NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JAMAAR RICHARDSON.	:	
	:	No. 465 EDA 2017
Appellant	:	

Appeal from the PCRA Order January 13, 2017
In the Court of Common Pleas of Philadelphia County Criminal Division at No(s): CP-51-CR-0407443-2004

BEFORE: STABILE, J., DUBOW, J., and FORD ELLIOTT, P.J.E.

MEMORANDUM BY DUBOW, J.: **FILED JUNE 15, 2018**

Appellant, Jamaar Richardson, appeals *pro se* from the Order entered in the Philadelphia County Court of Common Pleas dismissing his Petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546. After careful review, we adopt the PCRA court's June 28, 2017 Opinion as our own and affirm the denial of relief.

The PCRA court set forth the relevant factual and tortured procedural history of this case in its June 28, 2017 Opinion and we adopt its recitation for purposes of this appeal. ***See*** PCRA Ct. Op., 6/28/17, at 1-8. In summary, a jury convicted Appellant of Second-Degree Murder, two counts of Robbery, and two counts of Criminal Conspiracy[1] in connection with the planned robbery

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[1] 18 Pa.C.S. § 2502(b); 18 Pa.C.S. 3701(a)(1); 18 Pa.C.S. § 903(a), respectively.

of a Rite Aid in Philadelphia that resulted in the shooting death of the store's manager, Michael Richardson, on January 19, 2003. On September 9, 2004, the court sentenced Appellant to life in prison for the Second-Degree Murder conviction, and consecutive terms of 5 to 20 years' imprisonment for his remaining convictions.[2] This Court affirmed on direct appeal, and our Supreme Court denied allowance of appeal on April 25, 2012.[3] ***Commonwealth v. Richardson***, 911 A.2d 185 (Pa. Super. 2006)) (unpublished Memorandum), *appeal denied*, 44 A.3d 1161 (Pa. 2012).

On August 16, 2012, Appellant filed a *pro se* PCRA Petition and an amended *pro se* Petition on June 24, 2013. After Appellant filed a Motion for the appointment of counsel on March 31, 2015, the Court appointed counsel.[4] On February 11, 2016, counsel filed a motion to withdraw and a "no merit letter" pursuant to ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). Appellant forwarded a letter to PCRA counsel in response to the ***Finley*** letter. The court filed a Pa.R.Crim.P. 907 Notice on March 10, 2016, but after reviewing the letter Appellant had sent to counsel, the court directed counsel to review the notes of testimony from the suppression

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[2] Robbery of the victim merged with the charge of Second-Degree Murder.

[3] This six-year delay in the Pennsylvania Supreme Court's denial of Appellant's Petition for Allowance of Appeal was due to Appellant's twice obtaining the right to file a petition for allowance of appeal *nunc pro tunc* after filing PCRA Petitions.

[4] The trial court noted in its Pa.R.A.P. 1925(a) Opinion that it did not receive Appellant's PCRA Petitions from the Post-Trial Unit of the First Judicial District until May 8, 2015. ***See*** Trial Ct. Op., dated June 28, 2017, at 2 n. 10.

hearing and to file either an amended PCRA Petition or a supplemental ***Finley*** letter. PCRA counsel filed an amended ***Finley*** letter and the court subsequently issued a supplemental Rule 907 Notice and granted Appellant an extension to August 15, 2016, to respond. Appellant responded to the court's supplemental Rule 907 Notice on August 10, 2016, and the court directed counsel to respond to Appellant's filing. Counsel then filed a second amended ***Finley*** letter, and the court issued a second supplemental 907 Notice on December 13, 2016. Appellant responded to the second supplemental Rule 907 Notice raising a new claim of trial counsel ineffectiveness. On January 13, 2017, the PCRA dismissed Appellant's Petition and granted counsel's motion to withdraw.

Appellant filed a timely Notice of Appeal *pro se*. Both Appellant and the PCRA court complied with Pa.R.A.P. 1925.

Appellant raises the following issues on appeal:

> 1. Was trial counsel ineffective for advising [Appellant] to forego his 5th Amendment right to testify in his own defense due to his speech impediment?
>
> 2. Was trial counsel ineffective for failing to present Shyrina Jenkins as a witness for the defense?
>
> 3. Was trial counsel ineffective for failing to present character witnesses who were not related to her client and for failing to utilize character evidence at all in her closing argument?

4. Was trial counsel ineffective for presenting [Appellant's] sister, Tyeisha Marshall, as a character witness?[5]

Appellant's Brief at 7 (reordered).[6]

Standard/Scope of Review

We review the denial of a PCRA Petition to determine whether the record supports the PCRA court's findings and whether its order is otherwise free of legal error. ***Commonwealth v. Fears***, 86 A.3d 795, 803 (Pa. 2014). This Court grants great deference to the findings of the PCRA court if the record supports them. ***Commonwealth v. Boyd***, 923 A.2d 513, 515 (Pa. Super. 2007). We give no such deference, however, to the court's legal conclusions. ***Commonwealth v. Ford***, 44 A.3d 1190, 1194 (Pa. Super. 2012).

This Court has long recognized that there is no absolute right to an evidentiary hearing. ***Commonwealth v. Hart***, 911 A.2d 939, 941 (Pa. Super. 2006). "It is within the PCRA court's discretion to decline to hold a hearing if the petitioner's claim is patently frivolous and has no support either in the record or [in] other evidence." ***Commonwealth v. Wah***, 42 A.3d 335, 338 (Pa. Super. 2012) (citations omitted). When the PCRA court denies a petition

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[5] In his Rule 1925(b) Statement, Appellant challenged the manner in which counsel presented his character witness. Here, his Statement of the Issue challenges the fact that his character witness was presented at all. These are two different issues. However, because the argument in his Brief encompasses the issue raised in his Rule 1925(b) Statement, we decline to find the issue as raised here waived.

[6] Appellant abandoned issues challenging PCRA counsel's assistance that he had raised in his Pa.R.A.P. 1925(b) Statement.

without an evidentiary hearing, we "examine each issue raised in the PCRA petition in light of the record certified before it in order to determine if the PCRA court erred in its determination that there were no genuine issues of material fact in controversy and in denying relief without conducting an evidentiary hearing." ***Commonwealth v. Khalifah***, 852 A.2d 1238, 1240 (Pa. Super. 2004).

Ineffective Assistance of Counsel

The law presumes counsel has rendered effective assistance. ***Commonwealth v. Rivera***, 10 A.3d 1276, 1279 (Pa. Super. 2010). "[T]he burden of demonstrating ineffectiveness rests on [A]ppellant." ***Id.*** To satisfy this burden, Appellant must plead and prove by a preponderance of the evidence that: "(1) his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and, (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceeding would have been different." ***Commonwealth v. Fulton***, 830 A.2d 567, 572 (Pa. 2003). Failure to satisfy any prong of the test will result in rejection of the appellant's ineffective assistance of counsel claim. ***Commonwealth v. Jones***, 811 A.2d 994, 1002 (Pa. 2002).

Adoption of Trial Court's Analysis of Issues Raised

The Honorable M. Teresa Sarmina, who also presided over Appellant's jury trial, has authored a comprehensive, thorough, and well-reasoned Rule

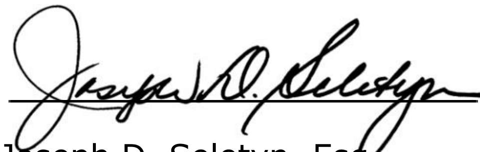
1925(a) Opinion, citing the record and relevant case law in addressing each of Appellant's ineffectiveness claims. After a thorough review of the certified record, the briefs of the parties, the applicable law, and the PCRA court's Opinion, we conclude that there is no merit to Appellant's claims. Accordingly, we adopt that Opinion as our own and affirm the court's denial of PCRA relief. ***See*** Trial Ct. Op., dated 6/28/17, at 10-13 (concluding, *inter alia,* that Appellant's reliance on ***Commonwealth v. Nieves***, 746 A.2d 1100, 1104 (Pa. 2002), is unavailing because (a) any alleged advice not to testify because of Appellant's stutter was a matter of trial strategy and not the result of an erroneous statement of law made by counsel; and (b) the colloquy Appellant had with the court shows that his decision not to testify was made knowingly and solely by Appellant); at 14-16 (concluding that, in light of the overwhelming evidence showing that Appellant participated in the two planning sessions for the robbery, including his own statement to police, the presentation of Jenkins' proffered testimony that Appellant did not participate in the planning would not have changed the outcome of the trial); at 17-19 (concluding that Appellant failed to satisfy the five-part test set forth in ***Commonwealth v. Matias***, 63 A.3d 807, 810-11 (Pa. Super. 2013), because he did not show that the character witnesses were available and willing to testify at trial, that counsel knew of the witnesses, and that the lack of their testimony was so prejudicial as to deny Appellant a fair trial; and, further, the record belies Appellant's claim that counsel knew of these witnesses at trial

because after counsel indicated she would be calling only Appellant's sister as a character witness, Appellant stated to the court that there were no other witnesses he wished to call); at 20-22 (counsel's strategy in presenting Appellant's sister's testimony as the only character witness Appellant wished to present was not lacking in reasonable basis, and in light of overwhelming evidence against Appellant, he cannot show he was prejudiced by his sister's impeached testimony).

The parties are instructed to annex the trial court's June 28, 2017 Opinion to any future filings.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/15/18

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PHILADELPHIA COURT OF COMMON PLEAS
CRIMINAL TRIAL DIVISION

COMMONWEALTH :

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v. :

Superior Court Docket
No.: 465 EDA 2017

JAMAAR RICHARDSON

CP-51-CR-0407443-2004 Comm v Richardson, Jamaar
Opinion
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FILED
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Appeals/Post Trial
Office of Judicial Records

Sarmina, J.
June 28, 2017

OPINION

PROCEDURAL HISTORY:

On July 28, 2004, following a four defendant[1] jury trial,[2] Jamaar Richardson (hereafter, petitioner) was convicted of second degree murder (H-2), two counts of robbery (F-1), and two counts of criminal conspiracy (F-1).[3] Sentencing was deferred until September 9, 2004, at which time petitioner was sentenced to the mandatory term[4] of life in prison for the crime of second degree murder.[5] Notes of Testimony (N.T.) 9/9/04 at 18.

[1] Petitioner was tried with James Richardson (his brother), Lavar Brown, and Christopher Kennedy. All but the latter faced second degree murder charges; Kennedy faced, and was convicted of, first degree murder, and was sentenced to death after a penalty phase hearing

[2] At trial, petitioner was represented by Regina Coyne, Esquire

[3] 18 Pa.C.S §§ 2502(b), 3701(a)(i), and 903(a), respectively.

[4] 18 Pa.C S A § 1102(b).

[5] The charge of robbery (victim, Michael Richardson) merged with the charge of second degree murder. As to the charge of criminal conspiracy (January 19, 2003), petitioner was sentenced to a consecutive term of not less than five nor more than 20 years in prison As to first charge of robbery (victim, Delbert Wech, January 18, 2003), petitioner was sentenced to a concurrent term of not less than five nor more than 20 years in prison As to the charge of criminal conspiracy (January 18, 2003), petitioner was sentenced to a consecutive term of not less than five nor more than 20 years in prison N T. 9/9/04 at 18-19

Petitioner filed a timely notice of appeal to Superior Court. On November 17, 2006, petitioner's judgment of sentence was affirmed.[6] Thereafter, on June 5, 2007, petitioner filed a *pro se* PCRA petition, requesting reinstatement of his right to petition for allowance of appeal in our Supreme Court *nunc pro tunc*. Counsel was appointed,[7] and filed an amended petition on March 7, 2008. Following an evidentiary hearing on July 21, 2008, on August 1, 2008, this Court granted petitioner leave to appeal *nunc pro tunc* to our Supreme Court. However, due to a mistake, petitioner's petition for allowance of appeal was never filed.[8] On June 27, 2011, having realized that the appeal was never docketed, PCRA counsel filed with our Supreme Court a petition to file petition for allowance of appeal *nunc pro tunc*, which was granted. On April 25, 2012, petitioner's petition for allowance of appeal was denied.[9]

On August 16, 2012, petitioner filed his first substantive PCRA petition, *pro se*, and an amended petition on June 24, 2013.[10] Petitioner filed a motion for appointment of counsel on March 31, 2015. Counsel was appointed,[11] and, on February 11, 2016, filed a Finley[12] "no merit" letter and motion to withdraw as counsel. Having reviewed the pleadings and conducted an independent review, on March 10, 2016, this Court sent petitioner notice of its intent to dismiss his PCRA petition without a hearing pursuant to Pa.R.Crim.P. 907 (907 Notice). However, on April 15,

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[6] Commonwealth v Jamaar Richardson, No 2678 EDA 2004, slip op (Pa Super., Nov. 17, 2006) (memorandum opinion)

[7] Daniel Rendine, Esquire, was appointed to represent petitioner for reinstatement of his right to seek *allocatur* However, due to a conflict of interest, Mr Rendine was relieved, and James Bruno, Esquire, was appointed in his place on November 19, 2007.

[8] Counsel claimed that he had filed the petition for allowance of appeal on September 2, 2008; however, the appeal was never docketed

[9] Commonwealth v Jamaar Richardson, No 718 EAL 2011, slip op. (Pa., April 25, 2012) (memorandum opinion).

[10] These documents were not forwarded to this Court by the Post-Trial Unit of the First Judicial District until May 8, 2015

[11] Barnaby Wittels, Esquire was appointed to represent petitioner on collateral attack.

[12] Commonwealth v Finley, 550 A.2d 213 (Pa.Super 1988)

2016, the date this matter had been scheduled for formal dismissal, PCRA counsel informed this Court that petitioner's response to counsel's Finley letter, of which this Court had been unaware, had been sent to PCRA counsel.[13] Upon review of petitioner's response, this Court instructed PCRA counsel to review the notes of testimony from petitioner's suppression hearing, and file either an amended petition or a supplemental Finley letter. On May 19, 2016, PCRA counsel filed a supplemental Finley letter. Having reviewed petitioner's additional claim, and determined that it failed, this Court issued a Supplemental 907 Notice on May 24, 2016. On June 21, 2016, this Court granted petitioner an extension of time until August 15, 2016 to respond to the Supplemental 907 Notice.

On September 2, 2016, when this Court dismissed petitioner's PCRA petition, this Court had not received a response to the Supplemental 907 Notice. Thereafter, on September 6, 2016, this Court received a copy of petitioner's response to the Supplemental 907 Notice.[14] This filing had been submitted to the Post-Trial Unit of the First Judicial District in a timely fashion on August 10, 2016, but was neither reflected on the docket for petitioner's case, nor provided to the Court, before the dismissal date of September 2, 2016. Therefore, on September 8, 2016, this Court issued an Order vacating the dismissal of petitioner's petition and instructing PCRA counsel to address the issues raised in petitioner's response to the Court's Supplemental 907 Notice. However, also on September 8, 2016, petitioner filed a Notice of Appeal from the Order denying post-conviction relief. On September 20, 2016, this Court sent petitioner a letter clarifying the status of his PCRA

[13] In his response to PCRA counsel's Finley letter, petitioner generally responded to PCRA counsel's assertions of no merit However, petitioner also claimed that PCRA counsel had evaluated his claims without obtaining notes of testimony from the suppression hearing on the admissibility of petitioner's police statement. Thus, in an abundance of caution, this Court ordered that PCRA counsel review those notes of testimony The notes of testimony from the suppression hearing are located at N.T. 7/15/04 at 72-197.

[14] In his objections to the Court's Supplemental 907 Notice, petitioner responded generally to this Court's findings of no merit on two of his previously-raised claims However, petitioner also raised a new claim of ineffective assistance of counsel for failure to call certain character witnesses Thus, this Court ordered that PCRA counsel should address this additional claim in a supplemental filing

petition, and explaining to petitioner that, before this Court could continue to evaluate his petition based on his response to the Supplemental 907 Notice, he would first need to file a Praecipe to Discontinue Appeal in Superior Court, as this Court was otherwise without jurisdiction. On September 28, 2016, petitioner filed the Praecipe to Discontinue Appeal. With jurisdiction over petitioner's PCRA petition returned to this Court, this Court instructed PCRA counsel to address the matter raised in petitioner's August 10, 2016 filing objecting to the Court's Supplemental 907 Notice. On October 19, 2016, counsel filed a second supplemental Finley letter. Upon review of the second supplemental Finley letter, this Court found that PCRA counsel had not fully addressed some of petitioner's objections to the Court's Supplemental 907 Notice, and directed counsel to submit an additional response. PCRA counsel filed his third supplemental Finley letter on November 3, 2016. Having reviewed petitioner's August 10, 2016 filing, counsel's supplemental Finley letters, and having once again conducted an independent review, this Court determined that petitioner's additional claim failed, and issued a Second Supplemental 907 Notice on December 13, 2016. On December 23, 2016, petitioner responded to the Second Supplemental 907 Notice, raising an additional claim: that trial counsel was ineffective for poorly presenting the character witness testimony of his sister, Tyeisha Marshall. Finding that this claim was both meritless and merely derivative of petitioner's previously-raised claim concerning the presentation of character witnesses, which was discussed at length in this Court's Second Supplemental 907 Notice, this Court did not issue an additional 907 Notice specifically addressing this claim. On January 13, 2017, this Court dismissed petitioner's petition. This timely appeal followed.

FACTS

As of January, 2003, petitioner had worked at the Rite Aid store (the Rite Aid) located at 13th & Girard Streets in Philadelphia for about two months. N.T. 07/15/04 at 93. Petitioner worked as a cashier and stocked store shelves. Id.

On Friday, January 17, 2003, Kiana Lyons was at petitioner's house along with petitioner, his brother, James, and Lavar Brown.[15] N.T. 17/19/04 at 86. The back of Ms. Lyons's house faced the back of petitioner's house. Id. at 70. While at petitioner's house, there was an ongoing discussion, during which petitioner stated that he had to work stock early the next morning at the Rite Aid. Id. at 101. He further stated that there was $50,000.00 in the Rite Aid, and that the only people who would be there that next morning were himself, the manager, and the delivery truck driver. Id. at 102.

Delbert Wech was an Assistant Manager of the Rite Aid. N.T. 07/16/04 at 105-06. On January 18, 2003, Mr. Wech was scheduled to be at the store at 4:00 a.m. to meet a delivery truck. Id. at 107-08. Petitioner was scheduled to work at the same time. Id. at 108. Mr. Wech was waiting in his car when the delivery truck arrived at the Rite Aid. N.T. 07/16/04 at 109. As soon as the trailer pulled in, the truck driver backed up to the front door. Id. Mr. Wech then exited his car to open the front doors, and began to bring the inventory into the store. Id. at 109, 114. Petitioner arrived shortly thereafter, and helped unload the truck. Id. at 115-17. After they had finished unloading, Mr. Wech went out the back door of the store to take the empty totes to the trailer. N.T. 07/16/04 at 119-20. He also grabbed some bags of trash that had been left near the back door from the night before and brought them to the dumpster. Id. at 120. When he returned from the dumpster, as he was walking into the back of the store, he saw someone "slide into the store." Id. at 121. The person he had seen had a rifle or shotgun in his hand, and was motioning for Mr. Wech to go into the store. N.T. 07/16/04 at 125-26. Instead, Mr. Wech turned and ran out the door, at which time he saw a second person standing approximately one car length away from him. Id. at 127. The second man shot at Mr. Wech. Id. at 127-28. Mr. Wech heard the shot, which went right behind his head. Id. at 128. He then ran toward the delivery truck N.T. 07/16/04 at 141-42. Riley

[15] Ms. Lyons was friends with James Richardson and had been Christopher Kennedy's girlfriend at one point N.T. 07/19/04 at 72.

Wymer, the delivery truck driver, had been inside of the truck, and had heard what sounded like a gun shot. Id. at 158-59. Mr. Wymer looked out of the back of the truck and saw a Black male, medium build, running from the store toward West Stiles Street.[16] Id. at 156-58.

On Saturday afternoon, January 18, 2003, Kiana Lyons was at petitioner's house in the kitchen with petitioner and James Richardson. N.T. 7/19/04 at 109. James Richardson told Ms. Lyons what had gone wrong with the robbery attempt the night before, and said that he had been the individual who had shot at the manager. Id. at 110. Ms. Lyons told both petitioner and James Richardson that she had witnessed James Richardson and Lavar Brown running through her backyard the night before. Id.

On Sunday afternoon, January 19, 2003, Kiana Lyons went to petitioner's house; she arrived after 3:00 p.m. N.T. 07/19/04 at 107, 111. Ms. Lyons, petitioner, Lavar Brown, Ronald Vann (a.k.a., Meatball), James Richardson, and Christopher Kennedy were in the living room. Id. at 113. They discussed robbing the Rite Aid, and talked about who would complete each task.[17] Id. at 114. Kennedy was supposed to shoot the manager in the leg,[18] and then the others were to enter the Rite Aid. Id. James Richardson, Lavar Brown, and petitioner were asking Kennedy whether he knew what the manager looked like. N.T. 07/19/04 at 115. Petitioner then told Kennedy where the safe was and how much money would be inside. Id. Ms. Lyons was asked to go to the Rite Aid ahead of

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[16] In the early morning hours, on January 18, 2003, Kiana Lyons saw James Richardson and Lavar Brown running through her back yard, toward petitioner's house N.T 07/19/04 at 103. Brown was carrying what appeared to be a rifle or shotgun. Id. at 104 Ms Lyons observed the two enter petitioner's house. Id. at 105.

[17] According to Ronald Vann, these tasks were given by Lavar Brown N T 07/22/04 at 140 Kiana Lyons was to go in the store and report back as to how many people were in the store Id. Mr. Vann was to go into the Rite Aid and close the gates from the inside. Id. Petitioner had told him how to pull the gates down from the inside. Id. Christopher Kennedy was to go in, grab the manager, and take him to the safe. N T. 07/22/04 at 141. James Richardson was to go in and grab the security guard to keep him from running out the door Id. at 142. Lavar Brown was to lay everybody in the store down – workers, customers – to make sure nobody moved. Id.

[18] In the statement that she gave to police, Kiana Lyons stated that Lavar Brown had told Christopher Kennedy to give the manager a leg shot Statement of Kiana Lyons at p. 8 (Commonwealth Exhibit 49, Defense Exhibit 1). Commonwealth witness Ronald Vann testified that, once inside the Rite Aid, Christopher Kennedy would take the manager to the safe, and if the manager gave him any trouble, he would shoot him N.T 07/22/04 at 143

time and advise the others of who was inside. Id. at 115-16. Ms. Lyons contacted James Richardson using a cell phone[19] when she arrived at the Rite Aid to report who was inside. Id. at 116.

Ronald Vann (Vann) testified that he took part in the plan to rob the Rite Aid on January 19, 2003. N.T. 07/22/04 at 107. The planning took place at James Richardson's house. Id. Vann indicated that during the planning, petitioner, James Richardson, Lavar Brown, and Christopher Kennedy were present. Id. at 125-28. Vann, James Richardson and Christopher Kennedy agreed to rob the Rite Aid. Id. at 128-29. Petitioner advised everyone where the alarms were located and instructed them on how to open the gate in the back of the Rite Aid. N.T. 07/22/04 at 129. Vann had brought a 9 millimeter handgun with him to the house. Id. at 107. Lavar Brown had an assault rifle. Id. at 126. Christopher Kennedy had a gun as well. Id. at 145.

That Sunday, January 19, 2003, Dinlitha Banks was working at the Rite Aid. N.T. 07/20/04 at 30-31. Her shift was from 9:00 a.m. to 5:00 p.m. Id. She was scheduled to work along with the manager, Michael Richardson (hereinafter, also referred to as the decedent), security guard Dwayne Parker, petitioner, and two other employees. Id. at 32, 34. Ms. Banks was working as a cashier when she observed Christopher Kennedy following the decedent down one of the aisles. Id. at 62. Moments later she heard a gunshot. N.T. 07/20/04 at 62. Then, the decedent cried out, "But I didn't do anything. I didn't do anything." Id. at 63. Ms. Banks ran out of the store to a payphone across the street, and called police. Id. at 63-64.

That evening, Officer John McDonnell, of the 23rd District, and his partner, Officer Joseph Ewald, were on routine patrol on Girard Avenue. N.T. 07/20/04 at 181. At approximately 6:35 p.m., as they proceeded westbound, near the 1200 block of Girard Avenue, the officers saw Security Guard Dwayne Parker running through the parking lot. Id. Mr. Parker was waving his arms and approached the officers on Girard Avenue. Id. He then told them that his manager had been shot.

[19] Lavar Brown had given Ms Lyons a cell phone when she left for the Rite Aid N T 07/19/03 at 115-16

Id. The officers pulled into the lot next to the Rite Aid; Officer McDonnell exited the vehicle and approached the store on foot. N.T. 07/20/04 at 181. He was in front of the store, below the window, when he heard a gunshot from inside the store. Id. at 182. Officer Ewald approached the store at this time, and observed Christopher Kennedy through the front window. Id. at 219. Officer Ewald then began to run to the back of the store; Officer McDonnell followed suit. Id. at 182-83. Officer McDonnell heard what sounded like a door opening at the back of the store. N.T. 07/20/04 at 184. He saw Christopher Kennedy running out of the back door with a gun in his right hand; he also had a dark green plastic trash bag. Id. at 185, 192. He then observed that Christopher Kennedy had dropped the gun. Id. at 187. Although Kennedy was ordered to stop, he kept running. Id. at 185. The police pursued him, eventually catching up to and apprehending him. N.T. 07/20/04 at 185. Kennedy had discarded the trash bag a couple of feet away from the gun. Id. at 194. The trash bag was found to contain approximately $2,200 00 in United States currency. Id.

Police Officer Rodney Anderson, of the 23rd District, proceeded to the Rite Aid in response to a radio call for assistance from Officer Ewald. N.T. 07/21/04 at 23. Officer Anderson arrived at the Rite Aid and entered the store via the front door (along with another officer who had already arrived); his partner, Officer Michael Winkler, with other officers in foot pursuit, entered via the back of the store. Id. at 26-27. When they entered the store, the officers noticed a pair of feet sticking outside of the manager's office door. Id. at 29. The officers proceeded toward the feet and discovered the decedent, lying in a pool of blood. Id. The decedent was gasping for air, and did not respond to Officer Anderson's voice; his only response was a gurgling sound. N.T. 07/21/04 at 32, 40. The decedent had a bullet hole in the side of his head near his left ear. Id. at 40-41. There was a trail of blood from the front of the store to the manager's office, where the decedent was found, and the safe was open. Id. at 85-86. The decedent was subsequently transported to the hospital, where he died during surgery at Hahnemann University Hospital. Id. at 54.

LEGAL ANALYSIS

Petitioner raises the following issues on appeal:[20]

1. The PCRA Court erred where it dismissed without a hearing petitioner's claim that trial counsel was ineffective for advising him not to testify based on his speech impediment.
2. The PCRA Court erred where it dismissed without a hearing petitioner's claim that trial counsel was ineffective for failure to present Shyrina Jenkins as a witness to rebut the Commonwealth's contention that petitioner conspired to commit robbery.
3. The PCRA Court erred where it dismissed without a hearing petitioner's claim that trial counsel was ineffective for failure to present character witnesses who were not members of petitioner's family or effectively utilize the character witness testimony in her closing argument.
4. The PCRA Court erred where it dismissed without a hearing petitioner's claim that trial counsel was ineffective where she poorly presented the testimony of Tyesha Marshall as a character witness.
5. The PCRA Court erred where it dismissed without a hearing petitioner's claim that appellate counsel was ineffective for litigating petitioner's direct appeal without a full and complete copy of the notes of testimony from petitioner's trial and suppression hearing.
6. PCRA counsel was ineffective for failing to interview witnesses in connection to petitioner's claims, and for failing to advocate effectively in petitioner's interests by repeatedly filing Finley "no merit" letters asserting that petitioner's claims are without merit.

Initially, this Court notes that, in nearly all of petitioner's issues complained of on appeal, petitioner asserts that this Court erred in denying petitioner's claims without a hearing. A

[20] These claims have been rephrased and consolidated for ease of disposition

petitioner's rights are not violated where the PCRA court declines to hold a hearing after finding that petitioner's claims are without merit, as a PCRA hearing is not a matter of right. See Commonwealth v. Morrison, 878 A.2d 102, 109 (Pa.Super. 2005) ("A PCRA hearing is not a matter of right, and the PCRA court may decline to hold a hearing if there is no genuine issue concerning any material fact and the defendant is not entitled to relief as a matter of law."). As discussed *infra*, this Court's review of the record and petitioner's claims found that none of petitioner's claims had merit. Therefore, this Court did not err when it denied petitioner's claims without a hearing.

Ineffective Assistance of Counsel Where Petitioner was Advised Not to Testify

Petitioner claimed that trial counsel was ineffective for offering unreasonable advice to petitioner regarding his right to testify. Petitioner asserted that he informed trial counsel that he wished to testify on his own behalf; however, trial counsel advised him that he should not take the stand because of his stutter. However, as this Court engaged in a colloquy with petitioner, in which he stated that he did not wish to testify, this claim failed.

According to the Pennsylvania Supreme Court in Commonwealth v. Balodis, 747 A.2d 34, 343 (Pa. 2000), counsel is presumed effective, and under 42 Pa.C.S. § 9543(a), petitioner has the burden of proving ineffective assistance of counsel. In order to be eligible for PCRA relief due to ineffective assistance, petitioner is required to prove that such assistance "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). Petitioner "must prove (1) that the underlying claim has arguable merit, (2) that counsel's conduct was without a reasonable basis designed to effectuate his or her client's interest, and (3) that counsel's ineffectiveness prejudiced [petitioner]." Commonwealth v. Allen, 833 A.2d 800, 802 (Pa.Super. 2003) (citations omitted). "All three prongs of this test must be satisfied. If [petitioner] fails to meet even one prong of the test, his conviction will not be reversed on the

basis of ineffective assistance of counsel." Commonwealth v. O'Bidos, 849 A.2d 243, 249 (Pa.Super. 2004).

In order to establish trial counsel ineffectiveness for advising a defendant against testifying, "a defendant must show that counsel interfered with his freedom to testify or gave him advise that was so unreasonable that it vitiated his knowing and intelligent decision not to testify on his own behalf." Commonwealth v. Boyd, 688 A.2d 1172, 1175 (Pa. 1997), *overruled on other grounds by* Com. ex rel. Dadario v. Goldberg, 773 A.2d 126 (Pa. 2001).

At trial, this Court engaged in a colloquy with petitioner, in which petitioner stated that it was his decision not to testify:[21]

> The Court: And, Mr. Lavar Brown, Mr. Jamaar Richardson, and Mr. James Richardson, I believe each of you has discussed with your attorney that you have the right to testify or not to testify; is that correct?
>
> Defendant Brown: Yes.
>
> **Defendant Jamaar Richardson: Yes.**
>
> Defendant James Richardson. Yes.
>
> The Court: I want you each to also understand that the decision is yours and yours alone to make. While your attorney can give you very valuable information, ultimately it is your decision to make. Do you each understand that?
>
> Defendant Brown: Yes.
>
> **Defendant Jamaar Richardson: Yes.**
>
> Defendant James Richardson: Yes.
>
> The Court: You have all heard me advise the jury certainly as to this question, but this is directed more to the three defendants, Brown and the two Richardsons. You have heard me advise the jury during my preliminary instructions that a defendant has no obligation to testify, and advising them that they are not permitted to make any adverse inferences against you if you do not testify, correct?
>
> Defendant Brown: Yes.
>
> **Defendant Jamaar Richardson: Yes.**

[21] This Court conducted a simultaneous colloquy of all defendants who were not going to testify.

[. . .]

Defendant James Richardson: Yes.

The Court: All right. I will again instruct the jury during my charge at the end of the case that the three of you – well, actually the four of you, have absolutely no burden of providing any evidence in this case, and that for those of you who do not testify, there may be no adverse inference made against you by your decision not to testify. In other words, they can't hold that against you in any way.

[. . .]

The Court: And Mr. Jamaar Richardson, were there any witnesses you wanted to call or anything you discussed with Ms. Coyne that has not happened or you think will not happen during the trial.

Defendant Jamaar Richardson: No, ma'am. No.

The Court: All right. And are you satisfied with her representation.

Defendant Jamaar Richardson: Yes.

[. . .]

The Court: Mr. Jamaar Richardson, is the decision not to testify your decision?

Defendant Jamaar Richardson: Yes.

[. . .]

The Court: All right. Has anyone pressured you or forced any one of you so you would testify or not testify in this case?

Defendant Kennedy: No.

Defendant Brown: No.

Defendant Jamaar Richardson: No, Your Honor.

Defendant James Richardson: No.

The Court: Has anyone promised you either [sic] if you do take the stand or if you do not take the stand?

Defendant Kennedy: No.

Defendant Brown: No.

Defendant Jamaar Richardson: No.

Defendant James Richardson: No.

The Court: Is the decision not to testify being made voluntarily and freely by those of you who are not testifying?

> [. . .]
>
> Defendant Brown: Oh, yes.
>
> **Defendant Jamaar Richardson: Yes.**
>
> Defendant James Richardson: Yes.
>
> [. . .]
>
> The Court: Very well. You may all have a seat. And I am making a finding each defendant understands his right to testify or not to testify, and their decisions have each been made knowingly, intelligently, and voluntarily.

N.T. 7/26/04 at 239-46 (emphasis added).

Petitioner claimed that trial counsel's advice to petitioner that he should not testify because of his stutter was so unreasonable that it vitiated his knowing and intelligent decision not to testify on his own behalf. In support of this claim, petitioner cited to Commonwealth v. Nieves, in which counsel advised the defendant not to testify at his trial because he would be impeached with his prior criminal record. 746 A.2d 1100, 1104 (Pa. 2002). However, evidence of prior convictions can only be used to impeach the credibility of a witness if the convictions involved crimes of dishonesty or false statement. Id. at 1104-05. At the time of trial, the defendant in Nieves had been convicted of two firearms offenses and two drug trafficking offenses, crimes which did not involve dishonesty or false statement. Id. Thus, as the defendant's prior convictions were not in fact admissible to impeach his credibility, the defendant's decision not to testify was based on trial counsel's erroneous advice. Id. at 1105. Our Supreme Court held that the defendant's decision therefore could not have been knowing and intelligent. Id.

Petitioner's decision, however, was not based on erroneous legal advice. Trial counsel's alleged advice to petitioner that he should not testify because of his stutter was a matter of trial strategy, and not based on an erroneous statement of the law, as in Nieves. Additionally, petitioner engaged in a colloquy with the Court, in which it was explained that the decision to testify was his and his alone. As petitioner knowingly and intelligently chose not to testify at trial, this claim failed.

Ineffective Assistance of Counsel for Failing to Call Shyrina Jenkins

Next, petitioner claimed that trial counsel was ineffective for failing to call Shyrina Jenkins (Jenkins) to rebut the Commonwealth's contention that petitioner had conspired to commit robbery.[22] Petitioner claimed that he asked trial counsel to interview Jenkins, petitioner's girlfriend at the time of the robbery and murder, who would have testified that petitioner was with her on the night that the robbery was planned.

In support of this claim, petitioner had submitted a certification from Jenkins of what she would have testified to, which stated the following: Jenkins was available to testify at trial, and trial counsel knew that she was available. Jenkins would have told the jury that petitioner did not help plan the Rite Aid robbery. When he came home from work the night this was planned, he went straight upstairs with Jenkins, who washed, blow dried, and braided his hair, which took hours to complete. Certification of Shyrina Jenkins, 6/19/13. Because there is not a reasonable probability that the outcome of the trial would have changed if petitioner had presented Jenkins' testimony, this claim failed.

In order to show that trial counsel was ineffective for failing to call or investigate witnesses, petitioner was required to show that:

> 1) the witness existed, 2) the witness was available to testify for the defense, 3) counsel knew of, or should have known of, the existence of the witness, 4) the witness was willing to testify for the defense,[23] and 5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial. . . .

Commonwealth v. Matias, 63 A.3d 807, 810-11 (Pa.Super. 2013), *citing* Commonwealth v. Sneed, 45 A.3d 1096, 1108-09 (Pa. 2012).

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[22] Petitioner's filings assert that the Commonwealth contended that petitioner had conspired to commit burglary. Petitioner was never charged with burglary, and was instead charged with, among other crimes, criminal conspiracy and robbery

[23] This Court wonders whether this requirement is a valid one, since, at least as to fact witnesses, that is the reason for compulsory process. But this issue is not a part of this case

"A failure to call a witness is not per se ineffective assistance of counsel for such decision usually involves matters of trial strategy." Commonwealth v. Auker, 681 A.2d 1305, 1319 (Pa. 1996). To establish the prejudice prong of an ineffective assistance of counsel claim, a petitioner must show that there is a "reasonable probability" that the outcome of the proceedings would have been different but for counsel's ineffectiveness. Commonwealth v. Dennis, 950 A.2d 945, 954 (Pa. 2008).

Due to the large amount of evidence implicating petitioner in this crime, even if counsel had called Jenkins as a witness, the outcome at trial would not have changed. Petitioner's own statement to police contradicts Jenkins' proffered testimony. In a statement given to police following his arrest, petitioner stated the following: Petitioner had been working at the Rite Aid store located at 13th Street and Girard Avenue for about two months as of January of 2003. N.T. 7/26/04 at 269-70. Petitioner worked as a cashier and stocked store shelves. Id. at 270. Petitioner knew where the safe was in the store because he used to count the money from the cashier drawer in the manager's office. Id. Petitioner told other individuals[24] details about when the armored truck came to take the money from the safe, and also told them how many managers and people typically worked on a shift at Rite Aid. Id. at 271. Additionally, petitioner told these individuals how they could pull the gates down on the front door of the Rite Aid, and how to leave through the back exit without a key. Id. at 273-74. Petitioner stated that, although no one ever told him that he would receive any money from the robbery, he figured that he would receive money from one of the robbery participants. Id. at 271.

Kiana Lyons (Lyons) testified at trial that on Friday, January 17, 2003, she was at petitioner's house along with petitioner, his brother, James, and Lavar Brown. N.T. 7/19/04 at 86. While at

[24] As petitioner was tried alongside co-defendants and chose not to testify, the jury heard a redacted version of his statement which did not identify his co-conspirators.

petitioner's house, there was an ongoing discussion, during which petitioner stated that he had to work stock early the next morning at the Rite Aid, and that there was $50,000.00 at the Rite Aid. Id. at 101. Petitioner told the group that the only people who would be there that next morning were himself, the manager, and the delivery truck driver. Id. at 102.

On Sunday afternoon, January 19, 2003, Lyons went to petitioner's house again; she arrived after 3:00 p.m. Id. at 107, 111. Lyons, petitioner, Lavar Brown, Ronald Vann (Vann), James Richardson, and Christopher Kennedy were in the living room. Id. at 113. They were talking about robbing the Rite Aid, and about who would complete each task. Id. at 114. Kennedy was supposed to shoot the manager in the leg, and then the others were to enter the Rite Aid. N.T 7/19/04 at 114. James Richardson, Lavar Brown, and petitioner asked Kennedy whether he knew what the manager looked like. Id. at 115. Petitioner then told Kennedy where the safe was and how much money would be inside. Id. Lyons was told to go to the Rite Aid ahead of time and advise the others of who was inside. Id. at 115-16.

Vann testified that he took part in the plan to rob the Rite Aid on January 19, 2003. N.T. 7/22/04 at 107. The planning took place at James Richardson's house. Id. Vann indicated that, during the planning, petitioner, James Richardson, Lavar Brown, and Christopher Kennedy were present. Id. at 125-28. Vann, James Richardson and Christopher Kennedy agreed to rob the Rite Aid. Id. at 128-29. Petitioner advised everyone where the alarms were located and instructed them on how to open the gate in the back of the Rite Aid. Id. at 129. Vann had brought a 9 millimeter handgun with him to the house. Id. at 107. Lavar Brown had an AK assault rifle. Id. at 126. Christopher Kennedy had a gun as well. Id. at 145.

Based on the overwhelming evidence that petitioner was present during the two planning sessions for the Rite Aid robbery, including petitioner's own words to police, words uttered by Jenkins in testimony that petitioner did not participate in the planning would not have changed the outcome at trial, and this claim failed.

Ineffective Assistance of Counsel for Failure to Call Character Witnesses Not Related to Petitioner

In petitioner's response to the Court's May 24, 2016 Supplemental 907 Notice, petitioner raised a new claim of ineffective assistance of counsel for failure to call character witnesses who were not part of his family, and for failing to argue petitioner's good character in closing arguments. At trial, counsel called petitioner's sister, Tyeisha Marshall, as a character witness. N.T. 7/27/02 at 289-98. Petitioner claimed that trial counsel was ineffective for failing to present testimony from Roslyn Paige, Kamari Boone, Corona Herron, or Betty Richardson,[25] all of whom were available and willing to testify to petitioner's good character for peacefulness and law-abidingness. Because petitioner failed to show that these witnesses actually were available to testify, and that counsel knew or should have known of these facts, **at the time of trial**, or to show that the absence of their testimony was so prejudicial as to deny petitioner a fair trial, this claim fails.

Respecting methods of proving character, the Pennsylvania Rules of Evidence provide that, "in all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation." Pa.R.E. 405(a). Generally, "[s]pecific instances of conduct are not admissible to prove character or a trait of character." Pa.R.E. 405(b). An attorney's failure to present character witnesses may constitute ineffective assistance of counsel. Commonwealth v. Harris, 785 A.2d 998, 1000 (Pa. 2001). However, an attorney who chooses not to present evidence of his client's good character is *not* constitutionally ineffective so long as the attorney had a "reasonable strategic basis" not to proffer such evidence. Commonwealth v. Van Horn, 797 A.2d 983, 988 (Pa.Super. 2002).

"Where a defendant claims that counsel was ineffective for failing to call a particular witness, we require proof of that witness's availability to testify, as well as an adequate assertion that the

[25] This Court noted that Betty Richardson is petitioner's aunt, contrary to petitioner's claim that trial counsel should have called additional character witnesses who were not part of his family

substance of the purported testimony would make a difference in the case." Commonwealth v. Clark, 961 A.2d 80, 90 (Pa. 2008). Proof is required in the form of a signed certification with respect to each witness' proposed testimony, and should include "the witness's name, address, date of birth and substance of testimony and shall include any documents material to that witness' testimony." 42 Pa.C.S. § 9545(d).

In petitioner's August 10, 2016 objection letter to this Court's 907 Notice, he provided a signed certification from himself providing the names and addresses of Roslyn Paige, Kamari Boone, Corona Herron, and Betty Richardson. Petitioner's Objections to Court's 907 Notice, August 10, 2016, at 12. While petitioner failed to provide the dates of birth for each of these witnesses, the more fundamental flaw in these certifications lies where petitioner sets forth the substance of the witness' testimony: rather than stating that these witnesses "were available" to testify at the time of trial, petitioner certifies that each witness "*would have been* willing and available" to testify as to petitioner's good character at the time of trial. Id. This is an important distinction, as the prongs of the Matias test specifically require that the witness *was [willing and] available to testify at the time of trial*, and not that petitioner assert that the witness would have, hypothetically, made herself or himself available at the time of trial if he or she had been asked. In order for petitioner to show ineffective assistance of counsel, petitioner was required to demonstrate that the availability of these witnesses to testify was known to trial counsel, and that trial counsel subsequently neglected or refused to call them. While petitioner asserted that he "verbally informed counsel"[26] of these witnesses, this was belied by the record. Before the defense put on its evidence at trial, trial counsel made clear to the Court that she would only call petitioner's sister Tyeisha Marshall to present testimony as to petitioner's good character. N.T. 7/26/2004 at 236. The Court then engaged in a colloquy with petitioner in which he stated that there were no other witnesses that he wished to call:

[26] Petitioner's Objections to Court's 907 Notice, August 10, 2016, at 9.

The Court: And Mr. Jamaar Richardson, were there any witnesses you wanted to call or anything you discussed with Ms. Coyne that has not happened or you think will not happen during the trial?
Petitioner: No, ma'am. No.

The Court: All right. And are you satisfied with her representation?

Petitioner: Yes.

N.T. 7/26/2004 at 243.

Petitioner asserted earlier in the colloquy that he would call only the single character witness noted by trial counsel, and this assertion foreclosed him from later asserting, at the PCRA stage, the existence and availability of other witnesses whom he failed to note in the trial colloquy. "[A]n on-the-record colloquy is a useful procedural tool whenever the waiver of any significant right is at issue, constitutional or otherwise, e.g. . . ., waiver of the right to call witnesses[.]" Commonwealth v. Mallory, 941 A.2d 686, 697 (Pa. 2008). Superior Court has specifically found that a petitioner's claim of counsel ineffectiveness lacked arguable merit where he engaged in a colloquy with the trial court in which he waived his right to testify, call fact witnesses, and called only one character witness. Commonwealth v. Pander, 100 A.3d 626, 642 (Pa.Super. 2014). Because there was a colloquy in this case, where petitioner heard that trial counsel only intended to call one witness to testify as to his good character, and he did not complain of counsel's failure to include Paige, Boone, Herron, or Richardson, this claim lacked arguable merit and, therefore, it failed.

Even assuming, *arguendo*, that petitioner had satisfied the first four prongs of the Matias test, the absence of character testimony by petitioner's four proffered witnesses was not so prejudicial as to have denied petitioner a fair trial due to the overwhelming evidence implicating petitioner in these crimes. As discussed *supra*, petitioner's own statement to police detailed his involvement in the planning of the robbery which resulted in the murder of the decedent. N.T. 7/26/04 at 269-274. The facts in petitioner's statement were corroborated and further established by the testimony of Lyons, N.T. 7/19/04 at 86-116, and Vann, N.T. 7/22/04 at 107-145. Based on the evidence that

petitioner actually instigated the robbery of the Rite Aid store and facilitated its occurrence by actively participating in two planning sessions for that robbery, the testimony of four additional witnesses asserting that petitioner nonetheless had a peaceful and law-abiding character would not have changed the outcome at trial.

Ineffective Assistance of Counsel for Poor Presentation of Character Witness Tyeisha Marshall

Petitioner's December 23, 2016 response to this Court's Second Supplemental 907 Notice raised a claim that trial counsel was ineffective for presenting petitioner's sister, Tyeisha Marshall, as a character witness, asserting that he "would have been better off presenting no character witness testimony than for Counsel to present a witness who was so easily attacked by the prosecution." Petitioner's Response to Notice of Intent to Dismiss, 12/23/16, at 2. As this Court determined that this claim was merely derivative of petitioner's character witness claim discussed *supra*, this Court did not issue a third Supplemental 907 Notice specifically disposing of this claim.[27] Because trial counsel's choices in examining Ms. Marshall were not unreasonable, and as the absence of her testimony would not have led to a different verdict (contrary to petitioner's assertions), this claim fails.

"The manner in which to [examine]... witnesses is largely a matter of trial strategy to be determined by counsel. As a general rule, 'trial strategy is a matter best left to counsel and [] a defendant is not entitled to relief simply because the strategy is unsuccessful.'" Commonwealth v.

[27] Rule 907 provides that the Court "shall promptly review the petition, any answer by the attorney for the Commonwealth, and other matters of record relating to the defendant's claim(s)" Pa.R Crim P 907 Superior Court's decision in Commonwealth v Feliciano provides that, where a PCRA court evaluates filings relating to a petitioner's claims for PCRA relief after issuing an Order dismissing the petition, the dismissal will not be reversed on appeal unless the petitioner demonstrates prejudice. 69 A.3d 1270, 1277 (Pa Super 2013) (no reversible error where PCRA court addressed certain claims in petitioner's filings in its Rule 1925(b) opinion rather than in a 907 Notice before dismissal). As this Court's decision would not have been different had it issued a Third Supplemental 907 Notice evaluating this claim, the mere fact that this Court did not specifically address this claim before dismissing petitioner's PCRA petition caused petitioner no prejudice.

McMaster, 666 A.2d 724, 732 (Pa.Super. 1995), *quoting* Commonwealth v. Tippens, 598 A.2d 553, 556 (Pa.Super. 1991).

> Trial decisions, including a decision as to whether to cross-examine a witness, are within the exclusive province of counsel. Counsel will not be declared ineffective where, as here, his trial strategy had a reasonable basis designed to effectuate his client's interest . . . and appellant has failed to show that the alternatives not chosen offered a potential for success substantially greater than the strategy and tactics actually utilized.

Commonwealth v. Metzger, 441 A.2d 1225, 1229-30 (Pa.Super. 1981)(citations omitted).

"The test is not whether other alternatives were more reasonable, employing a hindsight evaluation of the record. Although weigh the alternatives we must, the balance tips in favor of a finding of effective assistance as soon as it is determined that trial counsel's decisions had any reasonable basis." Commonwealth v. Fultz, 462 A.2d 1340, 1342 (Pa.Super. 1983)(citations omitted). "In determining whether counsel's action was reasonable, we do not question whether there were other more logical courses of action which counsel could have pursued; rather, we must examine whether counsel's decisions had *any* reasonable basis." Commonwealth v. Rollins, 738 A.2d 435, 441 (Pa. 1999) (emphasis added).

At trial, counsel presented Ms. Marshall, who testified that she was petitioner's sister and asserted that petitioner's reputation amongst his peers was as a peaceful and law-abiding citizen. N.T. 7/27/04 at 289-290. On cross examination, the Commonwealth impeached Ms. Marshall's testimony by emphasizing inconsistencies with respect to how many people Ms. Marshall testified that she had spoken to about petitioner's reputation, and questioning her about what appeared to be a detailed prep sheet given to her by trial counsel. Id. at 291-96. While it is clear that Ms. Marshall was not a persuasive witness, and that her credibility was thoroughly attacked by the prosecution, trial counsel's strategy in presenting Ms. Marshall's testimony cannot be characterized as lacking any reasonable basis. As petitioner's colloquy asserted that there were no other character witnesses to call, trial counsel was not unreasonable in proceeding with the only character witness who was represented to be available. N.T. 7/26/2004 at 236-43. Petitioner failed to offer any proof or

argument demonstrating that the absence of any character witness testimony offered a substantially greater potential for success at trial than the presentation of Ms. Marshall's testimony. As already discussed, it is apparent that the result at trial did not turn on the quality of character witness testimony in petitioner's favor so much as the statements of Vann, Lyons, and petitioner himself, which established his role in facilitating the robbery of his place of employment and the felony murder of his immediate supervisor. Therefore, this claim failed.

Ineffective Assistance of Appellate Counsel

Next, petitioner claimed that appellate counsel was ineffective for litigating his direct appeal without a full and complete copy of the notes of testimony for the suppression hearing and trial. Petitioner argued that appellate counsel's failure to ensure that the proceedings were transcribed and sent to Superior Court interfered with petitioner's rights.

Petitioner provided no support for his claim that appellate counsel did not have a full copy of the notes of testimony while litigating petitioner's direct appeal. In fact, the record reflects that appellate counsel cited to the notes of testimony from trial in petitioner's appellate brief. Appellate Brief, 4/7/05, at 5-11. Appellate counsel also cited to the suppression hearing notes of testimony in petitioner's appellate brief, in support of the claim that the Court erred in denying the motion to suppress petitioner's statement. Id. at 29-32. Therefore, this claim lacked merit, and it failed.

Ineffective Assistance of PCRA Counsel

Finally, petitioner asserted that PCRA counsel was ineffective where he failed to interview Shyrina Jenkins, Roslyn Paige, Kamari Boone, Corona Herrera, and Betty Richardson in connection with petitioner's claims which corresponded to those witnesses. Additionally, petitioner asserts that trial counsel was ineffective for failing to "advocat[e] effectively for him where [PCRA counsel's] primary contact with [petitioner] throughout this PCRA process has consisted of repeatedly filing

No-Merit letters against him." Petitioner's Rule 1925(b) Statement, at 2. As PCRA counsel complied with the requirements of Turner/Finley[28] and was not ineffective, this claim fails.

When a PCRA petitioner raises of claim of PCRA counsel's effectiveness, he bears the burden to demonstrate two layers of ineffective assistance – first by trial counsel, then by PCRA counsel.

> To plead and prove ineffective assistance of counsel a petitioner must establish: (1) that the underlying issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice resulted from counsel's act or failure to act. Commonwealth v. Chmiel, 30 A.3d 1111, 1127 (Pa. 2011). Where the defendant asserts a layered ineffectiveness claim he must properly argue each prong of the three-prong ineffectiveness test for each separate attorney. Id. at 1128; see also Commonwealth v. Reyes, 870 A 2d 888 (Pa. 2005); Commonwealth v. McGill, 832 A.2d 1014 (Pa. 2003). Layered claims of ineffectiveness "are not wholly distinct from the underlying claims," because "proof of the underlying claim is an essential element of the derivative ineffectiveness claim." Reyes, 870 A.2d at 896 (proving three prong ineffectiveness test for trial counsel establishes arguable merit to appellate counsel's ineffectiveness). "In determining a layered claim of ineffectiveness, the critical inquiry is whether the first attorney that the defendant asserts was ineffective did, in fact, render ineffective assistance of counsel. If that attorney was effective, then subsequent counsel cannot be deemed ineffective for failing to raise the underlying issue."

Commonwealth v. Rykard, 55 A.3d 1177, 1189-90 (Pa. Super. 2012).

With respect to petitioner's complaint that PCRA counsel failed to interview individuals in connection with his character witness claim, this was not ineffective assistance because, as discussed *supra*, trial counsel was not ineffective for failure to present these witnesses. Further, our Supreme Court has made clear that Turner/Finley does not require PCRA counsel to "launch into an extra-record investigation of every claim raised by a PCRA petitioner on collateral attack" before determining that claims lack merit for purposes of filing a "no merit" letter. Commonwealth v. Porter, 728 A.2d 890, 895 (Pa. 1999); Commonwealth v. Rykard, 55 A.3d 1177, 1191 n. 9 (Pa.Super. 2012), *citing* Porter, 728 A.2d at 895. If, upon review of the record and the information available to

[28] Commonwealth v Turner, 544 A.2d 927 (Pa 1988), Commonwealth v. Finley, 550 A 2d 213 (Pa Super 1988).

him, PCRA counsel determined that petitioner's character witness claim was without merit, there was no independent obligation for PCRA counsel to interview the individuals connected to this claim.

With respect to petitioner's claim that PCRA counsel failed to contact or interview Shyrina Jenkins in developing petitioner's corresponding claim of trial counsel ineffectiveness, PCRA counsel's October 20, 2016 Finley letter discusses in detail counsel's fruitless attempts to contact Ms. Jenkins:

> Undersigned counsel has tried on numerous occasions to speak with Ms. Jenkins, but without success. On one occasion, an unidentified male said he would take a message. On all other occasions, including during the time period between when Petitioner filed his objections and [October 20, 2016], the phone call has gone through and the call has been immediately terminated on the receiving end. It is interesting to note that back in 2004 when trial counsel was trying to speak with Ms. Jenkins, [trial counsel] experienced the same result – the call went through, the receiver was picked up and the call was immediately terminated.

PCRA Counsel's Second Supplemental Finley Letter, 10/20/16, at 3.

PCRA counsel can hardly be faulted for failing to speak with a witness who refuses to speak with him, and counsel's attempt alone to conduct an extra-record investigation into this claim went above and beyond his obligations under Finley. Porter, 728 A.2d at 895.

Lastly, with respect to petitioner's complaint that PCRA counsel "failed to advocat[e] effectively for him" by filing successive "no merit" letters, as both counsel and this Court complied with the requirements of Turner/Finley, this claim fails.

In accordance with the rules set forth in Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988), and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988), after PCRA counsel has reviewed the record and determined that there are no issues of arguable merit, the following requirements must be met:

> 1) PCRA counsel must submit a no merit letter detailing the nature and extent of his or her review;

2) The no merit letter by PCRA counsel must list each issue the petitioner wished to have reviewed;

3) The PCRA counsel's no merit letter must include an explanation of why the petitioner's issues were meritless;

4) The PCRA court must conduct its own independent review of the record; and

5) The PCRA court must agree with counsel that the petition was meritless.

Finley, 550 A.2d at 215.

Compliance with these requirements does not deny a PCRA petitioner the right to effective assistance of counsel. Id.

In the instant case, PCRA counsel complied with all of the requirements set forth in Turner/Finley, even considering petitioner's successive assertions of new claims following each evaluation. Counsel's successive Finley letters represented that, having reviewed the entire record there were no issues of arguable merit to be raised in an amended petition. Within those letters, PCRA counsel explained in detail the nature and extent of his review, and why the issues raised by petitioner were without merit. Throughout his Finley letters, PCRA counsel made reference to and cited to the record, detailed his discussions with trial counsel, and cited to applicable case law. Therefore, PCRA counsel's representation was satisfactory. See Zerby v. Shannon, 964 A.2d 956, 961 (Pa. Cmwlth. Ct. 2009) (finding that PCRA counsel's review of the record satisfied the requirements of Turner/Finley where PCRA counsel stated the extent of review, summarized the record, and reviewed applicable case law). In any event, this Court conducted multiple independent reviews of the record (including petitioner's successive responses to this Court's 907 Notices wherein he raised additional issues) and found, consistent with counsel's assessment, that petitioner was not entitled to PCRA relief. As PCRA counsel did comply with the mandates set forth in Turner/Finley, this claim fails, and was properly dismissed by this Court.

For the foregoing reasons, petitioner is not entitled to relief under the PCRA and the Court did not err in dismissing the petition. Accordingly, the Court's dismissal of the petition should be affirmed.

BY THE COURT:

M. TERESA SARMINA J.