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

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
vs.	:	No. 539 CR 2009
	:	
ERNEST T. FREEBY,	:	
Defendant	:	

Criminal Law – PCRA - Ineffectiveness of Trial Counsel - Requirement of Actual Prejudice - Comparing the Standards and Burdens which Apply to a Collateral Challenge Premised on Counsel's Ineffectiveness with those Applicable to a Claim of Trial Court Error on Direct Appeal – Distinguishing a Claim of Counsel's Ineffectiveness from a Waived Claim of Trial Court Error from which it Derives as Presenting Separate but Related Issues for Review

1. Under the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 5941-5946, a claim of ineffectiveness of trial counsel requires the petitioner to prove by a preponderance of the evidence that (1) the underlying claim has arguable merit; (2) counsel had no reasonable basis for the course of action or inaction chosen; and (3) counsel's action or inaction prejudiced the petitioner. Under this standard, the petitioner must prove that counsel's ineffectiveness so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

2. Where the claim of counsel's ineffectiveness is premised on matters of strategy and tactics, a finding that the strategy chosen by trial counsel lacked a reasonable basis is not warranted unless, in light of all the alternatives available to counsel, the strategy chosen was so unreasonable that no competent lawyer would have chosen it. In the absence of such proof, counsel is presumed to be effective.

3. To meet the PCRA standard for prejudice, the petitioner must prove actual prejudice; prejudice is not presumed. This requires the petitioner to prove that but for counsel's unprofessional errors, there is a reasonable probability the result of the proceedings would have been different. A reasonable probability is a probability that is sufficient to undermine confidence in the outcome of the proceeding.

4. In certain limited circumstances the prejudicial effect of counsel's ineffectiveness is presumed and is not required to be proven. *Per se* ineffectiveness has been found to exist in the following three scenarios: (1) where there was an actual or constructive denial of counsel; (2) where the state interfered with counsel's assistance; or (3) where counsel had an actual conflict of interest.

5. Whereas, when a collateral attack on trial counsel's performance is made under the PCRA counsel is presumed to be effective and defendant has the burden of proving that counsel's conduct had an actual adverse effect on the outcome of the proceedings, the standard for evaluating the effect of trial court error on direct appeal is an easier standard for a defendant to meet. Under the "harmless error" standard applicable to direct appeals of trial court error, "whenever there is a reasonable possibility that an error might have contributed to the conviction, the error is not harmless." To refute such a finding, the burden is on the Commonwealth to show that the error did not contribute to the verdict beyond a reasonable doubt.

6. A juror who acknowledges during voir dire a natural preference for wanting the defendant to take the stand and testify over a defendant who does not testify, but is not questioned as to whether she would be able to set aside this preference and follow the court's instruction that the defendant in a criminal case is not required to testify and that if he chooses not to testify this cannot be held against him, is not automatically disqualified as a juror. Consequently, where defense counsel fails to make a challenge for cause or to exercise a preemptory challenge to strike a juror who expresses such personal preference, and where no further examination occurs of whether such preference is fixed or whether the juror will accept and apply the law given by the court, this failure by itself, combined with the court's express instruction to the jury that defendant's decision not to testify cannot be held against him as well as the legal presumption that a jury follows the court's instructions, does not prove by a reasonable probability that defendant has in fact been prejudiced by the juror's selection as a member of the jury.

7. No error occurred when the trial court granted the Commonwealth's challenge for cause of those jurors who indicated during jury selection that their ability to be fair and impartial would be affected - in a case where the

defendant was charged with homicide - if the Commonwealth failed to produce the victim's body, and that they would be unable to convict under such circumstances. Moreover, the PCRA standard of prejudice is not met where trial counsel failed to raise this issue on direct appeal and fails to show that those jurors who were selected in place of those jurors who were stricken for cause were somehow not fair and impartial.

8. Generally, where matters of strategy and tactics are concerned, counsel's assistance is deemed constitutionally effective if he chose a particular course that has some reasonable basis designed to effectuate his client's interests. Here, trial counsel's decision not to call a defense expert - once the opinion of the Commonwealth's expert which the defense expert had been employed to rebut was precluded and stricken by the court - for fear that the defense expert's testimony might open the door to the Commonwealth recalling its expert was not so unreasonable that no competent lawyer would have chosen it.

9. Derivative claims of ineffective assistance of counsel are analytically distinct from defaulted direct review claims that were or could have been raised on direct appeal. Because Sixth Amendment claims challenging counsel's conduct at trial are analytically distinct from foregone claims of trial court error from which they frequently derive, and must be analyzed as such, Sixth Amendment claims of trial counsel's ineffectiveness constitute a separate issue for review under the PCRA and are not foreclosed by a denial on direct review of alleged trial court error.

10. Defense counsel's failure to request a mistrial was not ineffective where defense counsel had a reasonable basis to believe the trial was going well for Defendant and that reasonable doubt had been created, and where the record of the evidence presented at trial does not establish that Defendant was deprived of a fair and impartial trial.

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
vs.	:	No. 539 CR 2009
	:	
ERNEST T. FREEBY,	:	
Defendant	:	

Gary F. Dobias, Esquire — Counsel for Commonwealth
District Attorney

Brian J. Collins, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – June 23, 2017

On January 30, 2012, the Defendant, Ernest T. Freeby, was convicted of first degree murder[1] in the death of his wife, Edwina Onyango, and tampering with physical evidence[2] as part of a cover-up to conceal and remove evidence of his wife's death and his involvement. These convictions were upheld on direct appeal. Defendant now seeks to overturn his convictions through a collateral challenge pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 5941-5946, in which Defendant claims his trial counsel was ineffective.

PROCEDURAL AND FACTUAL BACKGROUND

[1] 18 Pa.C.S.A. § 2501(a).
[2] 18 Pa.C.S.A. § 4910(1).

Edwina's body was never discovered and there were no eyewitnesses to the crime. In consequence, the evidence used to convict Defendant was entirely circumstantial.

The marriage between Defendant and Edwina on March 20, 2001, was a marriage of convenience: Defendant wanted a wife to increase his chance of gaining custody of his two children from a previous relationship, and Edwina, a native of Kenya whose legal status in this country was in question, hoped to increase her chance of becoming a United States citizen by marrying Defendant. From this shaky beginning, it was perhaps not unexpected that the two separated sometime in 2003. Edwina remained in the Allentown area where she and Defendant first lived after their marriage, and Defendant moved to Carbon County and set up residence at 207 West Bertsch Street, Lansford, Pennsylvania.

After Defendant and Edwina separated, Defendant began a romantic relationship with Julianne Sneary with whom he fathered three children. Although Defendant claimed this was an open relationship of which Edwina was aware, the Commonwealth's evidence was that Edwina only became aware of the relationship and the fact that Defendant and Julianne Sneary had children together shortly before her disappearance in December of 2007. Before then, Defendant attempted to keep Ms. Sneary's presence hidden from Edwina – Ms. Sneary would leave Defendant's home on

Sundays before Edwina arrived to routinely visit Defendant - and Defendant had others tell Edwina the children Defendant had with Ms. Sneary were Defendant's sister's children.

In contrast to Edwina, Ms. Sneary knew of Edwina's existence and that Defendant and Edwina were married; in fact, this was the reason Defendant gave Ms. Sneary for why he was unable to marry her. Defendant disclosed to Ms. Sneary the nature of his marriage to Edwina, told Ms. Sneary that he could not get divorced because he had made a promise to Edwina to stay married until she obtained United States citizenship, discussed with Ms. Sneary the status of deportation proceedings that had been brought against Edwina and the parallel proceedings for Edwina to gain United States citizenship, and repeatedly promised Ms. Sneary that the end was in sight and that as soon as Edwina became a United States citizen, he would obtain a divorce and could marry Ms. Sneary.

As this situation dragged on, Ms. Sneary's parents increasingly disapproved of their daughter's relationship with Defendant, of her having children with a married man, and urged Ms. Sneary to leave Defendant. At one point when Defendant and Ms. Sneary were discussing their wedding plans, and the impossibility of this occurring as long as Defendant was married to Edwina, and the pressure Ms. Sneary's parents were placing on her to leave Defendant, Defendant told Ms. Sneary that the only

way he could rid himself of Edwina was to kill her. This conversation occurred approximately one year prior to Edwina's disappearance.

Edwina was last seen or heard from by her blood relatives on Sunday morning, December 9, 2007, at approximately 11:00 A.M. Edwina told her sister, Phoebe Onyango, and a family friend, Ester Ouma, that she was going to visit Defendant at his home in Lansford and would be returning home later in the day. This never happened.

Prior to her December 9, 2007, disappearance, Edwina had maintained regular, almost daily contact, either in person or by telephone, with family and friends. When this ceased, Edwina's family reported her missing to the police. As part of a police investigation into Edwina's whereabouts, Defendant told the police that Edwina had been to his home with a friend on December 9, 2007, at around noon, and stayed approximately two to two and a half hours. Defendant told the police that Edwina no longer wanted her 2000 Dodge Neon and had given it to him to keep, that Edwina left his home in her friend's vehicle. In Edwina's car were numerous personal items which would normally be removed by the owner before transferring ownership of a car. Defendant also denied that he had ever used Edwina's credit card, yet the police later learned that Edwina's credit card had

been used eight times after her disappearance, all eight times by Defendant.

While executing a search warrant at Defendant's residence on January 17, 2008, the police discovered human blood on steps leading to the basement, on the basement floor, on the door leading to the coal bin, and on several areas inside the coal bin. A large area of blood was discovered on the dirt floor of the coal bin and hair was found nearby embedded in blood on the concrete wall. Subsequent DNA testing disclosed that the blood found in three areas of the basement was Edwina's and that the hair matched Edwina's maternal bloodline.

During their investigation of Defendant's home on January 17, 2008, the police noticed that the steps leading to the basement had recently been painted. When this paint was stripped, the police found additional blood underneath the paint. Defendant admitted to painting the steps. Additionally, after the police discovered blood on the dirt floor of the coal bin, Defendant removed the dirt to a depth of approximately eight to ten inches and also removed a 2 x 4 wooden support beam that had previously been found to contain blood.

At trial, the Commonwealth's experts testified that the blood pattern on the floor of the coal bin was created by a large quantity or pooling of blood and that this was consistent with a substantial or significant wound. The Commonwealth's

experts further opined that the blood pattern in the coal bin floor was consistent with a stationary body bleeding while at that location, and that the hair embedded in blood on the concrete wall was consistent with the head of this body resting against the wall. The Commonwealth's experts further testified that the scene in Defendant's basement was indicative of injury resulting from trauma or violence, rather than accidental means. (N.T. 1/23/12 (Trial), pp.148-50; N.T. 1/24/12 (Trial), pp.140-43).

At the conclusion of the evidence, and following jury instructions, Defendant was convicted of murder in the first degree and tampering with physical evidence. He was sentenced to life imprisonment on the charge of murder and a consecutive term of two years' probation on the charge of tampering with physical evidence. Post-trial motions were filed by the Defendant on May 24, 2012, and denied by the court on October 22, 2012.

On direct appeal to the Pennsylvania Superior Court, Defendant's judgment of sentence was affirmed by that Court on December 4, 2013. Re-argument was denied on February 6, 2014. On July 9, 2014, the Pennsylvania Supreme Court denied Defendant's Petition for Allowance of Appeal.

On April 2, 2015, Defendant filed a *pro se* Post-Conviction Collateral Relief Act ("PCRA") Petition. As this was

Defendant's first PCRA petition, counsel was appointed to represent Defendant and an amended counseled Petition was filed on September 25, 2015. A hearing on the Amended Petition was held on June 23, 2016. Defendant's brief in support of the Petition was filed on November 28, 2016, and the Commonwealth's brief in opposition was filed on January 6, 2017. Defendant raises four issues, all involving claims of ineffectiveness of trial counsel, which we discuss below. At trial, Defendant was represented by attorneys George T. Dydynsky, Esquire and Paul J. Levy, Esquire.

DISCUSSION

Prefatory to examining Defendant's claims of counsels' ineffectiveness, it's important that we review the constitutional standard for evaluating on collateral review whether counsel has been ineffective and to contrast this with the harmless error standard applied in evaluating trial court error on direct appeal. Under the PCRA to establish trial counsel's ineffectiveness, a petitioner must demonstrate:

> (1) the underlying claim has arguable merit; (2) counsel had no reasonable basis for the course of action or inaction chosen; and (3) counsel's action or inaction prejudiced the petitioner. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973 (1987).

Commonwealth v. Spotz, 84 A.3d 294, 303 n.3 (Pa. 2014). Furthermore,

> a PCRA petitioner will be granted relief only when he proves, by a preponderance of the evidence, that his conviction or sentence resulted from the ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. 42 Pa.C.S. § 9543(a)(2)(ii). Counsel is presumed effective, and to rebut that presumption, the PCRA petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him.

Spotz, 84 A.3d at 311-12 (internal quotation marks and other punctuation omitted). To this must be added that

> [g]enerally, counsel's assistance is deemed constitutionally effective if he chose a particular course of conduct that had some reasonable basis designed to effectuate his client's interests. Where matters of strategy and tactics are concerned, a finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued. To demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability that is sufficient to undermine confidence in the outcome of the proceeding.

Spotz, 84 A.3d at 311-12; Commonwealth v. Dunbar, 470 A.2d 74, 77 (Pa. 1983) ("Before a claim of ineffectiveness can be sustained, it must be determined that, in light of all the alternatives available to counsel, the strategy actually employed was so unreasonable that no competent lawyer would have

chosen it.").[3] "Counsel's assistance is *deemed constitutionally effective* [if the Court] determines that the defendant has not established any one of the prongs of the ineffectiveness test." Commonwealth v. Rolan, 964 A.2d 398, 406 (Pa.Super. 2008) (citations and internal quotation marks omitted) (emphasis in original).

In contrasting the standard for evaluating counsel's ineffectiveness in the context of a post-conviction collateral proceeding with a preserved claim of trial court error on direct appeal, the Pennsylvania Supreme Court in Spotz stated:

> As a general and practical matter, it is more difficult for a defendant to prevail on a claim litigated through the lens of counsel ineffectiveness, rather than as a preserved claim of trial court error. *Commonwealth v. Gribble*, 580 Pa. 647, 863 A.2d 455, 472 (2004). This Court has addressed the difference as follows:
>
> > [A] defendant [raising a claim of ineffective assistance of counsel] is required to show

[3] Under the Strickland/Pierce test for ineffectiveness, actual prejudice must be demonstrated by the petitioner; it is not presumed. To prove prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

In United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2nd 657 (1984), decided the same day as Strickland, the United States Supreme Court held that there are certain circumstances "that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," prejudice is presumed and is not required to be proven. 466 U.S. at 658, 104 S.Ct. at 2046. In the context of ineffective assistance of counsel, *per se* ineffectiveness has been found to exist, thus removing the Defendant's burden to prove actual prejudice, where there was an actual or constructive denial of counsel, the state interfered with counsel's assistance, or counsel had an actual conflict of interest. Smith v. Robbins, 528 U.S. 259, 287, 120 S.Ct. 746, 765, 145 L.Ed.2nd 756 (2000); *see also* Commonwealth v. Reaves, 923 A.2d 1119, 1128 (Pa. 2007). Because Defendant's claim of ineffectiveness does not fall into one of these three categories, Defendant is required to prove actual prejudice to prevail.

> actual prejudice; that is, that counsel's ineffectiveness was of such magnitude that it 'could have reasonably had an adverse effect on the outcome of the proceedings.' *Pierce*, 515 Pa. at 162, 527 A.2d at 977. This standard is different from the harmless error analysis that is typically applied when determining whether the trial court erred in taking or failing to take certain action. The harmless error standard, as set forth by this Court in *Commonwealth v. Story*, 476 Pa. [391], 409, 383 A.2d [155], 164 [(1978)] (citations omitted), states that "[w]henever there is a 'reasonable possibility' that an error 'might have contributed to the conviction,' the error is not harmless." This standard, which places the burden on the Commonwealth to show that the error did not contribute to the verdict beyond a reasonable doubt, is a lesser standard than the *Pierce* prejudice standard, which requires the defendant to show that counsel's conduct had an actual adverse effect on the outcome of the proceedings. This distinction appropriately arises from the difference between a direct attack on error occurring at trial and a collateral attack on the stewardship of counsel. In a collateral attack, we first presume that counsel is effective, and that not every error by counsel can or will result in a constitutional violation of a defendant's Sixth Amendment right to counsel. *Pierce, supra*.

Spotz, 84 A.3d at 315.

Earlier, in Commonwealth v. Howard, 645 A.2d 1300 (Pa. 1994), the Pennsylvania Supreme Court stated the following with regard to the different standards and burdens in a collateral challenge premised on counsel's ineffectiveness versus a "harmless error" analysis on direct appeal:

> As noted above, this Court has held under *Pierce* and its progeny that a defendant is required to show actual prejudice; that is, that counsel's

> ineffectiveness was of such magnitude that it "could have reasonably had an adverse effect on the outcome of the proceedings." *Pierce*, 515 Pa. at 162, 527 A.2d at 977. This standard is different from the harmless error analysis that is typically applied when determining whether the trial court erred in taking or failing to take certain action. The harmless error standard, as set forth by this Court in Commonwealth v. Story, 476 Pa. at 409, 383 A.2d at 164 (citations omitted), states that "[w]henever there is a 'reasonable possibility' that an error 'might have contributed to the conviction,' the error is not harmless." This standard, which places the burden on the Commonwealth to show that the error did not contribute to the verdict beyond a reasonable doubt, is a lesser standard than the *Pierce* prejudice standard, which requires the defendant to show that counsel's conduct had an actual adverse effect on the outcome of the proceedings. This distinction appropriately arises from the difference between a direct attack on error occurring at trial and a collateral attack on the stewardship of counsel. In a collateral attack, we first presume that counsel is effective, and that not every error by counsel can or will result in a constitutional violation of a defendant's Sixth Amendment right to counsel. *Pierce*, *supra*.

Id. at 1307-1308. We now address Defendant's first claim of ineffectiveness of counsel.

(1) The Selection of Alice Nyer as a Juror

During *voir dire* the following exchange took place between Defendant's trial counsel, George T. Dydynsky, Esquire, and the jury:

> MR. DYDYNSKY: The law, our Constitution, our Bill of Rights do not require him to take the stand in his defense. . . . Now, that being said, should Mr. Freeby not take the stand, would any of you hold that against him? Or would you still

> give him the presumption of innocence and still look at the evidence as we present it and as the Commonwealth presents it and make your decision on the evidence that is before you and still believe in that presumption of innocence of Mr. Freeby?
>
> Now, that being said, does anyone here have a problem with a defendant not testifying on his own defense? Anyone have a problem with the defendant not testifying on his own behalf?
>
> JUROR 17: Pat Fauzio, number 17.
>
> MR. DYDYNSKY: Now, if the Judge instructed you, just as I did -- well, I didn't instruct you. I told you. I told you the background information. The defendant is presumed innocent. If the Judge instructs you that he does not need to get up and take an oath and testify, would you still feel that you prefer he testify?
>
> JUROR 5: Alicia Nyer, five.

(N.T. 1/9/12 (Trial), pp.55-57).

Based on this exchange, Defendant claims trial counsel was ineffective for failing to challenge for cause Ms. Nyer's ability to be a fair, impartial and unprejudiced juror or, in the alternative, for failing to exercise a peremptory challenge to have Ms. Nyer stricken as a member of the jury. Ultimately, Ms. Nyer was selected and sat as one of the twelve principal jurors at Defendant's trial. The Defendant did not take the stand in his own defense at trial.

In Commonwealth v. England, 375 A.2d 1292 (Pa. 1977), the Pennsylvania Supreme Court stated:

> A prospective juror's personal views are of no moment absent a showing that these opinions are so deeply embedded as to render that person incapable of accepting and applying the law as given by the court. So long as the juror is able to, intends to, and eventually does, adhere to the instructions on the law as propounded by the trial court, he or she is capable of performing the juror's function. In this regard, it may safely be inferred that a juror will not violate his or her oath in the absence of any expression or other indications to the contrary.

Id. at 1296. Contrary to Defendant's contention, Ms. Nyer did not express a fixed opinion of being unable to follow the court's instructions or that she would hold it against Defendant if he did not testify on his own behalf.

On its face, it is unclear what Ms. Nyer believed. During *voir dire*, the Jury was instructed that if a question was asked by counsel which identified an issue which required a response, they should raise their hand, state their name, and identify their jury number. (N.T. 1/9/12 (Trial), p.2). This was done by Ms. Nyer, however, no follow up was conducted by counsel and consequently, it is speculative at best to know exactly what Ms. Nyer intended to say if counsel had followed up. At most, Ms. Nyer's responding to the question actually asked indicates only the personal view of what most people asked this question would likely and honestly say, that they would "prefer" to hear from the Defendant. *See* Commonwealth v. England, 375 A.2d at 1296 ("A prospective juror's personal views are of no moment. . .

."). Ms. Nyer was not asked and she did not state that if she were expressly instructed by the court, as she was, that Defendant was not required to testify and that if he chose not to testify this could not be held against him, that she would not follow the court's instructions. (N.T. 1/30/12 (Trial), pp.178-79).[4]

Significantly, Defendant has failed to establish by a reasonable probability that, but for trial counsel's alleged failure to challenge for cause or to exercise a peremptory challenge and having Ms. Nyer stricken from the jury, that the result of the proceedings would have been different. The jury is presumed to follow the court's instructions and there is no reason to believe Ms. Nyer, as well as any of the other jurors, did not do so in this case. Commonwealth v. Johnson, 668 A.2d 97, 105 (Pa. 1995).

(2) Trial Counsel's Failure To Appeal The Court's Grant Of The Commonwealth's Challenge For Cause Of Those Jurors

[4] On this point, the jury was instructed as follows:

> In this case, the Defendant, Ernest Troy Freeby, did not take the stand to testify. It is entirely up to the defendant in a criminal trial to choose whether or not to testify. A criminal defendant has an absolute right, founded on the Constitution, to remain silent. His plea of not guilty is a denial of the charges against him. You must not draw any inference of guilt from the fact that the Defendant did not testify.
>
> The Commonwealth has to prove the Defendant's guilt beyond a reasonable doubt without any aid from the fact that the Defendant did not testify. This is not an arbitrary rule, but it is one that is well founded in logic and in our experience in the administration of justice.

(N.T. 1/30/12 (Trial), pp.178-79).

Who Stated That Their Ability To Be Fair And Impartial Would Be "Affected" By The Commonwealth's Inability To Produce A Body

During *voir dire*, the District Attorney asked the prospective jurors the following question:

> Members of the jury, I believe his Honor will later on instruct you that it is not necessary for the Commonwealth to produce the victim's body in order to convict someone of homicide. Are there any of you who do not agree with that or have a problem with that concept?

(N.T. 1/9/12 (Trial), p.29).[5] With respect to those jurors who responded in the affirmative, the District Attorney asked whether the failure of the Commonwealth to produce the victim's body would affect their ability to be fair and impartial and whether they would be able to convict the Defendant if the Commonwealth could not produce the victim's body. (N.T. 1/9/12 (Trial), pp.29-30). As to those jurors who indicated their ability to be fair and impartial would be affected by the Commonwealth's failure to produce the victim's body and that they would be unable to convict under such circumstances, the court granted the Commonwealth's request to strike for cause. (N.T. 1/9/12 (Trial), pp.65-71).[6]

[5] In fact, that instruction was given. (N.T. 1/30/12 (Trial), p.189).

[6] In Defendant's counseled Motion for Post-Conviction Collateral Relief the jurors complained of were juror numbers 10, 17, 41, 57, 62 and 78). At the PCRA hearing, counsel for the Defendant conceded that of those jurors identified in Defendant's PCRA Motion, several would have been stricken for cause for other reasons. (N.T. 6/23/16 (PCRA Hearing), pp.125-129).

As a matter of law, the Commonwealth is not required to produce a body to sustain a conviction in a homicide case. Commonwealth v. Rivera, 828 A.2d 1094, 1104 (Pa.Super. 2003), *appeal denied*, 842 A.2d 406 (Pa. 2004). Consequently, as to those jurors who stated their ability to be fair and impartial would be affected if the Commonwealth was unable to produce a body, the court acted appropriately in granting the Commonwealth's challenge for cause. *See* Commonwealth v. Sushinskie, 89 A. 564, 565 (Pa. 1913) (holding that when faced with a challenge of a juror for cause, the trial judge has "wide discretion" and his judgment in passing upon such challenge is to be given "much weight").

Further, Defendant has failed to show that by granting the Commonwealth's challenge for cause, the Defendant was somehow denied a fair and impartial jury. Stated differently, Defendant has failed to show that those jurors who were selected in place of those jurors who were stricken for cause were somehow not fair and impartial. In sum, Defendant has failed to establish that he was prejudiced by the jurors who were selected in place of those who were stricken, the third prong of the Pierce test.

(3) Trial Counsel's Failure To Call Dr. Cyril Wecht As An Expert Witness

As part of its case-in-chief, the Commonwealth presented the testimony of Dr. Isidore Mihalakis, an expert in the field

of forensic pathology. Dr. Mihalakis testified that the amount of Edwina's blood found in Defendant's basement was consistent with a significant injury, one requiring medical attention, and that the amount and location of this blood was indicative of trauma or violence. Defendant's objection to Dr. Mihalakis testifying that the crime scene was consistent with a homicide was sustained, and when Dr. Mihalakis nevertheless sought to interject such testimony in his response to another question, the testimony was stricken and the jury later instructed to disregard Dr. Mihalakis's testimony on this point. (N.T. 1/23/12 (Trial), pp.152-53).

To counter Dr. Mihalakis's testimony, the defense had arranged for its own forensic pathologist, Dr. Cyril Wecht, to be called as a defense witness. After Dr. Mihalakis was precluded from opining that the crime scene was consistent with a homicide, as a tactical matter, defense counsel elected not to call Dr. Wecht. As Attorney Dydynsky testified at the post-conviction hearing, the defense believed they had been successful in keeping a critical piece of evidence from being considered by the jury and were concerned that if Dr. Wecht were called as a defense witness, this might open the door to Dr. Mihalakis being recalled on rebuttal and risk having his opinions which were previously excluded admitted. (N.T. 6/23/16 (PCRA Hearing), pp.117-18, 186-87, 207).

Defendant's claim that his trial counsel was ineffective in failing to call Dr. Wecht in his defense directly questions the wisdom of strategic or tactical decisions made by his trial counsel. "Generally, where matters of strategy and tactics are concerned, counsel's assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis designed to effectuate his client's interests." Commonwealth v. Miller, 819 A.2d 504, 517 (Pa. 2002) (internal quotation marks omitted). With respect to the calling of expert witnesses in a criminal matter, the Pennsylvania Supreme Court in Commonwealth v. Chmiel, 30 A.3d 1111 (Pa. 2011) stated:

> The mere failure to obtain an expert rebuttal witness is not ineffectiveness. Appellant must demonstrate that an expert witness was available who would have offered testimony designed to advance appellant's cause. 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. Additionally, trial counsel will not be deemed ineffective for failing to call a medical, forensic, or scientific expert merely to critically evaluate expert testimony that was presented by the prosecution.

Id. at 1143. (internal quotations and citations omitted). Here, in addition to successfully challenging Dr. Mihalakis's opinion that the crime scene in Defendant's basement was consistent with a homicide, defense counsel raised questions regarding the quantity of blood upon which Dr. Mihalakis premised his opinion

that the amount of blood found was consistent with a significant injury having occurred.

When asked to estimate the amount of blood upon which he based his opinion, Dr. Mihalakis conceded he couldn't. Trooper Phillip Barletto, who testified on the Commonwealth's behalf before Dr. Mihalakis, also acknowledged on cross-examination that it was not possible to quantify the amount of blood spilled given the number of variables, including temperature, soil composition and the clothing worn by the victim. (N.T. 1/16/12 (Trial), p.177). When Dr. Mihalakis was asked whether his inability to quantify the actual amount of blood involved changed his opinion, he said it didn't, explaining the blood was distributed over an area of a foot and a half in length and six to eight inches wide. (N.T. 1/23/12 (Trial), pp.154-55). In closing argument, defense counsel demonstrated that even a small quantity of fluid could be dispersed over a similar area. (N.T. 1/30/12 (Trial), pp.66-67).

Dr. Wecht was retained by the defense in this case to refute the unexpressed but implied conclusion and opinion contained in Dr. Mihalakis's expert report of February 18, 2008, that the crime scene was consistent with a homicide. (N.T.

6/23/16 (PCRA Hearing), pp.114, 204-205).[7] Once Dr. Mihalakis was barred from rendering this opinion, the primary reason defense counsel had employed Dr. Wecht as a witness no longer existed and the threat of rebuttal testimony from Dr. Mihalakis undermining this victory if Dr. Wecht testified was a strategic and tactical consideration trial counsel was right to consider. *See* Commonwealth v. Begley, 780 A.2d 605, 635 (Pa. 2001) (finding that trial counsel may legitimately make tactical decisions not to question witnesses about alleged inconsistencies so as not to enable the witnesses to clarify their testimony and develop plausible explanations). Following Dr. Mihalakis's testimony, defense counsel believed they had dodged a bullet and had created reasonable doubt about Defendant's guilt by highlighting a major weakness in the Commonwealth's case - over how much blood was in fact lost and whether this loss was sufficient to be life-threatening - which would be jeopardized if Dr. Wecht were called to testify. (N.T. 6/23/16 (PCRA Hearing), p.218).

[7] To the extent Dr. Wecht was critical of the legitimacy of Dr. Mihalakis's conclusions and their reliance on what Dr. Wecht termed "interpersonal factors," this aspect of Dr. Wecht's report was a critical evaluation of an expert's opinion of the type found wanting in Chmiel, 30 A.3d at 1143, and was of a type readily understandable by a layperson and able to be argued directly by counsel before the jury. Moreover, as noted in our Memorandum Opinion of November 20, 2012, because the "interpersonal factors" to which Dr. Mihalakis referred in his report of February 18, 2008, in opining that Edwina was dead - factors such as her unexplained disappearance, failure to contact friends and family, and failure to return to work - were all factors which the jury could interpret on its own, without the need for expert testimony, we declined to allow Dr. Mihalakis to make this conclusion for the jury.

In evaluating defense counsel's strategy, it is also important to understand that during the trial defense counsel was in contact with Dr. Wecht and reviewed with him the evidence presented and trial strategy. (N.T. 6/23/16 (PCRA Hearing), pp.104-105). In particular, defense counsel advised Dr. Wecht that the court had precluded Dr. Mihalakis from testifying that the crime scene was consistent with a homicide. (N.T. 6/23/16 (PCRA Hearing), pp.116, 183-84). Both defense counsel and Dr. Wecht, who has a law degree and is admitted to the Pennsylvania bar, agreed that after the court ruling and the limitations of Dr. Mihalakis's testimony, it would not be necessary for Dr. Wecht to testify. (N.T. 6/23/16 (PCRA Hearing), pp.116, 207).

The reasonableness of counsel's representation must be viewed from counsel's perspective at the time of trial and evaluated in the context of the entire record and counsel's overall strategy to determine whether counsel lacked a reasonable basis for his or her actions or inactions; second-guessing counsel in hindsight and comparing what counsel did with what he or she might have been done is not the standard. Commonwealth v. Puksar, 951 A.2d 267, 277 (Pa. 2008); Commonwealth v. Saxton, 532 A.2d 352 (Pa. 1987). Given the reasons defense counsel provided at the PCRA hearing and the evidence which supported this rationale, we do not find counsel's decision not to call Dr. Wecht to be "so unreasonable

that no competent lawyer would have chosen it." Commonwealth v. Dunbar, 470 A.2d at 77.

(4) Failure To Request A Mistrial Following Dr. Mihalakis's Testimony That The Crime Scene Was Consistent With A Homicide

At trial, Dr. Mihalakis was asked on direct examination whether the scene in Defendant's basement was "consistent with or indicative of serious bodily injury or homicide." (N.T. 1/23/12 (Trial), p.150). The court sustained Defendant's objection to this question on the basis that any opinion about whether or not the crime scene was consistent with the occurrence of a homicide was beyond the scope of Dr. Mihalakis's report. (N.T. 1/23/12 (Trial), p.151-152). In response to the Commonwealth's next question, whether the scene was indicative of serious bodily injury, Dr. Mihalakis responded: "Yes, I believe it is indicative of significant bodily injury or homicide." (N.T. 1/23/12 (Trial), pp.152-53). Defendant's objection to this response was sustained, the answer was stricken, and the jury was instructed to disregard the testimony. (N.T. 1/23/12 (Trial), pp.152-53). Defendant did not request a mistrial.

On direct appeal Defendant claimed the court erred in not declaring a mistrial *sua sponte* as a matter of "manifest necessity." The Superior Court affirmed noting that the utterance of the remark did not deprive Defendant of a fair and

impartial trial where the record demonstrated overwhelming evidence of a homicide. Commonwealth v. Freeby, 3294 EDA 2012, Memorandum Opinion 12/4/13 at p.6. Defendant now claims that his counsel was ineffective in failing to move for a mistrial.

"Derivative claims of ineffective assistance of counsel are analytically distinct from the defaulted direct review claims that were (or could have been) raised on direct appeal." Commonwealth v. Reaves, 923 A.2d 1119, 1130 (Pa. 2007) (citing Commonwealth v. Collins, 888 A.2d 564, 572-73 (Pa. 2005)). Such claims

> deriving from an underlying claim of error that was litigated on direct appeal cannot automatically be dismissed as "previously litigated." Rather, Sixth Amendment claims challenging counsel's conduct at trial are analytically distinct from the foregone claim of trial court error from which they often derive, and must be analyzed as such. *Commonwealth v. Carson*, 590 Pa. 501, 913 A.2d 220, 234 (2006) ("This Court recognized in *Collins* that while an ineffectiveness claim may fail for the same reasons that the underlying claim faltered on direct review, the Sixth Amendment basis for ineffectiveness claims technically creates a separate issue for review under the PCRA.").

Commonwealth v. Puksar, 951 A.2d at 274. Therefore, although Defendant is now seeking collateral review of what in effect is essentially the same grounds raised and rejected on direct appeal, he is not foreclosed from doing so under the guise of ineffective assistance of counsel. To succeed, however, under the standard set forth in Strickland and Pierce Defendant must

plead and prove that his "counsel's performance was deficient" and that this "deficient performance prejudiced the defense." Strickland, 466 U.S. at 687, 104 S.Ct. at 2064; *see also* Pierce, 527 A.2d at 975.

As to the reasonableness of counsel's performance, a significant portion of the Commonwealth's case had been concluded by the time Dr. Mihalakis testified. Trial counsel believed that the case was going well for them and that issues raised during their cross-examination of Dr. Mihalakis created a reasonable doubt in the mind of the jury. (N.T. 6/23/16 (PCRA Hearing), pp.177-78, 218). These reasons were not unfounded as discussed in our review of counsels' decision not to call Dr. Wecht as a witness at trial.

As to whether Defendant was prejudiced by trial counsels' failure to move for a mistrial, the issue must be decided in light of what actually occurred at trial, not in light of what might have occurred had Dr. Wecht testified. The standard governing a trial court's refusal to grant a request for a mistrial was summarized by the Pennsylvania Superior Court in Commonwealth v. Bracey, 831 A.2d 678 (Pa.Super. 2003), *appeal denied*, 844 A.2d 551 (Pa. 2004), as follows:

> The decision to declare a mistrial is within the sound discretion of the court and will not be reversed absent a "flagrant abuse of discretion." *Commonwealth v. Cottam*, 420 Pa.Super. 311, 616 A.2d 988, 997 (1992); *Commonwealth v. Gonzales*,

> 415 Pa.Super. 564, 570, 609 A.2d 1368, 1370-71 (1992). A mistrial is an "extreme remedy ... [that] ... must be granted only when an incident is of such a nature that its unavoidable effect is to deprive defendant of a fair trial." *Commonwealth v. Vazquez*, 421 Pa.Super. 184, 617 A.2d 786, 787-88 (1992) (citing *Commonwealth v. Chestnut*, 511 Pa. 169, 512 A.2d 603 (1986), and *Commonwealth v. Brinkley*, 505 Pa. 442, 480 A.2d 980 (1984)). A trial court may remove taint caused by improper testimony through curative instructions. *Commonwealth v. Savage*, 529 Pa. 108, 602 A.2d 309, 312-13; Commonwealth v. Richardson, 496 Pa. 521, 437 A.2d 1162 (1981). Courts must consider all surrounding circumstances before finding that curative instructions were insufficient and the extreme remedy of a mistrial is required. *Richardson*, 496 Pa. at 526-527, 437 A.2d at 1165. The circumstances which the court must consider include whether the improper remark was intentionally elicited by the Commonwealth, whether the answer was responsive to the question posed, whether the Commonwealth exploited the reference, and whether the curative instruction was appropriate.

Id. at 682-83 (citing Commonwealth v. Stilley, 689 A.2d 242, 250 (Pa.Super. 1997)), *appeal denied*, 844 A.2d 551 (Pa. 2004). As a practical matter, whether a court errs in refusing to grant a mistrial is similar to whether defense counsel errs in failing to request a mistrial. The question to be asked in each instance is whether it can reasonably be said that the error deprived the defendant of a fair and impartial trial.

Here, Dr. Mihalakis's remark was not ignored or passed over by the court or the parties. Immediately when it occurred, defense counsel objected and the testimony was stricken from the

record. Further, both in preliminary instructions before any evidence or testimony was presented and in closing instructions, the jury was instructed to disregard any testimony that was stricken from the record and that it should be treated as though they had never heard it and that they could not base any of their findings upon it. (N.T. 1/10/12 (Trial), p.6; N.T. 1/30/12 (Trial), p.163).

Moreover, as noted by the Superior Court on direct appeal and discussed by this court in its Memorandum Opinion of November 20, 2012, denying Defendant's Post-Sentence Motion, in which we more fully detailed all of the evidence supporting Defendant's convictions, the evidence against Defendant that a homicide had occurred was overwhelming and Defendant was not deprived of a fair and impartial trial.

CONCLUSION

For the reasons discussed, Defendant has failed to overcome the presumption of counsel's effectiveness and Defendant has failed to prove, by a preponderance of the evidence, that his convictions resulted from the ineffective assistance of his trial counsel which, in the circumstances of this case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. Having so concluded, Defendant's Petition for Post-Conviction Collateral Relief, as amended, will be denied.

BY THE COURT:

_____
P.J.

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
vs.	:	No. 539 CR 2009
	:	
ERNEST T. FREEBY,	:	
Defendant	:	

Gary F. Dobias, Esquire — Counsel for Commonwealth
District Attorney
Brian J. Collins, Esquire — Counsel for Defendant

ORDER OF COURT

AND NOW, this 23rd day of June, 2017, upon consideration of Defendant's, Ernest T. Freeby's, Petition for Post-Conviction Collateral Relief, as amended, filed on September 25, 2015, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that the Petition is hereby denied.

BY THE COURT:

_____
P.J.

Notice to Petitioner

1. You have the right to appeal to the Pennsylvania Superior Court from this Order dismissing and denying your PCRA Petition and such appeal must be filed within 30 days from the entry of this order, Pa.R.A.P. 108 & 903.
2. You have the right to assistance of legal counsel in the preparation of the appeal.
3. You have the right to proceed in forma pauperis and to have an attorney appointed to assist you in the preparation of the appeal, if you are indigent. Brian J. Collins, Esquire is your current counsel. However, you may also "proceed pro se, or by privately retained counsel, or not at all." Commonwealth v. Turner, 544 A.2d 927, 929 (Pa. 1988).