NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
RICHARD J. FEHIR, JR.	:	
Appellant	:	No. 1092 WDA 2025

Appeal from the PCRA Order Entered August 6, 2025
In the Court of Common Pleas of Beaver County
Criminal Division at No(s): CP-04-CR-0000434-2016

BEFORE: PANELLA, P.J.E., KING, J., and LANE, J.

MEMORANDUM BY PANELLA, P.J.E.: **FILED: NOVEMBER 16, 2026**

Richard J. Fehir, Jr. appeals *pro se* from the order of the Court of Common Pleas of Beaver County denying his petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. Fehir challenges the PCRA court's denial of his claims of ineffective assistance of trial counsel and direct appeal counsel. Additionally, for the first time on appeal, Fehir raises new claims of his PCRA counsel's ineffectiveness pursuant to ***Commonwealth v. Bradley***, 261 A.3d 381 (Pa. 2021).[1]

After careful review, we affirm the PCRA court's order denying Fehir's PCRA petition. However, we are constrained to remand to the PCRA court for

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[1] In ***Bradley***, our Supreme Court held that "a PCRA petitioner may, after a PCRA court denies relief, and after obtaining new counsel or acting *pro se*, raise claims of PCRA counsel's ineffectiveness at the first opportunity to do so, even if on appeal." ***Bradley***, 261 A.3d at 401.

proceedings it deems necessary for it to consider in the first instance one of Fehir's ***Bradley*** claims raised on appeal. The remand is due to no fault of the PCRA Court because, as stated above, Fehir raised this claim for the first time on appeal. Fehir's other six ***Bradley*** claims are denied.

On January 19, 2018, Fehir was found guilty of twenty-three counts of sex offenses related to the sexual abuse of his stepdaughter ("Victim") over a ten-year period starting in 1998 when she was around the age of five. The typical pattern of abuse involved Fehir putting his mouth on Victim's vagina and rubbing his penis on her vagina. When Fehir would put his mouth on her vagina there was penetration with his tongue and on a few occasions, one of which when she was six or seven years old, he penetrated her vagina with his penis.

At trial, Victim, Detective Anthony McClure, Detective Dawn Shane, K.J., and J.W. testified. Detective McClure, who in November 2015 was the captain of detectives in the Beaver County District Attorney's Office, testified regarding the procedure for obtaining the wiretap authorization for the recorded in person conversation between Victim and Fehir. He testified that they initially intended to perform a "pretext call" and filed the necessary paperwork to get that accomplished. ***See*** N.T., 1/18/18, at 377. When that never came to fruition, they planned on performing an in-person consensual wiretap and, after submitting the necessary paperwork to a trial judge, obtained approval for it. ***See id.*** at 378. Thereafter, on November 7, 2015,

Detective McClure participated in the recording of a conversation between Victim and Fehir that took place in Fehir's parked vehicle.[2] ***See id.*** at 379.

Trial counsel objected to Detective Shane testifying to why in her "professional experience" sexual assault victims delay reporting. ***See*** N.T., 1/18/2018, at 395, 400. The trial court permitted Detective Shane to testify as to her own experience for how often sexual assault victims delay reporting. ***See id.*** at 397, 400. Detective Shane testified to the fact that in her experience sexual assault victims delay reporting but did not offer any testimony explaining the reasons for why that occurs.[3] ***See id.*** at 397-401.

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[2] Detective Shane also participated in the recording of the conversation between Victim and Fehir.

[3] Specifically, Detective Shane testified:

> Q. Detective Shane, in your years of experience as a police enforcement officer and specifically as a . . . detective investigating sexual assault cases, are you familiar with delayed reporting?
>
> A. Yes.
>
> Q. And in your experience is that something that happens often when you are working these cases?
>
> A. Yes.
>
> Q. How often would you say it occurs?
>
> A. Most, most of the cases that I get it's a delayed report. It's very rare that I get a report immediately.

(Footnote Continued Next Page)

K.J., Victim's cousin, and J.W., Victim's friend, testified about similar incidents of abuse that happened to them at Fehir's house when they were young teenagers.[4] K.J. testified that on one occasion Fehir entered the bedroom in which she was sleeping and attempted to remove her pants. ***See*** N.T., 1/18/18, at 421. J.W. testified to more than one incident in which Fehir stuck his hand down her pants and laid on top of her with an erect penis when she was sleeping. ***See id.*** at 461-65. They both also testified about how they and Victim disclosed the sexual abuse to each other before going to the police.[5] ***See id.*** at 424-25, 465-67.

Additionally, portions of a two-hour recorded conversation from November 2015 between Victim and Fehir, and transcripts of that testimony, were admitted into evidence. ***See id.*** at 490. During the conversation, Fehir stated "I never thought about you and what I, what I did can do to you[]" and

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> Q. Now, in this case when you met with [Victim] did you address delayed reporting with her?
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> A. Yes, I did.

N.T., 1/18/18, at 401.

[4] K.J. and J.W. are a few years older than Victim.

[5] The Commonwealth initially brought charges against Fehir based on K.J. and J.W.'s allegations, but the charges were *nolle prossed*.

Victim told him, "it changed my whole life[.]" ***Id.*** at 499. Victim testified that these comments referred to Fehir "raping and molesting" her.[6] ***Id.***

Fehir was sentenced to 306 to 612 months of incarceration followed by three years of probation.[7] He filed a post sentence motion which was denied and this Court affirmed his judgment on sentence. ***See Commonwealth v. Fehir***, No. 1355 WDA 2018, 2019 WL 6999909 (Pa. Super. filed Dec. 20, 2019) (unpublished memorandum). On direct appeal, he unsuccessfully raised claims of sufficiency of the evidence and challenged the trial court's allowance of the Commonwealth to re-open its case in chief after resting. Fehir did not seek further review with our Supreme Court. Therefore, Fehir's judgment of sentence became final on January 19, 2020. ***See*** 42 Pa.C.S.A. § 9545(b)(3).

Fehir filed a timely *pro se* PCRA petition on December 22, 2020. ***See id.*** at § 9545(b)(1). On May 16, 2022, appointed counsel filed a no merit letter and withdrew from the case. Thereafter, Fehir filed a series of *pro se* amended PCRA petitions. Fehir obtained private counsel and, on November 15, 2024, filed a fourth amended PCRA petition.

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[6] In its closing argument, the Commonwealth referred to additional statements made in the recorded conversation. ***See*** N.T., 1/19/18, at 569. Fehir disputes that those statements were included in the conversation. ***See*** Appellant's Brief, at 31.1. However, he does not dispute the above quoted statements.

[7] For his term of confinement, only the sentences for rape of a child (count three), 18 Pa.C.S.A. § 3121(c), 240 to 480 months, and involuntary deviate sexual intercourse ("IDSI") with a person less than thirteen years old (count eight), 18 Pa.C.S.A. § 3123(b), 66 to 132 months, were imposed consecutively.

On May 27, 2025, a hearing was held. At the hearing, the Commonwealth and defense counsel stipulated that Fehir was entitled to relief regarding trial counsel and appellate counsel's failure to raise the statute of limitations regarding the charge of unlawful contact with a minor (18 Pa.C.S.A. § 6318(a)(1)). Trial counsel and appellate counsel testified.[8]

On August 1, 2025, the PCRA court entered an order vacating Fehir's sentence for unlawful contact with a minor, which did not impact his overall sentence because the sentence for unlawful contact with a minor was imposed concurrently, and denying his PCRA petition in all other respects. His private counsel was granted leave to withdraw and Fehir timely appealed *pro se*. Both Fehir and the PCRA court complied with Pennsylvania Rule of Appellate Procedure 1925. ***See*** Pa.R.A.P. 1925(a)-(b).

Fehir raises the following issues for our review.

> 1). Whether PCRA counsel who was "also" Pre-Trial counsel was ineffective for not (under obligation) immediately advising his client and the [c]ourt of the conflict with the limits or pitfalls to "both" representations, due to not being able to reasonably argue against himself, which has denied a full and fair review of the case pursuant to the Sixth Amendment[?]
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> 2). Whether PCRA counsel was ineffective for failing to raise his and Trial counsel's ineffectiveness, because their failure to compel the Commonwealth to provide in discovery the wiretap order, wiretap application and affidavit of probable cause under the mandatory disclosure provisions of Pa.R.Crim.P. 573(B)(1)(g) and

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[8] In addition to his trial counsel, Fehir was represented by two different attorneys at different stages of his direct appeal. All three testified at the PCRA hearing. We also note that Fehir's counsel during the PCRA proceedings represented him pretrial until Fehir withdrew his guilty plea before trial.

the Wiretapping Act 18 Pa.C.S.[A.] § 5701-5782, has denied [Fehir] the ability to preserve in a pretrial motion to suppress the procedural defects establishing probable cause, denying a fair trial pursuant to the Sixth and Fourteenth Amendment(s)[?]

3). Whether PCRA counsel was ineffective for failing to raise Trial counsel's ineffectiveness for not objecting to the admission at trial of the narrated edited portions of the recorded wiretap audio and the transcript, because allowing the witness to narrate portions of this evidence was inadmissible hearsay and edited portions was misleading and taken out of context, denying a fair trial pursuant to the Sixth Amendment[?]

4). Whether PCRA counsel was ineffective for failing to raise Trial counsel's ineffectiveness for not impeaching at trial the witness with prior police, wiretap audio, and preliminary hearing statement[s], because the record supports that if counsel would have utilized the extensive information it would cast doubt on the witness's credibility and reasonable doubt to whether a jury would convict, denying a fair trial pursuant to the Sixth Amendment[?]

5). Whether PCRA counsel was ineffective for failing to raise Trial counsel's ineffectiveness for failing to put on available character witnesses who were willing to testify, because there was no strategic reasonable basis to not call these witnesses and absent their testimony denied a fair trial, pursuant to the Sixth Amendment[?]

6). Whether PCRA counsel was ineffective for failing to raise Trial counsel's ineffectiveness for not objecting to irrelevant picture(s) being admitted by the Commonwealth and sent out with the jury during deliberations, because such evidence (adolescent pictures) had no place in trial and thereby inflamed the jury affecting the outcome of the trial, pursuant to the Sixth Amendment[?]

7). Whether PCRA counsel was ineffective for failing to raise Trial counsel's ineffectiveness for failing to raise the trial court's error in not merging both 18 Pa.C.S.[A.] § 3121(c) and 18 Pa.C.S.[A.] § 3123(a)(6) under 42 Pa.C.S.[A.] § 9765 requiring merger for sentencing purposes, because the statutory elements are the same and the criminal act for each offense is the same making the sentence illegal, pursuant to the Sixth Amendment[?]

> 8). Whether the lower court abused its discretion in denying relief based on Appellate Counsel being ineffective for failing to raise Trial Counsel's preserved objection(s) arising from Detective Dawn Shane's testimony about [V]ictim's delayed reporting, when based on that detectives training, experience, and specialized knowledge constitutes expert testimony, and whether permitting such testimony from a lay witness is inconsistent with the plain language of Pa.R.E. 701 and 702 and ***Commonwealth v. Jones***, 240 A. 3d 881 (Pa. 2020)?
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> 9). Whether the lower court abused its discretion by denying relief where Trial Counsel was ineffective for failing to object to the jury being permitted to have during deliberations a printed copy of the audio "transcript" which was viewed as an admission or confession, because Pa.R.Crim.P. 646(B)(1) & (2) prohibits the jury from taking into the jury room a transcript of "any" trial testimony or written or otherwise recorded confession of [Fehir], pursuant to the Sixth Amendment[?]
>
> 10). Whether the lower court abused its discretion by denying relief where Trial counsel was ineffective for failing to request a limiting instruction or object to the Commonwealth's improper application of Pa.R.E. 404(b), because there is no "valid" prior evidence of other crimes or wrongs or other acts and the use of any opposing witness testimony is clearly hearsay and trial counsel had no conceivable strategic purpose for defense, denying a fair trial pursuant to the Sixth Amendment[?]

Appellant's Brief, at viii-xi (citations omitted).

In issues eight through ten, Fehir asserts that the PCRA court erred by denying him relief on his claims of ineffective assistance of trial and appellate counsel. We address these issues first for ease of disposition.

> Our standard of review from the denial of a PCRA petition is limited to examining whether the PCRA court's determination is supported by the evidence of record and whether it is free of legal error. The PCRA court's credibility determinations, when supported by the record, are binding on this Court; however, we apply a *de novo* standard of review to the PCRA court's legal conclusions.

Commonwealth v. Miranda, 317 A.3d 1070, 1075 (Pa. Super. 2024) (brackets and citation omitted).

We presume counsel is effective, and an appellant bears the burden to prove otherwise. ***See Commonwealth v. Bennett***, 57 A.3d 1185, 1195 (Pa. 2012). To establish a successful ineffective assistance of counsel claim, a petitioner must establish:

> (1) the underlying claim is of arguable merit;
> (2) that counsel had no reasonable strategic basis for his or her action or inaction; and
> (3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different.

Commonwealth v. Orlando, 156 A.3d 1274, 1281 (Pa. Super. 2017) (citation omitted). A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim. ***See Commonwealth v. Solano***, 129 A.3d 1156, 1163 (Pa. 2015).

In issue eight, Fehir asserts that the PCRA court erred in denying relief based on his claim that appellate counsel was ineffective for failing to raise trial counsel's preserved objection to Officer Dawn Shane's testimony. ***See*** Appellant's Brief, at 25-29. This claim does not merit relief.

At the conclusion of trial, the trial court gave the following instruction regarding Victim's delayed report:

> The evidence of [Victim's] delay in making a complaint does not necessarily make her testimony unreliable, but may remove from it the assurance of reliability accompanying the prompt complaint or out[]cry that the victim in cases such as these would ordinarily be expected to make.

> Therefore, the delay in making a complaint should be considered in evaluating [Victim's] testimony and deciding whether the acts occurred at all.
>
> You must not consider [Victim's] delay in making a complaint as conclusive evidence that the acts did not occur. Her failure to complain promptly and the nature of any explanation for that failure are factors bearing on the believability of her testimony and must be considered by you in light of all of the evidence in the case.

N.T., 1/19/18, at 590-91.

The PCRA court explained why the underlying claim lacked arguable merit.

> To begin, it is a well-established legal precedent that counsel cannot be held to be ineffective for failing to anticipate a change in law. ***See Commonwealth v. Duffey***, 889 A.2d 56 (Pa. 2005). In the present case, this Court recognizes that the Supreme Court case of ***Commonwealth v. Jones***, 240 A.3d 881 (Pa. 2020) established that previous case law was effectively overruled by 42 Pa.C.S. § 5920 and subsequent Superior Court cases such as ***Commonwealth v. Williams***, 274 A.3d 722 (Pa. Super. 2022) clearly establish that a detective or law enforcement officer cannot provide testimony on the delayed reporting of sexual assault victims without being properly qualified as an expert.
>
> However, these cases post date the filing of the appeal by some time. In fact, the Superior Court decision in ***Commonwealth v. Jones***, No. 1636 WDA 2016, 2018 WL 3598642 (Pa. Super. July 27, 2018) though non-precedential, was issued just a few months prior to the appeal in this case and seemed to indicate that a detective could testify about such issues in light of their personal experience and not need to be qualified as an expert. . . .
>
> As such, it is understandable that [trial counsel] felt as though the direction and limitation given by this [c]ourt, specifically narrowing the scope of Officer Dawn Shane's testimony to her personal experiences and facts from cases she had worked on, was sufficient. N.T., 5/27/25, at 14-17. It is also clear why

> Attorney Quinn, on appeal, did not raise the issue in light of the case law at the time and his understanding of it. ***Id.*** at 86-87.
>
> Given that the ***Jones*** decision was not issued until 2020, roughly two years after the appeal was filed in this case, appellate counsel cannot be held as ineffective for failing to raise the issue given the state of the law.

PCRA Court Opinion, 10/27/25, at 12-13 (unpaginated) (record citation format altered).

We find no error with the PCRA court's assessment and adopt it as our own.

Next, Fehir argues that the PCRA court erred in not granting him relief on his claim that trial counsel was ineffective for failing to either object to, or ask for an instruction regarding, the jury being allowed to have the transcript of the recorded conversation between Victim and Fehir in violation of Pa.R.Crim.P. 646. ***See*** Appellant's Brief, at 30-31. Fehir argues that the transcript contained a confession which unfairly prejudiced him. ***See id.*** The Commonwealth argues that, although the transcript contains "admissions," it does not contain a "confession." Appellee's Brief, at 15. Further, the Commonwealth argues that Fehir is not entitled to relief because failure to object to a violation of Rule 646 is not *per se* ineffective assistance of counsel and trial counsel had a reasonable strategic basis for not objecting. ***See id.*** at 14-18.

Pennsylvania Rule of Criminal Procedure 646 prohibits, in pertinent part, the jury from having "a copy of any written or otherwise recorded confession

by the defendant[.]" Pa.R.Crim.P. 646(C)(2). A violation of Rule 646(C) does not constitute *per se* ineffective assistance of counsel, and is subject to the traditional three-prong test for ineffectiveness. ***See Commonwealth v. Postie***, 200 A.3d 1015, 1030 (Pa. Super. 2018) (*en banc*).

The PCRA court explained its reasoning for denying Fehir's claim.

> [Trial counsel] clearly outlined his strategic reasonings for his actions at the PCRA Hearing. ***See*** N.T., 5/27/25, at 28-39, 52-55. [Trial counsel] recognized that the recordings had been properly admitted at trial as exhibits and that they could be played for the jury at any point. He also noted that there were statements made in the recording that were problematic for the defense, stating that considering the recording and the overall state of the case, "we had a long road to hoe . . . and I didn't want to hide those [] statements." ***Id.*** at 38. Instead, [trial counsel's] strategy was to attempt to explain and contextualize those statements and utilize the entirety of the recorded conversation in an attempt to humanize [Fehir] in the eyes of the jurors. ***Id.*** at 28, 29, and 39. [Trial counsel further explained that the "long" "civilized conversation" between Fehir and [V]ictim demonstrated "a comfort level that she had with him[.]" ***Id.*** at 29.]
>
> Given the above, this [c]ourt found that trial counsel had a reasonable basis for the decision to allow the transcript to go back [with] the jury during deliberations. [Fehir's] argument fails the ***Strickland*** test. Trial counsel was not ineffective for failing to object to the transcript going back [with] the jury, given the overarching strategy.

PCRA Court Opinion, 10/27/25, at 14 (unpaginated) (record citation format altered).

We agree with the PCRA court. In closing, trial counsel described the record conversation to the jury as "a lot of catching up, mutual support, normal conversation from having not seen one another for some time, which in itself is a little bit strange given the context for which we are dealing with

all of this here and what prompts that conversation to occur." N.T., 1/19/18, at 538. Trial counsel attempted to have the jury focus on the apparent emotional connection and level of comfort between Victim and Fehir, which was demonstrated in the recorded conversation, as a reason to disbelieve that sexual abuse occurred. Allowing the jury to have the transcript of the recorded conversations during deliberations is consistent with that strategy. The fact that the jury was unpersuaded does not render trial counsel's strategy unreasonable. Therefore, the PCRA court did not err in denying this claim.

In issue ten, his final claim of error by the PCRA court, Fehir argues that the PCRA court erred in denying his claim that trial counsel was ineffective by failing to object to K.J. and J.W.'s testimony. ***See*** Appellant's Brief, at 32-33. The entirety of his argument is that the testimony was inadmissible because it did not demonstrate a common scheme, plan or design to be admissible under Rule 404(b). ***See id.*** at 33-34. Fehir does not try to distinguish the facts of Victim's allegations from K.J. and J.W.'s allegations but rather states that the difference between them is that his charges pertaining to K.J. and J.W. were *nolle prossed*. ***See id.*** He also states in conclusory fashion that "there is an issue of hearsay." ***Id.*** at 34. Based on these bare assertions and undeveloped arguments, Fehir has waived this issue.[9] ***See Commonwealth***

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[9] Additionally, the PCRA court explained:

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v. Caruso, 361 A.3d 588, 602 (Pa. Super. 2026) (finding issue waived for lack of development).

Fehir's remaining claims, issues one through seven, assert for the first time on appeal, pursuant to ***Bradley***, that PCRA counsel was ineffective. Since this is his first opportunity to do so, he is permitted to raise these claims on appeal. ***See Bradley***, 261 A.3d at 401. In considering such claims we "have the ability to grant or deny relief on straightforward claims, as well as the power to remand to the PCRA court for the development of the record." ***Id.*** at 403. Our Supreme Court has further instructed:

> Here, [Fehir] had two other criminal cases involving sex crimes against minors which were *nolle prossed*, the Commonwealth sought to produce 404(b) testimony by those alleged victims to show evidence of a common scheme, plan or design where the crimes are so related that proof of one tends to prove the others and was admissible as such. The mere fact that the cases did not result in a conviction did not render them to be not "valid" as claimed by [Fehir] in his concise statement. As the evidence was properly admissible[,] [] there was no underlying reason for [trial counsel] to object. Though unnecessary in light of the above, we also take specific notice of [trial counsel's] stated trial strategy and intention to use the testimony of the alleged other victims to show collusion and attack the Commonwealth's attempt to paint [Fehir] having operat[ed] under a certain modus operandi. N.T., 5/27/25, at 24-28. For both the reasons that the underlying claim had no merit and because the trial attorney had a reasonable basis for allowing the 404(b) testimony into the case, this [c]ourt finds that [Fehir's] claim fails the ***Strickland*** test.

PCRA Court Opinion, 10/27/25, at 16-17 (unpaginated) (record citation format altered).

> In some instances, the record before the appellate court will be sufficient to allow for disposition of any newly-raised ineffectiveness claims. However, in other cases, the appellate court may need to remand to the PCRA court for further development of the record and for the PCRA court to consider such claims as an initial matter. Consistent with our prior case law, to advance a request for remand, a petition would be required to provide more than mere boilerplate assertions of PCRA counsel's ineffectiveness; however, where there are material facts at issue concerning claims challenging counsel's stewardship and relief is not plainly unavailable as a matter of law, the remand should be afforded.

Id. at 402 (citations, brackets, and quotation marks omitted).

Bradley does not displace the long-established roles of "the PCRA court as the court of first impression[,]" which "should have the first opportunity to address factual and legal claims[,]" and the appellate court's role of "review[ing] the PCRA court's decision for an error of law or an abuse of discretion." ***Commonwealth v. Greer***, 316 A.3d 623, 630-31 (Pa. 2024) (citations and footnote omitted). Consequently, our ability to address an ineffective assistance of counsel claim in the first instance, "applies only where there is [not] any question about the merit of the newly-raised ineffectiveness claim." ***Id.*** at 630 n.4.

Because these claims raised by Fehir challenge PCRA counsel's failure to raise claims of ineffectiveness of pretrial and trial counsel, they are layered ineffective assistance of counsel claims.

> 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. 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. Gibson, 318 A.3d 927, 932 (Pa. Super. 2024) (citation omitted).

Fehir requests that we either grant him relief or remand for the PCRA court to develop the record and consider the claims in the first instance. ***See*** Appellant's Brief, at 2. To his credit, Fehir raises cogent arguments that mostly contain more than mere boilerplate assertions as to why PCRA counsel was ineffective. In its Rule 1925(a) opinion, the PCRA court found that these claims were waived for not raising them in the PCRA court and the Commonwealth does not address them. ***See*** PCRA Court Opinion, 10/27/25, at 10 (unpaginated). Therefore, we are without any substantive adversarial argument against Fehir's ***Bradley*** claims.

In issue one, Fehir argues that his PCRA counsel was ineffective for failing to advise Fehir and the PCRA court of his inherent conflict of interest since PCRA counsel also represented Fehir pretrial. ***See*** Appellant's Brief, at 3-5. For this issue, Fehir does not allege that PCRA counsel's prior representation led to PCRA counsel's failure to raise certain claims regarding his ineffectiveness while acting as pretrial counsel and instead appears to argue that the representation itself constituted a breach of the duty of loyalty. ***See id.*** at 4-5. This is the sole claim where he asserts that the only appropriate remedy is a remand. ***See id.*** at 5.

"The phrase 'duty of loyalty' appears in the context of examining counsel's primary obligation to his own individual client." ***Commonwealth v. Washington***, 880 A.2d 536, 543 (Pa. 2005) (citation omitted). "The duty of loyalty is the obligation of counsel to avoid actual conflicts of interest that would adversely affect his ability to perform on behalf of his client." ***Id.*** (citation omitted). A claim that counsel violated a duty of loyalty to the client must be established within the confines of the three-prong test for ineffectiveness. ***See id.*** at 545. Because such claims are addressed within the confines of the test for ineffective assistance of counsel, ineffective assistance of counsel can only be established if PCRA counsel's prior representation as pretrial counsel caused PCRA counsel not to raise a meritorious issue regarding counsel's own prior representation. We see no basis to provide relief on a generalized claim that PCRA counsel's pretrial representation of Fehir *per se* constituted ineffective assistance of counsel. Because Fehir fails even to plead the three prongs of the ineffectiveness test, we can determine in the first instance that Fehir's first issue lacks legal merit.

Next, Fehir argues that PCRA counsel was ineffective for failing to raise both his own ineffectiveness when acting as pretrial counsel and trial counsel's ineffectiveness. Specifically, he claims both counsel failed to compel the Commonwealth to produce the wiretap order, wiretap application, and affidavit of probable cause in discovery, under the mandatory disclosure provisions of Pa.R.Crim.P. 573(B)(1)(g) and the Wiretapping Act, 18 Pa.C.S.A.

§§ 5701-5782, which denied him the ability to challenge procedural defects in a pretrial motion to suppress. ***See*** Appellant's Brief, at 6-8. He asserts that, had the documents related to the wiretap been provided, counsel would have been able to move for suppression pursuant to 18 Pa.C.S.A. § 5721.1(b)(1) (grounds for excluding contents of intercepted communications). ***See id.*** at 8.

Pennsylvania Rule of Criminal Procedure 573(B)(1)(g) provides in relevant part,

> **(B) Disclosure by the Commonwealth.**
>
> (1) *Mandatory.* In all court cases, **on request by the defendant**, and subject to any protective order which the Commonwealth might obtain under this rule, the Commonwealth shall disclose to the defendant's attorney all of the following requested items or information, provided they are material to the instant case. The Commonwealth shall, when applicable, permit the defendant's attorney to inspect and copy or photograph such items.
>
> . . . .
>
> (g) the transcripts and recordings of any electronic surveillance, and the authority by which the said transcripts and recordings were obtained.

Pa.R.Crim.P. 573(B)(1)(g) (emphasis added).

If counsel would have requested the authority for authorizing the recording, the Commonwealth would have been required to disclose that information. ***See id.***; ***Commonwealth v. Shreffler***, 201 A.3d 757, 767 (Pa. Super. 2018). However, Fehir cannot establish he was prejudiced by counsel's failure to do so because, even if the mandatory disclosure had been produced,

he has failed to establish that any underlying suppression claim would have had arguable merit.

Section 5721.1(b) of the Crimes Code sets forth the grounds for excluding evidence obtained from a wiretap and provides in pertinent part,

> **(b) Motion to exclude.--**Any aggrieved person who is a party to any proceeding in any court, board or agency of this Commonwealth may move to exclude the contents of any wire, electronic or oral communication, or evidence derived therefrom, on any of the following grounds:
>
> > (1) Unless intercepted pursuant to an exception set forth in section 5704 (relating to exceptions to prohibition of interception and disclosure of communications), the interception was made without prior procurement of an order of authorization under section 5712 (relating to issuance of order and effect) or an order of approval under section 5713(a) (relating to emergency situations) or 5713.1(b) (relating to emergency hostage and barricade situations).

18 Pa.C.S.A. § 5721.1(b)(1).

Relevant here is Section 5704(2)(ii) which applies when one of the parties to the conversation has consented to the recording.

> It shall not be unlawful and no prior court approval shall be required under this chapter for:
>
> . . . .
>
> > (2) Any investigative or law enforcement officer or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire, electronic or oral communication involving suspected criminal activities, including, but not limited to, the crimes enumerated in section 5708 (relating to order authorizing interception of wire, electronic or oral communications), where:

. . . .

> (ii) one of the parties to the communication has given prior consent to such interception. However, no interception under this paragraph shall be made unless the Attorney General or a deputy attorney general designated in writing by the Attorney General, or the district attorney, or an assistant district attorney designated in writing by the district attorney, of the county wherein the interception is to be initiated, has reviewed the facts and is satisfied that the consent is voluntary and has given prior approval for the interception; however, such interception shall be subject to the recording and record keeping requirements of section 5714(a) (relating to recording of intercepted communications) and that the Attorney General, deputy attorney general, district attorney or assistant district attorney authorizing the interception shall be the custodian of recorded evidence obtained therefrom[.]

18 Pa.C.S.A. § 5704(2)(ii).

In considering suppression claims of such recordings, "the consent of a party to the communication lessens the constitutional concerns related to privacy as compared to those which pertain to non-consensual interceptions." ***Commonwealth v. Spangler***, 809 A.2d 234, 240 (Pa. 2002) (footnote omitted). Under such circumstances, the Wiretap Act requires "that the informant acts consensually, that his consent is voluntary, and that the informant acts under the direction of an investigative or law enforcement

officer to intercept oral communications involving suspected criminal activities." ***Commonwealth v. Lissmore***, 313 A.3d 1050, 1060 (Pa. Super. 2024) (citation omitted).

Here, at trial, Victim testified that she voluntarily participated in the recorded conversation with Fehir. ***See*** N.T., 1/17/18, at 287-89. Detective McClure testified about the process for obtaining approval, including the district attorney's review and approval, and Victim's voluntary participation in the process. ***See*** N.T., 1/18/18, at 376-79. "[T]he failure to file a suppression motion under some circumstances may be evidence of ineffective assistance of counsel." ***Commonwealth v. Watley***, 153 A.3d 1034, 1044 (Pa. Super. 2016) (citations omitted). "However, if the grounds underpinning that motion are without merit, counsel will not be deemed ineffective for failing to so move." ***Id.*** (citation omitted). Therefore, because the trial testimony clearly established Victim's voluntary consent and the proper procedure for obtaining the recorded conversation, Fehir's claim fails because counsel cannot be ineffective where his suggested grounds for suppression would have been without merit.

In his third ***Bradley*** claim, Fehir argues that PCRA counsel was ineffective for failing to raise trial counsel's ineffectiveness for failing to object to Victim's testimony about portions of the recorded conversation. ***See*** Appellant's Brief, at 8-11. He argues that Victim's narration created a misleading impression about the content of the conversation, trial counsel

should not have stipulated to only excerpts of the recording being played, and pursuant to Pennsylvania Rule of Evidence 106, trial counsel should have requested to introduce the entire recording rather than excerpts. ***See id.*** at 9-11. He asserts that his statements in the conversation were related to an August 2009 incident during a trip to Florida, which was not an incident for which he was charged or on trial. ***See id.*** at 10. However, Fehir does not explain how the additional portions of the recorded conversation support his contention that his statements related to an August 2009 incident rather than sexual abuse that Victim testified occurred during her childhood. Such an unexplained assertion does not entitle Fehir to relief. Therefore, because he fails to plead how his underlying claim has merit, this issue lacks merit.

In his fourth ***Bradley*** claim, Fehir argues that PCRA counsel was ineffective for failing to raise a claim that trial counsel was ineffective for failing to impeach Victim. ***See id.*** at 12-15. Fehir points to Victim's testimony regarding two incidents in which Fehir penetrated her vagina with his penis which caused her to bleed, and she told her mother about the bleeding. ***See id.*** at 14-15. Victim testified that these incidents happened when she was six or seven and "before puberty" around the age of fourteen or fifteen.[10] ***See id.***

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[10] When asked to specify an age she gave multiple answers saying "I might have been 15[,]" "maybe 15, 14[,]" and "15, 16." N.T., 1/18/18, at 280, 297, 325. She consistently testified that the incident occurred before she began puberty. ***See id.***

On cross-examination, trial counsel asked Victim about the incidents of penile penetration that caused her to bleed and also elicited testimony from Victim that Fehir never touched her when she was a freshman and sophomore in high school. ***See*** N.T., 1/17/18, at 325-27, 334-36. According to Fehir, this testimony was inconsistent with her account that an incident of penetration occurred when she was fourteen or fifteen, and had trial counsel questioned Victim further on this inconsistency, her credibility would have been damaged. ***See*** Appellant's Brief, at 13-16. Essentially, he takes issue that trial counsel did not choose to place a greater emphasis on this inconsistent testimony.[11]

"Matters concerning the examination and cross-examination of witnesses are matters clearly within the province of trial counsel." ***Commonwealth v. Smith***, 17 A.3d 873, 912 (Pa. 2011) (citations omitted); ***see also Commonwealth v. Petras***, 534 A.2d 483, 487 (Pa. Super. 1987) ("This allegation clearly regards a choice of style and tactics rather than an arguable claim of error by counsel."). Trial counsel elicited the apparent inconsistent testimony but chose not to further press Victim about it. We can readily understand the reasons trial counsel did not pressure the victim in a

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[11] As part of this claim he also asserts, without explanation, that exhibits attached to his brief could have been further used to impeach Victim, but he offers no explanation for how these exhibits would have impeached Victim and therefore, we do not consider them. ***See*** Appellant's Brief, at 15.

more aggressive way in front of the jury on this sensitive issue. Fehir has failed to state how this strategy was unreasonable. Therefore, his claim fails.

Next, Fehir argues that PCRA counsel was ineffective for failing to raise trial counsel's ineffectiveness for failing to call character witnesses.[12] ***See*** Appellant's Brief, at 16-19. Fehir argues that character witnesses were important to his case because the primary consideration for the jury was Victim's credibility, which might have been undermined by his favorable character witnesses. ***See id.*** at 18-19.

"Counsel may be deemed ineffective for failing to call character witnesses." ***Commonwealth v. Alceus***, 315 A.3d 853, 860 (Pa. Super. 2024) (citations omitted).

> In establishing whether defense counsel was ineffective for failing to call witnesses, an appellant must prove: (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; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial.

Id. (brackets and citation omitted).[13]

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[12] The three potential character witnesses identified by Fehir all testified on his behalf at his sentencing hearing.

[13] Procedurally, a petitioner also "must attach to his PCRA petition a signed certification as to each intended witness stating the witness's name, address, date of birth and substance of testimony." ***Commonwealth v. McCready***, 295 A.3d 292, 299 (Pa. Super. 2023) (internal quotation marks and citations omitted). Fehir previously attached such a certification identifying his proffered character witnesses to his *pro se* PCRA petitions. ***See*** Certification, 9/6/22.

At this stage, we cannot determine whether trial counsel was ineffective for failing to call Fehir's character witnesses. There are outstanding factual questions about this issue. There was no evidence presented regarding the proffered character witnesses, such as their availability and willingness to testify and counsel's knowledge of their existence. In his brief, Fehir asserts that he informed counsel of the existence of the character witnesses, but trial counsel told him that the character witnesses would not be helpful. ***See*** Appellant's Brief, at 18. Further, because the claim was not presented to the PCRA court, trial counsel did not testify to whether there was a strategic basis for not calling Fehir's suggested character witnesses. Trial counsel described his overall strategy as trying to portray Fehir as a "gullible older guy" and Victim as colluding with K.J. and J.W. to make up a story. ***See*** N.T., 5/27/25, at 27-28, 55. Based on the record before us, we cannot evaluate Fehir's contention that the failure to call favorable character witnesses for Fehir was inconsistent with the defense trial strategy. The PCRA court is in the better position to resolve these factual issues.

Additionally, at this stage, we cannot rule out whether the underlying claim has arguable merit or similarly whether the absence of the character witnesses prejudiced Fehir. We have explained the importance of character witnesses in cases where the focus is on the victim's credibility and have found counsel ineffective for failing to call them in such cases. ***See Alceus***, 315 A.3d at 868. Therefore, we are constrained to remand to the PCRA court for it to

consider this claim in the first instance and to conduct any proceedings it deems necessary for that task.

Next, Fehir asserts that PCRA counsel was ineffective for failing to raise a claim of trial counsel's ineffectiveness for failing to object to the admission of pictures of Victim as a child through adolescence. ***See*** Appellant's Brief, at 20. Fehir is correct that such evidence was irrelevant and should not have been admitted. ***See Commonwealth v. Vucich***, 194 A.3d 1103, 1108-09 (Pa. Super. 2018). However, his underlying claim does not have arguable merit because any prejudice was *de minimis* and therefore harmless.

Vucich is analogous. There, the trial court admitted the victim's childhood school picture from around the time that the alleged sexual abuse occurred. ***Id.*** at 1106. On appeal, we held that the trial court abused its discretion in admitting the picture because it was irrelevant since there was no need to prove to the jury what the victim looked like as a child. ***See id.*** at 1109-10. However, we found that any prejudice was *de minimis* and therefore the error was harmless because their use was limited and they simply depicted the victim's general appearance. ***See id.*** at 1110-11. While here the Commonwealth also held up for the jury during closing argument one of the pictures from when Victim was in kindergarten, ***see*** N.T., 1/19/18, at 571, that does not raise it above the level of *de minimis* prejudice. As the ***Vucich*** Court explained "the jury was obviously aware of the fact that C.D. was once a child, and it takes no great leap of imagination to imagine what a witness

may have looked like as a child. This point further highlights the *de minimis* prejudice." ***Id.*** at 1111. Therefore, the underlying claim does not have arguable merit.

In his seventh issue and final ***Bradley*** claim, Fehir argues that PCRA counsel was ineffective for not asserting that trial counsel was ineffective for failing to raise the trial court's error in not merging his sentences for rape of a child (count three) and IDSI of a person less than thirteen years old (count eight). ***See*** Appellant's Brief, at 23.

Sentences shall not merge "unless the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the statutory elements of the other offense." 42 Pa.C.S.A. § 9765. Pennsylvania courts have held that rape of a child and IDSI of a person under thirteen years old merge for sentencing when they arise from the same criminal act of a victim performing oral sex. ***See Commonwealth v. Brown***, 159 A.3d 531, 533-34 (Pa. Super. 2017).

Oral sex, intercourse per os, such as penetration of the vagina by the tongue, is included in the definitions of both sexual intercourse and deviate sexual intercourse. ***See Commonwealth v. Banniger***, 303 A.3d 1085, 1092 (Pa. Super. 2023). However, "[v]aginal sex—inserting a penis into a vagina, the 'ordinary meaning' of sexual intercourse—is not included in the definition of deviate sexual intercourse." ***Id.*** (citation omitted). Instead, non-consensual

penile penetration of the vagina qualifies as rape. ***See Brown***, 159 A.3d at 533-34.

According to Fehir, Victim only testified to one incident when she was under the age of thirteen where he penetrated her and therefore, count three and count eight must arise from the same criminal act and merge. ***See*** Appellant's Brief, at 24-25 (citing N.T., 1/17/18, at 326-29). The testimony from Victim referenced by Fehir describes an incident when she was six or seven years old when Fehir penetrated her vagina with his penis. Victim was over thirteen years old when she described another incident of Fehir penetrating her with his penis. However, Fehir fails to account for the fact that Victim testified that he penetrated her vagina with his tongue on numerous occasions. ***See*** N.T., 1/17/18, at 296.

Victim's testimony describing Fehir penetrating her vagina with his penis when she was six or seven years old qualifies as rape of a child. ***See Brown***, 159 A.3d at 533-34. Meanwhile, her testimony describing other occasions when she was a child and Fehir penetrated her vagina with his tongue qualifies as IDSI of a person under thirteen years old. ***See Banniger***, 303 A.3d at 1092. Therefore, count three and count eight did not arise from the same criminal act and do not merge for sentencing. Accordingly, because Fehir's underlying claim lacks merit, his ***Bradley*** claim fails.

In sum, the PCRA court did not err in denying Fehir's amended PCRA petition. Six of Fehir's seven ***Bradley*** claims are denied as he failed to

establish that "there are material facts at issue concerning claims challenging counsel's stewardship and relief is not plainly unavailable as a matter of law[.]" ***Bradley***, at 402 (citations, brackets, and quotation marks omitted). However, we are constrained to find that one of Fehir's ***Bradley*** claims—PCRA counsel's ineffectiveness for failing to raise trial counsel's ineffectiveness for failing to call character witnesses—is worth remanding for the PCRA court to consider in the first instance and resolve any factual issues. "The PCRA court shall have use of all of the general procedures to complete this task, including the discretion to require additional briefing, argument, and evidentiary hearings." ***Commonwealth v. Parrish***, 317 A.3d 551, 562 (Pa. 2024).

Accordingly, the PCRA court's order denying Fehir's amended PCRA petition is affirmed, six of his seven ***Bradley*** claims are denied, and we remand the matter for the PCRA court to consider Fehir's remaining ***Bradley*** claims.

Order affirmed. ***Bradley*** claims denied in part in accordance with this decision. Case remanded for further proceedings. Jurisdiction relinquished.

Judgment Entered.

Benjamin D. Kohler

Benjamin D. Kohler, Esq.
Prothonotary

DATE: 11/16/2026