COURT OF COMMON PLEAS OF SCHUYLKILL COUNTY--CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	NO. CR-1243-1998
	:	
vs.	:	
	:	
RONALD GRANT CHAMPNEY,	:	
Defendant	:	

Andrea McKenna, Esquire Senior Deputy Attorney General - for the Commonwealth
Angela S. Elleman, Esquire, Defender's Association - for the Defendant
David Zuckerman, Esquire, Defender's Association - for the Defendant
Samuel J.B. Angell, Esquire, Defender's Association - for the Defendant

OPINION OF COURT

BALDWIN, P.J.

On June 4, 1992, Roy Bensinger was shot and killed in the driveway of his residence. More than six years later, on October 7, 1998, a complaint was filed charging the petitioner with Bensinger's murder, among other offenses. On October 25, 1999, a jury found the defendant guilty of numerous offenses, including first degree murder. The next day, the jury returned a verdict imposing the death penalty. The petitioner was formally sentenced by the court on November 17, 1999. Timely post-sentence motions were filed and decided against the petitioner on May 12, 2000.

The petitioner appealed his conviction on May 24, 2000, and on January 24, 2002, the Pennsylvania Supreme Court ordered the case be remanded for a hearing on the

petitioner's claim of after-discovered evidence. After numerous continuances, a hearing was conducted on that claim, and the motion was denied by order of court dated May 22, 2003. The Pennsylvania Supreme Court then affirmed his conviction and death sentence on September 24, 2003. Champney's petition for certiorari review was denied by the U.S. Supreme Court on June 28, 2004, and on June 1, 2005, he filed the petition for post conviction relief that is now before this court for disposition.

At the time Champney's PCRA petition was filed, the District Attorney for Schuylkill County was Frank Cori. Champney had been represented by Cori in another case while he was being investigated regarding the Bensinger killing. Champney's petition makes numerous allegations regarding Cori, and so the Attorney General was asked to represent the Commonwealth in this proceeding.

PENALTY PHASE

Champney's petition alleges multiple deficiencies in the way his trial counsel represented him during the penalty phase of his case. Among those allegations, he asserts that she was ineffective by failing to object to victim impact evidence presented by the Commonwealth.

In 1995, the Legislature amended the sentencing code to permit the introduction of victim impact testimony during the penalty phase of a capital murder case and directed that the jury be instructed to consider the evidence about the victim and impact of the

murder on the victim's family when weighing aggravating and mitigating factors should the jury find both to exist. 32 Pa.C.S.A. §9711. However the Legislature made this amendment applicable only to sentences imposed for offenses occurring on or after the effective date of the amendment. Act. No. 1995-22 (SS 1).

Although Champney was tried in 1999, the murder of Roy Bensinger occurred in 1992, before the effective date of the amendment. Prior thereto, victim impact evidence was inadmissible in capital sentencing proceedings. ***Com. v. McNeil***, 545 Pa, 42, 56, 679 A.2d 1253 (1996).

Clearly there could be no reasonable basis for counsel's failure to object to victim impact testimony during the penalty phase of Champney's trial. The jury found the existence of two aggravating and three mitigating circumstances. The parties agree that the court could not determine how the sentencing jury considered the victim impact testimony in weighing the aggravating and mitigating circumstances. As such, it was conceded, that the court would be compelled to grant Champney a new sentencing hearing.

Since the issue involving the victim impact testimony was alone sufficient to require this result, Champney's PCRA counsel agreed to forego presenting evidence to support his other allegations of ineffective representation relating to the penalty phase of his trial.

We now turn to the question as to whether the petitioner has shown a basis for a new trial or, in the alternative, a new appeal. The many arguments advanced by petitioner in support of his bid for a new trial will be generally grouped by category for ease of discussion.

SUFFICIENCY OF RESOURCES PROVIDED FOR THE DEFENSE

A. Appointment of Counsel

Champney argues that the court rendered his counsel ineffective by failing to provide co-counsel or qualified lead counsel.

The Pennsylvania Supreme Court has already considered and rejected Champney's claim that the court abused its discretion by not appointing co-counsel. ***Com. v. Champney***, 574 Pa. 435, 452-53, 832 A.2d 403, 413-14 (2003). Previously litigated claims cannot form a basis for post-conviction relief. 42 Pa.C.S.A. §9543(a)(3) and 9544(a)(2).

Champney's companion argument that his trial counsel was not qualified to handle a capital case is merely another way of advancing his argument that co-counsel should have been appointed. The court agrees with the Commonwealth's assertion that this claim is waived. It could have been raised at a prior stage of the proceedings but was not, 42 Pa.C.S.A. 9543(a)(3) and 9544(b), and is merely stating another theory in an attempt

to re-litigate an issue that has been previously decided adversely to the petitioner. ***Com. v. Collins***, 585 Pa. 45, 888 A.2d 564, 570 (2005).

B. Alleged Investigator Conflict

Trial counsel was appointed for Champney at the request of the Public Defender's Office because that office was representing Leroy Long, Champney's co-defendant in his then pending robbery case. Although conflict counsel was appointed for Champney, his counsel was directed by the court to utilize the investigators at the Public Defender's Office. Champney argues that, since the Public Defender's Office was relieved from providing legal counsel for him, the criminal investigators in that office suffered from the same conflict.

This claim is waived, because it could have been raised at an earlier stage of the proceedings but was not. 42 Pa.C.S.A. §§9543(a)(3) and 9544(b). Moreover, Champney has presented no specific evidence to show how he was disadvantaged by the assistance provided by the public defender investigators. His trial counsel confirmed at a pretrial proceeding that she was satisfied with the investigators' services. N.T. 10/8/1999, pp. 5-6. Finally, the identical claim was dismissed as meritless by the court in ***Com. v. Strong***, 522 Pa. 445, 461, 563 A.2d 479, 787 (1989).

C. Resources for Experts

Champney's trial counsel had been instructed by the court to request funds for expert assistance from the Chief Public Defender, and to let the court know if she had any trouble getting what she requested. PCRA N.T. 3/20/2007, p. 180. Champney presented no evidence that the Public Defender had ever denied his trial counsel's request for funds to employ experts, but in his PCRA petition he alleges trial court error by forcing his trial counsel to seek expert funds from an office that was conflicted out of representing him.

As this claim is advanced as one of trial court error, it is waived because it could have been raised at an earlier stage of the proceeding but was not. 42 Pa.C.S.A. §§9543(a)(3) and 9544(b).

D. Alleged Denial of Competent Counsel and Resources

This subpart of the petitioner's claim is just a re-iteration of previous claims which have been specifically addressed above.

E. Alleged Ineffectiveness for Failing to Raise the above Claims

The denial of trial counsel's request for co-counsel was raised and found to be meritless on appeal. ***Com. v. Champney***, 574 Pa. 435, 452-53, 832 A.2d 403, 413-14 (2003).

Further, as stated above, the petitioner has presented no evidence that the investigators from the Public Defender's Office, who did work for his trial counsel, had

any conflict. Trial counsel was appointed for Champney because the Public Defenders Office was representing Leroy Long, a co-defendant of Champney in an unrelated robbery case that was pending at the time he applied for a public defender in this case. There was no evidence that the Public Defender was representing anyone who was even a suspect or witness in Champney's murder case, nor that any investigator was working on the murder case for anyone other than Champney. There was also no evidence that any of his trial counsel's requests for investigative services or funds to employ experts were denied by the Chief Public Defender.

Even if Champney's trial, appellate and post-trial counsel could be deemed ineffective for failing to raise the issues complained of, there was no prejudice to Champney, since he has offered no evidence to demonstrate a reasonable probability that the results in his case would have been different if his counsel had done what he asserts they should have. ***Com. v. Pierce***, 515 Pa. 153, 527 A.2d 973 (1987).

PETITIONER'S STATEMENTS MADE TO POLICE

A. Invocation of Right to Counsel

On October 23, 1997, Champney was arrested for an unrelated robbery charge and incarcerated in the Schuylkill County Prison. He was represented in the robbery case by Attorney Frank Cori. Champney had not yet been charged with the homicide in the instant case, but Sergeant David Shinskie of the Pennsylvania State Police, who was

investigating the homicide, wanted to interview Champney about it. PCRA N.T. 3/20/2007, p. 199. The state police were aware that Cori represented Champney in the robbery case, and on November 3, 1997, Trooper Denny Grimm phoned Cori to ascertain if Cori was representing Champney with respect to the homicide case. Cori told Grimm that he was not representing Champney regarding the homicide, and that Cori had no problem with Grimm going to the prison to interview Champney regarding the homicide. PCRA N.T. 3/21/2007, pp. 42-43.

Approximately three weeks later, on November 25, 1997, Sgt. Shinskie and Tpr. Grimm spoke to Champney while transporting him to a hearing in a police cruiser. Shinskie testified that Champney spoke freely in the vehicle and at the district justice office; but when they requested that he go to the police station to talk, Champney stated that he would rather have his attorney present if he were to go to the police station. On December 23, 1997, Shinskie and Grimm were again transporting Champney to a hearing in a police cruiser. Again Shinskie attempted to discuss the homicide with Champney, and this time Champney stated, "I think I should talk to Frank Cori before I make a statement." PCRA N.T. 3/20/2007, pp. 204-07.

Sgt. Shinskie later interviewed Champney on two occasions about the homicide. He testified about both interviews during Champney's trial.

The first of these interviews occurred on May 13, 1998. Sgt. Shinskie testified at trial that he gave Champney the standard ***Miranda*** warnings, and Champney signed a

waiver form. He told Champney that he had information from witnesses implicating Champney in the Bensinger murder. Champney responded by asking what he was looking at. Shinskie told him he would have to talk to the District Attorney about that, and Champney told him to get the District Attorney right then so he could lay everything out for him. The District Attorney was unavailable. Shinskie told Champney that a 30/30 Winchester rifle was missing from the Bensinger residence, and Champney responded that the guns were kept in a gun locker in the basement. When told by Shinskie that three bullets were missing from a box of 30/30 ammunition, Champney shook his head affirmatively. Champney also told Shinskie that the gun was not destroyed and that he knew who had it, but would not identify that person. When Shinskie, to elicit a reaction, said that he felt Chris Reber was involved, Champney excitedly informed Shinskie that Reber was not involved, but had only dropped off Champney. Trial N.T. Vol. II, pp. 397-402.

The second interview occurred on October 8, 1998, when Champney was arrested in this case. Again Shinskie described explaining Champney's ***Miranda*** rights and obtaining a written waiver. Shinskie testified that while reading the affidavit of probable cause, Champney, unsolicited, said that his co-defendant, Beth Bensinger, probably got immunity for her statements. Shinskie told Champney that she had not gotten immunity and suggested that Champney might like to talk to the District Attorney about a deal. Champney responded that he was not going to take a deal, but would instead take the

death penalty, because he did not want to spend the rest of his life in jail. Trial N.T. Vol. II, pp. 403-05.

Champney's trial counsel moved to suppress his statement of May 13, 1998, on the basis that it was not voluntary. In that motion she cited the absence of counsel during the interview, but made no assertion of an invocation of the right to counsel. She mentioned the absence of counsel only as a factor, along with an assertion that the state police had created an atmosphere of excessive pressure by questioning him at the same time about multiple crimes in multiple jurisdictions. Her argument went to the voluntariness of his statement and did not address the invocation of counsel issue which Champney now advances.

Trial counsel's motion to suppress the statement was denied. The Commonwealth asserts that this issue was previously litigated, both at the trial level and on direct appeal by the Pennsylvania Supreme Court's "relaxed waiver" doctrine. We believe the Commonwealth is mistaken in this argument.

As stated above, trial counsel challenged only the voluntariness of Champney's statement in her pretrial motion. In fact, she made no challenge at all to the statement given on October 8, 1998. Champney's direct appeal argued that the police officer's testimony should have been excluded, because its prejudicial effect outweighed its probative value. Although not preserved for appeal, the Supreme Court considered and rejected that argument. At no time was either the trial or appellate court asked to

consider whether the uncounseled statements should have been excluded because Champney had invoked his right to counsel prior to the interviews.

In ***Miranda v. Arizona***, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the U.S. Supreme Court held that in order to protect an individual's privilege against self-incrimination secured by the Fifth Amendment of the United States Constitution, police custodial interrogation must cease when the individual states that he wants an attorney until such time as an attorney is present. ***Id.*** at 474, 86 S.Ct. at 1628. In ***Edwards v. Arizona***, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), the United States Supreme Court clarified further an individual's Fifth Amendment rights, holding that once the individual expresses a desire to deal with the police through an attorney, there can be no further interrogation until counsel has been made available, unless the individual initiates further communication with the police. ***Id.*** at 484-85, 101 S.Ct. at 1885. Finally in ***Minnick v. Mississippi***, 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990), the United States Supreme Court made clear that ***Edwards*** must be strictly construed so that when an accused requests counsel, not only must interrogation stop, but it cannot be reinitiated without counsel present, even if the accused had consulted with an attorney. ***Id.*** at 153, 111 S.Ct. at 491.

The Pennsylvania Superior Court applied the bright-line test espoused in ***Minnick*** when it suppressed the defendant's statements to police in ***Com. v. Santiago***, 591 A.2d 1095 (Pa. Super. 1991). Santiago had been arrested for his involvement in a street fight.

Upon his release, he vowed revenge against the police. Later that night, a police officer was found shot to death in his police cruiser in the same vicinity as the street fight. Santiago was rearrested on the fight charges, and after waiving his rights, spoke several times with the police, each time denying his involvement in the officer's murder. After he requested an attorney, the interrogation ceased. Santiago ultimately consulted with an attorney, who advised him to make no further statements. Santiago remained in custody, and over the next several weeks, contrary to his attorney's advice, he agreed to talk to the police several times, each time waiving his rights. His attorney was not present at any of these interrogations. Eventually he made a statement that led to his arrest and conviction on the murder charges.

As stated by the Court:

> As the United States Supreme Court has now made clear, once Santiago had requested counsel, he had invoked his fifth amendment right to have counsel *present* during all police initiated interrogation at *any point* after that request and before formal accusation of that crime. Neither the fact that Santiago was properly informed and repeatedly reminded of his fifth amendment right to remain silent, nor the fact that counsel was provided and (unsuccessfully) advised Santiago to invoke his ***Miranda*** right to remain silent, nor even the fact that Santiago chose to waive his right to remain silent, is of any consequence in the wake of ***Minnick v. Mississippi, supra.*** Proof that counsel had been requested, that the police has reinitiated questioning thereafter, and that counsel was not actually *present* during any such interrogation, dispositively established that the fifth amendment right to counsel as currently expounded by the Supreme Court was violated.

591 A.2d at 1102-03.

Champney argues that he invoked his right to counsel prior to making either of the statements used against him at trial; that the statements were made during police initiated custodial interrogation without the presence of counsel; and that his trial counsel was ineffective by failing to move for the suppression of those statements based on his invocation of the right to counsel and the holding in ***Minnick, supra.***

The Commonwealth's argument that this issue has already been litigated is unpersuasive for the reasons discussed above. Trial counsel sought to suppress one of the statements but made no argument based on Champney's invocation of his right to counsel.

The Commonwealth asserts that a motion to suppress on that basis would have been unsuccessful, because, it argues, Champney had not actually invoked his right to counsel. Sgt. Shinskie testified that on November 25, 1997, Champney spoke freely with him while being transported to a hearing and only expressed a desire to have an attorney present if he was going to be questioned at the state police barracks, as Shinskie suggested. He was never taken to the barracks for questioning. Since this condition on which he wanted counsel did not occur, the Commonwealth argues that Champney's remarks fell short of an unambiguous invocation of his right to counsel.

On December 23, 1997, while being questioned by Shinskie under similar circumstances, Champney said, "I think I should talk to Frank Cori before I make a statement." Again the Commonwealth argues that this statement is equivocal and

expresses only a "contemplated" request for an attorney, referring us to ***Davis v. United States***, 512 U.S. 452, 114 S.Ct. 2350 (1994).

In ***Davis***, the defendant was being questioned about a murder. About an hour and a half into the interview, he said, "Maybe I should talk to a lawyer." When asked if he was asking for a lawyer, he replied that he was not. The interrogators took a break, reminded him of his rights and continued with the interview. While applauding the officers' attempt to clarify Davis' original statement, the Court declined to impose the duty to do so in future interrogations. Instead, the Court held that in order to invoke his right to counsel under ***Miranda***, a suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." ***Id.*** at 459, 114 S.Ct. at 2355.

As the Commonwealth argues, Champney's stated preference to having an attorney present if he were to be questioned at the police barracks was conditional and somewhat ambiguous. However, we cannot accept the Commonwealth's argument that his request on December 23, 1997, to see Cori before making a statement was ambiguous merely because he used the word "think" within that statement. We believe that a reasonable police officer in Sgt. Shinskie's circumstances at the time would have understood Champney's statement to be a request for an attorney before making a statement. In fact, apparently Sgt. Shinskie understood it exactly that way and ceased further questioning at the time.

Had trial counsel moved to suppress Champney's statements, which were used against him at trial, on the basis that they were made without the presence of counsel after he had invoked his right to counsel, the evidence of those statements would have been unavailable to the Commonwealth at trial. We find this claim of the petitioner to be of arguable merit. His trial counsel freely acknowledged she had no tactical strategic reason for not litigating the issue. PCRA N.T. 3/20/2007, pp. 36-50. We will discuss the reasonable probability that the outcome of his trial would have been different after considering the rest of his claims.

B. Attorney Cori's Alleged Conflict

Champney asserts that his statements to police were obtained in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights because Attorney Frank Cori, who he believed to be representing him, had multiple conflicts of interest. Champney contends that Cori was advising him legally regarding the murder investigation while simultaneously advising Beth Bensinger, the decedent's wife, who would become Champney's co-defendant, and David Blickley, who would become a Commonwealth witness at Champney's trial.

It appears that Cori has had a close relationship with Blickley for many years and that, through that relationship, he became involved with Blickley's associates. There is no question that Cori had extensive involvement with many of the actors in this case, and that all of them had entanglements with each other.

Although they were never married, David Blickley and Beth Bensinger[1] had a daughter, Melissa[2]. Beth married Roy Bensinger, the victim in this case. They lived together with Melissa for a number of years, and Mr. Bensinger helped to raise Melissa. At some point their family relationship soured. Beth and Melissa left the Bensinger residence. At the time of Roy Bensinger's death, there existed a protection from abuse order directing him to have no contact with Beth or Melissa.

Cori and David Blickley have had close ties for nearly twenty years. In 1988, Blickley was sentenced to serve seven and one-half to sixteen years in state prison. Cori had been his attorney. His minimum date for parole eligibility was December 4, 1994.

On March 28, 1992, Beth Bensinger and Melisa Blickley visited David Blickley at SCI Rockview. Cori also visited Blickley earlier that day. Champney visited Blickley at Rockview on April 2, 1992, and again on June 2, 1992, the latter time accompanied by a woman named Bonita Donmoyer. Two days after that second visit, Roy Bensinger was shot in his driveway. The next day Champney visited Blickley at Rockview again. On June 10, 1992, Beth Bensinger again visited Blickley at Rockview. Champney had gone to visit his half-sister in Oregon, where he stayed from June 9 to June 19, leaving when the Oregon police began asking questions at the behest of the Pennsylvania State Police. On July 24, 1992, Champney again visited Blickley at Rockview and did so two more times that year, on August 30 and December 16.

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[1]By the time of Champney's trial, Beth Bensinger's last name was Shirey. She was successfully prosecuted for having paid to have Roy Bensinger killed, and David Blickley was also a Commonwealth witness against her.
[2]By the time of Champney's trial, Melissa Blickley's last name was Stine.

In September of 1994, as Blickley's minimum sentence approached, Schuylkill County District Attorney Claude A. Lord Shields wrote to the Board of Probation and Parole, objecting to Blickley's parole, partially because he was suspected of being involved in Roy Bensinger's murder. Shields recommended that Blickley serve his maximum. On November 15, 1994, Blickley's parole was denied. Shields' letter was a factor in that denial. PCRA N.T. 4/9/2007, pp. 59-69.

Cori represented Blickley in the appeal of his parole denial, contesting Blickley's involvement in Bensinger's murder. Blickley was also offering through Cori to help in the murder investigation if his parole application were to be unopposed the next year.

Blickley was paroled to a federal detainer in February of 1996. PCRA Def. Ex. 63. Cori continued to represent Blickley in civil matters and was holding money for Blickley, which he disbursed at Blickley's direction. Blickley's daughter, Melissa, was also given money by Cori when Blickley wanted her to have it. PCRA N.T. 4/9/2007, pp. 73, 92.

Blickley escaped from federal custody. In the fall of 1996, while Blickley was on the run, he made several phone calls to Cori. PCRA N.T. 4/9/2007, p. 74.

Cori also represented Beth Bensinger. His association with her was longstanding, and his representation included settling Roy Bensinger's estate. PCRA N.T. 4/9/2007, p. 79. Cori also acknowledged that he represented Beth Bensinger in November, 1997, when the state police wanted to talk to her in connection with their investigation of Roy

Bensinger's murder. At that time he gave her advice and made requests of the police on her behalf. PCRA N.T. 4/9/2007, pp. 80-81.

On October 23, 1997, Champney was arrested and incarcerated on robbery charges. Cori represented him in that case. According to David Blickley in a statement he gave to Sgt. Shinskie, Cori was not being paid to represent Champney, but was doing it as a favor to Blickley.

Cori acknowledged discussing the murder charges with Champney by phone on the day Champney was arrested on those charges. He also spoke with Champney at the prison a day or two later. He testified that he merely advised him not to speak to the police.

Champney argues that Cori's loyalty was to David Blickley, and that, because of Cori's relationship with Blickley, Cori had a conflict in representing Champney. He asserts that be believed Cori was representing him, but that instead, Cori abandoned him in order to protect Blickley. Champney argues that because of that conflict, his statements to the police were taken in violation of his right to counsel.

The Commonwealth counters that Cori did not abandon Champney, but merely declined to represent him in light of Cori's involvement with Blickley.

Cori would seem to have multiple conflicts that would preclude him ethically from representing Champney regarding the murder charges. The most notable being his continuous representation of and friendship with Blickley, who was attempting at the

same time to work a deal with the authorities that would have involved Blickley giving the police information about Roy Bensinger's murder. It seems to this court that Cori should have told Champney, when he was called on the day of Champney's arrest, that he could not represent him because of his involvement with Blickley. He should have done the same thing with Beth Bensinger, when she was contacted by the state police.

Cori was helping Blickley with his second parole application. Blickley had promised to help the Commonwealth with information about the Bensinger murder in exchange for the District Attorney withdrawing his opposition to Blickley's parole. Any information Champney or Beth Bensinger may have had about that killing would have been very helpful to Blickley in fulfilling his promise, as would knowledge about what information the police already had. Cori put himself in a position to get such information for Blickley by discussing the Bensinger case with Champney and Beth Bensinger and asking of the state police to see documents pertaining to Beth Bensinger.

Cori counseled Bensinger and dealt with the police on her behalf; and he went to see Champney at the prison right after his arrest. Logic dictates that Cori discussed the murder case with Champney and that Cori would have been in a position to share any information he may have gained from Champney with David Blickley, who later testified against Champney. However, Champney offered no proof that he gave Cori any information that could have been used against him. Champney did not testify, and Cori claimed that he merely advised Champney not to speak to the police. We see no way that

advising Champney not to speak with police could have caused his statements to the police to be involuntary.

C. Cognitive, Developmental and Mental Impairments

Champney claims that he has lifelong cognitive, developmental and mental impairments that precluded him from being able to voluntarily waive his ***Miranda*** rights before giving statements to the police. He argues that his trial counsel was ineffective in failing to have him mentally evaluated.

Champney's PCRA counsel did have him evaluated by Dr. Julie Kessel, a board certified psychiatrist. Additionally, Dr. Kessel relied fairly extensively on a neuropsychological evaluation of Champney performed by Dr. Ragland, also retained by Champney's PCRA counsel. Based on Dr. Kessel's evaluation, Champney's PCRA counsel argues that he was cognitively functioning at the level of a young adolescent when questioned by the police, and that, if his trial counsel had him evaluated, she could have suppressed his statements as involuntary. Essentially, counsel argues that the voluntariness of his statements and the waiver of his rights should have been determined by applying the standards used for statements obtained from a juvenile.

Dr. Kessel's testimony was educational in her description of what individuals with diagnoses like those she assigned to Champney may experience, but she offered scant evidence that Champney was experiencing such problems when he spoke to police. For example, she described how such individuals may try to cover their comprehension

difficulties by using humor, or appear to be pompous or snide. PCRA N.T. 3/23/2007, pp. 27-28. There is no evidence in the record that he exhibited any of these behaviors. Instead, he asked apparently rational questions of police, such as inquiring about what sentence he could be facing.

Dr. Kessel opines that his executive decision making abilities were greatly impaired, but as noted by the Commonwealth, planning trips and driving, as Champney had done, from Pennsylvania to Oregon and then to North Carolina demonstrated executive abilities.

Although, as previously discussed, we believe Champney's statements would have been suppressed if trial counsel had raised the right issue, we see no probability that the statements would have been suppressed based on the results of a mental evaluation had trial counsel pursued one.

D. Submission of Voluntariness of Statements to Jury

Champney claims that his trial counsel was ineffective in that she did not litigate the voluntariness of his statements to the police at trial and did not request instructions requiring the jury to make that determination.

Trial counsel explained at the PCRA hearing that she was not overly concerned about the voluntariness of the statements to the police, because he never admitted to the police that he had shot Roy Bensinger. She was more focused on Champney's boasting

to Joy Hinshaw that his nickname was "One Shot" because he had killed a man with one shot. PCRA N.T. 3/20/2007, pp. 58-60.

We find her strategy in this request to be a reasonable strategy intended to advance the petitioner's interests at trial.

EXCULPATORY EVIDENCE

A. Other Suspects

Champney claims that his trial counsel was ineffective in that she failed to adequately investigate the facts surrounding the Bensinger killing and to put exculpatory evidence before the jury.

David Bensinger is the brother of Roy Bensinger. At the PCRA hearing, Michael Kokitus relayed a conversation he had in a bar with David Bensinger after Roy Bensinger was killed. Kokitus' sister, Cindy, had shared with him her suspicion that a young girl living with David Bensinger had been abused. Kokitus decided to explore the issue with Bensinger. He approached Bensinger and described saying something like: "If you did what I think you did, then there could be problems." According to Kokitus, instead of responding about child abuse, Bensinger immediately replied: "You know I wouldn't have anything to do with killing my own brother if I wasn't pushed into it." Bensinger allegedly expressed his opinion that Roy had brought on the killing by always talking about how much money he had so that people believed he had a lot of money at his

house. David Bensinger mentioned developing a hypothetical plan with his girlfriend, Pam and Beth Bensinger to kill Roy for his money. Bensinger also told Kokitus that there was another guy involved in the plan – a guy who worked at Achey's. Kokitus thinks Bensinger may have said this guy was known as "Butch". PCRA N.T. 3/21/07, pp. 203-11.

Kokitus reported this conversation to the police, and the receipt of that information is recorded in PCRA Def. Ex. 7.

Cindy Kokitus had also had an encounter with David Bensinger. After Roy Bensinger's death, she ran into David at a bar. When she expressed sympathy for the loss of his brother, David Bensinger allegedly laughed and said that his brother deserved to die and that his killer would never be caught.

Kokitus then gave Bensinger a ride to his house to get more money. She waited for him outside in her truck. When he did not come back quickly enough, Kokitus went to the screen door of the house. Bensinger was arguing with his girlfriend, Pam. She could not hear everything, but she did hear Pam tell David that he had told Kokitus too much and that they would all get arrested. Bensinger slapped Pam, and at that point they saw Kokitus at the screen door.

She quickly returned to the truck and took off. She went to her brother's house and immediately called the police. PCRA N.T. 4/9/2007, pp. 5-10. The receipt of that report by the police is also recorded in PCRA Def. Ex. 7.

At the PCRA hearing, Champney's trial counsel did not recall seeing the state police report represented as PCRA Def. Ex. 7, but she did recall seeing discovery about information from the Kokituses that indentified the shooter as someone who worked at Achey's, and she knew Champney had worked there. Although trial counsel said at the PCRA hearing that she did not think there was a strategic reason for not putting the Kokituses' testimony before the jury, clearly one had occurred to her at the time of trial regarding Michael Kokitus' possible testimony. According to him, David Bensinger had described another man as being involved in the plot to kill Roy Bensinger. That man worked at Achey's, as did Champney at the time.

Fear that a possible defense witness could harm one's client is a reasonable basis for not calling that witness. Ineffectiveness cannot be found when a reasonable basis exists for counsel's actions. ***Com. v. Pierce***, 515 Pa. 153, 527 A.2d 973 (1987).

No tactical basis for not calling Cindy Kokitus was proffered, but without her brother's testimony, she could only tell the jury that David Bensinger was pleased that his brother was dead and that he and his girlfriend were fighting over whether Kokitus knew too much and would cause them to be arrested. We find no reasonable probability that her testimony would have changed the outcome of the trial.

A report authored by Tpr. Joseph Lipsett revealed that on January 19, 1993, seven months after Bensinger's murder, the officer received a call through the Schuylkill County Crime Stoppers during which the caller claimed that **Steven Stripe**, a week

before Roy Bensinger was shot, had stated to the caller that either he was going to kill Bensinger, or that he would like to kill him. Stripe allegedly told the caller that Bensinger had "ripped him off" on a construction job, and continued that, if he were going to kill Bensinger, he would use a high powered rifle and probably go behind Bensinger's house, getting there either by foot or by using a motorcycle or four wheeler. The caller further stated that he/she knew of Stripe but claimed not to have seen or heard from him after the murder was reported in the newspapers. PCRA Def. Ex. 9.

Champney's trial counsel made no attempt to identify or locate the caller. Champney's PCRA counsel asserts that the identity of the caller was known to the police, but the evidence indicates otherwise. Tpr. Lipsett testified that the call was made anonymously, as are most calls to the Crime Stoppers. PCRA N.T. 3/21/07, pp. 222-29. Champney has failed to show how trial counsel would have been able to identify and locate the caller at all. As such, there is no merit to this claim.

A police report dated July 17, 1992, reveals that the police had learned that **John Wingle** had had an affair with Beth Bensinger and that Roy Bensinger and Wingle had engaged in more than one physical altercation in which Wingle was beaten by Bensinger. Wingle was interviewed by the state police. He admitted to having an affair with Beth Bensinger on and off from 1985 to 1988, but claimed to have had no contact with her after 1990. It was reported that Wingle further told the police that Beth said she would be thankful if someone killed Roy Bensinger. She frequently brought up the topic of killing

her husband with Wingle and told Wingle that she would never do it. Someone would have to do it for her. The report also indicates that Wingle was admitted to the Lebanon VA Hospital for drug and alcohol rehabilitation on the day Bensinger was shot and not discharged until June 23, 1992.

Since Wingle was found to have had an alibi for the day Roy Bensinger was shot, there is no merit in Champney's claim that his counsel was ineffective for failing to prove that Wingle may have killed Bensinger.

B. Parole Board Records

Champney claims that the Commonwealth failed to reveal material exculpatory evidence that could have been used to impeach David Blickley when he testified against Champney at trial, and that his trial counsel was ineffective for failing to obtain and use that evidence.

As previously discussed, in 1994, David Blickley was in state prison serving a 7½ to 16 year sentence and had applied for parole. As required by law, the Parole Board solicited comments regarding Blickley's parole application from the Schuylkill County District Attorney. In September of 1994, District Attorney Claude Shields responded by letter opposing Blickley's parole "in the strongest possible terms". In that letter, Shields described Blickley as "the principal in an extensive criminal network in Schuylkill County involving drugs, stolen vehicles, burglary and fencing operations." The letter also informed the Parole Board that Blickley was under investigation in connection with

the Bensinger killing, that in Shields' opinion, Blickley's "duplicity knows no bounds" and that Shields and the state police officers who investigated Blickley all felt that Blickley should serve the maximum sentence. PCRA Def. Ex. 57.

Blickley's parole application was denied on November 15, 1994. Fred Jacobs, Blickley's hearing examiner, testified that the opposition from the District Attorney was the main reason for that decision. PCRA N.T. 7/9/07, p. 67. Frank Cori filed a request for reconsideration on Blickley's behalf, but that was denied on May 26, 1995. PCRA Def. Ex. 62.

In March of 1995, Tpr. Allen Smith was contacted by an attorney for Blickley asking if the authorities would be interested in talking to Blickley about the Bensinger shooting. PCRA Def. Ex. 67; PCRA N.T. 7/9/07, pp. 43-46. With District Attorney Shields' approval, on June 12, 1995, Tpr. Smith interviewed Blickley at SCI Rockview. Blickley told Tpr. Smith that he would be willing to assist the police in the Bensinger investigation if his then pending, second parole application was not opposed. Tpr. Smith relayed Blickley's offer to Shields, who told Smith that he would discuss the offer with Assistant District Attorney Charles Bressi, who was handling the Bensinger case, and have Bressi get back to him. PCRA N.T. 7/9/07, pp. 47-49.

Blickley's second parole application was considered by the Parole Board in September of 1995. Again the District Attorney was contacted for comment on the parole application. He responded in November of 1995, and informed the Board that he

had checked with his staff and that, if the Board wanted to parole Blickley, the District Attorney's Office was not objecting. PCRA Def. Ex. 68; PCRA N.T. 7/9/07, pp. 59-61. On February 19, 1996, Blickley was paroled to federal custody. PCRA Def. Ex. 63; PCRA N.T. 7/9/07, p. 84. In October of 1996, Blickley walked away from the federal prison camp in Allenwood and remained a fugitive until December of 1997.

Champney's trial counsel had been given the state police homicide investigation file, which included Tpr. Smith's report of his interview of Blickley at SCI Rockview and Blickley's offer to help if his parole were not opposed. In addition to his claim that the Commonwealth withheld evidence that could have been used to impeach a key Commonwealth witness in violation of its duty pursuant to ***Brady v. Maryland***, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1983), Champney claims that his trial counsel was ineffective in failing to subpoena Blickley's parole file which would have led her to the information about his second parole application and the District Attorney's withdrawal of opposition to Blickley's parole.

At trial Blickley testified that he was serving a twenty-two year federal sentence for dealing in stolen merchandise. He told the jury that his first state parole application was opposed by District Attorney Shields, who told the Parole Board that he was a suspect in the Bensinger homicide. He stated that he had to serve an extra fifteen months because of Shields' letter. He claimed that he was given no promises for his testimony and that he was testifying because he was tired of carrying the information on his

shoulders. He also said that he had attempted to give information to the police about this case as early as 1993. Trial N.T., pp. 237-39.

On cross-examination, Champney's trial counsel got Blickley to admit that the first time he ever told the police that Champney had confessed to shooting Bensinger was in December of 1997, after having been picked up on federal escape charges. Blickley acknowledged that, in doing so, he was hoping for a sentencing break. Trial N.T., pp. 246-47.

The Commonwealth had not revealed to Champney's trial counsel that the District Attorney had gone from vehemently opposing any parole for Blickley on the basis that he was a suspect in the Bensinger murder, to not opposing his second parole application, apparently for Blickley's mere promise at that time to help with the investigation. Blickley and the Commonwealth left the jury with the impression that the Commonwealth had only opposed his parole, both knowing that was not the whole truth. Champney's trial counsel did not know to ask Blickley about his second parole application, because she had not been given that information by the Commonwealth, and because she never subpoenaed Blickley's parole file. She failed in this regard even though the homicide investigation file given to her by the Commonwealth contained a reference to Blickley's offer to help if his parole were not opposed.

We believe that Champney's ability to impeach Blickley's testimony was impaired by the Commonwealth's failure to give the defense information to which the defendant

was entitled under ***Brady v. Maryland*** and by his trial counsel's ineffectiveness in failing to investigate and pursue the parole issue referenced in the police report.

C. Blickley's Statements to the FBI

David Blickley gave a statement to Agent Greg Banis of the FBI on March 30, 1999. Champney claims that the FBI was an investigatory agency regarding the Bensinger murder, and that his due process rights were violated by the Commonwealth's failure to disclose the report of this interview to his trial counsel.

Agent Banis testified that he interviewed David Blickley on March 30, 1999. He filed two FD302 interview reports memorializing that interview. PCRA Def. Ex. 54, 55. In that interview, Blickley told Agt. Banis that after he walked away from the federal prison camp in October of 1996, he spent most of his time in Schuylkill County. During that time, he claimed to have met with Frank Cori at least ten times, and that at most of those meetings Cori gave him anywhere from $200 to $800. Blickley told Banis that between 1982 and 1987, he and Cori were partners in the sale of large amounts of methamphetamines, and that Cori was still holding $120,000 of Blickley's share of the profits from that drug operation. PCRA N.T. 4/9/07, pp. 46-47.

Melissa Blickley (now Cicero), David Blickley's daughter, confirmed that Cori was her father's attorney over a long period of time and that Cori was holding money for her father over a ten year period. She knows this because her father told her that Cori

was holding money for him, and because she went to Cori over that time span and received money from her father through Cori. PCRA N.T. 3/21/07, pp. 181-82.

Cori also acknowledged holding money for Blickley, but he denied it came from illegal activity. Cori testified that Blickley had won a settlement in an unspecified civil rights action, and that Cori was holding the money pursuant to a power of attorney from Blickley so that he could handle Blickley's financial affairs while Blickley was in prison. PCRA N.T. 4/9/07, pp. 73, 91-92.

Blickley also told Banis that he had prior knowledge that the Bensinger homicide was going to occur. He also said that Beth Bensinger planned to pay Champney to kill Roy Bensinger. He further told Banis that Champney had told him about how the murder was committed. PCRA N.T. 4/9/07, pp. 48, 54-55.

There is no evidence that the Schuylkill County District Attorney's Office, the Pennsylvania State Police or any other agency investigating the Bensinger homicide was aware of the entire statement given by Blickley to Agt. Banis of the FBI. Despite Champney's characterization of the FBI as an investigatory agency in this case, the record contradicts that assertion.

Blickley was in Federal custody at the time he spoke with Banis and was looking to help himself on federal charges by offering to cooperate regarding what he knew in the Bensinger case. After Banis interviewed Blickley, he sent a memo to the District Attorney (PCRA Def. Ex. 31). The memo makes no mention of Blickley's statement that

Cori was holding money representing Blickley's share of their joint drug sales. The Commonwealth cannot be faulted for failing to inform Champney of information which, at the time of trial, was known only to Blickley and the FBI.

Furthermore, the allegation that Cori was holding and disbursing money for Blickley would have been of no help to Champney at his trial. Champney now argues that this information would have corroborated Jeffrey Miller's PCRA testimony that after Bensinger was shot, Miller took Ray Ortman to Cori's office where Ortman picked up a $25,000 payment for a job in a brown bag containing $100 bills. However, Miller did not mention the trip to Cori's office during his trial testimony. Blickley's claim to sharing in drug sales with Cori would otherwise have been irrelevant.

Champney's other argument regarding Blickley's statement to Banis relates to what Blickley claimed to have known about the murder. Blickley told Banis he had prior knowledge about the shooting. At trial he denied any pre-knowledge. Champney argues Banis' report could have been used to impeach Blickley.

The report itself would not have been admissible, but Champney's trial counsel could have asked Blickley whether he made the statement to Banis. If Blickley denied doing so, Banis might have been called to prove a prior inconsistent statement. However, it is difficult to see how Blickley's statement could have helped Champney. Banis' report, given to the District Attorney, related that Blickley claimed to have learned that the killing would occur from Beth Bensinger when she visited him in prison. According

to Blickley, Beth Bensinger said she was going to pay Champney to kill her husband. That is exactly the theory of the prosecution. It is very difficult to see how Champney's case would have been helped by confronting Blickley with that statement, merely to show that he had pre-knowledge of the killings.

TRIAL COUNSEL'S INTERROGATION OF WITNESSES

A. Joy Hinshaw

Joy Hinshaw testified for the Commonwealth at trial that she overheard Champney make incriminating statements regarding the Bensinger homicide. Hinshaw owned a trucking company in North Carolina and had employed Champney as a driver. She had also testified for the Commonwealth at Champney's preliminary hearing.

The strategy of Champney's trial counsel was to show that Hinshaw was biased against him. Hinshaw was cross-examined at trial about accusing Champney of stealing a trailer. Hinshaw claimed that she suffered no financial loss from the incident, because the trailer belonged to another company. Trial N.T. Vol. I, p. 324.

Champney's trial counsel considered Hinshaw to be a very damaging witness, but she made no attempt to interview her prior to trial. PCRA N.T. 3/20/07, pp. 23-26. Hinshaw was called to testify at the PCRA hearing. She acknowledged that, while suffering no financial loss directly from the loss of the trailer, the incident caused her to lose a contract with the trailer owner. She also stated she had no hard feelings toward

Champney and that the loss of the contract had no bearing on her testimony. Hinshaw was very angry with Champney over the incident at the time. PCRA N.T. 7/9/07, pp. 135-38.

Champney claims that his trial counsel would have learned of the lost contract if she had gone to North Carolina to interview Hinshaw and would then have been in a position to cross-examine her more effectively. His PCRA counsel did just that, and we see no material difference in her testimony at the PCRA hearing versus that given at trial.

B. Jeffrey Miller

Jeffrey Miller was a defense witness at Champney's trial. He testified that Bensinger's murder was arranged by a man named Bubba at the Celebrity Bar in Frackville and that he drove past Bensinger's house several days before the shooting with a man named Ray Ortman to show him where Bensinger lived. He also said that he had been paid to dispose of the murder weapon.

In a pretrial interview by Champney's trial counsel, Miller also said that a few days after the shooting, he drove Ortman to Frank Cori's office in Orwigsburg so that Ortman could get paid for "the job I did the other night." Miller said that Ortman came out of Cori's office with $25,000 in $100 bills in a brown paper bag. PCRA N.T. 3/22/07, p. 81-88. At one point in her examination of Miller, trial counsel seems to be directing Miller's attention to this meeting with Ortman; however, she prefaced her

questions by admonishing Miller not to tell the jury what was said at the meeting. Champney claims that his trial counsel was ineffective in not eliciting that testimony.

He claims that Miller's testimony about Ortman's visit to Cori's office would have undermined Blickley's credibility. Because trial counsel stated that it was in Champney's interest to attack Blickley's credibility, Champney's PCRA counsel argues that there could be no tactical or strategic reason for not asking Miller about this part of his pretrial statement. It is noteworthy that trial counsel was not asked during the PCRA hearing whether she had a tactical or strategic reason for not pursuing this topic when Miller was on the stand.

Miller was a difficult witness. At trial counsel's request, he was declared a hostile witness. His stories about what he knew regarding the homicide were varied and inconsistent. He testified that he had lied to trial counsel in a statement he gave to her, which was marked Def. Ex. 3 at trial. He had already been convicted of giving a false statement to the police in connection with this case. Absent testimony from trial counsel that her decision not to examine Miller on this point, the Court is not prepared to conclude that there could be no tactical or strategic reason for not asking Miller more questions when he was on the stand.

C. Sgt. David Shinskie

Champney argues that his trial counsel was ineffective in failing to utilize the police reports given to her in discovery to impeach David Blickley's testimony.

Specifically, the petitioner points to the reports filed by Sgt. Shinskie of the state police. Sgt. Shinskie was the crime section supervisor overseeing this case. He met with David Blickley and reported that Blickley was trying to get information from him regarding the case. He felt that Blickley "seemed to be fishing, on a fishing expedition for information." PCRA N.T. 3/20/07, pp. 183-84. During an interview on December 16, 1997, Blickley told Shinskie that Beth Bensinger asked Blickley to kill Roy Bensinger. PCRA N.T. 3/20/07, pp. 189, 193. Even though Sgt. Shinskie asked Blickley to tell him everything he knew about the killing, Blickley made no mention of Champney taking him to the scene and describing how the shooting was done. ***Id.*** at 194.

Champney's trial counsel failed to cross-examine Sgt. Shinskie about these statements or to call him to rebut Blickley's trial counsel. She offered no tactical reason for failing to do so. PCRA N.T. 3/20/07, pp. 100-104.

D. Art Raudenbush

Art Raudenbush was called to testify briefly for the petitioner during the penalty phase, but Champney argues that he should have been called during the guilt phase of the trial as well. The Commonwealth advanced the theory at trial that Champney adopted the nickname, "One Shot," after killing Roy Bensinger with one shot. At the PCRA hearing Raudenbush testified that his step-father had given Champney that nickname in the mid-eighties, long before the murder, and that the name was a joke because Champney had proven himself to be a terrible shot when he, Raudenbush and other co-workers went

hunting together. PCRA N.T. 3/21/07, pp. 189-90. Champney had told his trial counsel how he got his nickname. PCRA N.T. 3/20/07, pp. 162-63.

Champney's trial counsel testified that she had never heard of "Art Raudenbush" prior to trial, but she knew of "Art Achey". PCRA N.T. 3/20/07 p. 162. Raudenbush testified that his father-in-law's name was Achey, and that everyone thought his name was Achey. In fact, when he received the subpoena from Champney's trial counsel addressed to Art Achey, he knew it was intended for him and appeared to testify. PCRA N.T. 3/21/07, pp. 186-87.

Champney's claim in this regard has arguable merit. A key element of the Commonwealth's case against Champney was the testimony of Joy Hinshaw, previously discussed, in which she described Champney's license plate bearing the "1 SHOT" moniker and his bragging that it related to his having killed a man in his driveway with one shot. Raudenbush could have established that Champney was actually given that nickname a number of years before the murder because he was such a bad shot. His testimony could have called into question Hinshaw's evidence, or at least, might have suggested that Champney was making up stories to impress his employer and co-workers. It could also have impeached David Blickley's testimony how Champney allegedly described the way the shooting occurred.

In general, to prevail on a claim of ineffective representation of counsel for failure to call a witness, the petitioner must show that (1) the witness existed, (2) counsel was

either aware of or should have been aware of the witness' existence, (3) the witness was willing and able to cooperate on behalf of the defendant and (4) the proposed testimony was necessary to avoid prejudice to the defendant. ***Com. v. Bryant***, 855 A.2d 726 (Pa. Super. 2004). The petitioner has satisfied those requirements, but trial counsel offered a tactical reason for not pursuing this issue.

Trial counsel testified that she did not pursue how he got the nickname, because she thought that it would have been too damaging for the jury to hear that "his circle of friends" think it is somehow humorous to be caught up in a murder investigation." PCRA N.T. 3/20/07, pp. 163-64. In hindsight, trial counsel now regrets choosing that strategy.

Trial counsel is not ineffective if she pursues a reasonable strategy designed to protect her client's interests. Our Supreme Court has defined the test to evaluate counsel's actions:

> We cannot emphasize strongly enough, however, that our inquiry ceases and counsel's assistance is deemed constitutionally effective once we are able to conclude that the particular path chosen by counsel had Some reasonable basis designed to effectuate his client's interests. 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.

Com. ex rel. Washington v. Maroney, 427 Pa. 599, 604-05, 235 A.2d 349, 352-53 (1967). Champney has failed to show that his trial counsel's strategy in this regard had no reasonable basis designed to effectuate his interests.

CRIME RECONSTRUCTION EXPERT

David Blickley testified at trial that Champney accompanied him to the scene of the homicide and described in detail how he had shot Roy Bensinger including a description of where each was standing at the time of the shot and where the bullet struck Bensinger. Champney's trial counsel gave no consideration to retaining an expert to reconstruct the crime.

Champney's PCRA counsel retained Ralph Tressel, a forensic investigator. Utilizing crime scene photos showing the position of Roy Bensinger's body and the buildings on the Bensinger property, Mr. Tressel opined rather convincingly that the body would have been lying with the head toward the opposite direction if the shot were fired from the location that Blickley described, allegedly based on Champney's confession to him. It has been confirmed that a .30 caliber rifle was used in the shooting. Using velocity data for a 30/30 rifle, the location of the bullet wound and the blood splatter pattern found on the shoes worn by the victim, Mr. Tressel explained that Roy Bensinger had to have fallen over backwards to the ground, with no turning or twisting.

The Commonwealth's forensic evidence at trial came from Dr. Richard Bindie, who considered only the evidence found from the body, without considering the blood splatter pattern and body location.

Mr. Tressel's testimony was very convincing. If accepted, the shooter would have had to be almost on the opposite side from what Blickley described. Had trial counsel presented similar testimony that was accepted by the jury, the obvious conclusion would have been that Blickley lied about Champney confessing to him.

The court has found no delineation of a defense attorney's duty to investigate and consider the need for an expert opinion beyond the requirement that trial counsel do what would reasonably be expected of a competent defense attorney to consider every possible defense and to make reasonable inquiry into all plausible defenses. In doing so, circumstances may require expert assistance. ***Driscoll v. Delco***, 71 F.3d 701, 707-08 (8th Cir. 1996); ***Rogers v. Israel***, 746 F.2d 1288. 1292-94 (7th Cir. 1984).

David Blickley's testimony was a major component of the Commonwealth's case against Champney. Blickley testified that Champney took him to the scene of the killing and described the shooting, including where Champney and the victim were standing when the shot was fired. Roy Bensinger was shot in the face with a high-powered rifle. One would expect the shot to knock him right down. If Champney fired the shot from the location described by Blickley, one would further expect Bensinger's head to be pointing in almost the opposite direction from the position in which his body was found.

Champney's trial counsel recognized the point, as demonstrated by her cross-examination of the medical examiner about how Bensinger would have fallen. Trial Tr. N.T. pp. 181-83. Trial counsel recognized the impeachment of Blickley's testimony was

critical to Champney's case. PCTA N.T. 3/20/07, p. 92. She wanted to determine where the fatal shot came from, but she retained no expert to help her do so. PCRA N.T. 3/20/07, pp. 27-30. She had no tactical reason for this failure. It just was not done.

ACCOMPLICE INSTRUCTION

Champney claims that his trial counsel was ineffective by failing to request a "corrupt and polluted" source instruction regarding David Blickley's testimony. The court disagrees with the Commonwealth's contention that the witness must be charged as an accomplice before the defendant is entitled to the accomplice charge. ***Com. v. Chmiel***, 536 Pa. 244, 251, 639 A.2d 9, 13 (1994). On the other hand, Champney has cited no trial evidence that would have allowed the jury to infer Blickley was an accomplice.

Evidence that certain individuals **suspected** Blickley of being involved in the Bensinger homicide proves nothing. Evidence that Beth Bensinger and Melissa Blickley visited David Blickley at Rockview is not alone enough to make him an accomplice. Even Blickley's testimony that Beth Bensinger discussed her plans to have Roy Bensinger killed does not make Blickley an accomplice without evidence that he did something to help her. This claim is without merit.

PROSECUTORIAL MISCONDUCT

The petition makes numerous claims of prosecutorial misconduct. Because these claims could have been raised at an earlier stage in the proceedings and were not, they are waived. 42 Pa.C.S. §§9543(a)(3), 9544(b); ***Com. v. Ragan***, 560 Pa. 106, 743 A.2d 390 (1999). However, these claims are also pled as ineffective assistance of counsel in that at trial, counsel failed to object, move for curative instructions or ask for a mistrial. As such, the claims are available for post-conviction review.

A. Opening Statement

The petitioner contends that his trial counsel was ineffective in failing to object to the following words used by the assistant district attorney in her opening statement:

> The Commonwealth will present evidence in this case that on June 14, 1992, the defendant, Champney, shot and killed with one shot fired from a weapon **into the head of Roy Bensinger, a 37-year-old man, a working man, a self-employed contractor**, a father and stepfather at the time of his death.

Trial N.T., p. 16.

The petitioner contends that the prosecutor's reference to the decedent's personal characteristics were irrelevant and were introduced solely to inflame the jury. This claim lacks merit.

Evidence may not be introduced merely for the purpose of arousing sympathy for a crime victim, ***Com. v. Blystone***, 519 Pa. 450, 549 A.2d 81 (1988); but the prosecutor's

description of the victim in her opening statement was delivered in a matter-of-fact manner, with no apparent intent to inflame the jury or evoke sympathy. An objection posed by trial counsel to this language would have been denied by the court as meritless.

B. Commonwealth's Examination of Witnesses

For the same reason, the petitioner argues that his trial counsel should have objected when the Commonwealth asked witnesses Paul Blankenhorn and Henry Weist if the victim was a hard worker most of his life and a decent guy; and when the Commonwealth asked Melissa Stine if the victim had generally been a good stepfather and supported her.

While these brief questions may have been irrelevant, they certainly did not have the unavoidable effect of so prejudicing the jury that they were unable to dispassionately and impartially weigh the evidence, as the petitioner is required to show. ***Com. v. Hill***, 542 Pa. 291, 666 A.2d 642 (1995), *cert. denied*, 517 U.S. 1235, 116 S.Ct. 1880, 135 L.Ed.2d 175 (1996).

C. Closing Argument

The petitioner asserts that the assistant district attorney was improperly vouching for Commonwealth witnesses during her closing argument, without objection from his trial counsel.

A prosecutor may not personally vouch for his or her witnesses. The proscribed conduct was explained by the Court in ***Com. v. Reed***, 446 A.2d 311 (Pa. Super. 1982):

> Generally speaking, it is improper for the prosecution to *vouch* for the credibility of a government witness. Vouching has been characterized in two categories: (1) when the prosecution places the prestige of the government behind the witness by personal assurances of the witness' veracity; and (2) when the prosecution indicates that information which is not before the jury supports the witness' testimony.

446 A.2d at 314.

The particular statements cited by the petitioner occurred when the assistant district attorney, in her closing argument, referred to Leo Carr, the emergency medical technician, as a "nice man," Trial N.T. Vol. II, pp. 660, 664; when she referred to Dr. Bindie, the pathologist who did the autopsy and testified for the Commonwealth, as "probably one of the most respected forensic pathologists in the entire nation", ***Id.*** at 664; and referring to Sgt. Shinskie, the lead investigator, as a "[t]wenty year veteran of the state police". ***Id.*** at 677.

Sgt. Shinskie had testified to his police experience and to information gathered during his investigation. It was not unreasonable to imply that extensive investigation experience might assist an officer in accurately reporting what he had done.

The prosecutor's characterization of Leo Carr as a nice man can fairly be taken as the prosecutor's personal reaction to his personality, not his veracity.

With respect to the hyperbole used by the prosecutor to describe Dr. Bindie, we believe she did step over the line, asserting a status of recognition in his profession that

was not supported by any evidence in the record. Had trial counsel objected, a curative instruction would have been given, but there has been no showing by the petitioner that his trial counsel's failure to object to the statement raises a reasonable probability that the outcome in his trial would have been different had she done so.

D. Attack on Right to Remain Silent

The petitioner argues that his trial counsel was ineffective by not objecting to the prosecutor's attack, during her closing argument, on the petitioner's silence in response to questioning by police.

Sgt. David Shinskie had been the lead investigator in this case for the state police. At trial he testified regarding an interview he conducted with the petitioner. He described giving Champney his ***Miranda*** rights and then told Champney that people were implicating him in the Bensinger homicide. According to Sgt. Shinskie, Champney responded by asking what he was looking at. When Shinskie told him that the District Attorney would make that decision, Champney told Shinskie to get the District Attorney and he would "lay everything out for him." Champney further volunteered that Bensinger's guns were kept in a basement locker and nodded affirmatively when Shinskie stated that three bullets were missing from a box of 30/30 Winchester ammunition. When Shinskie said that his investigation suggested the gun had been destroyed, Champney stated he knew who had the gun but would not identify the person.

Champney also responded to Shinskie's suggestion that Chris Reber was involved by insisting Reber was not.

This exchange between Sgt. Shinskie and the petitioner was highlighted by the assistant district attorney during her closing argument in this manner:

> Sergeant Shinskie wanted to make sure because now the state police had reviewed everything the second time, had re-interviewed everybody the second time, and he wanted to make sure when he was talking to the Defendant on this day that the Defendant knew they were talking about this case, this case, the Roy Bensinger homicide case, and he's telling him different people are implicating you, Mr. Champney, you the Defendant in this case. If you were involved -- if you were not involved in this case whatsoever, if you didn't know anything about that, isn't that what you would have told Sergeant Shinskie on May 13th of 1998. Of course you would have. It makes sense. One of the things I always want to argue to a jury is your good American common sense. If you know nothing about this case, if you believe that somebody else is involved, aren't you going to tell the police that? Of course you are. May 13th of 1998 did the Defendant do that? No. He asks Sergeant Shinskie at that time what he was looking at, how much time he would get for the offense. Use the good American common sense, ladies and gentlemen. Use it. Sergeant Shinskie tells him I have to talk to the District Attorney about that. You go get the D.A., and I'll lay it out for him. Twenty year veteran of the state police and there's no evidence whatsoever that he harbors any ill will against this particular Defendant, and what Sergeant Shinskie's testimony does, ladies and gentlemen, beyond a reasonable doubt is shows you that the Defendant was involved in this murder.

Trial Tr., Vol. II, pp. 676-77.

The Commonwealth suggests that it is permissible to refer to a defendant's pre-arrest silence. Since the petitioner was not arrested in this case until after the interrogation referenced in the Commonwealth's closing argument, it is argued that the petitioner's claim lacks merit. We believe that the Commonwealth has misinterpreted the

case law in that the defendant was clearly in custodial detention at the time and had been given his ***Miranda*** warnings.

The Pennsylvania Supreme Court considered the reference to a defendant's silence in ***Com. v. Turner***, 499 Pa. 579, 454 A.2d 537 (1982). Our Supreme Court first noted that the United States Supreme Court has sanctioned the use of a defendant's pre-***Miranda*** silence to impeach the defendant's trial testimony of exculpatory events. *See*, ***Fletcher v. Weir***, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982). The ***Turner*** Court then explains the difference of Pennsylvania constitutional jurisprudence from that in the federal courts on this issue:

> ... In this Commonwealth, however, we have traditionally reviewed such references to the accused's silence as impermissible for a variety of reasons.
>
> The view of this Court that there exists a strong disposition on the part of lay jurors to view the exercise of the Fifth Amendment privilege as an admission of guilt is well established. *See* ***Com. v. Singletary***, 478 Pa. 610, 612, 387 A.2d 656, 657 (1978); ***Com. v. Greco***, 465 Pa. 400, 404, 350 A.2d 826, 828 (1976); ***Com. v. Haideman***, 449 Pa. 367, 371, 296 A.2d 765, 767 (1972). In ***Com. v. Haideman***, ***supra***. we stated:
>
>> "We would be naïve if we failed to recognize that most laymen view an assertion of the Fifth Amendment privilege as a badge of guilt. ***Walker v. United States*** [404 F.2d 900 (5th Cir. 1968)], ... It is clear that '[t]he privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury.'" ***Slochower v. Board of Higher Ed. of N.Y.***, [350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692]."

> ***Com. v. Haideman***, 449 Pa. 367, 371, 296 A.2d 765, 767 (1972) *(citations omitted).*

499 Pa. at 582-83, 454 A.2d at 539. The ***Turner*** Court found the prejudice to a defendant resulting from reference to his silence to be "substantial." The Court found any reference at trial to a defendant's silence to be impermissible and held that the Commonwealth must limit its impeachment of the defendant's trial testimony to reference to factual inconsistencies, unless the defendant claims to have given the police his version at the time of his arrest. ***Id.*** 499 Pa. at 583, 454 A.2d at 539-40.

In the instant case, the petitioner made no such claim. He did not even testify. His silence was used not just to impeach his testimony, but to prove his guilt, as argued by the assistant district attorney during her closing.

Reference to a defendant's silence is considered so prejudicial that the prejudice is not always curable by cautionary instructions. Whether instructions are adequate depends on factors, such as, the nature of the reference to the defendant's silence, how it was elicited and whether the prosecutor exploited it. ***Com. v. Anderjack***, 413 A.2d 693, 698 (Pa. Super. 1979). Here the assistant district attorney was the source of the reference to the petitioner's silence, asked the jury to consider it as evidence of his guilt and argued that it established his guilt beyond a reasonable doubt.

The petitioner's trial counsel made no objection to the assistant district attorney's reference to the petitioner's silence, nor could she offer any tactical reason for her failure to object. PCRA N.T., 3/20/07, pp. 122-23.

E. Appeal to Common Sense

During her closing argument, the assistant district attorney urged the jurors to use their "good American common sense." The petitioner's argument that her comment could be construed as implying that the petitioner is un-American is just silly.

NEW EVIDENCE OF INNOCENCE

A petitioner under the PCRA may seek relief by showing that his conviction resulted from the unavailability at the time of trial of exculpatory evidence which later becomes available and is of the nature that, had it been introduced at trial, it would have changed the outcome of the trial. 42 Pa.C.S.A. §9543(a)(2)(vi). Champney argues that the testimony of Glenn Widel fulfills that requirement for relief.

At the PCRA hearing Widel testified about a conversation he had with Clifford Helterbran, Champney's half-brother. As Widel described it, Helterbran was upset with a Joe Stevenson over something that occurred with Stevenson and Helterbran's wife, Jackie. At the time of this conversation, Champney had already been arrested. Widel, who knew both Champney and Helterbran since childhood, asked in response to Helterbran's complaining about Stevenson: "Well, jeez, Clifford, how come you didn't have your brother do the two-for-one deal then?" PCRA N.T.7/9/07, pp. 117-18.

Widel knew that Stevenson lived close by Bensinger and asked the question as a joke. Helterbran responded: "For sure they would have figured out it was me that did

it." Widel interpreted Helterbran's response to be a confession that Helterbran had killed Bensinger. PCRA N.T. 7/9/07, p. 119.

Widel claimed that he told his account of the Helterbran conversation to members of the state police before Champney's trial, but they did not investigate his story or interview him in person. He had no explanation as to why he did not contact Champney's attorney about Helterbran's confession during Champney's trial. It was in March of 2007, when he read about Champney's PCRA hearing and contacted his attorney with this information. PCRA N.T. 7/9/07, pp. 121-30.

On cross-examination, Widel acknowledged that Helterbran was widely known to have disliked Stevenson, and changed his interpretation of Helterbran's remarks to mean that if Champney had killed both Bensinger and Stevenson, people would know Helterbran had caused Stevenson to be killed. PCRA N.T., p. 127.

Widel's explanation as to why he did not contact Champney's defense team during his trial is at best weak. Even if he had done so and been called to the stand, the court does not believe his testimony would have changed the outcome of the trial. As correctly argued by the Commonwealth, Helterbran's alleged statement about people knowing he had done it was capable of two interpretations – one that others would know he had killed Bensinger and the second that they would know that he had his brother kill Stevenson. Even Widel seemed confused about what Helterbran meant. Since there was no evidence

of bad blood between Widel and Bensinger, but ample evidence of Widel's hatred for Stevenson, the latter interpretation seems more likely.

PREJUDICE TO PETITIONER

To be eligible for post conviction relief based on the arguments raised in this case, the petitioner must prove by a preponderance of the evidence that his conviction resulted from a violation of the state or federal constitution or from ineffective assistance of counsel, either of which, in the particular circumstances of his case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. 42 Pa.C.S.A. §9543(a)(2)(i)(ii).

In the context of an ineffective assistance of counsel claim, the petitioner must show:

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

Com. v. Kimball, 555 Pa. 299, 312, 724 A.2d 326, 333 (1999).

The court has found five significant instances when the representation provided by the petitioner's trial counsel fell below acceptable standards. In each of these, trial counsel acknowledged that she had no reasonable strategic basis for her failure to act. We must now consider whether there is a reasonable probability

that the verdict would have been different had trial counsel not committed those errors and omissions during trial.

A significant part of the Commonwealth's case consisted of the statements made by Champney to Sgt. Shinskie of the state police on May 13 and October 8, 1998. Had trial counsel moved to suppress those statements on the basis that they occurred after the petitioner had invoked his right to counsel, they would not have been available as evidence for the Commonwealth at trial.

Arguably, the strongest evidence against the petitioner was the testimony of David Blickley, who testified that Champney admitted to him that he had killed Roy Bensinger and took Blickley to the crime scene, showing him where he was standing when the shot was fired. Trial counsel was particularly deficient in challenging Blickley's testimony.

Even though trial counsel recognized that the spot from which the shot was fired was critical to the defense, she obtained no expert assistance to help her determine that location. If she had, she could have demonstrated that Blickley's description of the shooting was in direct conflict with the physical evidence at the scene, strongly suggesting that Blickley made up the story of Champney's confession. Trial counsel compounded her error by failing to use Sgt. Shinskie to demonstrate that Blickley had failed to even mention a confession when he first told the police what he knew of the shooting.

Blickley's testimony would have been further weakened if the jury had been told that the District Attorney withdrew his opposition to Blickley's parole after Blickley offered to help with the case against Champney. The Commonwealth had a duty to disclose to the defense that its position on Blickley's parole had changed, but Champney's trial counsel should have discovered those facts on her own as well. If that information had been put before the jury, Blickley's testimony would have been further undermined.

There was no forensic evidence linking the petitioner to this killing. Without Champney's statements to Shinskie and with Blickley's testimony discredited, the Commonwealth's case against the petitioner would have consisted only of his statements to Joy Hinshaw and his apparent flight from the state the day after the shooting.

When Champney was being interviewed by Hinshaw for a truck driver position in 1995, he told Hinshaw that he had been involved in a murder investigation but was cleared and no longer under investigation at the time of the interview. When she asked if he had done the killing, he grinned and said that nothing could be proven and that the weapon was never found.

Later Champney bragged to Hinshaw and fellow employees that he had shot a guy in a driveway in Pennsylvania. He said he shot the man in the head with one shot using a .30 caliber rifle. He discussed getting a "1 Shot" license

plate for his car to commemorate it. Although Champney never identified Roy Bensinger as the victim of this shooting, the assertions in his bragging matched a number of the facts in the Bensinger killing.

Champney's trial counsel attacked Hinshaw's credibility during her closing argument, questioning why Hinshaw would have hired someone who just told her he was the subject of a murder investigation and why she would have continued to employ him after he allegedly described how he did it in front of her and other co-workers. It was only after Champney lost a trailer that she contacted authorities in Pennsylvania. Without the evidence of his statements to the police, the jury may have given greater weight to the apparent inconsistencies between his alleged statements to her and her reaction thereto.

Champney also left Schuylkill County to visit a half-sister in Oregon the day after Roy Bensinger was killed. He had located her the year before and called her occasionally, but in June of 1992, he called and insisted on visiting her that month. While at her home, his behavior was consistent with someone who was trying to stay out of sight. He left her home when the police visited her home at the request of the Pennsylvania State Police to discuss the Bensinger case.

The Commonwealth presented evidence that Beth Bensinger, Blickley's daughter Melissa, and Frank Cori visited Blickley at Rockview SCI on March 28, 1992. The prison records also showed that Champney visited Blickley that year

on April 2, June 2 (two days before the murder) and June 5 (the day after). Records also show Beth Bensinger visited again June 10, 1992 (six days after the murder).

To the extent the prison records prove anything, they might suggest that Beth Bensinger and Blickley's daughter visited Blickley to complain about how Roy Bensinger was treating them. If the records were meant to suggest that Champney was chosen to eliminate their problem by killing Roy Bensinger, they would also suggest that Blickley was the one who chose him for the task. There would be no reason for them to share their plans with Blickley, unless he was making the arrangements for the killing. He specifically denied that when he was called as a Commonwealth witness at Champney's trial.

Those same records showed that Champney visited Blickley at Rockview again that year in July, August and December; and Beth Bensinger visited again in November. There is no evidence other than Blickley's highly suspect testimony to show that any of these visits were anymore than friends visiting another friend in jail.

Champney's visit to Blickley the day after the killing is especially open to conflicting interpretation. Was he reporting to his employer that he had completed the assignment of killing Roy Bensinger, or was he just stopping in because he was on his way to Oregon and would not be around for awhile? If he was on the

run to avoid a murder investigation, why would he take the time to stop at a state correctional institution just to talk to Blickley? Champney's trial counsel could have argued that this evidence, capable of different interpretations, did not prove guilt beyond a reasonable doubt.

Absent the deficiencies in the representation by Champney's trial counsel, the Commonwealth's evidence against him would have been substantially weakened. Additionally, the Commonwealth failed to inform the petitioner's trial counsel that the District Attorney had withdrawn its opposition to Blickley's parole after he offered to help with the case against Champney. Finally, there was the error by trial counsel in failing to object and request a mistrial when the assistant district attorney argued during her closing that the jury should find Champney guilty because he did not deny his guilt when being questioned by the police.

Each of trial counsel's errors involve issues that were critical to the case, and each, by itself, raises a reasonable probability that the outcome of the petitioner's trial would have been different. The court finds that together they constitute ineffective representation of counsel that so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. As a result, we find that the petitioner is entitled to a new trial in both the guilt and penalty phases of his case.

COURT OF COMMON PLEAS OF SCHUYLKILL COUNTY--CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	NO. CR-1243-1998
	:	
vs.	:	
	:	
RONALD GRANT CHAMPNEY,	:	
Defendant	:	

Andrea McKenna, Esquire Senior Deputy Attorney General - for the Commonwealth
Angela S. Elleman, Esquire, Defender's Association - for the Defendant
David Zuckerman, Esquire, Defender's Association - for the Defendant
Samuel J.B. Angell, Esquire, Defender's Association - for the Defendant

ORDER OF COURT

BALDWIN, P.J.

AND NOW, this 3rd day of June, 2008, at 2:10 p.m., the petitioner having established ineffective assistance of counsel at trial, it is hereby ORDERED that his conviction be vacated and he be granted a new trial.

BY THE COURT,

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