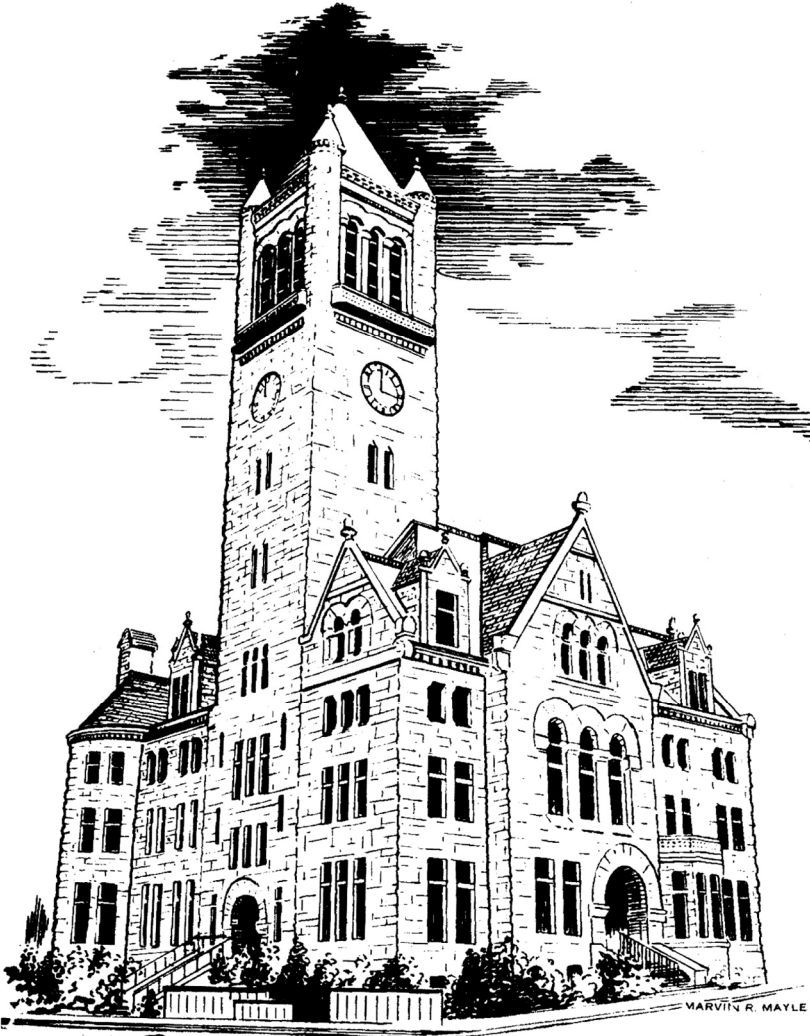


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Notice is hereby given that letters testamentary or of administration have been granted to the following estates. All persons indebted to said estates are required to make payment, and those having claims or demands to present the same without delay to the administrators or executors named.

Third Publication

**CHARLES RONALD ANDERSON, a/k/a
CHARLES R. ANDERSON, a/k/a C.
RONALD ANDERSON**, late of Perry
Township, Fayette County, PA (3)
Administrator: Mearl W. Anderson
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720 Vanderbilt Road
Connellsville, PA 15425
Attorney: Timothy J. Witt

ARNOLD W. PRITTS, JR., late of Saltlick
Township, Fayette County, PA (3)
Co-Administrators: Douglas Alan Pritts
and Rachel Renee Pritts
c/o Casini & Geibig, LLC
815B Memorial Boulevard
Connellsville, PA 15425
Attorney: Jennifer M. Casini

HELEN I. REICHERT, late of Uniontown,
Fayette County, PA (3)
Administratrix: Karen S. Brozik
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68 South Beeson Boulevard
Uniontown, PA 15401
Attorney: James E. Higinbotham, Jr.

**LINDA L. SHALLENBERGER, a/k/a
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Personal Representative: Darlah McKeel
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Connellsville, PA 15425
Attorney: Timothy J. Witt

Second Publication

**JOANNE D. BAUGH, a/k/a JOANNE
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Executrix: Lisa Quarrick (2)
c/o Adams Law Offices, PC
55 East Church Street, Suite 101
Uniontown, PA 15401
Attorney: Jason F. Adams

ROBERT C. DETWILER, late of
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Administratrix: Kimberly Genova
c/o Goodwin Como, P.C.
108 North Beeson Boulevard, Suite 400
Uniontown, PA 15401
Attorney: Benjamin Goodwin

ROSE M. FABERY, late of South Union
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Administrator: William F. Fabery, Jr.
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Uniontown, PA 15401
Attorney: William M. Martin

ANTHONY E. JOHNSON, late of Uniontown,
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Executrix: Constance M. Johnson
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Uniontown, PA 15401
Attorney: Gary J. Frankhouser

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South Union Township, Fayette County, PA (2)

Administratrix: Adrienne Jordan-Egnot
303 Fawn Haven Way
Morgantown, WV 26508
c/o 4 North Beeson Boulevard
Uniontown, PA 15401
Attorney: Ewing D. Newcomer

**NASSER G. LAVAIE, a/k/a, NASSER
GOODARZ LAVAIE**, late of Uniontown,
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Executrix: Alexa Lavaie
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Attorney: Benjamin Goodwin

**JEROME SEPER, a/k/a JEROME
MICHAEL SEPER, a/k/a JEROME M.
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PA (2)

Executrix: Lynn Jellots
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107 East Main Street
Uniontown, PA 15401
Attorney: James T. Davis

**LINDA SUE SEPER, a/k/a LINDA S.
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PA (2)

Executrix: Lori Sue Rohrer, a/k/a
Lori Sue Kozup
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107 East Main Street
Uniontown, PA 15401
Attorney: James T. Davis

OWEN K. SILBAUGH, SR., late of
Uniontown, Fayette County, PA (2)

Administrator: Owen K. Silbaugh, Jr. and
Courtney Radcliffe
c/o Tiberi Law Office
84 East Main Street

Uniontown, PA 15401
Attorney: Vincent M. Tiberi

FRANK J. ZADELL, JR., late of Dunbar,
Fayette County, PA (2)

Personal Representative: John Zadell
c/o 208 South Arch Street, Suite 2
Connellsville, PA 15401
Attorney: Richard A. Husband

First Publication

**EUGENE W. COLBORN, a/k/a EUGENE
WALTER COLBORN, SR., a/k/a E.W.
COLBORN**, late of Springfield Township,
Fayette County, PA (1)

Personal Representative:
Charles W. Watson
c/o Watson Mundorff, LLP
720 Vanderbilt Road
Connellsville, PA 15425
Attorney: Timothy J. Witt

**MALCOLM GORDON BALFOUR, a/k/a
MALCOLM G. BALFOUR**, late of Saltlick
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Executor: Merle Stutzman
205 Coffman Road
Acme, PA 15610
c/o Moore Becker Smarto & Acosta, P.C.
121 West Second Street
Greensburg, PA 15601
Attorney: Lawrence F. Becker, III

MICHAEL GEORGE MISKANIN, JR., late
of Uniontown, Fayette County, PA (1)

Executor: Michael George Miskanin, III
c/o Davis & Davis
107 East Main Street
Uniontown, PA 15401
Attorney: James T. Davis

STEVEN D. RAVENSCROFT, late of
Uniontown, Fayette County, PA (1)

Executor: Kevin S. Ravenscroft
c/o Adams Law Offices, PC
55 East Church Street, Suite 10
Uniontown, PA 15401
Attorney: Jason Adams

JOHN EDWARD RODERICK, late of
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Personal Representative:
Kelley Dawn Wheeler
c/o Davis & Davis
107 East Main Street
Uniontown, PA 15401
Attorney: Gary J. Frankhouser

KENNETH D. SLONECKER, late of Bullskin
Township, Fayette County, PA
Executor: Kevin D. Slonecker
c/o Molinaro Law Offices
P.O. Box 799
Connellsville, PA 15425
Attorney: Carmine V. Molinaro, Jr.

LEGAL NOTICES

IN THE COURT OF COMMON PLEAS OF
FAYETTE COUNTY PENNSYLVANIA
CIVIL DIVISION
Number 1515 of 2023, G. D.
JUDGE LINDA R. CORDARO

IN RE: ALL THAT CERTAIN PARCEL OF
REAL PROPERTY SITUATED AT 420
GRAY STREET EXTENSION, IN
GERMAN TOWNSHIP, FAYETTE COUNTY,
PENNSYLVANIA, PARCEL
IDENTIFICATION
NUMBER: 15-39-0011

**SERVICE BY SPECIAL ORDER OF
COURT PURSUANT TO Pa.R.C.P. 430**

TAKE NOTICE that a Declaration of
Taking has been filed in the office of the
Prothonotary for Fayette County, Pennsylvania,
at Case Number 1515 of 2023, G.D., on August
4, 2023, and duly recorded in the Office of the
Recorder of Deeds for Fayette County,
Pennsylvania, and indexed at Record Book
Number 3554, Page 184 on August 4, 2023, for
the taking of the following parcel of real
property for public use:

420 Gray Street Extension
Masontown, PA 15461

Tax ID No. 15-39-0011

NOTICE

If you wish to defend, you must enter a
written appearance personally or by attorney and
file your defenses or objections in writing with
the court. You are warned that if you fail to do
so the case may proceed without you and a
judgment may be entered against you without
further notice for the relief requested by the
plaintiff. You may lose money or property or
other rights important to you.

YOU SHOULD TAKE THIS PAPER TO
YOUR LAWYER AT ONCE. IF YOU DO
NOT HAVE A LAWYER, GO TO OR
TELEPHONE THE OFFICE SET FORTH
BELOW. THIS OFFICE CAN PROVIDE YOU
WITH INFORMATION ABOUT HIRING A
LAWYER.

IF YOU CANNOT AFFORD TO HIRE A
LAWYER, THIS OFFICE MAY BE ABLE TO
PROVIDE YOU WITH INFORMATION
ABOUT AGENCIES THAT MAY OFFER
LEGAL SERVICES TO ELIGIBLE PERSONS
AT A REDUCED FEE OR NO FEE.

Vincent M. Tiberi, Esquire
Solicitor, German Township, Pennsylvania
84 East Main Street
Uniontown, Pennsylvania 15401
(724) 430-0300

IN THE COURT OF COMMON PLEAS OF
FAYETTE COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION
NO. 11 ADOPT 2023

IN RE: ADOPTION OF
AVAHEYA MEIER

NOTICE

TO: Jai'Mare Wilson (alleged father) and
Unknown Unknown (biological father)

A petition has been filed asking the Court
to put an end to all rights you have to your child,
Avaeya Meier. The last name of the mother is
Dunmeyer. The child was born on 2/28/22, of
the female gender, at Westmoreland Hospital,
Greensburg, Westmoreland County, PA. The
court has set a hearing to consider ending your
rights to your child. That hearing has been
scheduled for Wednesday, October 11, 2023 at
1:30 p.m., and will be held in Courtroom No. 3
of the Fayette County Courthouse, 61 East Main
St., Uniontown, Fayette County, Pennsylvania,
before the Honorable Linda R. Cordaro. Your
presence is required at the hearing. You should

contact Fayette County Children and Youth Services or their counsel Anthony S. Dedola Jr., Esq., to obtain a copy of the petition prior to the hearing. YOU ARE WARNED THAT EVEN IF YOU FAIL TO APPEAR AT THE SCHEDULED HEARING, THE HEARING WILL GO ON WITHOUT YOU.

Your rights may also be subject to termination pursuant to subsection (d) if you fail to file wither an acknowledgement of paternity or claim of paternity pursuant to Section 5103 (relating to acknowledgment and claim of paternity), and fail to either appear at the hearing for the purpose of objecting to the termination of your rights or file a written objection to such termination with the court prior to the hearing.

YOU ARE ALSO NOTIFIED OF THE ACT 101 OF 2010 WHICH ALLOWS FOR AN ENFORCEABLE VOLUNTARY AGREEMENT FOR CONTINUING CONTACT OR COMMUNICATION FOLLOWING AN ADOPTION BETWEEN AN ADOPTIVE PARENT, A CHILD, A BIRTH PARENT, AND/OR A BIRTH RELATIVE OF THE CHILD, IF ALL PARTIES AGREE AND THE WRITTEN VOLUNTARY AGREEMENT IS APPROVED BY THE COURT YOU HAVE A RIGHT TO BE REPRESENTED AT THE HEARING BY A LAWYER. YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU HAVE PREVIOUSLY BEEN RPERESENTED BY A LAWYER IN DEPENDENCY COURT PROCEEDINGS, YOUR LAWYER WILL NOT BE AWARE OF THIS HEARING UNLESS YOU CONTACT YOUR LAWYER. YOU MUST CALL YOUR LAWYER AND INFORM YOUR LAWYER OF THE DATE OF THIS HEARING.

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(800) 692-7375
NOTICE

Notice is hereby given that a Certificate of Organization was filed with the Pennsylvania Department of State, on August 10, 2023, for a Limited Liability Company, organized under the Limited Liability Company Law of 1994, as from time to time amended. The name of the Company is RyLyn Rentals LLC having an address of 209 Gillespie Road, Fayette City, PA 15438.

ADAMS LAW OFFICES, PC
Jason F. Adams, Esquire
55 East Church Street, Suite 101
Uniontown, PA 15401
724-437-2711

IN THE COURT OF COMMON PLEAS OF
FAYETTE COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 193 of 2023, G.D.

EMERSON T. LONG and TARA LYNN
LONG, his wife,
Plaintiff,
v.
DAVID L. FINFROCK,
Defendant.

**NOTICE TO DEFENDANT,
DAVID L. FINFROCK,**

You have been named as a defendant in a Breach of Contract, Breach of Warranty, Negligent Misrepresentation, Negligence, and Breach of the Unfair Trade Practices and Consumer Protection Law, action instituted by Plaintiffs, Emerson T. Long and Tara Lynn Long, his wife, against you in this Court. Plaintiffs seek monetary damages in an amount exceeding fifty-thousand (\$50,000.00) dollars.

The service of this Complaint by publication is made pursuant to an Order of Court dated August 1, 2023, and filed at the above term and number.

You are hereby notified to plead to the Complaint in this action of which the above is a brief summary within twenty (20) days from today.

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within

twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the Court without further notice for any money claimed in the complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW.

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PENNSYLVANIA LAWYER
REFERRAL SERVICE
PENNSYLVANIA BAR ASSOCIATION
100 SOUTH STREET
P.O. BOX 186
HARRISBURG, PA 17108
PHONE: 1-800-692-7375

By: David D. Tamasy, Esquire
Watson Mundorff, LLP
720 Vanderbilt Road
Connellsville, PA 15425
Phone: 724-626-8882

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JOHN F. WARMAN

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JUDICIAL OPINION

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

COMMONWEALTH OF :
PENNSYLVANIA :
v. :
MICHAEL LYNN WRIGHT, JR., : No. 870 of 2016
Petitioner. : Honorable Linda R. Cordaro

OPINION

Linda R. Cordaro, J.

August 29, 2023

Currently before this Court is Petitioner’s Amended PCRA Petition filed on October 24, 2022. {1} Petitioner was represented before and during his May 6, 2019 trial by attorneys from the Fayette County Office of the Public Defender and now raises several claims of ineffective assistance of counsel.

Procedural Background

On May 9, 2019, after a four-day jury trial, Petitioner was convicted of third-degree murder, endangering the welfare of a child, and recklessly endangering another person, all in relation to his 23-month-old daughter, L.W. On May 24, 2019, Petitioner was sentenced to 15 to 40 years of incarceration for third-degree murder, with no further penalty on the other convictions.

Petitioner filed a timely notice of appeal via counsel {2} on June 10, 2019, and the Pennsylvania Superior Court affirmed on May 11, 2020. {3} Petitioner then sought allocatur in the Pennsylvania Supreme Court, which was denied on October 5, 2020. His conviction became final on January 4, 2021. 42 Pa.C.S.A. § 9545(b)(1).

On January 3, 2022, Petitioner’s PCRA counsel filed a PCRA Petition that included claims of ineffective assistance of trial counsel and the withholding of favorable evidence by the Commonwealth in violation of Brady v. Maryland, 373 U.S. 83 (1963). This Court scheduled an evidentiary hearing for March 28, 2022, which was thereafter continued several times.

On September 9, 2022, Petitioner’s counsel moved for another continuance and, on September 29, 2022, for leave to file an amended PCRA petition. The evidentiary hearing was continued to November 28, 2022, and the motion to file an amended petition was granted. On October 24, 2022, counsel filed the Amended PCRA Petition, which incorporated the entirety of the original Petition and raised an additional issue of newly discovered evidence.

{1}The Amended PCRA Petition incorporates by reference the entirety of the original Petition filed on January 3, 2022.

{2}Petitioner retained new counsel for his appeal and said counsel continues to represent him for his PCRA petition.

{3}Commonwealth v. Wright, 2020 WL 2315932 (Pa. Super. Ct. 2020).

On November 28, 2022, at the time and place of the scheduled hearing, Petitioner's counsel informed this Court that the expert that was to testify about the newly discovered evidence had withdrawn his opinion via email just before the Thanksgiving holiday. Given this extremely recent development, Petitioner's counsel asked to keep the record open to present some testimony at a later date and time. However, this Court continued the entire hearing to March 16, 2023 rather than hear only part of the evidence with the remainder to be presented later.

The evidentiary hearing finally was held on March 16, 2023 and included testimony from: Attorneys Jeffrey Whiteko and Susan Harper from Fayette County Office of the Public Defender, who had represented Petitioner before and during his trial; Attorney Jeremy Davis, death penalty mitigation counsel on the case; Andrea Dusha, L.W.'s mother {4}; Rebecca Pegg, CYS caseworker; Jennifer Hammers, D.O., pathologist; and Petitioner himself.

At the conclusion of the evidentiary hearing, this Court directed counsel to provide proposed findings of fact and conclusions of law in support of their respective positions by April 14, 2023. On that date, this Court granted a joint motion to extend the deadline to allow time for the preparation of the transcript of the proceedings. Both parties thereafter submitted memoranda on or before May 30, 2023.

ISSUES RAISED

Petitioner's issues alleging ineffective assistance of counsel as presented in his Petitions are listed below:

- (1) Failure to convey a plea offer;
- (2) Failure to consult with client and investigate;
- (3) Failure to assert meritorious suppression issues, resulting in waiver;
- (4) Failure to raise speedy trial issue;
- (5) Failure to obtain helpful medical expert testimony;
- (6) Failure to call expert witness with respect to lack of malice;
- (7) Failure to present an adequate closing argument;
- (8) Failure to adequately challenge L.W.'s weight measurement.

In addition to these claims of ineffective assistance of counsel, the original PCRA Petition also alleges that the Commonwealth withheld evidence that would have been favorable to his case. The Amended PCRA Petition incorporates all claims as raised in the original Petition and also alleges that, in the alternative to an ineffectiveness claim, the discovery that L.W.'s weight as testified to at trial was an erroneous measurement constitutes newly discovered evidence.

LEGAL PRINCIPLES

Petitioner was convicted of a crime in Pennsylvania and currently is serving a sentence of imprisonment for that crime. 42 Pa.C.S.A. § 9543(a)(1)(i). Petitioner asserts a constitutional violation and ineffective assistance of counsel, which are enumerated grounds for relief under the PCRA. 42 Pa.C.S.A. § 9543(a)(2)(i) and (ii). Petitioner also asserts that there exists exculpatory evidence that now has become available, the introduction of which would have changed the outcome of the trial. This also is enumerated basis for relief under 42 Pa. C.S.A. § 9543(2)(vi).

{4} Ms. Dusha also was charged in the original case and entered a guilty plea.

As to the constitutional violation (Brady violation) claim, Petitioner must establish that this alleged violation 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); *Commonwealth v. Haskins*, 60 A.3d 538 (Pa. Super. Ct. 2012).

As to the ineffectiveness of counsel claims, “counsel is presumed to be effective, and the petitioner bears the burden of proving to the contrary.” *Commonwealth v. Brown*, 196 A.3d 130, 150 (Pa. 2018). A petitioner must show, by a preponderance of the evidence, that: (1) the underlying claim has arguable merit; (2) counsel lacked a reasonable basis for action or inaction; and (3) the petitioner suffered prejudice as a result of counsel’s action or inaction. *Id.* at 150. The failure to establish even one of these elements will defeat the claim. *Commonwealth v. Walker*, 36 A.3d 1, 7 (Pa. 2011).

As to a newly discovered evidence claim, Petitioner must establish that (1) the evidence was discovered after trial and could not have been obtained at or prior to trial through reasonable diligence; (2) the evidence is not cumulative; (3) it is not being used solely to impeach credibility; and (4) it would likely compel a different verdict. *Commonwealth v. D’Amato*, 856 A.2d 806, 823 (Pa. 2004).

DISCUSSION

Petitioner has raised multiple PCRA claims. However, the substantive evidence presented at the March 16, 2023 evidentiary hearing primarily related to only a few of those claims, and insufficient evidence was presented to consider and reach a conclusion on the following: (1) failure to address meritorious suppression issues; (2) failure to raise a speedy trial issue; (3) failure to present an adequate closing argument; and (4) the Commonwealth’s alleged withholding of favorable evidence. These claims are denied for insufficient evidence, and therefore, consideration shall be given only to the following:

- (1) failure to convey a plea offer;
- (2) failure to consult with Petitioner and investigate;
- (3) failure to obtain helpful medical expert testimony;
- (4) failure to call an expert witness; and
- (5) failure to adequately challenge L.W.’s weight measurement.

If it is determined that the claim that counsel failed to adequately challenge L.W.’s weight does not warrant relief as an ineffective assistance of counsel claim, then the weight measurement issue will be analyzed as a claim of newly discovered evidence.

Failure to convey a plea offer

The decision whether to plead guilty is among the important decisions for which a defendant has “ultimate authority” and which an attorney has the duty to discuss with the client. *Commonwealth v. Brown*, 18 A.3d 1147, 1158 (Pa. Super. Ct. 2011) (quoting *Florida v. Nixon*, 543 U.S. 175, 187 (2004)). When the Commonwealth offers a plea bargain, defendant’s counsel must communicate both the terms of the plea bargain and the relative merits of the offer compared to the defendant’s chances at trial. *Commonwealth v. Copeland*, 554 A.2d 54, 60 (Pa. Super. Ct. 1988) (quoting *Commonwealth v. Napper*, 385 A.2d 521, 523-24 (Pa. Super. Ct. 1978)).

Petitioner contends that a plea offer was not communicated to him but emphasizes that there must have been some offer based on this Court’s order of March 9, 2018, {5} which was issued after a status conference in the case. It states, in part:

{5} Admitted at the March 26, 2023 hearing as Petitioner’s Exhibit 6.

1. Defense counsel shall meet with the Defendant in the place of Defendant's confinement within 45 days of the date of this Order to review all discovery with the Defendant and to consult with the Defendant about the plea offer that has been extended by the Commonwealth; and

2. A Pretrial Conference shall be held on Friday, May 4, 2018, at 10:30 o'clock a.m., at which time the Defendant shall accept or reject the plea offer extended by the Commonwealth. {6}

The transcript of the mentioned May 4, 2018 proceeding includes no discussion of a plea. Attorney Harper testified at the PCRA evidentiary hearing that she could not recall the terms of the plea offer but asserted that Petitioner would have been told about it, although she did not know who communicated it to him. N.T., 3/16/23, at 12-13. She also stated that Petitioner "at all times wanted to go to trial." Id. at 12.

Attorney Whiteko stated that he conveyed an offer to Petitioner, which he believed was related to a plea for third-degree murder, although he could not recall the specific terms. Id. at 64-65.

In contrast, Petitioner testified that he was not informed about a plea offer, and that the first time he knew of one was from the March 9, 2018 order. Id. at 117-118. Petitioner stated that he wanted to go to trial because he was incarcerated without bail and had no other choice, and that he would have entertained a plea offer. Id. at 126-27. He could not recall whether he was present for the March 9, 2018 status conference at which the offer was presumably discussed. {7} Id. His testimony also emphasized a lack of official documentation related to any plea offer. {8}

However, here, there is insufficient evidence to overcome the presumption of effective counsel. Both of Petitioner's trial attorneys testified that a plea offer either would have been, or was, communicated to Petitioner, who denies it. The lack of signed documentation showing Petitioner's rejection of a plea offer (or that an offer was communicated to him) is not persuasive. Therefore, a conclusion must be reached based only on directly contradictory testimony. The weight of the testimony of two experienced attorneys that a plea offer was, or would have been, communicated to Petitioner, along with Attorney Harper's assertion that the Petitioner "at all times" wanted a trial, balances against Petitioner's contrary assertion that he was not told of an offer. Without more, there is insufficient evidence to overcome a presumption of counsel's effectiveness, and this claim does not warrant relief.

{6} On May 4, 2018, mitigation counsel filed a motion to continue the trial. A continuation to the March 2019 term of criminal jury trial was granted, and the pre-trial conference also was continued to November 30, 2018.

{7} There is no record of the discussion at the status conference, as this Court's practice is to conduct status conferences as informal discussions off the record until and unless an order is entered.

{8} "[T]here was never any paper signed of me denying a plea deal, accepting a plea deal, telling me anything about a plea deal once, officially." N.T., 3/16/23, at 117.

***Failure to consult with client and investigate
Failure to obtain helpful medical expert testimony
Failure to challenge the weight measurement***

A determination of the reasonableness of counsel's action or inaction must be highly deferential to counsel's judgments, it must consider all the circumstances, and it must view the challenged conduct as of that time, not in hindsight. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.

Id. at 691. Ultimately, the focus of inquiry must be upon the "fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696.

In general, counsel has a duty "to undertake reasonable investigations or make reasonable decisions that render particular investigations unnecessary." *Commonwealth v. Johnson*, 966 A.2d 523, 535 (Pa. 2009). Further, unreasonable failure to adequately prepare for trial is "an abdication of the minimum performance required of defense counsel." *Id.* (quoting *Commonwealth v. Brooks*, 839 A.2d 245, 248 (Pa. 2003)). Since counsel's investigative and strategic decisions are influenced by a defendant's statements and input, failure to adequately consult with a client impedes counsel's ability to make such decisions and to adequately prepare for, and participate in, a trial.

At the evidentiary hearing, Attorney Harper testified that she was a part-time public defender and served as second counsel on Petitioner's case while Attorney Whiteko was primary counsel. N.T., 3/16/23, at 7, 14. Attorney Harper testified that she visited Petitioner a few times, although for medical reasons, eventually she could not visit the jail. N.T., 3/16/23, at 13, 33. She stated that she did prepare with Petitioner prior to trial. *Id.* at 21. She recalled receiving written correspondence from Petitioner "from the very beginning," and testified that her practice for cross-examination at trial was to ask her client whether there was anything else they wished to ask. *Id.* at 13-14, 20-21. She testified that Petitioner did communicate the questions he wished to ask Andrea Dusha, L.W.'s mother, when she testified at his trial. *Id.* at 20. She also spoke to the division of labor during trial that she and Attorney Whiteko undertook:

ATTY COOPER: . . . How did you divide the labor in this case?

ATTY HARPER: I did [the] opening [statement]. Mr. Whiteko did closing. I, I did a, you're going to have to look at the transcript and see who I cross-examined and who I didn't. I know Mr. Whiteko did Mr., Dr. Wecht. I know Mr. Whiteko did the direct on Mr. Wright. I took care of, on the defense side I took care of Mr. Wright's father. I took care of, gosh I'm trying to think of her name, maybe Pam Wilson {9} if you look on the transcript. I took care of that because I was the person who contacted her and spoke with her. She was the person at the methadone clinic maybe it was. I don't think it was Suboxone, methadone.

Id. at 21.

{9} According to the trial transcripts, Attorney Whiteko cross-examined two Commonwealth witnesses: Rebecca Pegg and Dr. Cyril Wecht and indicated no questions on cross for Trooper Matthew Haslett. N.T., 5/7/19, at 44, 151-53; 5/8/19, at 39-41. He also conducted the direct examination of Petitioner. N.T., 5/8/19, at 87-124.

Attorney Whiteko testified that he did not recall cross-examining Dr. Cyril Wecht, and, other than opening statement and closing argument, he did not recall how trial duties were divided between him and Attorney Harper. {10} Id. at 67. He stated that he did consult with Petitioner prior to trial but did not recall the meetings or their frequency. Id. at 63, 71. He also testified that he reviewed discovery with Petitioner but did not recall specifics. Id. at 66. He did not recall what he did to investigate Petitioner's case, nor did he recall consulting any experts concerning the circumstances of L.W.'s death. Id. at 62. He also testified that he was sure Petitioner was consulted about what witnesses he wished to call in his defense. Id. at 72.

For his part, Petitioner testified that Attorney Whiteko met with him twice, shortly before the start of trial. Id. at 114-15. He also stated that his meetings with Attorney Whiteko were brief, and they did not discuss discovery. Id. at 115. He testified that he met with Attorney Harper three times, the first time while he was "doing mitigations with Selina Matis whenever I filed a disciplinary board complaint against Jeffrey Whiteko." Id. Petitioner testified that at the second meeting, he and Attorney Harper discussed either a status conference or pretrial conference, and the third time was a similarly brief meeting. Id. at 115-16. These meetings, according to Petitioner, occurred "months" before his trial. Id. at 116.

Petitioner's testimony describes meetings during which no substantive discussions occurred:

ATTY. COOPER: Did any of your attorneys ever meet with you to discuss the circumstances of the statements that you gave to the, to law enforcement?

PETITIONER: Never.

ATTY. COOPER: Did they ever discuss with you any possible defenses based on the search warrants?

PETITIONER: Not once.

ATTY. COOPER: Did they discuss with you any possible defenses based on your mental state?

PETITIONER: No.

ATTY. COOPER: Did you have any opportunity to provide input into what suppression motions would be filed on your behalf?

PETITIONER: No.

ATTY. COOPER: Were you ever asked by any of your attorneys about what sort of questions ought to be asked on cross examination to the Commonwealth's witnesses at your trial?

PETITIONER: I had no communication with any lawyer before my trial.

ATTY. COOPER: For how much, how long of a period would you say before trial?

PETITIONER: Months.

{9} According to the record, Attorney Whiteko signed several pre-trial motions and petitions, including an Omnibus Pretrial Motion (July 13, 2016) and two (2) Motions for Continuance (September 13, 2016; March 5, 2019).

ATTY. COOPER: Months. Okay.

PETITIONER: I was actually in Bedford County, also.

ATTY. COOPER: Okay. Did you have the opportunity to make any sort of, raise any sort of issues that you perceived with the discovery that was disclosed by the Commonwealth prior to your trial?

PETITIONER: I did not.

ATTY. COOPER: You noted that Mr. Davis [mitigation counsel] had provided you with some of your discovery; is that correct?

PETITIONER: Yes. Some of it.

ATTY. COOPER: After receiving that did you ever have an opportunity to bring to any of your attorneys' attention any issues that you would like litigated concerning the discovery?

PETITIONER: The only person I ever got to talk to was Salina Matis but she was not my lawyer. She was my mitigations doctor. But as for my lawyers pursuing anything that was ever asked through her or any kind of communication between them that did not happen.

Id. at 120-22.

Petitioner testified that his counsel only briefly consulted with him even during his four-day trial:

ATTY. COOPER: During the periods of time following the end of each trial session did your attorneys visit with you to help prepare for the next day of trial?

PETITIONER: As we were walking out of the courtroom doors we would have a brief conversation for about 30 seconds, 45 seconds and I would keep going to the jail not to see them again till the next day where I resided in the hole with no phone calls to be able to call them or to see them.

ATTY. COOPER: So even during the downtime between the dates of the trial you had no chance to consult with your attorneys?

PETITIONER: No. None.

ATTY. COOPER: Did any of your attorneys consult with you following the guilty verdict?

PETITIONER: No. None.

ATTY. COOPER: When was the last time prior to filing this petition that you saw either Mr. Whiteko or Miss Harper?

PETITIONER: Before filing this petition today?

ATTY. COOPER: Before filing the PCRA Petition[.]

PETITIONER: The last time I seen them was at my trial, well sentencing, sorry.

ATTY. COOPER: Sentencing?

PETITIONER: Yes.

ATTY. COOPER: Did you see them between your trial and sentencing?

PETITIONER: I did not.

ATTY. COOPER: Were you given the opportunity to put on or suggest anybody who might testify in mitigation of sentencing?

PETITIONER: I was not given the opportunity.

Id. at 123-25.

Neither party has presented evidence such visit or telephone call records from any facility in which Petitioner was incarcerated, and so, again, testimonial evidence is the basis for a determination. Petitioner recalls only a few visits or discussions from Attorneys Harper and Whiteko during his multiple years of incarceration. {11} This does not contradict their testimonies, which are, at best, vague as to frequency of contact and the substance of what was discussed. Furthermore, the same pattern appears to have continued even during Petitioner's four days of trial, when Attorney Whiteko, as primary counsel, had opportunities to consult with him face-to-face. Petitioner still may have had the opportunity to provide some input in the midst of proceedings, but the periods of recess from trial

are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance.

Geders v. U.S., 425 U.S. 80, 88 (1976). Petitioner testified that no such consultation took place with counsel in his case, even during his trial for homicide.

In addition, the specific direction of this Court's March 9, 2018 reflects that, as of that date, counsel still had not fully consulted with Petitioner about discovery in his case. This indicates that counsel's approach was found wanting even at that time and required the correction of the court.

Although a defendant is not entitled to specified minimum number of visits or consultations with his attorney, nevertheless, as *Strickland* and *Geders* make clear, his input is crucial in the development of investigation of the case and trial strategy, and it informs the reasonableness of an attorney's decisions. Here, Petitioner's testimony describes only brief, cursory contact with his counsel during his multiple years of incarceration, including during the trial itself.

As to the failure of Petitioner's counsel to obtain helpful medical expert testimony, this alone does not necessarily constitute deficient performance, provided that trial counsel was able to effectively cross-examine the Commonwealth's expert witnesses and elicit helpful testimony. *Commonwealth v. Williams*, 141 A.3d 440, 464 (Pa. 2016) (quoting *Commonwealth v. Chmiel*, 30 A.3d 1111, 1143 (Pa. 2011)).

{11} According to the docket, Petitioner was incarcerated on March 17, 2016.

With regard to counsel's efforts to obtain medical expert testimony, Attorney Harper testified that she did call the medical examiner in Erie County to inquire about a review of the autopsy performed by Dr. Cyril Wecht, and that she made other calls as well, but "no one would involve themselves." N.T., 3/16/23, at 17. In addition, when she learned from the attorneys representing L.W.'s mother, Andrea Dusha, that they did not plan to call an expert on Ms. Dusha's behalf, Attorney Harper observed that of course, Petitioner's counsel would not do so either. Id.

Attorney Whiteko testified that he discussed Dr. Wecht's report with Petitioner, but he did not recall the report or the discussion. Id. at 67. He did not recall cross-examining Dr. Wecht at trial nor what his preparation for cross-examination involved. Id. at 67-68. He also testified about the general policy for retaining an expert for public defender clients:

ATTY. COOPER: When you had a case that had a medical examiner's report was it, what were the policies of your office in terms of trying to obtain expert consultation?

ATTY. WHITEKO: What was our policy?

ATTY. COOPER: Did you have a policy, I should ask?

ATTY. WHITEKO: I mean, we would look at the case and decide.

ATTY. COOPER: Okay. Do you recall how that decision was made in this case?

ATTY. WHITEKO: No.

ATTY. COOPER: Who would have made that decision?

ATTY. WHITEKO: In this case or every case?

ATTY. COOPER: Well, I'll ask first. Who, generally, would've made that decision?

ATTY. WHITEKO: In this case or every case[?]

ATTY. COOPER: Okay. We'll start with this case. In this case.

ATTY. WHITEKO: It would be myself and Miss Harper in this case cause we were the attorneys that were handling the case.

ATTY. COOPER: Okay.

ATTY. WHITEKO: If it was another case the attorneys would contact an expert if they decided they needed one and get a price.

ATTY. COOPER: What would happen after the price was given?

ATTY. WHITEKO: We would either, if we had it in our budget we would pay. If it wasn't in our budget we would then contact the commissioners to see if they would pay that particular fee.

ATTY. COOPER: Okay. Did that happen in this case?

ATTY. WHITEKO: No.

ATTY. COOPER: Do you recall whether there was any determination by you or

any other lawyer in your office that an expert would be helpful?

ATTY. WHITEKO: I don't recall.

Id. at 68-69.

In Petitioner's case, Dr. Cyril Wecht performed the autopsy of L.W. and testified at trial as an expert witness in forensic pathology for the Commonwealth. His testimony was that the autopsy showed, in addition to signs of dehydration such as "tenting" of the skin, that the 23-month-old weighed "about ten pounds." N.T., 5/8/19, at 28. Ultimately, Dr. Wecht's conclusion was that L.W.'s cause of death was malnutrition and dehydration. Id. at 32.

Dr. Phillip Reilly, Fayette County coroner and an expert witness for the Commonwealth in medicine, relied on the findings of Dr. Wecht when making his determination as to the manner of L.W.'s death. N.T., 5/6/19, at 39. During his testimony, he read aloud from Dr. Wecht's report that the child's weight was "in grams, 4,550" or "10 pounds." Id. at 54.

Petitioner now has presented evidence indicating that L.W.'s weight actually was more than 10 pounds. Dr. Jennifer Hammers was admitted as an expert witness in pathology at the March 16, 2023 evidentiary hearing and testified as to her opinion that the weight measurement was erroneous. She testified that she reviewed the autopsy report and photographs as well as the coroner's report and that the photographs did not depict a child weighing only 10 pounds. N.T., 3/16/23, at 91. Specifically, she testified that when she added up the measured weights of L.W.'s organs, the total was just under three and one-half (3 ½) pounds. Id. at 94-95. This, combined with the weight of her bones and skin, would equal about 10 pounds before any consideration for the additional weight of muscle, tissues, and fluids that were found to be present. Id.

So, when I look at all of those measurements, even just using the average weights she is, she is at or over ten pounds without having the substances in her body that we know that she had, that are visualized in the autopsy photographs because she did have muscles. She wasn't wasted. She did have subcutaneous tissues and she did have blood and other fluids in her body.

Id. at 95-96.

According to Petitioner's trial transcript, Attorney Whiteko's cross-examination of Dr. Wecht was brief and consisted of questions about the final pathological diagnosis, the condition of L.W.'s teeth, the fact that she was born prematurely, and whether all her organs were intact. N.T., 5/8/19, at 39-41. There was no mention of her weight at all, either in itself or in relation to autopsy photographs. Attorney Harper's cross-examination of Dr. Reilly was lengthier, and she inquired into his reliance on Dr. Wecht's findings, the condition of L.W.'s teeth, the presence of some fecal matter in her intestines, and findings of pulmonary congestion. N.T., 5/6/19, at 47-51. Again, there was no mention of the measurement of L.W.'s weight (although Dr. Reilly had relied on Dr. Wecht's report and findings for his own). {12}

{12} This Court will not speculate as to why neither Dr. Wecht nor Dr. Reilly appear to have questioned the 10-pound measurement. However, this suggests even more strongly that an effective challenge via cross-examination may have been helpful to Petitioner.

Moreover, L.W.'s weight at the time of her death was a major factor in the case against Petitioner:

ATTY. COOPER: In your opinion what was the most damning evidence that the Commonwealth had against Mr. Wright?

ATTY. HARPER: Umm, of course, Dr. Cyril Wecht's testimony. That goes without question.

ATTY. COOPER: What aspect of it in particular?

ATTY. HARPER: The condition of the child. The weight of the child, to be honest. Yes.

ATTY. COOPER: Do you recall what weight Dr. Wecht represented he weight the child at? Just approximately. I'm not asking down to the gram.

ATTY. HARPER: Ten pounds maybe. Am I right?

N.T., 3/16/23, at 25.

The Commonwealth repeatedly and specifically highlighted the weight measurement in its closing argument.

What else did [Dr. Wecht] tell us? Ten pounds. He weighed her, ladies and gentlemen. He weighed her. An expert forensic pathologist rendered a decision, rendered an opinion, that this tiny baby at 23 months was 10 pounds. Trooper Pierce, in his interview of the defendant, you'll recall hearing that yesterday, said to him, babies are born at 10 pounds. She was 23 months and she was 10 pounds. I have three children myself. Two of mine were born at 9 pounds. I agree with Trooper Pierce. And yet Lydia was 10 pounds at 23 months. That, ladies and gentlemen, is malnourishment.

Trial Excerpt - Closing Arguments, 5/9/19, at 13.

In addition, one of the Commonwealth's exhibits admitted at trial and published to the jury was a photograph of L.W. when she was approximately one year old. N.T., 5/6/19, at 71-72, 80. However, no photographs of L.W. taken at her autopsy were presented or admitted into evidence. Therefore, the jury was left to consider visual evidence of L.W. at one year old contrasted with an uncontroverted mental image of the same child weighing just ten pounds.

Finally, there is evidence that Petitioner suspected the weight measurement was incorrect prior to his trial. A May 22, 2018 competency evaluation performed by Dr. Curtis Mayernik, M.D., was admitted at the March 16, 2023 evidentiary hearing for another purpose (related to a finding of Petitioner's lack of malice). {13} However, the evaluation also referenced Petitioner's statements to Dr. Mayernik that the measurement of L.W.'s weight as 10 pounds could not be correct. Competency Evaluation of Curtis Mayernik, M.D. at 2. Petitioner's statement is not considered for the truth of the matter asserted but as a demonstration that, at least one year before trial, Petitioner possessed the suspicion now corroborated by Dr. Hammers' expert testimony – that L.W. could not have weighed only ten pounds.

{13} Admitted at the March 26, 2023 hearing as Petitioner's Exhibit 1.

The three claims of ineffective assistance of counsel here are interrelated. Petitioner's claim that counsel failed to adequately consult and investigate has merit, specifically with respect to primary counsel Attorney Whiteko, and this failure has no reasonable basis. Although his client suspected well before trial that there was an error in L.W.'s measured weight, and there is no reason to believe that Petitioner would have hidden his suspicion from his defense counsel, there is no indication that any investigation took place. This, despite the fact that the matter surely could have been addressed, either to confirm that the measurement was accurate or to challenge it as an error. Furthermore, and relatedly, Attorney Whiteko's cross-examination of Dr. Cyril Wecht failed to challenge the weight measurement, despite the suspicions of inaccuracy and the Commonwealth's reliance on the measurement as a main point of prosecution. The "ten pounds" measurement therefore was permitted to remain uncontradicted, prejudicing Petitioner. Furthermore, since no expert witness was called to testify on Defendant's behalf, Attorney Whiteko's inadequate cross-examination and (again, relatedly) failure to challenge the weight measurement equate to ineffective assistance of counsel. {14}

Failure to call expert witness with respect to Petitioner's lack of malice

The claim that Petitioner's trial counsel failed to call an expert witness as to Petitioner's lack of malice asserts that Petitioner's counsel could have presented evidence to negate the malice aspect of third-degree murder (of which the jury ultimately found Petitioner guilty).

Where a defendant claims that counsel was ineffective for failing to call a particular witness, we require proof of that witness's availability to testify, as well an adequate assertion that the substance of the purported testimony would make a difference in the case. Generally, we require a defendant to demonstrate that:

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

Commonwealth v. Clark, 961 A.2d 80, 90 (Pa. 2008) (quoting Commonwealth v. Washington, 927 A.2d 586, 599 (Pa. 2007)).

The competency evaluation report as provided by Dr. Curtis Mayernik and admitted at the evidentiary hearing as an exhibit does indicate that Dr. Mayernik did not "find evidence of deliberate malice or intent during [his] examination." Competency Evaluation of Curtis Mayernik, M.D. at 9. Petitioner's counsel asked Attorney Harper about the evaluation during the evidentiary hearing. N.T., 3/26/23, at 22-25. He also questioned Attorney Whiteko about the competency evaluation at the hearing. Id. at 69. However, while Petitioner may be correct in that testimony from Dr. Mayernik as to the lack of malice may have negated the malice element such that the jury would not have convicted Petitioner of third-degree murder, there has been no evidence presented that Dr. Mayernik was available and willing to testify at trial. Therefore, counsel cannot be found ineffective for failing to call him, and this claim is denied.

{14} Since the failure to adequately challenge the weight measurement has merit as a claim of ineffective assistance of counsel, there is no need to consider it as a claim of newly discovered evidence.

Conclusion

Petitioner's claims of ineffective assistance of counsel due to waiver of meritorious suppression issues, failure to raise a speedy trial issue, failure to present an adequate closing argument, and his claim of prosecutorial misconduct by the Commonwealth for withholding helpful evidence are denied for lack of substantive evidence upon which to reach a conclusion.

Petitioner's claim that counsel was ineffective for failing to communicate a plea offer has not been proven by a preponderance and is denied.

In addition, Petitioner has not proven all of the elements of his claim that counsel was ineffective for failing to call an expert witness with respect to his lack of malice, and this claim also is denied.

However, Petitioner has established by a preponderance of the evidence that Attorney Whiteko had no reasonable basis to fail to adequately consult and/or investigate. This failure impacted Attorney Whiteko's cross-examination of Dr. Cyril Wecht at trial, whose testimony included a measurement of L.W's weight as a mere 10 pounds, the most damning evidence against Petitioner. This damning evidence was one of the Commonwealth's main points of prosecution against Petitioner, and it was reinforced to the jury via photographic exhibit and the Commonwealth's heavy emphasis on it during closing argument. However, because of the ineffective assistance of Petitioner's counsel, the alleged weight measurement remained uncontradicted and unchallenged in the jury's mind. Petitioner thereby was prejudiced to an extent that the outcome of the trial may have been different but for counsel's inaction. Therefore, Petitioner's requested relief of a new trial is granted on the merits of these claims.

BY THE COURT:
Linda R. Cordaro, Judge

ATTEST:
Clerk of Courts

Date: August 29, 2023

BENCH BAR CONFERENCE

Fayette County Bar Association Bench Bar Conference
Wednesday, October 18, 2023
The Historic Summit Inn

AGENDA

8:30 **Meet the Sponsors & Breakfast Buffet**

9:00 **How the Courts have Dramatically Re-Shaped College Sports**
John P. Gismondi – Gismondi & Associates
1.5 Substantive CLE Credit

10:30 Break

10:45 **Succession Planning and Other Issues Relating to Experienced Lawyers**
Thomas J. Farrell, Chief Disciplinary Counsel –
Disciplinary Board of the Supreme Court of PA
1.0 Ethics CLE Credit

11:45 **Fayette County Practice and Procedure Discussion**
President Judge Steve P. Leskinen
0.5 Substantive CLE Credit

12:30 Lunch Buffet

Fees to Attend

FCBA members - \$85

Non-members of the FCBA - \$135

Attorneys admitted to practice after January 1, 2018 - \$50

RSVP due Wednesday, October 4th
to Cindy at 724-437-7994 or cindy@fcbar.org

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