addition this Court instructed the jury on lack of motive. We are not convinced that the admission of additional evidence regarding lack of motive would have changed the outcome of this case as it was clear throughout the trial that the Petitioner had no motive to kill his brother As such we find that this issue does not rise to

a level which undermines the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

> Petitioner was denied the effective assistance of counsel as guaranteed under the United States and Pennsylvania Constitutions when trial counsel failed to provide the proper evidentiary basis to admit exculpatory statements Petitioner made to an emergency room physician when such statements were admissible for the truth as excited utterances or under the medical exception to the hearsay rule and then were admitted not for the truth but for a limited reason only.

The Petitioner avers that trial counsel was ineffective in failing to preserve the claim that exculpatory statements made by the Petitioner to the emergency room physician were admissible as substantive evidence At trial Dr Scott McCurley a defense witness testified to his treatment of the Petitioner in the emergency room According to Dr McCurley the Petitioner was hyperventilating (Notes of Trial Testimony May 16 2010 page 1624.) When defense counsel proceeded to question Dr McCurley about statements made by the Petitioner regarding the days events the prosecutor objected and the following ensued:

**Attorney Kelley** Objection Your Honor Hearsay.
**Attorney McGlaughlin** Your Honor this is a statement of a party so to speak and furthermore Your Honor this would come in under the excited utterance exception.
**The Court** Doctor the history that was provided was this provided to you or was this provided to others?

**The Witness** The history was provided to me from Zachary.
**The Court** And for what purpose do you seek this history?
**The Witness** In an attempt to evaluate any medical patient one would you know try to find out the events of the day that led to whatever brought him in .He was listed by the in the triage note as a possible crisis check which is essentially was our term for a psychiatric evaluation.
**The Court** All right Ladies and gentlemen of the jury to the extent that there are assertions made these are part of the treatment process that the doctor professionals traditionally employ in conducting their examination Statements are not offered for the purposes of the truth asserted contained there within. Let's proceed.
**Attorney McGlaughlin** Doctor you can continue with what the history of what Zachary gave you was.
**Attorney Kelley** Your Honor I'd like defense counsel to limit the history to anything that is relevant to this doctor treatment of Defendant A story explaining his position is not relevant to the issue.
**The Court** The Court finds itself as it has in the past with not having the benefit of what you are talking about I don't have the report and if counsel would like to approach sidebar so that I can get some sense as to the issue that's being outlined, I'd welcome that opportunity.
*****
**The Court** Simply stated I haven't seen the reports or been provided them.
**Attorney Kelley** I'll let you know at the outset with the new rules of evidence and the case law in regards to statements in anticipation of medical treatment that has become extremely restrictive. Usually that

bodes poorly against the Commonwealth who might seek a victim statements They have case law has prohibited anything that does not directly relate to what caused the specific nature of the cause of the injury What we are going to have here is defense counsel attempt to get self-serving statements in through this witness. Not only is it prohibited under the statements in anticipation of medical treatment it's specifically prohibited under case law whereas the Defendant and his counsel cannot introduce the statements of a defendant through cross examination because case law indicates that we are it has to be a party opponent who introduces the statements. That's specifically the rule.

**Attorney McGlaughlin** Well Judge I would suggest that this falls into the category the same category as June Weigle She testified what he said in the ambulance

**Attorney Kelley** And I asked for that information. That was my statements

**Attorney McGlaughlin** Understood

**Attorney Kelley** Party opponent

**Attorney McGlaughlin** If it comes in under party opponent or excited utterance in the ambulance it should come in under the same grounds of the of at least excited utterance at the hospital.

**The Court** If it's excited utterance then the issue is are these excited utterances

**Attorney McGlaughlin** He said he was hyperventilating Judge.

**The Court** What are you specifically attempting to cull out here Attorney Kelley so I have an opportunity to-

**Attorney McGlaughlin** We are going to cut this Gordian knot. My main concern with the doctor is his injuries and physical examination. Let's cut the knot and I'll hone in on that.

**The Co**urt I wanted to let you know I am willing to focus in on these issues but if you-
**Attorney McGlaughlin** We got enough out about what he was like that day
**The Court** All right That's all.
(Notes of Trial Testimony May 16 2003 page 16259)

The Petitioner argues that Dr MsCurley testimony was admissible for the truth because the Petitioner statements qualified under Pennsylvania Rules of Evidence, Rule 803(2) as an "excited utterance." Pursuant to this rule "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The Commonwealth asserted during trial that any statements made by the Petitioner which were made for the purposes of medical diagnosis or treatment applies only to statements that describe the declarant past or present symptoms including pain and medical history SEE Pennsylvania Rules of Evidence Rule 803(4). The causes of those medical conditions are only admissible when pertinent to obtaining medical help As explained by the Court in *Commonwealth of Pennsylvania v Smith*, 545 Pa. 487, 494, 681 A.2d 1288, 1292 (1996), "a person statement 'I was hit by a car,' made for the purpose of receiving medical treatment would come within the exception It is important for doctors to know how the person sustained the injuries However a person statement, 'I was hit by the car which went through the red light,' would not come within the exception or at least that part of the statement which indicated that the car went through the red light would not It is inconsequential and irrelevant to medical treatment to know that the car went through the red light."

The same premise would apply in the instant matter. It would certainly be admissible in terms of any statements made for treatment of the Petitioner to know and state that the Petitioner saw his younger brother on the floor of the laundry room covered in blood. But any history or statements given by the Petitioner to Dr McCurley would be inadmissible based upon the Rule of Evidence stated above.

Further it is unclear what statements were made to Dr McCurley by the Petitioner because an offer although requested was not made by defense counsel But presumably any statements could have arguably referred to the Petitioner seeing his brother body after the crime or the statements could have referred to his reaction seeing his brother body after he had in fact stabbed him or after someone else had committed the crime As such we do not believe that the Petitioner has demonstrated how he may have been prejudiced by virtue of the fact that his evidence was not presented at trial for the truth of the matter nor do we believe the introduction of this evidence for the truth of the matter would have affected the outcome of the Petitioner case Attorney McGlaughlin asserted during trial that his main concerns during Dr MscCurley testimony were the Psetitioner injuries and physical examination maintaining that several other witnesses had testified to the Petitioner state of mind on the day in question and in fact withdrew his line of questioning at trial regarding statements made by the Petition to Dr McCurley at the York Hospital As such we find that this PCRA issue does not rise to the level which undermines the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

> Petitioner was denied the effective assistance of counsel as guaranteed under the United States and Pennsylvania Constitutions when trial counsel withdrew a previously made motion in limine to exclude the subjective conclusions of the Commonwealth blood spatter expert on the erroneous ground that he had violated a civil procedure rule and though invited to conduct a Frye hearing by the trial judge refused to do so the expert conclusions were based on novel non-reproduced and non-reproducible out-of-court experiments which were never peer reviewed and which would fail under the Frye test for admissibility the expert testified to the ultimate conclusion in the case usurping the jury function and trial counsel then failed to cross-examine the expert about her experiments.

Prior to the commencement of proceedings on Monday May 12 2003m the Court met with counsel in chambers to discuss the Petitioner Motion in Limine to preclude the subjective conclusions of Deborah Calhoun a forensic scientist with the Pennsylvania State Police Crime Lab Following this chambers meeting the following discourse took place on the record and outside the presence of the jury;

**The Court** Counsel this is the time set aside by the Court for it to consider the motion in limine[11] to preclude subjective conclusions of Deborah Calhoun.

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[11] MOTION IN LIMINE TO PRECLUDE SUBJECTIVE CONCLUSIONS OF DEBRA CALHOUN

1 At trial the defense expects the commonwealth to attempt to introduce subjective conclusions of Ms Debra Calhoun in connection with her qualification and testimony as a calloed blood stain expert.

2 Said subjective conclusions should be prohibited as they violate the so called Frye test *United States v Frye,* infra of general scientific acceptability as modified by *McKenzie v Westinghouse,* infra.

3 Subjective conclusions are not science expert or otherwise and constitute untestable speculation which also invades the province of the jury as fact finder and should be prohibited since to admit them violates state and federal due process.

4 This court should employ the test for admissibility of so called scientific or technical evidence set forth in the case in *Daubert v Merrell Dow Pharmaceuticals Inc,* infra as the minimum due process protection permissible in criminal trials in Pennsylvania where the supremacy clause of the United States Constitution mandates such minimal federal protection throughout the states.

5 Also permitting any opinion on the ultimate issue in a criminal case is a violation of state and federal due process and fair trial rights where the expression of said subjective conclusions on the ultimate issue invades the province of the jury in violation of federal law as exemplified by the *Apprendi v New Jersey*, infra.

6 To the extent Pennsylvania Rule of Evidence 704 permits an opinion on the ultimate issue it is unconstitutional for the reasons set forth above primarily because it invades the province of the jury and permits untestable unverifiable speculative subjective conclusions to pass for relevant evidence in criminal trials in Pennsylvania.

7 Commonwealth is not overtly prejudiced in placing before the jury what semblance of true science is present in the theory of blood stain pattern analysis and the physical laws it concerns.

We'v had a meeting in chambers as we preliminarily do every day to determine the choreography as well as the outline of today proceeding and I understand it's the intention of defense to withdraw the motion that's now pending before the Court is that correct?
**Attorney McGlaughlin** That is correct Your Honor
**The Court** Would you elaborate if you will on the record the reasons for that so that I can then engage if you will with a discussion with your client
**Attorney McGlaughlin** Yes Your Honor I will do so now Your Honor after we broke for the day on Friday I had been I had received a copy of your order regarding compliance with Pennsylvania Rule of Civil Procedure 20 -207.1.
**The Court** 207.1.
**Attorney McGlaughlin** And I attempted to begin almost immediately after we broke to draft a new motion because the old motion simply did not comply with those requirements. In the process of doing that Your Honor it became apparent to me relatively quickly that there is a there is a sound reason for why these matters traditionally and in fact usually are taken up in a pre-trial proceeding The pre-trial proceeding allows much more flexibility and it allows it indeed requires in my view defense counsel to engage an expert of their own to make a much more intensive attack on these on this type of evidence than what I was prepared to do In fact the example of it Your Honor is most recently in Philadelphia in a federal case called De La Plaza there was an attack on the use of fingerprint experts and it was much it was geared much towards the same type of challenge that I have pursued but in that case Your Honor there was a massive pre-trial proceeding with multiple experts on both sides that came in and testified.

They made a very large record about it and in contemplating that case plus this procedure that I had attempted to invoke here in addition to the order and the rules requirements that I was privy to it made me realize Your Honor that I was not going to be able to do it the appropriate way or the proper way and that in fact simply by withdrawing the motion I was not handcuffing myself to pursue traditional cross examination methods with whatever expert the Commonwealth attempts to call so that I want defeating anything by withdrawing the motion and that in fact it became clear to me very quickly that that was the course of action that I had to take.

Now I didn't just unilaterally do that in the sense that I called Mr Witman and spoke to Mr Witman and Mrs Witman who have taken obviously taken a managing interest in their son defense in this case and explained all the reasons for my contemplated procedure. I then of course asked them to explain to Zach Zachary and he Your Honor throughout the entire my entire representation in this case has deferred to my judgment in legal matters and I checked with him this morning to make sure there wasn't any specific objection from Zachary himself and there was none.

So for those reasons Your Honor it did become apparent to me again I say that the best course of action for me in this case for us in this case was to simply withdraw that that it would end up probably wasting more time than it would than I had already and that I do regret the fact that we had set aside the morning hours for this and that we are not going to be able to do it.

That much I certainly regret it and deeply apologize for Your Honor but in the long run I felt that I and I don't mean to sound as they say corny but I had an

ethical duty Your Honor to notify the Commonwealth and notify the Court at the earliest convenience to of this development in the matter.
So that pretty much explains the background and the reasons why we feel that - I felt that that motion should be withdrawn.
As to the other - there were two other counts in that motion Your Honor and as we discussed those counts are directly contrary to established law as it stands now in Pennsylvania so I would certainly agree that they should be deemed denied by operation of law Your Honor without any further ado.
**The Court** I trust you understand that the Court utilization of the framework of the civil rule was not a predictor as to how this Court would view from the standpoint the timing was concerned I set aside this hearing number one to have a full and complete exploration of the Frye potentially Daubert issues with regard to expert testimony I trust you understand that.
**Attorney McGlaughlin** Absolutely Your Honor ist crystal clear and in fact if Your Honor please although I may have had some taken some issue with using a civil rule in a criminal matter your use of that rule actually crystallized the issues better for me in my own mind and made my course of action clear to take Your Honor so I don't take issue with it In fact, I am glad that the Court did that.
**The Court** From the standpoint of the Court utilization of that rule it was my hope that that would have provided focus if you will to the issues that were to be addressed by parties as well as ultimately the Court in resolving it's the Frye/Daubert expert issues and I s didn't want to be in a shooting gallery where the targets were undefined and postured all over a

potential situs that we needed to get some focus as to where we were going I trust you understand that.

**Attorney McGlaughlin** No question Your Honor I agree one hundred percent with that In fact well yes I understand and agree with it Your Honor

**The Court** Do you understand that the Court was not attempting by issuing that order to unduly limit you or limit you in any respect in the defense of your client

**Attorney McGlaughlin** I again Your Honor I understand completely that that is the case

**The Court** Now - now you indicated that you realized that in order to effectively deal with Daubert issues of this sort or Frye issues of this sort that an expert of your own could have potentially been engaged Are you suggesting that by virtue of not having done so that that presents an issue insofar as your ability to effectively deal with this case.

**Attorney McGlaughlin** No Your Honor When I mentioned that Your Honor what I determined was that these types of issues are best addressed there's a reason why traditionally and practically even these types of issues must be addressed in a pre-trial proceeding I purposely stayed away from engaging an expert because I felt that I could effectively deal with the Commonwealth with any Commonwealth expert on utilizing traditional cross examination and that in an effort to avoid any possibility of yet a third pre-trial appeal in this case which nobody in this case I believe wanted that I attempted to if I'll just say it to cut a corner if you will and do it within the context of the trial itself and not a pre-trial motion but when I read the order and I looked at the rule and I realized that there is a reason why we have these pre-trial proceedings I realized that it just was not going to it was not the appropriate procedure to utilize I thought

it was I thought that it was going to be able to work but it became clear to me Your Honor that it simply was not appropriate to use this vehicle during the pendency or during the trial even if we did carve out a short time for the hearing that that it just was not the appropriate vehicle to use and in that view Your Honor the best thing to do was to not even continue with it just stand up tell the Court we have to withdraw it after of course explaining my position to the to Mr Witman and his family

**The Court** You, as all counsel are aware who have tried cases in front of me if there are transportation scheduling any other issues that might come about with regard to potentially expert witnesses the Court attempts to accommodate those at all costs and do you understand that I would allow this issue to be a deferred one if you will and time within the context reasonably of course for you to obtain such an expert if you so desired within the context of this trial? Do you understand that>

**Attorney McGlaughlin** Absolutely, Your Honor. I did not feel hampered or hamstrung or constrained in any way shape or form by the Court and this is this is all my fault.

**The Court** Well I dton fault if you have a desire to retain an expert to deal with the Frye issues I'd certainly be more than willing to within reasonable constraints this case has been long in the gestation period I don't want it to be impacted upon a weekend decision and the Court utilization of a rule that just gives some substance and framework and focus to what was an outstanding motion.

**Attorney McGlaughlin** Your Honor no I don't feel constrained in any way In fact if the truth be known Your Honor even before I filed that motion last week I had certain personal misgivings about it Obviously

they were not strong enough to preclude me from doing so but now I can understand where from whence those misgivings sprang and obviously it was a recognition however far back in my own mind that the procedures to be utilized were simply not the appropriate procedures and that nobody that I'm not handcuffing myself I'm not precluding my abilities to as I said before to traditionally cross-examine any expert witness put forth by the Commonwealth both as to qualifications both as to science behind it and on the merits of their testimony so we are not we are not harming ourself in any way by withdrawing this motion in my professional judgment Your Honor

**The Court** And it's your representation to the Court that this has been fully and completely discussed with not only your client but the family members of the client that have been fully supportive of him.

**Attorney McGlaughlin** Yes Your Honor In fact before I placed my call to Mr Rebert on Friday late afternoon early evening before I called him to let him know about this I spent quite a bit of time on the telephone with Mr And Mrs Witman and of course Zachary as well.

**The Court** Very well. Thank you counsel. Mr Zachary Witman?

**The Defendant** Yes

**The Court** You've heard the representations made by your attorney Mr McGlaughlin. He has indicated a desire to withdraw the motion that's pending now before the Court challenging the capacity/competency of the proposed testimony of Deborah Calhoun who I understand works for the Commonwealth of Pennsylvania in some capacity in their lab That not only challenged the competency and capacity of her testimony but also challenged the constitutionality of allowing such testimony to be offered under various

aspects. He is asking those to be withdrawn those motions Do you agree with his decision to withdraw such motions?
**The Defendant** Yes
**The Court** And you do understand that the Court is prepared to go forward today and I would continue this proceeding if you felt that additional expert testimony would be of benefit to you and allow such time to contact such expert. Do you understand that?
**The Defendant** I understand that Your Honor
**The Court** And do you understand that this is an action that given the context your withdrawal of it is much akin to your desire to demonstrate the one exhibit reflecting a photograph of your brother in the laundry area or the linen area of your household Do you understand that.
**The Defendant** Okay I understand Your Honor
**The Court** And this is something that is occurring voluntarily and it's not being forced upon you.
**The Defendant** Yes
**The Court** And you've had adequate opportunity to discuss this with your attorney?
**The Defendant** Yes(
(Notes of Trial Testimony May 12 2003 page 644-654)

This Court then deemed the motion in limine as withdrawn by the Petitioner after colloquies with the Petitioner and the Petitioner father (Notes of Trial Testimony May 12 2003 page 655)

Testimony of scientific experts in the form of an opinion is admissible pursuant to Rule 702 of the Pennsylvania Rules of Evidence which provides: *If scientific technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to*

*determine a fact in issue a witness qualified as an expert by knowledge skill experience training or education may testify thereto in the form of an opinion or otherwise*.

> When scientific evidence is novel the proponent must prove that the methodology used by the expert is generally accepted by practitioners of the relevant field and may be used for arriving at the conclusion to which the expert will testify The proponent does not have to prove that other experts in the field have generally accepted the witness conclusion Only the witness methodology need have achieved general acceptance in the relevant scientific community The particular conclusions reached by the expert witness from generally accepted principles and methodologies need not also be generally accepted *Tucker v Community Medical Center*, 833 A.2d 217, 224 (Pa. Super 2003). The preceding requirement is known as the *Frye* rule after the test announced in *Frye v United States,* 293 F.1013 (D.C. Circuit 1923). The "will assist" language of Rule 702 is the basis for precluding testimony under the *Frye* rule because unless methodologically sound and appropriate opinion evidence does not assist the jury.

In withdrawing the Motion in Limine as it related to Ms Csalhoun testimony trial counsel maintained that he could "effectively deal" with the witness through traditional cross-examination. Further trial counsel stated that he wanted to avoid yet a possible third pretrial appeal and that he did not

want to turn over an expert report to the Commonwealth which could possibly lead to a rebuttal witness being presented by the Commonwealth we find this logic to be incomprehensible The Petitioner argues that Ms Calhoun conclusion that based upon the purported impact spatter on the sweatshirt the Petitioner was in close proximity to the victim when the injuries were inflicted should have been precluded as subjective and experimental In evaluating this claim pursuant to the standards governing an ineffectiveness claim trial counsel expressly and voluntarily withdrew the motion in limine and this Court made sure that the Petitioner and the Petitioner father had adequate opportunity to discuss this issue with trial counsel. Even if the contested portion of Ms Calhoun testimony had been excluded the description of the arterial spurt on the Petitioner sweatshirt is a concept that the jury could have understood without the benefit of expert testimony In order for the Petitioner to receive that kind of pattern on his sweatshirt he would have to have been in close proximity to the victim during the commission of the crime In withdrawal of the Motion in Limine trial counsel had a basis for this act in that he was able to challenge Ms Calhoun expert status and cross examine her on the merits of the testimony presented (Notes of Testimony PCRA Hearing February 02 2007 page 1924)

Furthermore the Petitioner never addressed the validity of the withdrawal of this Motion in Limine during the PCRA Hearing Again this Court engaged the Petitioner in a similar colloquy at the PCRA Hearing to ensure that the Petitioner had an opportunity to raise any issue and testify if he desired:

**The Court** Before I close the record Zachary Witman. I'm going to ask you a couple questions You may remain seated You have a microphone there I'll tackle the static You received a copy of the post-conviction relief petition I assume?
**The Defendant** Yes Your Honor sure
**The Court** And are there any matters that you wish to include that have not been included today
**The Defendant** No
**The Court** Do you understand that you would have a right to testify surrounding any of these issues during the course of this post-conviction proceeding?
**The Defendant** Yes
**The Court** I gather you have not wished to testify You were not called Do you understand that if you testified I would listen to that testimony the same manner I address all witnesses testimony?
**The Defendant** I understand that
**The Court** And do you also understand that it's your burden of proof as Petitioner to proceed in these cases?
**The Defendant** I understand that
**The Court** - at this stage? And it's my understanding that after consultation with counsel you have concluded that you do not wish to take the witness stand.
**The Defendant** I don't think there's any need for me to testify today. They don't feel there's any need for me to testify today.
**The Court** Has anyone forced you not to testify
**The Defendant** No
**The Court** Your decision not to testify is yours and yours alone
**The Defendant** That's right

**The Court** Very well. I don't have any further questions. The record will be closed.
(Notes of Testimony PCRA Hearing February 02 2007 page 215)

The Petitioner failed to present any testimony or evidence at the PCRA hearing to demonstrate that his colloquy on the withdrawal of the Motion in Limine was involuntarily and unintelligently made Lastly the Petitioner failed to produce any evidence at the PCRA hearing to support the proposition that his *Frye* petition was meritorious The defense did not produce any expert testimony to challenge either bloodstain pattern analysis as novel science or the methodology employed by Deborah Calhoun as lacking general acceptance in the scientific community The Petitioner did call Dr Henry Lee as an expert witness who offered limited testimony on bloodstain pattern analysis however even given the opportunity to do so this limited testimony did not fully litigate the *Frye* challenge Accordingly we determine that this PCRA claim does not rise to the level which undermines the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

> Petitioner was denied the effective assistance of counsel as guaranteed under the United States and Pennsylvania Constitutions when trial counsel failed to move in limine to exlude evidence of a presumptive blood test luminol test though the evidence was not probative because among other things the photographs of the luminol never turned out the witnesses were testifying from memory without photographs or notes the Commonwealth never established that the substance

illuminated was blood or dated the substance illuminated and never established that footprints that illuminated and led to the buried knife and soccer gloves and back to the victim house were the size of gait of or otherwise matched Petitioner footprints.

The Petitioner asserts that trial counsel should have moved to preclude the introduction of luminol testimony as being more prejudical than probative and as violative of the Petitioner due process rights. During the hearing on the filed PCRA Petition trial counsel testified regarding his trial strategy as it related to the luminol and footprints:

Q Now with regards to other aspects of the socks you had testified that you wanted to show the jury visually what the socks looked like to have in comparison with what the detectives were saying the footprint looked like that luminesced leading out of the house and back into the house correct
A That is correct because the luminol testimony was coming in If I had a way to show that that was in somehow in some way inaccurate or incorrect that's the reason why I chose to permit to allow the socks to come in because it refuted the Commonwealth testimony which was not supported by photographs measurements diagrams or anything else
Q Now when you said that the luminol was going to come in what aspect was the luminol going to come in your in your analysis
A That a witness is permitted to testify as to what they did and so on
Q And with regards to the testimony by the investigators was that to what they did and what they testified to

**A** That's the way I saw it
**Q** And in terms of the trial and in terms of trial strategy was there any reference did anyone testify that because the mere fact that there was luminescence that had occurred through the use of luminol that that established that the substance was blood
**A** I don't well it was implied but then we brought out the fact that there are other substances Luminol is not a substance-specific agent and that other substances in the world will in fact light as they say light up when they are sprayed with luminol
**Q** And in fact you asked that of Trooper Woodcock correct
**A** Yes
**Q** You asked that of Detective Goodfellow, correct?
**A** Yes
**Q** And Trooper Maiolino
**A** I believe we covered that
**Q** And your cross examination of especially Trooper Maiolino concerning the luminol would be for lack of a better term intense correct
**A** I seem to recall it being intense yes I would also add Mr Barker that another important aspect of luminol and the weakening of luminol when the Commonwealth had taken a photograph of the Witman's indoor/outdoor carpet in their mudroom or sun room or whatever had it tested along with wood chips from the steps the results came back negative for blood Now the wood chip results were not introduced either by the Commonwealth or myself but the carpet negative results I know was brought out
**Q** And that carpet that was taken at a much later date than when the original luminescence occurred correct
**A** Yeah that is correct

Q And that did come out at trial that was one of the things you had brought out correct
A Yes
(Notes of Testimony PCRA Hearing February 2 2007 page 1546)

All deficiencies in documentation or experience concerning the luminol were appropriate for cross-examination n and closing argument which trial counsel extensively pursued at trial and therefore the Petitioner cannot meet his burden that the evidence and testimony concerning the footprints that appeared following the application of the luminol was inadmissible.

The Petitioner also asserts that trial counsel should have called an expert like Dr Lee to testify to the deficiencies of the investigators in applying and documenting the luminol Trial counsel need not introduce expert testimony on his cslient behalf if he is able effectively to cross-examine prosecution witnesses and elicit helpful testimony. *Copenhefer,* 719 A.2d at 253; *accord Commonwealth of Pennsylvania v Williams,* 537 Pa. 1, 640 A.2d 1251, 1265 (Pa. 1994). Additionally trial counsel will not be deemed ineffective for failing to call a medical forensic or scientific expert merely to critically evaluate expert testimony which was presented by the prosecution *Copenhefer*, 719 A.2d at 253 n12. C*ommonwealth of Pennsylvania v Marinelli,* 570 Pa 622 644 810 A2d 1257, 1269 (2002.)

At the PCRA Hearing Dr Henry C Lee Ph.D., an expert called by the Petitioner testified that testimony concerning luminol needed to be consistent with his teachings on its limitations These limitations

include 1 that numerous items other than blood like bleach or certain metals and plant life can react to luminol 2you cannot tell when an item was deposited with luminol and 3 proper documentation through photography is important in analyzing a luminesced item Moreover Dr Lee advised that defense counsel should aggressively cross-examine investigators that did not properly document their findings. (Notes of Testimony PCRA Hearing February 02 2007 page 5607)

At trial defense counsel developed every point raised by Dr Lee on cross-examination of the investigators. Trial counsel elicited from Detective Goodfellow Trooper Woodcock and Trooper Maiolino that luminol will react to numerous agents other than blood Concerning documentation trial counsel cross-examination of Trooper Maiolino concerning why the photographs of the luminesced footprints did not develop was thorough. (Notes of Testimony PCRA Hearing February 02 2007 page 1556) With regard to the possibility that some substance other than blood may trigger a positive test courts rely on the fact that the jury was made aware of such possibilities and the issue then becomes one of weight to be accorded the evidence not admissibility. *SEE State v Stenson*, 132 Wash.2 668, 940 Pd.2 1239, 1264, 1265 (1997). SEE ALSO *Commonwealth of Pennsylvania v Duguay,* 430 Mass. 397, 720 N.E.2d 458 (1999)(fact that substances other than blood can trigger positive result in orthotolidine test goes to weight not admissibility); *State v Leep*, 212 W.Va. 57, 569 S.E.2d 133 (2002)(limitations on STD test results do not render it inadmissible they affect only weight).

Lastly Dr Lee testified that he is uncertain what his testimony would be concerning the ultimate inference that the footprints were a blood trail leading to and from the hole containing the gloves and knife. (Notes of Testimony PCRA Hearing February 02 2007 page801) Given that the Petitioner was unable to elicit an opinion from his expert that supports a conclusion beyond what trial counsel achieved effectively through cross-examination, we are not convinced that admission of additional evidence regarding luminol and the findings of the testing would have changed the outcome of this case and as such we find that this issue does not rise to the level which would undermine the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

> *Petitioner was denied the effective assistance of counsel as guaranteed under the United States and Pennsylvania Constitutions when trial counsel failed to properly elicit from its own witness the precise time at which the witness had seen an unidentified white van driven by a stranger near the crime scene misstated the evidence about when the witness had seen the van and then failed to establish that the Commonwealth rebuttal witness could not be the driver of the van and failed to obtain phone records in order to corroborate the exculpatory evidence of a critical defense witness about when she had called the victim house*.

During discovery trial counsel was provided with a report prepared by Detective Goodfellow dated November 27 1998 summarizing the investigation

that took place on the afternoon and evening of October 2 1998. In this Report Detective Goodfellow stated the following:

> While at the Witman resident Officer Martin of this department stopped and informed me that Donald Bortner had contacted the station and reported remembering seeing a vehicle in the same development around the time of the offense I contacted Bortner who is known to me and works for New Freedom Borough via cellular phone He stated that he and a co-worker were driving north on Shaffer Dr between 1500 hrs and 1515 hrs and upon approaching the intersection of S Shaffer Dr and Leader Rd *he* observed a white van near the intersection The van was traveling south and approaching the same intersection He could not provide any further description of the van He described the lone occupant as a white male approximately forty years of age ruddy complexion wearing glasses and having his medium length hair combed to one side Bortner stated that the driver appeared to be confused as to which way to go at the intersection. (Petition for Post Conviction Collateral Relief Exhibit One, Page 9)

Based upon this report trial counsel called Mr Bortner to testify at the trial in the above referenced matter:

**Q** Directing your attention to approximately 300 to 330 pm that day were you in the neighborhood of 9 Albright Court

**A** Yes

**Q** And specifically directing your attention to do you recognize this layout here this
**A** Yes
**Q** What is that Can you identify the road
**A** South Shaffer Drive the main drag
**Q** And do you know what this road is
**A** Tshat Leader Road
**Q** Where were you strike that Did there come a time that you found yourself at this intersection in a vehicle
**A** Yes
**Q** And when you were at that intersection in a vehicle what if anything did you notice
**A** As I approached the intersection there was a White van going south which would be going this way indicating
**Q** Going this direction indicating
**A** No, no, going south on South Shaffer which would be going up to the top of the picture there
**Q** This way
**A** Yes
**Q** So you were across from that van
**A** Yes I was going north on South Shaffer and the van was going south
**Q** Okay
**A** When I approached the intersection I slowed down because the guy looked like he was confused I was more concerned about him turning into me and not paying attention to me at the time and that's why I took notice of the van
**Q** And the driver
**A** Yes I did happen to see the driver
**Q** Did you see him enough to even get a make a description of him
**A** I took notice that he had glasses on had brown hair and that's about it really didn't' recognize the person

**Q** Now is New Freedom a large community or a small community
**A** We're about 30 - or about 3,000 population
**Q** Okay Do you know many of the people that live there
**A** Yes I know a good many
**Q** And the vehicles they drive
**A** I can't really say that
**Q** All right. Did this person appear to be a stranger to you
**A** Yes, I didn't' recognize the person who was in the van
**Q** Okay Now subsequently to your encounter to this person did you make any report of this to anyone
**A** I had called later that evening to report it to the police that I thought it might be important at the time
**Q** And did you in fact do so
**A** Yes I did
Q Do you remember who you spoke to
**A** Detective Goodfellow
**Q** And after that did anyone ever come to you to get any further information or any follow-up information, or take any follow-up report if you recall
**A** You had contacted me I did have some other people contacting newspaper people stuff like that but I made no contact with anybody
**Q** Anybody in law enforcement ever do anything like that
**A** As far as?
**Q** A follow-up interview or further information or more in detailed information if available
**A** No not that I recall
(Notes of Trial Testimony May 16 2007 page 1701-1703)

On redirect examination the Commonwealth obtained additional information from Mr Bortner regarding the white van:

**Q** Mr Bortner just a couple of questions The officer that you originally spoke to do you recall who that officer was

**A** I thought I was talking to Detective Goodfellow but I might have been talking to Officer Martin

**Q** Okay spoke with an Officer Martin When you talked to Officer Martin were you able to provide him any information regarding the license plate number that was on the van

**A** No I didn't take notice if it was Pennsylvania or Maryland I don"t recall saying a license plate number or even what state it was

**Q** And were you able to give an accurate description of the make and model of the van

**A** As far as just the van it was a white van There was no markings on it

**Q** Now the individual that you saw you described him as looking confused. What do you mean by confused

**A** I guess you could almost say he looked like he was maybe lost not knowing where to go.

**Q** Now, are you aware in the New Freedom area at around October 2nd 1998 was there any in that part of the county construction or building things like that going on

**A** Yes

**Q** And in the building that was going on in those areas were there various people that one of the things that they drove to sites were vans

**A** That's correct

**Q** And just to be clear on this this issue you originally gave this information to Officer Martin correct

**A** Yes

**Q** All the information that you gave to Officer Martin was that complete was there any information you left out
**A** No
**Q** Is that the same as you testified to here today
**A** Yes
(Notes of Trial Testimony May 16 2003 page 17015)

At the PCRA Hearing held on February 2 2007 trial counsel testified that he called Mr Bortner as a witness to be one more factor or aspect in the reasonable doubt analysis or argument Trial counsel allowed Mr Bortner to testify that he saw this unfamiliar white van at an intersection near the Witman street between 030 pm and 330 pm because this time fit the times of the phones calls testified to in the case particularly the Petitioner call to 9-1-1. (Notes of Testimony PCRA Hearing February 02 2007 page 182-184). Such an extension becomes important due to the Petitioner statements where he stated he heard the door shut as he walked downstairs to observe what caused the commotion in the house Given the time of the 9-1-1 call was 137 pm the Petitioner statements afforded room to place the unknown killer fleeing the house after315 pm Trial counsel had more than a reasonable basis for the extension of the time frame.

In response to the testimony of Mr Bortner the Commonwealth in rebuttal called Lawrence Allen D'Apice the victim soccer coach to the stand as a witness Mr D'Apice testified that he received a call from a member of the District Attorney office prior to 340 pm but he could not pinpoint the time exactly When hearing about the victim death the witness proceeded to drive to the Witman home in his

Plymouth Grand Voyager White van but was turned away by the police Mr D'Apice testified that in a shall-shocked state he drove down Leader Road and at one point found himself at the intersection of Leader Road and South Shaffer Road. (Notes of Trial Testimony May 19 2003 page 1873-1875) However during cross-0examination by defense counsel Mr D'Apice conceded that he may not have been in the area until after 400 pm. The Petitioner belief that the change in time frame testified to by Mr Bortner was supported by Mr D'Apice testimony is unfounded and we find this issue to not rise to a level which would undermine the truth-determination process that no reliable adjudication of guilt or innocence could have taken place.

> Petitioner was denied the effective assistance of counsel as guaranteed under the United States and Pennsylvania Constitutions when trial counsel failed to seek nuclear DNA testing of an unidentified hair found in the victim neck wound though the hair did not belong to the Petitioner or the victim and the hair had a root and could be subjected to nuclear DNA testing failed to object when the Commonwealth argued that the hair belonged to the victim mother and failed to introduce forensic evidence that would refute the premise that a hair could be found in the wound that had been deposited before the crime took place.[12]

[12] We would note that as it relates to the physical evidence and whether or not trial counsel should have obtained expert testimony at trial the evidence was available and remained available for testing to be accomplished by the defense team however no such testing was accomplished either pre during or

In his report dated November 18 2006, Dr Lee asserts that trial counsel should have tested the gray hair found around the neck area of the victim for nuclear DNA.

> A Mitochondrial DNA Testing/Inferences Relating to the Hair Evidence
>
> Neither Zach nor Gregory can be excluded as potential donors of the hairs found on the victim The Caucasian data base merely represents the frequency of that particularly profile in the Caucasian database It is not stating that there is an individual in the database that matched the derived profile If there is a hair with a root still available it would be very beneficial to conduct nuclear based DNA analysis such as STR DNA typing on that sample That type of testing would be able to distinguish between Zach and Gregory while Mitochondrial DNA testing would not.
>
> The human head hair taken from the throat area of the victim and the human head hair taken from the neckline of the victim's jersey were found to be inconsistent with both victim and suspect known hair samples Given the dynamic nature of this event numerous stab sounds and activity and the concentration of activity in the area where these hairs were found these hairs have significant forensic value in this investigation.

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post-trial.

> An alternative but less likely possibility is that these hairs were deposited onto Zach after the assault as he lay on the floor These hairs may have originated from the actual perpetrator or possibly from personnel working on the victim Significant efforts should have been taken to collect known hair standards from all of the medical and police personnel who worked on the victim and exclude or include them as the source of the hair It is inappropriate to make an inference that these hairs belong to Sue Witman based on the Mitochondrial DNA results.

All of the hairs on the victim body including the gray hair at issue were sent to Laboratory Corporation of American also known as LabCorp (Notes of Trial Testimony May 13 2003 page 9602) At trial, the Commonwealth called Shawn Michael Weiss as an expert in the field of DNA analysis and profiling Mr Weiss first addressed the jury as to the difference between Nuclear DNA and Mitochondrial DNA.

**Q** Mr Weiss did there come an occasion when a Detective Roger Goodfellow had presented some hair samples to LabCorp to have an analysis conducted on them?
**A** Yes
**Q** And specifically what type of analysis was being requested to be done on these hair samples?
**A** We were being requested to do mitochondrial DNA testing.
**Q** Now at this time I think it would be appropriate if you could explain to us a little bit about what mitochondrial DNA is and why that would be

requested to be done on a hair sample versus nuclear DNA testing?

**A** Nuclear DNA, I'm sure there's been other witnesses have described is found in the nucleus of the cell Mitochondrial DNA is actually found outside the nucleus in what's called mitochondria. The mitochondria is responsible for energy being produced by the cell. In these mitochondria there's DNA that's anywhere from ten to a hundred thousand of these circular DNA that has 16,567 bases compared to nuclear DNA which has like three billion bases. It's small and compact. It's circular.

What allows us to do this DNA testing as we go in and there's an area on this is circular DNA that would differ among individuals. That's what allows us to do it for forensic testing.

The other difference why we would use mitochondrial DNA testing versus nuclear DNA testing is the only place there is nucleated cells on a hair is on a hair root My understanding most of these hairs did not have any hair root so we have to go to the next level of testing which would be mitochondrial DNA.

The other big difference in mitochondrial DNA is not unique to that individual Mitochondrial DNA is maternally inherited so anybody in your maternal linkage is going to have the same sequence.

When I say sequence we are looking at 647 bases. We are looking base by base by base by base compared to nuclear DNA where they are looking at different chromosomes and different locations on those chromosomes where the bases are repeating.

Give you an example: One person phone number is a sequence of numbers If you go to someone

eslse phone number it is different This is what we're doing.

We're sequencing and looking for differences so you can use a phone number as an example of one person being different from the other because they have different phone numbers The numbers line up in a different sequence.

**Q** Now with regards to this specific case did you go ahead and perform mitochondrial DNA testing

**A** Yes

**Q** On specific hair items

**A** Yes

(Notes of Trial Testimony May 16 2003 page 1651-1653)

Mr Weiss further testified mitochondrial DNA testing was done on the hair found in the throat area of the victim.

**Q** Can you tell us what the results were with that particular hair item

**A** The results were the same as the hair from the neckline Zachary, Gregory, Amelia Sue, could not be excluded as the source of the hair or the maternal relatives Ronald Witman because of one base difference also could not be excluded as a source of the hair.

(Notes of Trial Testimony May 16 2003 page 1662)

The Petitioner asserts that defense counsel was ineffective in two 2 ways 1 by never seeking Nuclear DNA testing and 2 by failing to introduce a DNA expert to challenge the conclusion drawn from the Mitochondrial DNA testing or the assertion that a hair of Mrs Witman could be found in this deep wound Dr Lee testified during the PCRA Hearing that he would have suggested to trial counsel that the gray

hair found in the victim severed neck should be tested for Nuclear DNA basing this recommendation upon the hair having a root. (Notes of Testimony PCRA Hearing February 02 2007 page 21, 43 and 47.) Dr Lee explained that Nuclear DNA testing would have provided more conclusive results than Mitochondrial DNA however he did acknowledge that he did not know if the nature and quality of the root allowed for Nuclear DNA testing The main point asserted by Dr Lee is that trial counsel should ask questions of the Commonwealth DNA expert about testing the root for nuclear DNA. (Notes of Testimony PCRA Hearing February 02 2007 page 439)

Attorney McGlaughlin testified at the PCRA Hearing that he did indeed consult with an expert regarding possible testing of the gray hair for nuclear DNA focusing on the importance of getting an exclusion for the Petitioner and his lineage as a possible smoking gun to show that someone else could have murdered the victim. (Notes of Testimony PCRA Hearing February 02 2007 page 144-145) To assist with this analysis trial counsel hired Mitotyping a DNA analysis laboratory in State College and attended a lengthy meeting with Terry Melton an expert in DNA analysis Ms Melton discussed mitochondria DNA testing with trial counsel and informed Attorney McGlaughlin that mitochondria DNA testing was the only type applicable because there was not enough material from the root to perform nuclear DNA. (Notes of Testimony PCRA Hearing February 02 2007 page 144-146) We do not believe that the Petitioner has demonstrated that further testing of the gray hair and/or the introduction of expert testimony would have affected the outcome of the Petitioner case and as such we find

that this PCRA issue does not rise to the level which undermines the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

> Petitioner was denied the effective assistance of counsel as guaranteed under the United States and Pennsylvania Constitutions when trial counsel failed to introduce the testimony of forensic experts including fiber experts to testify to the presence or absence of fiber transfer between Petitioner sweatshirt and the bloody gloves and to whether Petitioner fingerprints would be found on the bloodied gloves if Petitioner had taken them off to bury them ii soil experts to determine whether soil transfer should have been found on certain items of clothing such as Petitioner sweatshirt and to testify that the soil in the victim backyard was too common to be conclusively matched to the soil found on other evidentiary items including Petitioner socks and a towel used to wipe his hands and iii DNA experts to testify to the limitations of mitochondrial DNA testing and to testify whether nuclear DNA testing could be done on an unidentified hair found in the victim neck wound and if so the results of such testing and to rebut the Commonwealth claim that mitochondrial DNA testing established that the hair belonged to the victim's mother.

The Commonwealth introduced the testimony of two experts at trial to link the Petitioner's clothes to the soil in the Witman backyard and particularly the soil from the area where the gloves and knife were

buried John E Evans, an employee of the Pennsylvania State Police Crime Lab and an expert in the area of trace evidence analysis and specifically in the area of comparative soil analysis testified as to his comparison analysis of soil obtained from the backyard of the Witman residence to a light blue sweatshirt white athletic socks gloves a small folding razor-blade-type knife and a white towel. In his analysis, Mr Evans stated that soil found on the knife gloves white athletic socks and white towel was consistent with the soil provided to him for comparison. (Notes of Trial Testimony May 13 2003 page 1057-1067)

In addition the Commonwealth introduced the testimony of Gary Andrew Cooke an expert in the filed of materials analysis and specifically the sub-science of soil analysis Mr Cooke testified that he was asked to examine several articles and to determine if there was recoverable soil from the various objects of evidence which included a sweatshirt shirt socks white hand towel gloves and knife Also received were several cans of soil termed as site or potential site samples which were to be used as comparison samples Mr Cooke testified that the white hand towel was the only item deemed to have sufficient material for SEM analysis. ( Notes of Trial Testimony May 13 2003 page 823-832)

At the PCRA Hearing Dr Lee testified concerning the soil analysis and further relayed his findings in his expert report dated November 18 2006.

2 Soil Analysis

A In the RI Lee Group Report dated July 24 2000 there were comments regarding Insufficient amounts of soil present for analysis If those were the clothes allegedly worn by Zach when he buried the glove and knife there are questions about whether it is reasonable that he did not acquire significant soil transfers on his clothing particularly the knees of his sweatpants.

B There is described a heavily stained sweatshirt and
two soiled socks Was all of the soiling blood like substances If these items were still damp with a blood like substance then the probability of a soil transfer would be greater Whether this is significant will largely depend on the adhesive nature of the soil in which the objects were buried.

C Soil analysis will not allow for an opinion that the soil on articles of clothing and objects came exclusively from the Witman yard Further the Commonwealth witness will likely concede that the soil on these objects could have originated from a variety of other locations that were not eliminated through testing and that they cannot determine when the soil was deposited on these items.

At the PCRA Hearing Dr Lee stated that he had the opportunity to review the report prepared by Mr Evans and acknowledged that Mr Evans concluded that the soil found on the Petitioner clothing and the towel were consistent with the soil found in the hole containing the blood gloves and

knife. (Notes of Testimony PCRA Hearing February 02 2007 page 72) Dr Lee also noted that testing completed by Mr Cooke showed soil found on the towel was consistent with the soil obtained from distances of forty (40) and seventy-five (75) feet away from the hole containing the murder weapon and gloves Dr Lee testified that if he had been retained as an expert at trial he would have advised trial counsel to explore the issue that soil from the front yard or other yards could also be consistent with soil found on the towel and that the testing done by Mr Cooke did not exclude that possibility. (Notes of Testimony PCRA Hearing February 02 2007 page 635).

We would note that during his cross-examination of Mr Cooke trial counsel did indeed ask the questions deemed appropriate by Dr Lee and in fact obtained a concession during trial from Mr Cooke that it was not surprising to find the soils being consistent and that he would have expected the front yard to be consistent as well. (Notes of Trial Testimony May 13 2003 page 838) We find trial counsel cross-examination of the soil analysis experts to have accomplished what Dr Lee proposed and any further testimony would have been cumulative and would not have changed the outcome of the trial Accordingly we conclude that the allegation lacks merit.

The final area of DNA testing that Dr Lee explored was the possible testing of fingernail clippings which were obtained from the victim at the autopsy Dr Lee opined:

4 Fingernail Clippings

> Greg's fingernails were clipped during the autopsy. It would be of interest to conduct DNA analysis on the fingernails It would also be very relevant to microscopically examine the fingernails and swab areas of blood or tissue rather than a blind general swabbing of the fingernails.

Dr Lee testified that he did not know if inculpatory evidence existed under the victim fingernails however at trial Attorney McGlaughlin elicited from Deborah Calhoun that enzyme testing revealed only the victim enzymes but that no further testing was performed. (Notes of Testimony PCRA Hearing February 02 2007 page 56 and 142) Trial counsel stressed the lack of DNA testing on the fingernail clippings in his closing argument in support of a reasonable doubt strategy. (Notes of Trial Testimony May 19 2003 page 1887-1888) Dr Lee acknowledged that a scientist could have given defense counsel advice on testing but as far as trial strategy that's up to the attorney We again determine that the Petitioner has failed to meet his burden with regards to this allegation of error and as such we deem this assertion to not rise to a level which would undermine the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

> Petitioner was denied the effective assistance of counsel as guaranteed under the United States and Pennsylvania Constitutions when trial counsel failed to move to dismiss the case on constitutional speedy trial grounds or pursuant to 42 Pa R Crim P 600(a)(3), even though the trial commenced 1688 days 4 years

> and 6 months after the complaint was filed and the Commonwealth just before the trial was scheduled to begin delayed the trial by an additional 399 days by taking a frivolous appeal (that the trial court ruled was non-certifiable) on an issue that had been decided by the trial court and the appellate court two years earlier.

The Petitioner contends that trial counsel was ineffective for failing to file a Rule 600 Motion for Dismissal primarily based upon the filing by the Commonwealth of a frivolous appeal that would support a Rule 600 violation. At the PCRA Hearing defense counsel was questioned regarding this issue:

**Q** Now you were asked questions why didn't you go ahead and file the motion if you felt that it was frivolous. Did you believe that once your motion to quash was stricken and the matter was fully heard by the Superior Court[13] that the appeal then would have been for purposes of dismissing the case been deemed to be frivolous for Rule 1100 now 600 purposes
**A** Mr Barker I have to as I sit here under oath I will say to you and everyone else I did not consider filing a

[13] The Petitioner filed a Motion to Quash Appeal and Brief with the Pennsylvania Superior Court on the issue of whether or not the Commonwealth Appeal was frivolous The Court held that it had failed to clearly rule on the socks sweatpants and underpants during the original appeal The Superior Court then proceeded to address the underlying merits and affirmed the lower court on the sweatpants and underpants while reversing the suppression of the socks These facts support trial counsel statements that "there was reasonable grounds for disagreement about what was said in that first [Superior Court] opinion."

motion to dismiss under the speedy trial rule for any theory for any reason I just simply did not consider it Part of part of my thinking on it I'm certain was the fact that Greg that Zachary was not incarcerated at the time. I usually make a very major distinction if I've speedy trial claims on whether or not a client is incarcerated awaiting trials or some sort of conditional release awaiting trial in terms of its chances or success because every speedy trial and there haven't been many that I filed because defense lawyers routinely do not file them I did not in a long career did not file many but whenever I did there was the first question out of the Court mouth usual was Is this man incarcerated or woman incarcerated or not. That's usually a first consideration from a Court consideration a speedy trial dismissal motion.

**Q** And you're basing some of your analysis and perception of strategies upon your experience your lengthy experience 20 years as a defense attorney at that point

**A** That is correct

(Notes of Testimony PCRA Hearing February 02 2007 page 186-187)

We determine that trial counsel decision not to file a Rule 600 Motion clearly falls in the category of trial strategy and secondly, as no factual basis existed for a Rule 600 claim, the Petitioner has failed to meet his PCRA burden and as such, we find this allegation has no merit.

> Petitioner's Eighth Amendment rights were violated by the imposition of sentence of life imprisonment without the possibility of parole for a crime he allegedly committed when he was fifteen years old and Petitioner was

> denied the effective assistance of counsel as guaranteed under the United States and Pennsylvania Constitutions when counsel failed to object to the sentence of life imprisonment without the possibility of parole as violating the Eighth Amendment prohibition against cruel and unusual punishment.

This issue is currently before the United States Supreme Court in the matters of *Sullivan v Florida,* 08-7621 and *Graham v Florida*, 08-7412 and, therefore, any decision or comment by this Court is premature.

Accordingly we enter the following Order.

BY THE COURT:

_____

JOHN C. UHLER,
SENIOR JUDGE

DATE: April 26, 2010.

J. A16030/11

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

| | |
|---|---|
| COMMONWEALTH OF PENNSYLVANIA, | : IN THE SUPERIOR |
| Appellant | : COURT OF |
| v. | : PENNSYLVANIA |
| ZACHARY PAUL WITMAN | : No. 797 MDA 2010 |

Appeal from the PCRA Order entered April 26, 2010, in the Court of Common Pleas of York County, Criminal Division, at No. CP-67-CR-0005411-1998.

BEFORE: BENDER, OLSON and FREEDBERG, JJ.

MEMORANDUM BY OLSON, J.:

FILED: December 9, 2011

Appellant, Zachary Paul Witman, appeals from the order entered on April 26, 2010, dismissing his first petition pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. After careful consideration of the petition, the briefs,[1] the trial court's opinion, and the lengthy record, we affirm.

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[1] On February 3, 2011, the Commonwealth filed a motion to file a brief in excess of 70 pages as established by Pa.R.A.P. 2135. "A litigant may always seek this Court's permission to extend the page limits for briefs by making an application for relief under Pa.R.A.P. 123." *Commonwealth v. Briggs*, 12 A.3d 291, 343 n.50 (Pa. 2011). As will be shown, the Commonwealth is responding to ten complex claims in a first-degree murder case. The Commonwealth's brief is merely 18 pages longer than our briefing re-

The facts of this case, as aptly summarized by a panel of this Court on direct appeal, are as follows:

> On the afternoon of October 2, 1998, thirteen-year-old Gregory Witman got off the school bus and headed towards his New Freedom Borough home approximately two blocks away. He arrived at the residence at approximately 3:10 pm. Just seven minutes later, Gregory's fifteen-year-old brother, [Appellant], called 911 to report that Gregory was lying dead in their home, the victim of a knife attack.
>
> Gregory had been stabbed in the back and about the head, chest and neck over 60 times. His throat was cut, his windpipe and carotid artery were severed and he was nearly decapitated.
>
> On October 10, 1998, police arrested [Appellant] for the murder of his younger brother. Trial was delayed for a period of years for several reasons, including a request for decertification to juvenile court and suppression issues that were litigated in the trial and appellate courts. Trial commenced in May of 2003 and the Commonwealth presented extensive circumstantial evidence tying [Appellant] to the crime.

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quirements. Thus, in the interest of justice, we grant the Commonwealth's request to exceed the 70-page limitation.

[Appellant] was home on the day of the murder because he wasn't feeling well. According to statements made to emergency personnel and police, [Appellant] spent much of the day sleeping and was in his bedroom on the second floor when his brother entered the house shortly after 3:00 p.m. When [Appellant] heard "roughhousing" of some kind, he went downstairs to investigate and saw blood in the front hall. He discovered his brother's body in the laundry room in the back of the house and called 911.

An emergency squad arrived at the Witman residence and, ultimately, [Appellant] was taken to the hospital for examination. A towel used by emergency personnel to wipe [Appellant's] hands while en route to the hospital was found to contain Gregory's blood and soil consistent with the dirt in the Witman's yard. Emergency personnel transporting [Appellant] to the hospital and medical personnel at the hospital noticed a cut on [Appellant's] hand that, according to one source, was "oozing" when [Appellant's] hands were washed. [Appellant] explained the origin of the cut in different ways to different people. He told one person that he was injured while playing with his dogs; he told another that he must have been hurt when he "felt something sharp" as he moved his brother's body.

With the use of lumin[o]l, police observed footprints leading from a back door of the home

to some pine trees in the rear of the yard. The knife that was used to accomplish the murder and a pair of blood-soaked soccer gloves worn by the perpetrator were found buried beneath these trees. The lumin[o]l-enhanced prints reversed their direction at the pine trees and led back into the Witman home.

The murder weapon was a pen knife with a Baltimore, Maryland automobile parts company insignia on it, the type of item used for promotional purposes. Evidence revealed that [Appellant] had a collection of pen knives and that Ronald Witman, the boys' father, once owned an automobile parts store in the Baltimore area.[2]

Deborah Calhoun, an expert in serology and bloodstain pattern analysis, testified that [Appellant] was in "very close proximity" to Gregory at the time he was being attacked because "arterial spurting" and "impact spatter" stains were visible on [Appellant's] sweatshirt. In response to suggestions that [Appellant's] shirt was stained only as the result of his moving Gregory's body on the instruction of the 911 operator, Calhoun testified that while a few of the stains "may be con-

[2] [Appellant's] pen knife collection was seized by police and one of the items in it, a knife displaying another automobile parts company insignia, was shown to the jury to establish the similarity between the knives [Appellant] owned and the knife used to kill Gregory.

> sistent with that scenario," the others simply were not, because they were the result of active, pressured bleeding and could only have occurred at the time of the attack. Calhoun's testimony was supplemented by that of pathologist Sarah Funke, who testified that the nature of Gregory's injuries caused him to bleed out very quickly, such that by the time the last cut to his neck was made, he had no effective blood pressure that could have caused the spurting of blood.
>
> The jury found [Appellant] guilty of first degree murder and he was sentenced to life in prison.

*Commonwealth v. Witman*, 872 A.2d 1277 (unpublished memorandum) (Pa. Super. 2005) at 1-4.

Procedurally, the case progressed as follows. The Commonwealth charged Appellant in connection with the crimes in January 1999. In February 1999, Appellant filed a motion to suppress items seized from Appellant's person and home. In May 1999, the trial court entered an order suppressing 22 items of evidence. The Commonwealth appealed that determination, claiming that suppression of those items substantially handicapped its case. On appeal, this Court affirmed in part and reversed in part the trial court's order of suppression. *Commonwealth v. Witman*, 750 A.2d 327 (Pa. Super. 2000) (*Witman I*). We reversed the portion of the trial court's suppression order pertaining to 16 items initially recovered from inside the residence, concluding they were admissible because the police either found them during a protective sweep

of the property or in a subsequent search with the consent of Appellant's parents. We affirmed the trial court's suppression of six items later seized pursuant to search warrants because there was a lack of probable cause or the warrants failed to describe the seized items adequately.

Before trial, in February 2002, the Commonwealth filed a motion *in limine* requesting the admission of the pants, underwear, and socks that Appellant was wearing at the crime scene. There was confusion as to whether these specific items were to remain suppressed following our ***Witman I*** decision. Following a pre-trial conference on the matter, the trial court interpreted our decision as affirming the suppression of those items *sub silentio*. However, at that time, counsel for Appellant stipulated to the admission of the socks. On March 19, 2002, the trial court issued an order stating that our Court's silence on the issue of the worn apparel implicitly affirmed suppression. The Commonwealth appealed. The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) intimating its position that Appellant's apparel should remain suppressed and chastising the Commonwealth for waiting until the eve of trial for appellate clarification.

On appeal, this Court determined that we had not addressed the admissibility of Appellant's pants, socks, and underwear in the prior appeal. ***Commonwealth v. Witman***, 821 A.2d 138 (Pa. Super. 2003) (unpublished memorandum) (***Witman II***). We concluded that Appellant's socks were admissible because the parties stipulated to their admission. ***Id.*** at 10-11. We further determined that the trial court properly suppressed Appellant's pants and underwear, opining

that there was no visible blood "on the pants to give rise to probable cause linking the pants to the crime, and the underwear was not in plain view." ***Id.*** at 11. Moreover, this Court reasoned that because Appellant was not under arrest at the time of the seizure, taking his clothes from hospital personnel without Appellant's consent was unconstitutional and, thus, required suppression. ***Id.*** at 11-12.

On May 5, 2003, a two-week jury trial commenced. At its conclusion, the jury convicted Appellant of first-degree murder. The trial court sentenced Appellant to a mandatory sentence of life imprisonment without the possibility of parole. Appellant filed timely post-sentence motions that the trial court denied. Appellant filed a timely appeal. On January 11, 2005, this Court affirmed Appellant's judgment of sentence and the Pennsylvania Supreme Court denied further review. ***Commonwealth v. Witman***, 872 A.2d 1277 (Pa. Super. 2005) (unpublished memorandum) (***Witman III***), *appeal denied*, 876 A.2d 395 (Pa. 2005). In December 2005, the United States Supreme Court denied *certiorari*. ***Witman v. Pennsylvania***, 546 U.S. 1075 (2005).

On November 22, 2006, Appellant filed a timely PCRA petition. On February 2, 2007, the PCRA court conducted a hearing wherein trial counsel and forensic expert, Dr. Henry Lee, testified. On December 21, 2007, the PCRA court determined that counsel was ineffective for stipulating to the admission of Appellant's socks and granted a new trial. The PCRA court did not address the other issues presented in the PCRA petition.

On appeal, this Court reversed. ***Commonwealth v. Witman***, 972 A.2d 565 (Pa. Super. 2009) (unpublished memorandum) (***Witman IV***). We determined that Appellant suffered no prejudice because of the stipulation since

> the evidence presented at trial overwhelmingly indicated [Appellant's] guilt and [] removal of the socks from the equation would not have changed the outcome. More importantly, in every manner in which the socks connected [Appellant] to the crime, there was another, admissible piece of evidence that made the same connection, and did so more convincingly. Effectively, [Appellant's] socks served merely as corroborating evidence to another, better piece of evidence. Simply stated, the socks were not the linchpin ofthis conviction.

*Id.* at 5-6. We ultimately concluded:

> Indeed, even without the socks in evidence, the trier-of-fact, is still presented with testimony that a luminescent trail of footprints was discovered in the rear yard of [Appellant's] home, that the murder weapon and gloves were buried at the terminus of the footprint trail, that the murder weapon was very closely associated with [Appellant's] knife collection and his father's former business, that one of the gloves was cut where [Appellant's] corresponding finger was cut, and that the footprint trail returned to the house.
> These facts remain before the jury even if the socks are excluded.

*Id.* at 13-14. As a result, we remanded the case for the PCRA court to consider the merits of Appellant's remaining contentions. Appellant appealed and the Pennsylvania Supreme Court denied further review. *Commonwealth v. Witman*, 982 A.2d 1228 (Pa. 2009).

Upon remand, the PCRA court denied Appellant's remaining claims. This timely appeal resulted[3] wherein Appellant presents the following issues for our review:

> I. Was Appellant deprived of his Constitutional right to the effective assistance of counsel when:
>
> A. Counsel stipulated to the admission of suppressed evidence that the Commonwealth argued was alone sufficient to convict;
>
> B. Based on ignorance of the law, refused to obtain forensic expert assistance in a highly complex forensic case, thus hampering his ability to cross-examine the Commonwealth's experts or counter their conclusions;

[3] The PCRA court denied relief on April 26, 2010. On May 7, 2010, Appellant filed a notice of appeal. On May 20, 2010, the PCRA court filed an order pursuant to Pa.R.A.P. 1925(b) directing Appellant to file a concise statement of errors complained of on appeal. Appellant complied on June 3, 2010. The PCRA court relied upon its opinion dated April 26, 2010 and a supplemental opinion pursuant to Pa.R.A.P. 1925(a) dated June 16, 2010 in denying Appellant relief.

C. Withdrew a motion to preclude the subjective conclusions of the Commonwealth's blood spatter expert and refused to retain his own expert to challenge her conclusions;

D. Failed to object to the admission of unconfirmed and
undocumented luminol testing results that were used to directly implicate [Appellant];

E. Botched his examination of a defense witness who had seen an unidentified van in the vicinity of the murder;[4]

F. Failed to insist on DNA testing of a grey hair found in the victim's wound;
G. Waived his right to introduce evidence showing the absence of motive and the loving relationship between [A]ppellant and his brother, the murder victim;

H. Failed to argue that the emergency room doctor's testimony about statements made by [] Appellant while still in shock were admissible a[s] substantive evidence?

II. Was Appellant deprived of his Constitutional right to the effective assistance of counsel when counsel failed to move to dismiss on speedy trial grounds, though the clock had

[4] In the argument section of his brief, Appellant switched the order of issues I(E) and I(F). For ease of discussion, we have reordered these issues accordingly.

> run, when, on the eve of trial, the Commonwealth filed a frivolous appeal?
>
> III. Was it a violation of the Eighth Amendment to impose a mandatory life sentence without the possibility of parole on Appellant, a first-time offender who was 15 years old when the crime was committed?

Appellant's Brief at 4.

"Our standard of review of the denial of PCRA relief is well settled: we examine whether the PCRA court's determination is supported by the evidence and is free of legal error." *Commonwealth v. Smith*, 995 A.2d 1143, 1149 (Pa. 2010). "A PCRA court passes on witness credibility at PCRA hearings, and its credibility determinations should be provided great deference by reviewing courts." *Commonwealth v. Johnson*, 966 A.2d 523, 539 (Pa. 2009) (citations omitted). In order to be eligible for PCRA relief, the petitioner must prove by a preponderance of the evidence that his conviction or sentence resulted from one or more of the enumerated circumstances found in Section 9543(a)(2); one of those circumstances is the ineffective assistance of counsel. 42 Pa.C.S.A. § 9543(a)(2)(ii). Further, the petitioner must show that the issues raised in his PCRA petition have not been previously litigated or waived. 42 Pa.C.S.A. § 9543(a)(3).

Appellant's first two issues, including sub-parts, allege ineffective assistance of counsel. Because there is a presumption that counsel provided effective representation, a PCRA petitioner bears the burden of proving ineffectiveness. *Commonwealth v. Ligons*, 971

A.2d 1125, 1137 (Pa. 2009) (citations omitted). "To be entitled to relief on a claim of trial counsel's ineffectiveness, appellant must prove the underlying claim is of arguable merit, counsel's performance lacked a reasonable basis, and counsel's ineffectiveness caused him prejudice." *Smith*, 995 A.2d at 1150. "Prejudice in the context of ineffective assistance of counsel means demonstrating there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different." *Id.* at 1151. "Failure to establish any prong of the test will defeat an ineffectiveness claim." *Id.*

This claim was previously litigated; we determined that Appellant suffered no prejudice and remanded the case for the PCRA court's assessment of Appellant's remaining claims. *See Witman IV*. As such, the current claim that counsel was ineffective for stipulating to the admission of Appellant's socks must fail.

In issue I(B), Appellant asserts that counsel was ineffective for failing to retain forensic experts to rebut the Commonwealth's expert testimony presented at trial.[5] Appellant claims counsel was ineffective, based

[5] Appellant has changed the scope of this issue on appeal. In his PCRA petition and Rule 1925 statement, Appellant initially framed this issue as follows:

> Petitioner was denied the effective assistance of counsel, as guaranteed under the United States and Pennsylvania Constitutions, when trial counsel failed to introduce the testimony of forensic experts, including: (i) fiber experts to testify to the presence or absence of fiber transfer between Petitioner's sweatshirt and the bloody gloves and to whether Petitioner's fingerprints would be

upon an ignorance of law, because: (1) he believed he would have to turn over

damaging expert reports during discovery, even if counsel did not call the experts at trial; (2) he wanted to surprise the Commonwealth in summation; and, (3) he was "afraid to expose any experts to cross-examination." Appellant's Brief at 27.

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> found on the bloodied gloves if Petitioner had taken them off to bury them; (ii) soil experts to determine whether soil transfer should have been found on certain items of clothing, such as Petitioner's sweatshirt, and to testify that the soil in the victim's backyard was too common to be conclusively matched to the soil found on other evidentiary items, including Petitioner's socks and a towel used to wipe his hands; and (iii) DNA experts to testify to the limitations of mitochondrial DNA testing and to testify whether nuclear DNA testing could be done on an unidentified hair found on the victim's neck wound, and, if so, the results of such testing, and to rebut the Commonwealth's claim that mitochondrial DNA testing established that the hair belonged to the victim's mother.

PCRA Petition, 11/22/2006, at 5, ¶ h; Rule 1925(b) Statement, at 4-5, ¶ h. On appeal, however, Appellant generally challenges counsel's stewardship for failing to obtain any expert witnesses. Accordingly, we will address this issue to the extent that Appellant properly preserved it below and developed it on appeal. Thus, we will limit our analysis of issue (I)(B) to Appellant's claim of counsel's ineffectiveness in failing to introduce fiber and soil experts at trial. In his brief to this Court, Appellant raised a separate ineffective assistance of counsel claim pertaining to DNA analysis and a grey hair found on the victim's neck that we address ***infra***.

"The law merely requires defense counsel to conduct reasonable investigations or reach rational decisions that make particular investigations unnecessary." ***Commonwealth v. Cox***, 983 A.2d 666, 692 (Pa. 2009), *citing* ***Commonwealth v. Hughes***, 865 A.2d 761, 813 (Pa. 2004). In ***Commonwealth v. Copenhefer***, 719 A.2d 242 (Pa. 1998), the Pennsylvania Supreme Court stated that "[t]rial counsel will not be deemed ineffective for failing to call a medical, forensic, or scientific expert merely to critically evaluate expert testimony which was presented by the prosecution." ***Id.*** at 255 (citation omitted). "Trial counsel need not introduce expert testimony on his client's behalf if he is able effectively to cross-examine prosecution witnesses and elicit helpful testimony." ***Id.*** at 253 (citation omitted).

The PCRA court determined that this claim lacked merit, specifically examining Dr. Lee's test may as presented by Appellant. At trial, the Commonwealth presented two experts to establish that the soil found on Appellant's clothes, and recovered from a towel Appellant used in the ambulance, matched the soil from the area were the bloody gloves and murder weapon were buried. At the PCRA hearing, Dr. Lee testified that he would have recommended challenging that determination because soil from the front yard or a neighboring yard could also be consistent with the samples recovered from Appellant. N.T., 2/2/2007, at 64-65. The PCRA court concluded:

> [T]rial counsel did indeed ask the questions deemed appropriate by Dr. Lee and in fact, obtained a concession during trial from [one of the Commonwealth's soil experts] that it was not surprising to find the soils being consistent

> and that he would have expected the front yard to be consistent as well. We find that trial counsel's cross examination of the soil analysis experts to have accomplished what Dr. Lee proposed and any further testimony would have been cumulative and would not have changed the outcome of the trial. Accordingly, we conclude that the allegation lacks merit.

PCRA Court Opinion, 4/26/2010, at 60. We discern no error. We further note that Appellant's reliance on federal case law is unavailing. This Court is not bound by the decisions of federal courts in the absence of a United States Supreme Court pronouncement. ***See Commonwealth v. Lambert***, 765 A.2d 306, 315 n.4 (Pa. Super. 2000).

We next address the portion of issue I(B) pertaining to counsel's ineffectiveness for failing to retain fiber experts to testify regarding the absence of fiber transfer between Appellant's sweatshirt and the bloody gloves. Appellant's Brief at 34. Appellant relies upon Dr. Lee's testimony that there should have been fibers exchanged between the sweatshirt and gloves based upon "Locard's principle – that every time two surfaces meet, there is a physical exchange." ***Id.*** Appellant claims that lack of fiber transfer was exculpatory, counsel was ineffective for failing to retain a fiber expert, and the PCRA court erred by not addressing this claim. ***Id.***

This claim lacks merit. At trial, the Commonwealth fiber expert conceded that there was no transfer of fibers between the gloves and Appellant's sweatshirt. N.T., 5/16/2003, at 1686 and 1692. More-

over, trial counsel highlighted the lack of fiber transfer in opening and closing statements. N.T., 5/7/2003, at 28; N.T., 5/19/2003, at 1918-1919. Retaining a defense expert to testify that there were no fibers transferred would have been merely cumulative. This aspect of Appellant's ineffectiveness claim fails.

In issue I(C), Appellant asserts that counsel was ineffective for withdrawing a motion *in limine* to exclude the subjective conclusions of Deborah Calhoun, the Commonwealth's blood spatter expert. Appellant's Brief at 36. Ms. Calhoun opined that blood stains on Appellant's sweatshirt were caused by arterial spurting which indicated that Appellant was in close proximity to the victim at his time of death. Appellant argues that it was error for counsel to withdraw the motion based upon his failure to proceed pursuant to Pa.R.Civ.P. 207.1 which governs motions to exclude expert testimony that relies upon novel scientific evidence. Appellant assails the PCRA court's reliance on trial counsel's statement that he could "effectively deal" with the Commonwealth expert through cross-examination. ***Id.*** at 36- 38. Appellant argues that the PCRA erred further by concluding that Appellant consented to the withdrawal. ***Id.*** at 38-39. Further, Appellant claims: (1) Dr. Lee discredited Ms. Calhoun's conclusions; (2) the jury could not understand blood spatter evidence without the benefit of expert testimony; and, (3) cross-examination allowed Ms. Calhoun to merely restate her conclusions. ***Id.*** at 36-38. Appellant opines that the prejudice to him was clear, because this Court has already accepted Ms. Calhoun's conclusion that the "impact spatter stains on the sweatshirt put [Appellant] in close proximity" to the

victim at the time of the murder. ***Id.*** at 39, *citing* ***Witman IV***, at 12.

Initially, we note that Appellant has again re-framed the issue on appeal. In his PCRA petition and Rule 1925 statement, Appellant initially claimed that trial counsel was ineffective for withdrawing the motion because Ms. Calhoun's opinions were inadmissible because they were based upon novel scientific experiments in contravention of ***Frye v. United States***, 293 F. 1013 (D.C. Cir. 1923). The motion at issue, however, challenged only Ms. Calhoun's conclusions, which fall outside of ***Frye***'s protective sweep. This Court has previously determined "that ***Frye*** only applies to determine if the relevant scientific community has generally accepted the principles and methodology the scientist employs, *not* the conclusions the scientist reaches, before the court may allow the expert to testify." ***Trach v. Fellin***, 817 A.2d 1102, 1112 (Pa. Super. 2003) (*en banc*) (emphasis in original). Moreover, Appellant did not present evidence at the PCRA hearing to challenge Ms. Calhoun's methodology as novel. Upon review of the PCRA hearing transcript, Dr. Lee offered only general testimony about blood spatter analysis and did not examine the blood patterns on Appellant's sweatshirt. N.T., 2/2/2007, at 37-41. Dr. Lee stated that he read the laboratory reports and relevant trial transcripts and looked at the photographic evidence, but never classified Ms. Calhoun's methodology as novel. ***Id.*** at 41-42. "Where the opp sition is to the legitimacy of the expert's conclusions rather than to the novelty of his or her methodology, such a challenge 'goes not to admissibility but to weight.'" ***Betz v. Pneumo Abex LLC***, 998 A.2d 962, 972, n.15 (Pa. Super. 2010) (citation omitted). Thus, we conclude that there was no underlying merit to a mo-

tion *in limine* based upon ***Frye*** and counsel had a reasonable basis for withdrawing it.

Furthermore, as previously stated, counsel is not *per se* ineffective for failing to retain experts if he can effectively cross-examine the prosecution's witnesses. Upon examination of the record, trial counsel spent several hours vigorously cross-examining Ms. Calhoun and appeared well versed in blood spatter analysis. Specifically, counsel challenged Ms. Calhoun's conclusion that Appellant was in close proximity to the victim at the time of the murder. Thus, we will not deem counsel ineffective in this regard.

Moreover, Appellant's claim that he did not voluntarily consent to withdrawal of the motion *in limine* is raised for the first time on appeal. This he cannot do and, thus, this aspect of the claim has been waived. ***See*** Pa.R.A.P. 302. Regardless, the consent issue is without merit. Before allowing Appellant to withdraw the motion at issue, the trial court conducted a colloquy to ensure the withdrawal was voluntary. N.T., 5/12/2003, at 644-655. Appellant did not challenge his lack of consent at the PCRA hearing. N.T., 2/2/2007, at 215-216. To assent to Appellant's current position, this Court would have to believe that Appellant was untruthful during both colloquies. We do not. For all of the foregoing reasons, we find no merit to issue I(C).

In issue I(D), Appellant avers that counsel was ineffective for failing to move to exclude testimony concerning the results of luminol5 testing. Appellant's

Brief at 39. Appellant argues that the luminol[6] tests conducted by police were faulty and not properly documented, thus, police testimony in this regard was more prejudicial than probative and should have been excluded under Pa.R.E. 403. He contends that the PCRA court erred in determining that "the deficiencies in the Commonwealth's luminol evidence were dealt with on cross-examination" because "[w]ithout the luminol trail, the police could not have testified that a trail led from the buried knife and gloves and back to the house." ***Id.*** at 40 and 43.

The PCRA court discerned that there was no arguable merit to this claim. Specifically, it determined that Appellant could not meet his burden of proving the evidence was inadmissible. PCRA Court Opinion, 4/26/2010, at 44. The PCRA court concluded that Dr. Lee's testimony concerning the inadequacies of luminol was consistent with trial counsel's opening and closing statements, as well as the cross-examination of the various Commonwealth witnesses who testified about the luminol trail. ***Id.*** at 45. In particular, Dr. Lee opined: (1) items, other than blood, such as bleach and metallic substances can react to luminol; (2) luminol cannot be used to date when a substance was deposited; and, (3) proper documentation, including taking photographs and measurements, is important when conducting luminol tests because the results develop quickly and then fade. ***Id.***, *citing* N.T., 2/2/2007, at 57-60. The PCRA court ultimately concluded that trial counsel thoroughly examined the

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[6] Luminol is a chemical that will illuminate blood that is not visible to the human eye. PCRA Court Opinion, 4/26/2010, at 13.

shortcomings of the luminol tests conducted in this case by cross-examining the detectives who failed to document the results. Accordingly, the PCRA court decided that the luminol evidence was admissible and the weight given to the evidence was for the factfinder to determine. We agree.

Rule 403 provides that "[t]he probative value of the evidence might be outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, pointlessness of presentation, or unnecessary presentation of cumulative evidence." Pa.R.E. 403. The comment to Pa.R.E. 403 instructs that: "'Unfair prejudice' means a tendency to suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially." Pa.R.E. 403, Comment. "Evidence will not be prohibited merely because it is harmful to the defendant." ***Commonwealth v. Page***, 965 A.2d 1212, 1220 (Pa. Super. 2009) (citation omitted). "[E]xclusion is limited to evidence so prejudicial that it would inflame the jury to make a decision based upon something other than the legal propositions relevant to the case." ***Id.***

Upon review, the evidence was not so unfairly prejudicial to Appellant as to exclude it from evidence. At trial, counsel cross-examined the police who conducted the luminol tests in an attempt to distance Appellant from the footprints found. Officer Douglas Woodcook testified that chemicals, not blood, may have caused the luminescent trail and that it was unknown who made the footprints or when they were made. N.T., 5/7/2003, at 423-426, 449. Trooper Woodcock acknowledged that when police arrived at the scene,

they found Appellant in the garage in his socks; however, police did not detect footprints, with the use of luminol, in the garage. *Id.* at 448-449. Officer Ralph Malino testified that he used luminol for the first time in this case, acknowledged that he did not use his camera properly, and conceded that there was no photographic evidence of the luminol results. *Id.* at 592- 601. The luminol evidence was not so prejudicial as to divert the jury's attention away from its duty of weighing the evidence impartially. The results were questionable, but not inflammatory. Moreover, as the above examples of trial counsel's cross-examination demonstrate, trial counsel asked the same questions that Dr. Lee suggested were necessary. Finally, Appellant provides scant, irrelevant legal authority to support his position. Thus, Appellant's claim I(D) lacks merit.

In issue I(E), Appellant claims that trial counsel was ineffective by allowing Donald Bortner to testify that he saw a mysterious white van near the Witman residence between 3:00 p.m. and 3:30 p.m. on the day of the murder. Appellant's Brief at 44. Appellant claims that Mr. Bortner originally told police that he saw the van between 3:00 p.m. and 3:15 p.m. *Id.* at 45. Appellant avers that the fifteen-minute discrepancy allowed the Commonwealth to call a rebuttal witness to explain the van sighting. More specifically, Larry D'Apice, the victim's soccer coach, testified that he drove his white van toward the Witman home upon learning of the victim's death.

The PCRA court determined that counsel had a reasonable basis in allowing Mr. Bortner to testify that he saw an unidentified van near the Witman home

between 3:00 p.m. and 3:30 p.m. on the day in question. PCRA Court Opinion, 4/26/2010, at 51. The PCRA court noted that Appellant's 9-1-1 call occurred at 3:17 p.m., thus, Mr. Bortner's testimony that he saw a van as late as 3:30 p.m. "afforded room to place the unknown killer fleeing the house after 3:15 p.m." ***Id.*** Moreover, trial counsel elicited testimony from Mr. D'Apice who stated that he received a call about the victim's death before 4:30 p.m., but could not be certain as to the exact time, and conceded that he may have been in the area in his van after 4:00 p.m. N.T., 5/19/2003, 1869-1878. Additionally, although not referenced by the PCRA court, we note that Mr. D'Apice testified that he received the call about the victim's death between 3:15 p.m. and 4:00 p.m. ***Id.*** at 1877-1878. Obviously, Mr. D'Apice could not have received the call at 3:15 p.m., because Appellant did not call 9-1-1 until 3:17 p.m. Because we agree that trial counsel had a reasonable basis to allow Mr. Bortner to testify as he did and Mr. D'Apice's testimony did not refute such testimony, we discern no error in finding counsel effective in this regard.

In issue I(F), Appellant maintains that trial counsel was ineffective for failing to conduct nuclear DNA testing on a grey hair found on the victim's neck. Appellant's Brief at 45. Appellant explains that mitochondrial DNA testing was conducted on the hair at issue and it was linked maternally to the Witman family; however, nuclear DNA testing, which can only be conducted on a hair with an intact root, could have pinpointed an unrelated third person. ***Id.*** at 46. Appellant claims the PCRA court erred by accepting trial counsel's testimony that he had consulted with a DNA analyst who opined that only mitochondrial DNA

testing could be performed on this specific hair, because trial counsel also stated that he did not turn over the hair sample for examination. ***Id.*** at 47. Appellant also points to Ms. Calhoun's trial testimony wherein she stated that the hair at issue had a root. ***Id.*** at 46.

The PCRA court accepted trial counsel's PCRA hearing testimony that he met with a DNA analyst who informed him "mitochondria DNA testing was the only type applicable because there was not enough material from the [grey hair] root to perform nuclear DNA." PCRA Court Opinion, 4/26/2010, *citing* N.T., 2/2/2007, at 144-146. The PCRA court's credibility determination is supported by the record. In the alternative,[7] however, Appellant cannot claim such alleged error is so prejudicial as to change the outcome of his trial. At trial, the Commonwealth called Shawn Michael Weiss, a DNA expert. He explained that "[m]itochondrial DNA is maternally inherited, so anybody in your maternal linkage is going to have the same [DNA] sequence." N.T., 5/16/2003, at 1652. He then concluded that the victim, Appellant, and Mrs. Witman "could not be excluded as the source of the hair or the maternal relatives." ***Id.*** at 1662. Mr. Weiss stated that "with 95 percent confidence[,]" he was able to exclude "99.94 percent of the population of having the same [DNA] sequence." ***Id.*** at 1674. Thus, at best, nuclear DNA testing of the found hair would only pinpoint to whom, in the Witman's maternal lineage, the hair belonged. Additional testing would not, as Appellant suggests, point to an unknown third person

[7] It is established that we can affirm the trial court on any valid basis. ***Commonwealth v. Kemp***, 961 A.2d 1247, 1254 (Pa. Super. 2008)

and provide exculpatory evidence. Moreover, there was no evidence to suggest that another maternal relative committed the murder.[8] Thus, Appellant's claim fails.

In issue I(G), Appellant contends that trial counsel was ineffective in waiving Appellant's right to introduce evidence of a lack of motive. Appellant's Brief at 48. He claims that trial counsel asserted the defense during the opening statement, but then each time he tried to elicit testimony in support, the prosecutor objected based upon improper character evidence. *Id.* Appellant claims that trial counsel "folded" and did not offer evidence of a loving relationship between the brothers. *Id.* Appellant avers "[t]he jury might well have rejected [Appellant] as the killer if it had learned that [Appellant], just weeks before the murder, had enjoyed a camping vacation with his brother and had gone out of his way to help his brother build a soccer net." *Id.* at 51.

The PCRA court determined that the Commonwealth conceded in its opening statement that there was no motive in this case and defense counsel highlighted this fact again in its opening statement. PCRA Court Opinion, 4/26/2010, at 22-23, 27. Trial counsel also reinforced the lack of motive during closing argument. *Id.* at 27. The PCRA court also determined that the proffered testimony was merely cumulative of the testimony of Elizabeth Beck and The-

[8] We also note that the grey hair, by its very nature, was not powerful inculpatory evidence as to a 15-year-old suspect. Thus, any prejudice was extremely minimal.

resa Miller admitted at trial through cross-examination. ***Id.*** We agree.

Proof of motive is not necessary for a conviction of first-degree murder. ***Commonwealth v. Chmiel***, 889 A.2d 501, 517 (Pa. 2005). "[T]he presence or absence of motive [is] relevant and [may] be considered by the jury in determining whether the Commonwealth's evidence [] proved guilt beyond a reasonable doubt." ***Commonwealth v. Green***, 611 A.2d 1294, 1299 (Pa. Super. 1992). The jury was aware throughout the trial that there was a lack of motive. The Commonwealth conceded as such, in both its opening and closing statements. The Commonwealth never argued that Appellant had a motive. Trial counsel highlighted the lack of motive defense in his opening and closing remarks as well. Elizabeth Beck testified that she never witnessed Appellant harming or beating the victim. N.T., 5/7/2003, at 63. The trial court provided two pertinent instructions before jury deliberations: (1) evidence of good character may by itself raise a reasonable doubt of guilt, and (2) absence of motive should be considered in deciding guilt or innocence. N.T., 5/19/2003, at 2049-2050, 2059. "The law presumes that the jury will follow the instructions of the court." ***Commonwealth v. Spotz***, 896 A.2d 1191, 1224 (Pa. 2006). Thus, we determine that there was evidence of lack of motive in this case, trial counsel highlighted it, the Commonwealth conceded it, the trial court instructed the jury on it and, therefore, there is no merit to Appellant's claim of ineffective assistance of counsel in this regard.[9]

[9] Moreover,to the extent Appellant argues that evidence of a loving relationship between the parties would tend to establish that

In issue I(H), Appellant maintains that trial counsel was ineffective for failing to admit as substantive evidence a statement made by Appellant to emergency room physician, Dr. Scott McCurley. Appellant's Brief at 52. Appellant told Dr. McCurley, "I can't believe what I saw." *Id.* Appellant contends that the statement qualifies as an exception to hearsay as an excited utterance under Pa.R.E. 803(2). *Id.* at 53, n.17. He claims that the statement was exculpatory because it "would have conveyed to the jury from an unbiased source just how shocked [Appellant] was when he came downstairs and saw [the victim's] body." *Id.* at 54.

The PCRA court determined that Appellant was not prejudiced because there were multiple other witnesses who testified to Appellant's state of mind on the day of the murder. We agree. In addition, we conclude that there is no merit to this claim. While "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is admiss ble as an excited utterance pursuant to Pa.R.E. 803(2), Appellant has failed to demonstrate how the proffered statement was exculpatory. Appellant did not say that he could not believe that another person murdered his

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Appellant could not have committed this heinous crime, defense counsel testified at the PCRA hearing that he intended to use such evidence to support this argument, however, the trial court refused to allow such evidence to be introduced. N.T., 2/2/2007, at 12-14. Thus, counsel cannot be found to be ineffective when he attempted (although unsuccessfully) to introduce such evidence at the time of trial.

brother. He simply stated that he could not believe what he saw. As the PCRA court noted, the statement "could have referred to [Appellant's] reaction [to] seeing his brother's body after he had in fact stabbed him[.]" PCRA Court Opinion, 4/26/2010, at 31-32. There is no merit to Appellant's claim.

In issue I(I), Appellant asserts that the cumulative claims of ineffective assistance of counsel rendered the verdict unreliable. Appellant's Brief at 55.[10] This issue was not set forth in Appellant's statement of questions involved. Pa.R.A.P. 2116(a) ("No question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby."). Moreover, Appellant failed to raise this issue in his PCRA petition or his 1925(b) statement and waived this claim. "Any claim not raised in the PCRA petition is waived and not cognizable on appeal." ***Commonwealth v. Washington***, 927 A.2d 586, 601 (Pa. 2007); Pa.R.A.P. 302(a). Regardless, this claim is wholly without merit. As the Pennsylvania Supreme Court has recently stated:

> We have often held that no number of failed claims may collectively warrant relief if they fail to do so individually. However, we have clarified that this principle applies to claims that fail because of lack of merit or arguable merit. When the failure of individual claims is grounded in lack of prejudice, then the cumu-

[10] In issue I(A), Appellant contends that trial counsel was ineffective for stipulating to the admission of Appellant's socks based upon a theory of cumulative error.

> lative prejudice from those individual claims may properly be assessed.

*Commonwealth v. Spotz*, 18 A.3d 244, 321 (Pa. 2011) (quotations, citations, and brackets omitted). Here, we did not recognize findings of ineffectiveness based upon a lack of prejudice.[11] Thus, Appellant's argument I(I) is waived, but also without merit.

In issue II, Appellant contends that counsel was ineffective for failing to file a motion requesting dismissal pursuant to Pa.R.Crim.P. 600 on speedy trial grounds. Appellant's Brief at 56. Specifically, he challenges the portion of delay attributable to "the frivolous appeal the Commonwealth filed on the eve of trial" pertaining to the admissibility of the apparel worn by Appellant at the time of the crime. *Id.*

We conclude that there is no merit to Appellant's claim. The Commonwealth appealed the denial of its motion *in limine* to admit Appellant's socks, underwear, and pants at trial. *Witman II*. On appeal, this Court determined that we had not specifically ruled on these items in our previous decision, *Witman I*. Later, in *Whitman III*, this Court expressly stated:

> Unfortunately, [our] opinion [in *Whitman I*], failed to address the suppression of certain

[11] We acknowledge that we determined alternatively, *supra*, that Appellant's argument pertaining to nuclear DNA testing on the grey hair found on the victim's neck resulted in minimal prejudice. This solitary finding cannot support a claim of cumulative error, even in conjunction with the prior panel's finding of prejudice for stipulating to the admission of Appellant's socks in *Witman IV.*

> items that had been seized at the hospital to which [Appellant] had been transported following the crime. These items included [Appellant's] pants, his underwear, and his socks. The failure to address these items ultimately led to a subsequent appeal.

*Whitman III*, at 2-3. Thus, this Court acknowledged that there was confusion in our previous ruling and we examined the merits of the Commonwealth's appeal. Therefore, Appellant's contention that the Commonwealth filed a frivolous appeal is belied by the record. Appellant's sole basis for contending counsel was ineffective for failing to file a Rule 600 motion lacks arguable merit. Accordingly, this claim fails.

Finally, Appellant argues that his life sentence without the possibility of parole amounts to cruel and unusual punishment under the Eighth Amendment of the United States Constitution. Appellant's Brief at 61. Recently, this Court in *Commonwealth v. Whitaker*, 2011 PA Super 205 (2011) held that a sentence of life imprisonment without the possibility of parole imposed on a juvenile convicted of first-degree murder does not constitute cruel and unusual punishment. Here, the trial court sentenced Appellant to life imprisonment without the possibility of parole after Appellant was convicted of first-degree murder. We are bound by the precedent that holds that such a sentence does not constitute cruel and unusual punishment. Accordingly, Appellant's final issue fails.

Order affirmed.
J. A16030/11
December 9, 2011

Judgment Entered.
Deputy Prothonotary
Date; December 9, 2011