JEFFERSON COUNTY COMMON PLEAS COURT
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA **Respondent-Appellee,**	)	
v.	)	**CP-33-CR-0000455-2011**
	)	**PCRA Court: Foradora, J.**
JUDY SPRANKLE **Petitioner-Appellant.**	)	

Amended PCRA Petition

Petitioner, **Judy Sprankle**, by and through counsel, **Craig M. Cooley**, respectfully submits her *Amended PCRA Petition*, which is filed in good faith, based on the following facts and points of authority, and alleges claims under the Sixth and Fourteenth Amendments of the U.S. Constitution as well as Article 1, Section 9 of the Pennsylvania Constitution.

PROCEDURAL HISTORY

1. On **October 21, 2011**, the Commonwealth filed a 13-count *Information* charging Ms. Sprankle with several offenses in connection with an altercation she had with her estranged husband, **Elmer Sprankle**, on **September 8, 2011**.[1]

a. The Commonwealth alleged Mr. Sprankle and Ms. Sprankle had an argument outside the local district magistrate's office. Ms. Sprankle then attempted to hit Mr. Sprankle's girlfriend, Alicia Caltagarone, who was seated in his car.

b. When Mr. Sprankle re-entered his car and drove off, the Commonwealth alleged Ms. Sprankle removed a handgun from her purse and fired six shots at Mr. Sprankle's vehicle.

[1] Ex. 1.

c. One bullet struck Mr. Sprankle's car. Another bullet was recovered from inside a nearby house.

d. The Commonwealth alleged that Ms. Sprankle went to the magistrate's office that day with the specific intent to kill Mr. Sprankle and Ms. Caltagarone.

2. The Commonwealth charged Ms. Sprankle with two counts of attempted homicide, two counts of aggravated assault, three counts of simple assault, three counts of recklessly endangering another person ("REAP"), two counts of criminal mischief-damaging property, and one count of discharging a firearm into an occupied structure ("DFOS").[2]

3. Ms. Sprakle retained **Toni Cherry** as counsel.

4. On **September 10, 2012**, before the **Honorable John H. Foradora**, Ms. Sprankle pled guilty to **one count of attempted murder**, **one count of REAP**, and **one count of DFOS**.

a. The trial court also conducted an on-the-record plea colloquy with Ms. Sprankle where, on Ms. Cherry's advice, she waived the reading of the *Information* into the record.[3]

b. Ms. Sprankle signed a written plea colloquy.[4]

5. On **September 18, 2012**, the trial court held a sentencing hearing. The trial court sentenced Ms. Sprankle to an aggregate sentence of **9½ years to 29 years** in prison. The trial court also collectively fined Ms. Sprankle **$27,000**.

a. **Attempted homicide**: **78 months** to **20 years** in a state correctional facility and a **$15,000 fine**.

b. **REAP**: **6 months** to **2 years** in a state correctional facility, to run **consecutive** with the attempted homicide sentence and a **$2,000 fine**.

c. **DFOS**: **12 months** to **7 years** in a state correctional facility, to run **consecutive** to the REAP sentence and a **$10,000 fine**.[5]

[2] Ex. 1.
[3] NT, Plea Colloquy, 9/10/2012, p. 6; Ex. 2.
[4] Ex. 3.
[5] Ex. 4.

6. On **September 28, 2012**, Ms. Sprankle filed her *Post-Sentencing Motion*,[6] which the trial court denied on **December 21, 2012**.[7]

7. On **January 21, 2013**, Ms. Sprankle filed a timely notice of appeal (**165 WDA 2013**). Toni Cherry continued her representation and litigated Ms. Sprankle's direct appeal.

8. On **February 12, 2013**, Ms. Sprankle filed her *Concise Statement of Errors*, raising one issue:

> The failure of the Trial Court to conduct a thorough colloquy on the record prevented the plea of the Defendant from being knowing and voluntary and understandingly tendered as required by Pa. R. Crim. Pa. 590.

9. On **March 26, 2013**, the trial court issued its opinion.[8]

10. On **July 2, 2014**, the Superior Court affirmed.[9]

11. Ms. Sprankle filed a timely *Petition for Allowance of Appeal*, which was denied on **November 26, 2014** (**356 WAL 2014**).[10]

12. Ms. Sprankle did not file a certiorari petition with the U.S. Supreme Court, meaning her conviction became final on **February 24, 2015**.

13. On **February 22, 2016**, Ms. Sprankle filed a timely PCRA petition.

[6] Ex. 5.
[7] Ex. 6.
[8] Ex. 7.
[9] Ex. 8.
[10] Ex. 9.

STATEMENT OF FACTS

A. Judy Sprankle's 40-Years of Abuse and Torment

14. **Elmer Sprankle** is an ex-felon who physically, sexually, and emotionally abused and controlled his wife, **Judy Sprankle**, for more than forty years. Mr. Sprankle's abusive and misogynistic behavior dates back to his teenage years when he allegedly raped one or two of his sisters.[11]

15. Ms. Sprankle met Mr. Sprankle when she was 17-years-old. The two married shortly thereafter in 1969, but Ms. Sprankle's love for him slowly dissipated due to Mr. Sprankle's abusive behavior toward her and their children, Kim and Kevin.

16. Mr. Sprankle's physical, sexual, and psychological abuse of Ms. Sprankle lasted more than forty years.

17. Sometime between 1971 and 1972, Mr. Sprankle began slapping Ms. Sprankle. This coincided with Ms. Sprankle taking a position with the local glass company. Mr. Sprankle routinely believed Ms. Sprankle flirted with her co-workers and he slapped and hit her when his insecurities ran deep. Mr. Sprankle also criticized her work clothing, saying they were too tight and too short for work. Mr. Sprankle also checked the mileage on her car because he suspected infidelity on her part.[12]

18. During the early 1970s, Mr. Sprankle also convinced Ms. Sprankle to have sex with Debbie and Ed, the couple who lived above them at the time. Ms. Sprankle reluctantly agreed to "swap" and had sex with Ed because Mr. Sprankle wanted her to and because she feared what Mr. Sprankle might do if she refused to have sex with Ed. Mr. Sprankle also "swapped" and had sex with Debbie.[13] Once Ms. Sprankle "swapped" and had sex with Ed, however, Mr. Sprankle became jealous and physically assaulted Ms. Sprankle on February 28, 1972 by repeatedly punching her in the face, resulting in Mr. Sprankle's arrest. According to the police complaint, Mr. Sprankle "unlawfully and willfully made an assault and beat about the face and head of one Judy Sprankle[.]"[14] Ms. Sprankle was hospitalized as a result of the assault.[15]

[11] Ex. 10.
[12] Ex. 10.
[13] Ex. 22.
[14] Ex. 19.
[15] Ex. 22.

19. In 1973, Mr. Sprankle punched Ms. Sprankle in the face and stomach, braking one of her ribs.[16]

20. In 1975, Ms. Sprankle left Mr. Sprankle because of the abuse, but she eventually returned. During this separation, their son, **Kevin**, was born.[17] Kevin's father is Ted Sprankle, Mr. Sprankle's brother.[18]

21. Between 1976 and 1978 Mr. Sprankle began raping Ms. Sprankle. It was during this period that Ms. Sprankle turned to alcohol to cope with Mr. Sprankle's abuse. The abuse continued, though, resulting in several black eyes.[19] During this period, Ms. Sprankle routinely contemplated suicide.[20]

22. From 1975 to the early 1980s, Ms. Sprankle routinely called the police because of Mr. Sprankle's abuse, but she never had Mr. Sprankle arrested and charged.[21]

23. In 1979, Ms. Sprankle became pregnant with her daughter, **Kim**. During the last trimester of her pregnancy, Ms. Sprankle became so concerned with Mr. Sprankle's abuse one night, and how it could impact her pregnancy, she climbed out a bathroom window and hid on the roof.[22]

24. During the 1980s, Mr. Sprankle's abuse continued as did the police routinely coming to their house.[23] Ms. Sprankle also recalled several times when she arrived home from work to find black and blue marks on Kevin's arms, legs, and face. When she confronted Mr. Sprankle about the injuries, Mr. Sprankle always blamed the injuries on falls of some sort.[24]

25. Tired of the abuse, sometime in 1990 or 1991, Ms. Sprankle told Mr. Sprankle she wanted to seek treatment by seeing a counselor, but Mr. Sprankle rejected the idea. To escape from Mr. Sprankle's abuse, Ms. Sprankle worked double shifts at the glass plant and drank heavily on her days off. [25]

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[16] Ex. 10.
[17] Ex. 10.
[18] Ex. 22.
[19] Ex. 10.
[20] Ex. 22.
[21] Ex. 22.
[22] Exs. 10, 22.
[23] Ex. 22.
[24] Ex. 10.
[25] Exs. 10, 22.

26. During the 1990s, Mr. Sprankle forced Ms. Sprankle to get breast implants.[26] During this period, "A regular family ritual was the use of ice bags to limit bleeding and swelling after Judy was struck by [Elmer]."[27] Likewise, during this period, Mr. Sprankle frequently threatened to shoot and kill Ms. Sprankle and the kids if they left or threatened to leave.[28] Mr. Sprankle also repeatedly pointed his gun at Ms. Sprankle and the kids when he got angry.[29] Mr. Sprankle also continued to rape Ms. Sprankle during this period.[30]

27. Ms. Sprankle's drinking increased during the 1990s to cope with Mr. Sprankle's.[31] Her drinking increased to the point where she began attending AA meetings.[32]

28. Kim described what it was like growing up with Mr. Sprankle: "Elmer Sprankle has abused myself, [my] brother, and [my] mother our entire lives physically, emotionally, mentally, and sexually."[33]

29. Kim added:

> Growing up I remember Elmer and my mom physically fighting and yelling at each other. I remember my mom and I climbing out our bedroom window, running to the car, and staying in a hotel room… until Elmer found us and knocked on the door and yell[ed] until we returned home. This happened frequently.[34]

30. Kim added:

> I remember the police showing up at our house and taking us to my grandparents house to stay the night. I remember Elmer hitting [me], my mom, [and] my brother. He [called] use names. He [told] me that he 'wished I was never born'

[26] Ex. 10.
[27] Ex. 10.
[28] Ex. 10; NT, Sentencing Hrg., 9/18/2012, pp. 11-12.
[29] NT, Sentencing Hrg., 9/18/2012, p. 11; Ex. 22.
[30] Ex. 22.
[31] Exs. 10, 22.
[32] NT, Sentencing Hrg., 9/18/2012, p. 49.
[33] NT, Sentencing Hrg., 9/18/2012, p. 23.
[34] Ex. 11.

> and he used to call me his 'little nigger' when it was just [me and] him.[35]

31. Kim added:

> Because growing up… [Elmer] was very harmful. He was very mean to us and cruel. I witnessed him punching [Judy] in the face, slapping her… when she would ball up and fall on the floor, he would kick her… when she was down on the ground, he would pull her by her hair into the bedroom, and he would slam it and lock it. I would hear crying, yelling. He was very mean.[36]
>
> ….
>
> He did mean things to me growing up… if I came home from school and my lips were chapped, I got beat with a belt for having chapped lips."[37]

32. Kim described seeing Mr. Sprankle force himself onto Ms. Sprankle:

> I've seen Elmer punch my mom in the face and point a hand gun in her and my direction. I remember looking into their bedroom and saw [Elmer] on top of [my mom] having sex, and [my mom] was crying.[38]
>
> …
>
> I watched Elmer rape my mother. That's what I meant sexually. That's what I witnessed.[39]

33. Kim said Ms. Sprankle was always the aggressor.[40] Ms. Sprankle frequently fought back, by throwing punches of her own, but "she always ended up going down on the ground" and "bailing up in a ball."[41] Fed up with Mr. Sprankle's abuse, Ms. Sprankle eventually enrolled in self-defense classes.[42] Again, though, while she

[35] Ex. 11.
[36] NT, Sentencing Hrg., 9/18/2012, pp. 9-10.
[37] NT, Sentencing Hrg., 9/18/2012, p. 10.
[38] Ex. 11.
[39] NT, Sentencing Hrg., 9/18/2012, p. 24.
[40] NT, Sentencing Hrg., 9/18/2012, p. 7.
[41] NT, Sentencing Hrg., 9/18/2012, p. 14.
[42] NT, Sentencing Hrg., 9/18/2012, p. 17.

frequently fought back, Ms. Sprankle inevitably ended up on the ground curled up in a ball.

34. Kim also described Mr. Sprankle's physical, emotional, and sexual abuse against her.

a. Kim recalled Mr. Sprankle slamming her head against the car window if she failed to tell him a car was coming. She recalled a time when Mr. Sprankle beat her with a belt because she had chapped lips.[43]

b. Kim said Mr. Sprankle "furiously" criticized her and Kevin "for not doing enough or well enough."[44]

c. Kim described how, at 7-years-old, she fell out of a tree and broke her arm and leg. Instead of taking her immediately to the hospital to treat the fractures, Mr. Sprankle insisted on cutting down the tree first. He construed it as punishment for being in the tree in the first place.[45]

d. Kim described how, as a young girl, Mr. Sprankle "washed" her "private area 2-3 times roughly with a wash cloth saying [she] was a 'dirty girl.'" After Mr. Sprankle did this multiple times, Kim began locking the bathroom door.[46]

35. Despite the long-term abuse, Kim said Ms. Sprankle always went back to Mr. Sprankle:

> Yes [she tried to leave often]. When they would fight, she would holler or the police would come to our house, give us a ride to my grandparents' house in DuBoise. **But she always went back**. I remember him saying, "I'll kill you. I'll kill them. Then I'll kill myself."[47]

36. So fearful of Mr. Sprankle was Kim, she refused to allow John Paul, her son–and Mr. Sprankle's grandson–to be in a room alone with Mr. Sprankle.

[43] Ex. 11; NT, Sentencing Hrg., 9/18/2012, pp. 12-13.
[44] Ex. 1.
[45] Ex. 10.
[46] Ex. 11; NT, Sentencing Hrg., 9/18/2012, p. 13.
[47] NT, Sentencing Hrg., 9/18/2012, p. 27.

37. **William Carulli**, Kim's husband, also said they "always had to be watching" Mr. Sprankle to ensure he did not physically abuse or hit their son,[48] because, one time, they caught Mr. Sprankle pulling John Paul's hair even though he was still a toddler.[49] They also instructed their day care provider to never allow Mr. Sprankle to pick up John Paul from day care after Mr. Sprankle removed him from daycare one day without his or Kim's knowledge and permission.[50] Kim and William eventually moved out of Pennsylvania to "get away from… Elmer. To get away from his craziness[.]"[51]

38. William described Mr. Sprankle's behavior and conduct over the course of his marriage to Kim.

a. William described Mr. Sprankle as a "very abusive and dangerous person"[52] and a "master manipulator"[53] who "always had evil intentions[.]"[54] William was not physically afraid of Mr. Sprankle, but he was "afraid of his mental capability[.]"[55]

b. William described Mr. Sprankle as "a control freak" who "made it adamantly clear, 'When I talk, you jump,' to everyone around him."[56] As William put it: "[A]nytime you had a dealing with [Mr. Sprankle], he… let you know that he was in control."[57]

c. William is "one hundred and ten percent" certain Ms. Sprankle and Kim feared Mr. Sprankle.[58]

39. After Ms. Sprankle and Mr. Sprankle finally separated in 2009, Mr. Sprankle engaged in numerous behaviors aimed at tormenting, aggravating, and angering Ms. Sprankle.

[48] NT, Sentencing Hrg., 9/18/2012, p. 15.
[49] NT, Sentencing Hrg., 9/18/2012, p. 32.
[50] NT, Sentencing Hrg., 9/18/2012, p. 37.
[51] NT, Sentencing Hrg., 9/18/2012, p. 7.
[52] NT, Sentencing Hrg., 9/18/2012, p. 30.
[53] NT, Sentencing Hrg., 9/18/2012, p. 45.
[54] NT, Sentencing Hrg., 9/18/2012, p. 38.
[55] NT, Sentencing Hrg., 9/18/2012, p. 39.
[56] NT, Sentencing Hrg., 9/18/2012, p. 33.
[57] NT, Sentencing Hrg., 9/18/2012, p. 38.
[58] NT, Sentencing Hrg., 9/18/2012, p. 34.

a. William, for instance, said Mr. Sprankle appeared set on tormenting Ms. Sprankle after their separation. William described an incident where Mr. Sprankle drove back and forth in front of Ms. Sprankle's residence honking his horn. [59] **Jim Schwartz**, Ms. Sprankle's then boyfriend and now husband, also described multiple instances of Mr. Sprankle incessantly driving past Ms. Sprankle's residence and honking his horn as well as honking his horn at her whenever he saw her out and about in town.[60] Kim also described this behavior.[61]

b. After Ms. Sprankle and Mr. Sprankle separated, William also frequently saw Mr. Sprankle opening Ms. Sprankle's mail box and going through her mail.[62]

c. In another post-separation incident, Mr. Sprankle chased Ms. Sprankle and Kim in Ms. Sprankle's car causing her car to flip.[63]

40. When Ms. Sprankle began dating Jim Schwartz in 2009, the interpersonal conflict with Mr. Sprankle intensified.[64] When Jim moved in with Ms. Sprankle "[i]t went from bad to worse."[65] Mr. Sprankle not only made harassing phone calls to Ms. Sprankle's work, he also called her boss and friends, as well as Jim's ex-wife. Likewise, the tires on their cars were mysteriously slashed. Ms. Sprankle and Jim called the police at least once a week to report Mr. Sprankle's illegal and harassing behaviors. Mr. Sprankle's craziness and proclivity for violence eventually forced Kim and William to move out of state.[66]

41. Between December 2010 and April 2011, Ms. Sprankle sought treatment and counseling from the Punxsutawney Area Hospital Counseling Center for "anxiety/panic symptoms" and "traumatic experience from her abusive husband of forty years."[67] Dr. Satish Amirneni, for instance, evaluated Ms. Sprankle on December 22, 2010. In his report, under the section "History of Present Illness," Dr. Amirneni wrote the following comprehensive synopsis of Ms. Sprankle's mental health issues:

[59] NT, Sentencing Hrg., 9/18/2012, p. 35-36.
[60] NT, Sentencing Hrg., 9/18/2012, at 74-80.
[61] Ex. 10.
[62] NT, Sentencing Hrg., 9/18/2012, pp. 37-38.
[63] Ex. 10.
[64] Ex. 10.
[65] Ex. 10.
[66] Ex. 10.
[67] Ex. 12.

> This is a 59-year-old female who has been married to her present husband for almost 40 years where she has left him about a year ago. It has been a messy separation process as he was making threats that he is going to kill the children, her, and himself. She ended up moving away from him to another city, but he is still stalking [her] as he retired as a construction worker. He also has been calling her work leaving messages. She also found out from her own children that he was also emotionally abusive to both the children, and they have very poor relationship[s] with her ex-husband at this time. This led to her decision to leave [her] husband… There were also incidents in the past where he was… physically aggressive towards her where she had some broken bones, but she has not pressed any charges at this point… She was taken to the emergency room a few weeks ago where she thought she was having a heart attack and losing her mind. She was having sweaty palms, getting dizzy, and very fearful… [doctors diagnosed her symptoms as a] panic attack… She presently denies depression, but does become very fearful unconsciously looking behind her back, and she already had a gun, has an ax in her car, and also has mace… in her pocketbook…. She did attend a trauma group once and is asking if she can attend an individual session. She is having some nightmares and having insomnia about the chronic abuse she has suffered over the years.[68]

42. Dr. Amirneni diagnosed Ms. Sprankle as suffering from panic disorder without agoraphobia and PTSD based on Mr. Sprankle's physical and mental abuse.[69]

B. Events Prior to the Shooting and the Shooting

43. In June 2011, only a few months before the shooting, Kim finally divulged to her mother the true extent of Mr. Sprankle's physical and sexual abuse. Kim never divulged the true details of the abuse as a child because Mr. Sprankle always threatened her. She did so in June 2011, however, because she obtained a *Protection from Abuse* ("PFA") order against Mr. Sprankle on May 17, 2011.[70] Kim obtained the

[68] Ex. 12.
[69] Ex. 12.
[70] NT, Sentencing Hrg., 9/18/2012, p. 27.

PFA after Mr. Sprankle ran Ms. Sprankle's car off the road. Mr. Sprankle thought Ms. Sprankle was driving the car, but Kim was driving.[71] During the June 2011 PFA hearing, Kim discussed the physical abuse, as well as the two to three times Mr. Sprankle roughly washed her private parts and called her a "dirty little girl"[72] She also said Mr. Sprankle threatened her to "[k]eep your mouth shut or it will get worse."[73] As Kim stated: "I would have never told [my mother] anything if it wasn't for the PFA… I started remembering things, and that's when I started to tell [my mother] things."[74]

44. After Kim divulged this information, Ms. Sprankle's demeanor changed. She felt extremely guilty for failing to protect her children as they were growing up. She did not want to fail at protecting her grandson, John Paul.[75]

45. Only days before the shooting, Mr. Sprankle called Ms. Sprankle at work and again taunted her by making crude comments and telling her he "fucked" her Kim.[76] Concerned, angered, and confused by Mr. Sprankle's comments, Ms. Sprankle spoke with William. According to William:

> And this was after the PFA hearing… and that bothered Judy immensely… I knew at that point she was overridden with guilt. Now she's starting to think what happened. She worked a lot while they were growing up… I could see at that time, the slipping, the thinking about the incident. That's when she had a conversation with me, and I could see it on her face that she was going to say something weird or out of the ordinary. She's like, "Elmer called me at work and said that I [fucked] your daughter." And then she was just in tears. She said, "What do you think he meant? Do you think he meant finically?" She was just distraught. "Do you think he would do that?" I said, "Yes, I do."[77]

[71] NT, Sentencing Hrg., 9/18/2012, p. 8, 22; Ex. 10.
[72] NT, Sentencing Hrg., 9/18/2012, pp. 20, 22.
[73] NT, Sentencing Hrg., 9/18/2012, p. 27.
[74] NT, Sentencing Hrg., 9/18/2012, p. 13.
[75] NT, Sentencing Hrg., 9/18/2012, p. 53; Ex 10.
[76] Ex. 10. NT, Sentencing Hrg. 9/18/2012, p. 25.
[77] NT, Sentencing Hrg., 9/18/2012, p. 34.

46. William added:

> I don't know how she held it together. Especially, given the events… leading up to that day, that week. With the way I saw her as bothered as she looked… She just wanted out of this. She really did. She didn't want the money, the property. Just out. Out. She would have given him anything he wanted as long as… he would have just gone away…[.][78]

47. On the day of the shooting, Ms. Sprankle drove to the magistrate's office and Mr. Sprankle followed her. Although only 8:30 a.m., Ms. Sprankle was already intoxicated. Fearful of Mr. Sprankle, Ms. Sprankle began carrying a gun in her purse. As a result, she had her gun that day. When she parked, Mr. Sprankle pulled alongside her and yelled, "I'm going to get it all!" Mr. Sprankle was with his girlfriend, **Alicia Caltagarone**. Ms. Sprankle ignored Mr. Sprankle's taunt and ran up the steps of the magistrate's office. Mr. Sprankle then yelled, "I'm going to get Jon," referring to her grandson John Paul. At this point, something triggered Ms. Sprankle. She felt tremendous guilt for not protecting her own children from Mr. Sprankle's abuse. She was not going to allow this to happen to her grandson John Paul.[79]

48. Ms. Sprankle walked to the passenger side of Mr. Sprankle's car and told Alicia, "Move aside – I'm going after Elmer." Mr. Sprankle pulled out of the parking lot yelling, "I fucked your daughter," before turning down the nearby alley. Ms. Sprankle followed on foot. Mr. Sprankle, though, stopped, placed his car in reverse, and began backing up toward Ms. Sprankle. At this point, when Ms. Sprankle saw Mr. Sprankle's car moving in reverse toward her, she quickly thought, "**It's either him or me**," so she removed the gun from her purse, walked toward his car, and fired multiple shots at his car in **self-defense**.[80]

49. When police arrived, Ms. Sprankle surrendered without incident. Based on her demeanor and statements, arresting officers believed Ms. Sprankle was **intoxicated**.[81] For instance, when officers handcuffed Ms. Sprankle, she supposedly said, "Take it easy it's not you I'm going to hurt it's my husband I'm going to kill."[82] Likewise,

[78] NT, Sentencing Hrg., 9/18/2012, p. 42.
[79] Ex. 10.
[80] Ex. 10.
[81] NT, Sentencing Hrg., 9/18/2012, p. 64.
[82] Ex. 13.

while being transported to PSP-Punxsutawney, Ms. Sprankle allegedly said, "Don't let me out of jail because I'll kill him."[83]

C. Information, Pre-Trial Proceedings, and Trial Counsel's Pre-Trial Investigation

50. On **October 11, 2011**, Toni Cherry filed a motion requesting public funds to hire a *battered woman/post-traumatic stress ("PTSD") expert*. Based on her initial interviews with Ms. Sprankle, her review of documents relating to this case, and her review of documents relating to Ms. Sprankle and Mr. Sprankle's marriage and divorce proceedings, Toni Cherry alleged Ms. Sprankle was a "battered wife" and that the "appointment" of a qualified battered woman/PTSD expert was "essential to the preparation of the defense in this case."[84] Toni Cherry added that an "independent psychiatrist" was "necessary" to "determine if" Ms. Sprankle "suffer[ed] from battered wife syndrome or other mental illness that would bear upon her mental capacity to understand the nature" of the criminal charges pending against her.[85]

51. On **October 21, 2011**, the District Attorney's Office filed a 13-count *Information*. The first two counts are for **CRIMINAL ATTEMPT** and both read as follows:

> **COUNT 1: CRIMINAL ATTEMPT**
> **18 Pa. C.S.A. 901(a) – Homicide 1st DEGREE**
> With intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime, to wit: In that the actor did with the intent to commit the specific act of Criminal Homicide [18§2501(a)] by firing six rounds from a .22 caliber Smith and Wesson revolver at *Elmer Sprankle*, victim, which constitutes a substantial step toward the commission of that [crime].
>
> **COUNT 2: CRIMINAL ATTEMPT**
> **18 Pa. C.S.A. 901(a) – Homicide 1st DEGREE**
> With intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime, to wit: In that the actor did with the intent to commit the specific act of Criminal Homicide [18§2501(a)]

[83] Ex. 13.
[84] Ex. 14., pp. 1-2.
[85] Ex. 14, p. 2.

> by firing six rounds from a .22 caliber Smith and Wesson revolver at *Alicia Ann Caltagarone*, victim, which constitutes a substantial step toward the commission of that [crime].[86]

52. On **March 19, 2012**, the trial court denied Toni Cherry's funding request.[87]

53. Toni Cherry did not file a reconsideration motion, nor did she request a hearing where she could, at the very least, make a proffer to the trial court explaining why a qualified battered woman/PTSD expert was essential to Ms. Sprankle's defense. Likewise, Toni Cherry did not consult with a qualified battered woman/PTSD expert to determine whether the expert could draft a preliminary affidavit, at a reduced rate, explaining how a qualified battered woman/PTSD expert could assist her preparation of Ms. Sprankle's defense.

54. Toni Cherry never revisited the funding issue, nor did she consult with a qualified battered woman/PTSD expert. Instead, Toni Cherry consulted with Dr. Joseph Silverman–a general practitioner psychiatrist with little to no experience counseling and treating battered woman who have moderate to severe PTSD symptoms as a result of the abuse.[88] To retain Dr. Silverman, Ms. Sprankle had to come up with $5,000. Ms. Sprankle came up with the money and Toni Cherry retained Dr. Silverman.

55. Dr. Silverman evaluated Ms. Sprankle on July 27, 2012 at the Jefferson County Jail. Dr. Silverman also interviewed Kim Carulli, William Carulli, and Jim Schwartz.[89] After interviewing Ms. Sprankle, Kim Carulli, William Carulli, and Jim Schwartz, Dr. Silverman drafted an initial report on July 30, 2012.[90] Dr. Silverman issued another report on August 9, 2012.[91]

56. After evaluating Ms. Sprankle, Kim, William, and Jim, and realizing the depth, duration, and brutality of Ms. Sprankle's abuse, Dr. Silverman realized he was *not qualified* to address how battered woman syndrome and PTSD impacted Ms. Sprankle's mental state on September 8, 2011. This conclusion can be gleaned from the **August 13, 2012** letter Dr. Silverman wrote Ms. Sprankle:

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[86] Ex. 1.
[87] Ex. 15.
[88] Ex. 21.
[89] NT, Sentencing Hrg., 9/18/2012, p. 51.
[90] Ex. 10.
[91] Ex. 10.

> With Attorney Cherry's permission, I have contacted the National Clearinghouse for the Defense of Battered Women, located in Philadelphia. The staff there is pondering your case, looking for something that would justify a plea bargain with a lesser sentence.[92]

57. Toni Cherry never contacted the National Clearinghouse for the Defense of Battered Women ["NCDBW"].

D. Plea Offer and Plea Colloquy

58. In **September 2012**, Toni Cherry presented a plea offer to the Commonwealth that would have Ms. Sprankle serve a prison sentence of no more than five year. On **September 7, 2012**, District Attorney Jeffery Burkett wrote Toni Cherry and made a "counter-offer[.]"[93] DA Burkett said he was "absolutely convinced" Ms. Sprankle "fully intended to kill Elmer Sprankle" on September 8, 2011.[94] DA Burkett said Ms. Sprankle "repeatedly told the police that day" that her "exact mental state" was to kill Mr. Sprankle.

59. Based on his interpretation of Ms. Sprankle's actions and words, DA Burkett presented Toni Cherry with "two separate offers"–one being a "specific time offer," the other being an offer to "drop some charges and allowing Judy to enter an open plea to other charges."[95]

a. First plea offer:

i. Criminal-Attempt Homicide: If Ms. Sprankle pled guilty to Criminal Attempt-Homicide, she would receive a *96 month to 20 years prison sentence*. DA Burkett would drop the Criminal-Attempt Homicide charge against Alicia Caltagarone.[96]

ii. Recklessly Endangering Another Person ("REAP"): If Ms. Sprankle pled guilty to REAP, she would receive a *7 month to 24 month prison sentence*, which would run consecutively with the Criminal-Attempt Homicide sentence.[97]

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[92] Ex. 16.
[93] Ex. 17.
[94] Ex. 10, p. 1.
[95] Ex. 10, p. 1.
[96] Ex. 10, pp. 1-2.
[97] Ex. 10, p. 2.

iii. Discharge of a Firearm into an Occupied Structure ("DFOS"): If Ms. Sprankle pled guilty to DFOS, she would receive a *2 year to 4 year prison sentence*, which would run consecutively with the Criminal-Attempt Homicide and REAP sentences.[98]

iv. The cumulatively sentence for the first plea offer, therefore, was *127 months (10 years and 7 months) to 26 years in prison*.

v. If Ms. Sprankle pled guilty to attempted homicide, REAP, and DFOS, the Commonwealth would drop the remaining 10 counts.

b. Second plea offer: Under the open plea offer, DA Burkett agreed to have a "full-blown" sentencing hearing because, as DA Burkett even recognized, "Judy and Elmer's prior history appear[ed] to be so ugly[.]"[99] The sentencing hearing, DA Burkett wrote, would allow Toni Cherry to "present any evidence, testimony, and arguments" in support of a mitigated sentence or a concurrent sentencing scheme.[100]

60. Toni Cherry never showed or informed Ms. Sprankle of DA Burkett's plea offer letter or his terms of years (127 months to 26 years in prison) plea offer.[101]

61. On September 10, 2012, three days after DA Burkett faxed his plea offer letter to Toni Cherry, Ms. Sprankle agreed to enter an open plea to attempted homicide, REAP, and DFOS. There was a caveat, though; Toni Cherry advised Ms. Sprankle she would be pleading guilty to *attempted third-degree murder*. Toni Cherry also told Ms. Sprankle the trial court would likely sentence her to *5 years* in prison and run her sentences concurrently, not consecutively.[102]

62. The written plea form Ms. Sprankle completed before pleading guilty substantiates this fact, as does Ms. Sprankle's oral guilty plea. During the oral plea colloquy, the trial court asked this question to Ms. Sprankle:

> Do you understand that for criminal attempt at homicide, the attempt would mean you would have to take a substantial step towards committing a *third degree murder*, *which would not be a specific intentional killing*, but you would have to know the consequences of your actions in

[98] Ex. 10, p. 2.
[99] Ex. 10, p. 1.
[100] Ex. 10, p. 1.
[101] Ex. 20, ¶ 8.
[102] Ex. 20, ¶ 6.c.iv; Ex. 20, ¶ 6.d.

> attempting to use a weapon on a person. Do you understand that?

63. Ms. Sprankle answered, "Yes."[103]

64. Later during the plea colloquy, the trial court asked:

> Having reviewed those facts and understanding the charge of *criminal attempt at third degree murder*, how do you plead?

65. Ms. Sprankle answered, "Guilty."[104]

66. Consequently, when Ms. Sprankle appeared before the trial court on September 10, 2012 to plead guilty, she was prepared to admit under oath and did in fact admit under oath that when she fired at Mr. Sprankle on September 8, 2011, *her intent was to scare or harm Mr. Sprankle, not to kill him.*

67. Toward the very end of the plea colloquy, however, the prosecutor asked the trial court whether the criminal attempt homicide charge should be for first-degree murder, not third-degree murder.

> ADA Cole: Your Honor, for the purpose of the colloquy, should that be first degree, not third?[105]

68. The trial court said it "[didn't] matter," but then posed this question to Ms. Sprankle:

> Trial Court: I guess it doesn't matter. Essentially, it's an attempt at homicide. I would say, I – the Commonwealth is saying you intended to kill him, M[s]. Sprankle. *Do you understand that? That would be their charge of criminal attempt, and I should have said that you specifically wanted to kill him.* Does that change your mind in any way on your plea?[106]

[103] NT, Plea Colloquy, 9/10/2012, pp. 5-6; Ex. 2, pp. 5-6.
[104] NT, Plea Colloquy, 9/10/2012, p. 7; Ex. 2, p. 7.
[105] NT, Plea Colloquy, 9/10/2012, p. 7; Ex. 2, p. 7.
[106] NT, Plea Colloquy, 9/10/2012, pp. 7-8; Ex. 2, p. 7 (emphasis added).

69. Before Ms. Sprankle answered, Toni Cherry did not intervene and ask the trial court for a brief recess to consult with her client to make sure Ms. Sprankle knew the difference between first- and third-degree murder and, particularly, the difference between malice as it related to third-degree murder and the specific intent to kill as it related to first-degree murder. During her pre-plea consultations with Ms. Sprankle, Toni Cherry never discussed or explained the elements of first- and third-degree murder for Ms. Sprankle, nor discussed or explained the difference between malice and the specific intent to kill. Toni Cherry also never discussed or explained the criminal attempt statute, 18 Pa. C.S. § 901, and never told Ms. Sprankle that the law of attempt is well settled. Toni Cherry, in other words, never explained to Ms. Sprankle that a "person commits an attempt when, *with intent to commit a specific crime*, [s]he does any act which constitutes a substantial step toward commission of that crime." 18 Pa. C.S. § 901(a) (emphasis added).[107]

70. Likewise, before Ms. Sprankle answered, Toni Cherry never discussed or explained that, if Ms. Sprankle admitted in open court and under oath that her sole and specific purpose of going to the magistrate's office on September 8, 2011 was to kill Mr. Sprankle, she would almost certainly not receive the 5 year prison sentence Ms. Cherry discussed with her during their pre-plea discussions.[108]

71. With no intervention or consultation from Toni Cherry, Ms. Sprankle answered the trial court's question and said, "No," to which the trial court said:

> Trial Court: Okay. You're still – thank you. *I don't think it matters*. We've got it covered. Okay. We'll see you next Tuesday. Thank you. Court is adjourned.[109]

72. During the plea colloquy, Toni Cherry also advised Ms. Sprankle to waive the reading of *Information* for all three counts included in Ms. Sprankle's guilty plea. After the trial court identified the three offenses – attempted murder, REAP, and DFOS – the trial court told Ms. Sprankle to "[l]isten closely" to ADA Cole as she read into the record the plea's factual basis. Immediatley after the trial court said this, Toni Cheri intervened and said, "We'll waive a reading of the information."[110]

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[107] Ex. 20, ¶ 6.
[108] Ex. 20, ¶¶ 6-7.
[109] NT, Plea Colloquy, 9/10/2012, p. 8 (emphasis added)
[110] NT, Plea Colloquy, 9/10/2012, p. 7.

Trial Court: Listen closely while [ADA] Cole recites the facts.

Cherry: We'll waive a reading of the information.

(Discussion held off record.)

Trial Court: Your attorney has indicated you would waive a reading of the facts. So you have had sufficient time to review the facts charged against you with Attorney Cherry?

Sprankle: Yes.[111]

E. Pre-Sentence Report

73. On September 12, 2012, Pre-Sentence Investigator Kristine Lindemuth submitted her pre-sentence report. Under the "Defendant's Version" section, Investigator Lindemuth reported:

> On the day of the offense, both [Ms. Sprankle] and Mr. Sprankle were summoned to DJ Chamber's office in Punxsutawney to dispose of a Harassment charge that was filed against the defendant in June 2011. [Ms. Sprankle] stated that Mr. Sprankle was behind her as she drove to [the] DJ's Chambers office, so instead of just pulling into the parking lot, she circled through Punxsutawney before going to the office. She stated that she always carried a gun in her glove box for protection from Mr. Sprankle. When she arrived at the office, she took the gun out the glove box and kept it on her person. After Mr. Sprankle arrived, she ran up the office steps when Mr. Sprankle yelled, "I fucked your daughter!" At that point, [Ms. Sprankle] stated that she turned around and told Mr. Sprankle's girlfriend to "get out of the way" and Mr. Sprankle drove around the corner. [Ms. Sprankle] followed his vehicle on foot around the corner of the building, and saw brake lights come on. She

[111] NT, Plea Colloquy, 9/10/2012, p. 7.

> stated that at that point she took the gun out and started "walking and shooting."…[.][112]

74. Under the "Marital History" section, Investigator Lindemuth reported:

> … It's reported that the first year of marriage [to Elmer Sprankle] was good but then Mr. Sprankle started becoming more controlling and the physical abuse followed. At first, when [Elmer Sprankle] would be physically abusive, he was apologetic and would offer excuses. The abuse subsided for a time after [Ms. Sprankle] became pregnant, but [the physical abuse] resumed. [Ms. Sprankle] relayed that she felt that she had let her children down by not protecting them from Mr. Sprankle. She reports that in June 2011, her children disclosed to her the abuse they had endured during their childhood. Her daughter informed her that her father had sexually abused her when she was 5 years old while bathing her. She went to the police, however, the statute of limitations prohibited charges being filed. Further, her son relayed that he slept with a baseball bat for protection from his father… [.]
>
> She stated that she often thought the abuse was her fault, but knows better now. "I should have got out 40 years ago." The couple did have periods of separation, but she would always go back. Finally, approximately 2 years ago, the couple agreed to separate. The defendant reports that things were fine until she began dating her current boyfriend, Jim Schutz [sic]. At that point, Mr. Sprankle became jealous and destructive of Mr. Schutz [six] and [Ms. Sprankle's] property. [Ms. Sprankle] gained a PFA against Mr. Sprankle in September 2009, and he counteracted with a PFA against [her] by reporting that she had threatened his life. She denies these threats… [.][113]

75. Under the "Mental Health" section, Investigator Lindemuth reported:

[112] Ex. 18, p. 2.
[113] Ex. 18, p. 3.

> [Ms. Sprankle] sought mental health counseling on two separate occasions prior to her incarceration. During the 1980's, she travelled to State College for mental health counseling because Mr. Sprankle did not approve of her going to counseling. After the counselor mailed information to her, Mr. Sprankle found out she was going to counseling and she quit attending. During their final separation in 2009, she began attending counseling in Punxsutawney. She was… diagnosed with Anxiety just prior to her incarceration… [.]
>
> Prior to the day of the incident, the defendant stated that she lived in fear of Mr. Sprankle. During the interview, she stated that "now after 10 seconds, I'm not scared of him anymore." She also stated that she is very "comfortable" at the JCJ. She commented that she feels like she is "in protective custody" and "I can do jail well."[114]

76. Under the "Alcohol Use" section, Investigator Lindemuth reported:

> During her second year of marriage, [Ms. Sprankle] began drinking. She reports that she first began drinking so she could sleep. As time passed, she stated that she drank to "deal with everything," even the mere presence of Mr. Sprankle. [Ms. Sprankle] further relayed that she drank so that she would pass out so that she could have intercourse with Mr. Sprankle as it was "kind of like a rape thing." When drinking, [Ms. Sprankle] reports that if she was drinking at night after work she would consume approximately one 6 pack of beer. On days off work when she was home with Mr. Sprankle, she drank vodka and coke.[115]

[114] Ex. 18. P. 4.
[115] Ex. 18, p. 4.

F. Sentencing Hearing

77. Toni Cherry presented Dr. Silverman at Ms. Sprankle's sentencing hearing. Dr. Silverman provided the following opinions and testimony:

a. Ms. Sprankle "felt she was a failure of protecting her children. She didn't want to be a failure of protecting her grandchildren."[116]

b. On the day of the shooting, "I felt she was showing the effects of 40 years of stress, extreme stress. And my conclusion was a reasonable person would do no better than she did with daily harassment and teasing, abuse, derogation, threats, and other behavior of that nature."[117]

c. "I think [Ms. Sprankle] felt that she had basically illustrated a switch from the flight orientation to a fight orientation. And when that happens, I think the tension and anxiety that she put up with so long dissipated. And I think to this day, she is no longer the victim of fear, having taken some affirmative action."[118]

d. "[S]he was driven to an extreme measure, a pointless measure. After all, she didn't know how to use a gun and so forth. Never practiced it, I'm told. But I think she reached a limit, and what happened, happened."[119]

e. Dr. Silverman opined Ms. Sprankle was not a danger to society.[120] Assuming Mr. Sprankle stopped harassing and tormenting her, Dr. Silverman had no doubt Ms. Sprankle would "be a solid citizen" in the community.[121]

f. Dr. Silverman, though, never once mentioned that Ms. Sprankle suffered from battered woman syndrome ("BWS") or PTSD, nor did he attempt to explain how women who suffer from BWS/PTSD perceive their abuser's actions and threats. Likewise, Dr. Silverman never explained why battered women like Ms. Sprankle stay with their abusers, nor did he explain how Ms. Sprankle's BWS/PTSD impacted her mental state before, during, and after the shooting.

78. Toni Cherry also presented Kim Carulli, William Carulli, and Jim Schwartz, each of whom graphically described Mr. Sprankle's physical, sexual, and emotional abuse.

[116] NT, Sentencing Hrg., 9/18/2012, p. 53.
[117] NT, Sentencing Hrg., 9/18/2012, pp. 52-53.
[118] NT, Sentencing Hrg., 9/18/2012, pp. 53-54.
[119] NT, Sentencing Hrg., 9/18/2012, p. 57.
[120] NT, Sentencing Hrg., 9/18/2012, p. 54.
[121] NT, Sentencing Hrg., 9/18/2012, p. 54.

79. Toni Cherry did not consult with or retain a battered woman/PTSD expert. Toni Cherry, as a result, did not present a battered woman/PTSD expert to explain how Ms. Sprankle's years of physical, sexual, and emotional abuse affected her mental state on September 8, 2011.

80. Ms. Sprankle testified at the sentencing hearing. She described the events and her mental state preceding the shooting. She testified that Mr. Sprankle yelled, "I fucked Kim and I'm going to get it all. I'm going to get JP."[122] After hearing Mr. Sprankle's admission, Ms. Sprankle said her initial thought was, "I can't live. I don't want to live like this. I don't care if I live or die."[123]

81. Ms. Sprankle also said she shot at Mr. Sprankle only after she saw him stop his car and place it in reverse:

> And I did see brake lights and he started backing up, and I started shooting and I didn't care. But I realize now that thank God nobody was killed.[124]

82. The trial court sentenced Ms. Sprankle to an aggregate sentence of *9 ½ years to 29 years in prison*:

a. Attempted homicide: 78 months to 20 years in a state correctional facility.

b. REAP: 6 months to 2 years in a state correctional facility, to run consecutive with the attempted homicide sentence.

c. DFOS: 12 months to 7 years in a state correctional facility, to run consecutive to the REAP sentence.[125]

G. Motion to Withdraw Guilty Plea

83. On September 28, 2012, Toni Cherry filed a motion requesting the trial court to withdraw Ms. Sprankle's guilty plea.[126] Toni Cherry based her request on the following reasons:

[122] NT, Sentencing Hrg., 9/18/2012, p. 89.
[123] NT, Sentencing Hrg., 9/18/2012, p. 89.
[124] NT, Sentencing Hrg., 9/18/2012, p. 89.
[125] Ex. 4.
[126] Ex. 5.

a. *First*, Toni Cherry argued that Ms. Sprankle was "induced" to plead guilty based on the "mistaken belief she would receive a sentence for all the counts in the mitigated range in light of the fact that no physical harm came to any victim."[127] Toni Cherry, in other words, conceded that she advised Ms. Sprankle that if she pled guilty to attempted *third-degree murder*, REAP, and DFOS, she would receive a mitigated sentence.

b. *Second*, Toni Cherry argued that Ms. Sprankle was "induced" to plead guilty "because she was told that the sentences would be served concurrently rather than consecutively."[128] Toni Cherry, in other words, conceded she advised Ms. Sprankle that if she pled guilty to attempted *third-degree murder*, REAP, and DFOS, the trial court would very likely run her sentences concurrently.

c. *Third*, Toni Cherry argued that "each and every element that the Commonwealth was required to prove in each count to which [Ms. Sprankle] entered a guilty plea," *i.e.*, attempted first-degree murder, REAP, and DFOS, "were not fully and completely explained to [Ms. Sprankle]."[129] Toni Cherry, in other words, conceded that she did not advise Ms. Sprankle regarding the elements of attempted first-degree murder, REAP, and DFOS.

[127] Ex. 5, ¶ 10.
[128] Ex. 5, ¶ 11.
[129] Ex. 5, ¶ 13.

CLAIMS FOR RELIEF

I. Toni Cherry's legal advice to Judy Sprankle before and during Judy Sprankle's oral plea colloquy was incomplete, inadequate, wrong, and objectively unreasonable under professional standards. Judy Sprankle based her decision to plead guilty to attempted murder, REAP, and DFOS on Toni Cherry's incomplete, inadequate, wrong, and objectively unreasonable advice. Had Judy Sprankle been adequately, completely, and accurately advised regarding the relevant Pennsylvania law regarding each offense, Judy Sprankle would not have pled guilty to attempted murder, REAP, and DFOS. Judy Sprankle's guilty plea, therefore, is unknowing and unintelligent, meeting the manifest injustice standard to have her guilty plea vacated. U.S. Const. amdts. V, VI, VIII, XIV; Pa. Const. art. I, § 9.

A. Withdrawing Guilty Pleas

84. A defendant may move to withdraw his guilty plea at any time, but the standard for withdrawing her plea becomes more daunting after sentencing. Withdrawal requests made *before* sentencing are liberally granted. *Commonwealth v. Turiano,* 601 A.2d 846, 854 (Pa. Super. 1992). A request made post-sentencing, however, requires the defendant to demonstrate prejudice "on the order of manifest injustice." *Commonwealth v. Yeomans*, 24 A.3d 1044, 1046 (Pa. Super. 2011). A showing of manifest injustice may be established "if the plea was entered into involuntarily, unknowingly, or unintelligently." *Id.*

85. Ms. Sprankle can prove her plea was invalid if she proves Toni Cherry's ineffectiveness wrongly induced her to plead guilty to any of the three charges included in her oral plea colloquy, particularly the attempted murder charge. In other words, ineffectiveness allegations "provide a basis for withdrawal of [a guilty] plea only where there is a causal nexus between counsel's ineffectiveness, if any, and an unknowing or involuntary plea." *Commonwealth v. Flood*, 627 A.2d. 1193, 1199 (Pa. Super. 1993). The issue, therefore, is whether Ms. Sprankle was "misled or misinformed and acted under that misguided influence when entering [her] guilty plea." *Id.; see also Commonwealth v. Kersteter*, 877 A.2d 466, 468 (Pa. Super. 2005); *Commonwealth v. Hickman*, 799 A.2d 136, 141 (Pa. Super. 2002); *Commonwealth v. Broadwater,* 479 A.2d 526, 531 (Pa. Super. 1984).

B. Trial Counsel Ineffectiveness Claims

86. Ms. Sprankle had a right to effective trial counsel. U.S. Const. amdt. 6; *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012) ("The right to the effective assistance of counsel at trial is a bedrock principle in our justice system."). This right is "fundamental" because it "assures the fairness, and thus the legitimacy, of our adversary process." *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986).). Although Ms. Sprankle pled guilty, she still had a right to effective representation during the pre-plea and actual plea stages. *Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012); *Hill v. Lockhart*, 474 U.S. 52 (1985); *Commonwealth v. Lewis*, 63 A.3d 1274, 1280 (Pa. Super. 2013). Regardless of whether a defendant pleads guilty or proceeds to trial, trial counsel has a duty to consult with her client by "keep[ing] [her] informed of important developments in the course of the prosecution." *Strickland v. Washington*, 466 U. S. 668, 688 (1984); *accord Florida v. Nixon*, 543 U.S. 175, 178 (2004).

87. Regardless of whether the defendant pleads guilty or proceeds to trial, counsel's purpose is to "test[] the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged." *Martinez v. Ryan*, 132 S.Ct. at 1317. The right to effective representation, consequently, is "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984). Trial counsel, as a result, "has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, 468 U.S. at 688. Consequently, unless a defendant receives effective representation, "a serious risk of injustice infects the [plea stage or] trial itself." *Cuyler v. Sullivan*, 446 U.S. 330, 343 (1980).

88. To prevail on an ineffectiveness claim, Ms. Sprankle must demonstrate Toni Cherry's performance was deficient and her deficient performance prejudiced her. *Strickland v. Washington*, 466 U.S. at 687. The deficiency prong "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* This prong is "necessarily linked to the practice and expectations of the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (quoting *Strickland v. Washington*, 466 U.S. at 688). Thus, when a court reviews a trial counsel ineffectiveness claim, "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland v. Washington*, 466 U.S. at 688. The prejudice prong requires showing a reasonable probability that, but for counsel's errors, the proceeding's results would have been different. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Strickland v.*

Washington, 466 U.S at 694. The "undermine confidence" standard "is not a stringent one," as it is "less demanding than the preponderance standard." *Hall v. Kyler*, 190 F.3d 88, 110 (3d Cir. 1999); *accord Kyles v. Whitley*, 514 U.S. 419, 435 (1995); *Nix v. Whiteside*, 475 U.S. 157, 175 (1986). *Commonwealth v. Hickman*, 799 A.2d at 141.

89. The Pennsylvania Supreme Court has interpreted *Strickland* and articulated its own three-factor test. To obtain relief, the petitioner must show: (1) the underlying legal claim is of arguable merit; (2) trial counsel's action or inaction lacked any objectively reasonable basis designed to effectuate his or her client's interest; and (3) prejudice, to the effect there was a reasonable probability of a different outcome at trial, if not for counsel's error. *Commonwealth v. Pierce*, 527 A.2d 973, 975–976 (Pa. 1987). Trial counsel's strategy will be considered unreasonable if the petitioner establishes "that an alternative not chosen offered a potential for success substantially greater than the course actually pursued." *Commonwealth v. Howard*, 719 A.2d 233, 237 (1998). Although *Pierce* rests on a three-prong analysis, as compared to *Strickland's* two-prongs, "the test for counsel ineffectiveness is, in substance, the same under both the Pennsylvania and federal Constitutions: it is the performance and prejudice test set forth in *Strickland*[.]" *Commonwealth v. Spotz*, 870 A.2d 822, 829 (Pa. 2005); *Commonwealth v. Williams*, 936 A.2d 12, 19 (Pa. 2007).

90. In the guilty plea context, therefore, entry of a guilty plea will serve as a basis for relief only if the ineffectiveness caused the defendant to enter an involuntary or unknowing plea. *Commonwealth v. Allen,* 732 A.2d 582, 587 (Pa. 1999). A guilty plea's voluntariness "depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." *Commonwealth v. Lynch*, 820 A.2d 728, 733 (Pa. Super. 2003); *accord Hill v. Lockhart*, 474 U.S. at 56; *McMann v. Richardson,* 397 U.S. 759, 771 (1970); *Tollett v. Henderson,* 411 U.S. 258, 267 (1973). In determining whether a guilty plea was entered knowingly and intelligently, a reviewing court must review all the circumstances surrounding the plea's entry. *Commonwealth v. Allen*, 732 A.2d at 587. To prove prejudice, in the guilty plea context, the defendant must show it is reasonably probable that, but for counsel's errors, she would not have pled guilty and would have gone to trial. *Hill v. Lockhart,* 474 U.S. at 59; *Commonwealth v. Hickman*, 799 A.2d at 141.

C. Application of Law to Facts

91. All the evidence clearly establishes that Toni Cherry advised Ms. Sprankle that *attempted third-degree murder* was a cognizable crime under state law.[130]

92. The evidence also clearly establishes that Toni Cherry advised Ms. Sprankle that the Commonwealth's September 7, 2010 plea offer was for attempted *third-degree murder*, not attempted first-degree murder.[131]

93. The evidence also clearly establishes that Toni Cherry advised Ms. Sprankle that if she pled guilty to attempted third-degree murder, the trial court would likely sentence her to 5 years in prison and that her sentences would run concurrently.[132]

94. The evidence also clearly establishes that Toni Cherry never advised Ms. Sprankle regarding the elements of third-degree murder, first-degree murder, or criminal attempt under 18 Pa. C.S. § 901.[133]

95. Third-degree murder is a killing done with legal malice but without specific intent to kill required in first-degree murder. Malice is the essential element of third-degree murder, and is the distinguishing factor between murder and manslaughter. *Commonwealth v. Cruz—Centeno*, 447 Pa. Super. 98, 668 A.2d 536, 539 (Pa.Super.1995). Malice "comprehends not only a particular ill-will, but every case where there is wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty[.]" *Commonwealth v. Drum*, 58 Pa. 9, 15 (1868).

96. Third-degree murder is *not* a specific intent crime; it requires an intentional act, but not an act defined by the statute as intentional murder:

> … [E]vidence of intent to kill is simply irrelevant to third degree murder. The elements of third degree murder absolutely include an intentional act, *but not an act defined by the statute as intentional murder*. The act sufficient for third degree is still a purposeful one, committed with malice, which results in death[.]

[130] Ex. 20, ¶6.c.iv.
[131] Ex. 20, ¶¶ 6-8.
[132] Ex. 5; Ex. 20, ¶ 6.c.vi.
[133] Ex. 5; Ex. 20, ¶¶ 6-8.

Commonwealth v. Fisher, 80 A.3d 1186, 1191 (2013) (emphasis added); *accord Commonwealth v. Meadows*, 787 A.2d 312, 317 (Pa. 2001); *Commonwealth v. Young*, 748 A.2d 166, 174-175 (Pa. 1999).

97. First-degree murder, though, is a specific intent crime. *Commonwealth v. Blakeney*, 946 A.2d 645, 652 (Pa. 2008) ("A conviction for attempted murder requires the Commonwealth to prove beyond a reasonable doubt that the defendant had the *specific intent to kill* and took a substantial step towards that goal.") (emphasis added).

98. The difference between the two mental states is significant, especially for sentencing purposes. If a defendant *specifically intends to kill* the victim and succeeds in doing so, he or she is automatically sentenced to life imprisonment without parole; the defendant is not entitled to a sentencing hearing where he or she can argue for a sentence less than life. 18 Pa. C.S. § 1102(a)(1). However, if a defendant commits an intentional act–*with malic*e-with the intent of harming the victim, but not with the sole and specific intent of killing the victim, and the victim ultimately dies, the maximum sentence the defendant can receive is forty years. *Commonwealth v. Rose*, 127 A.3d 794, 806 (Pa. 2015). Moreover, the defendant is entitled to a sentencing hearing where he or she can present evidence and argument calling for a sentence less than 40 years, but not less than 20 years.

99. Consequently, when Ms. Sprankle appeared before the trial court on September 10, 2012 to plead guilty, she was prepared to admit under oath that when she fired at Mr. Sprankle on September 8, 2011, *her specific intent was to scare or harm Mr. Sprankle, not to kill him*. In other words, while Ms. Sprankle did not have the specific intent to kill Mr. Sprankle, she nonetheless recklessly disregarded the likelihood that Mr. Sprankle or someone else could have been seriously injured or killed based on her actions.

100. Unfortunately for Ms. Sprankle, Toni Cherry's legal advice regarding *attempted third-degree murder* was wrong; there is no such crime as attempted third-degree murder in Pennsylvania. *Commonwealth v. Weimer*, 977 A.2d 1103, 1112 (Pa. 2009); *Commonwealth v. Spells*, 612 A.2d 458, 461 n.5 (Pa. Super. 1992) ("An attempt to commit murder can only constitute an attempt to commit murder of the first degree, because both second and third degree murder are unintended results of a specific intent to commit a felony or serious bodily harm, not to kill"); *Commonwealth v. Barnyak*, 639 A.2d 40, 45 n.5 (Pa. Super. 1994) (noting that there is no crime of attempted third-degree murder); *Commonwealth v. Griffin*, 456 A.2d 171, 177 (Pa. Super. 1983) (holding that an individual cannot attempt to commit murder of the second or third degree because the crime of attempt is a specific intent crime, and an attempt to commit second or third degree murder would require proof that the individual intended to perpetrate an unintentional killing, which is logically impossible).

101. Based on all the evidence, it is obvious Toni Cherry not only did not know the elements of third-degree murder, she did not research the issue of whether attempted third-degree murder was even a cognizable crime in Pennsylvania. In this respect, therefore, Toni Cherry's performance was objectively unreasonable and deficient under *Strickland*. *Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*."); ABA Standards for Criminal Justice, Defense Function 4-6.1(b) ("Defense counsel may engage in plea discussions with the prosecutor. Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, *including an analysis of controlling law* and the evidence likely to be introduced at trial.") (emphasis added).

102. Moreover, it is also obvious Toni Cherry did not know the criminal attempt statute, the law regarding criminal attempt, and she did not discuss or explain the criminal attempt statue and case law with Ms. Sprankle. This is obvious because, had she done each of these things, Toni Cherry would have known every criminal attempt is a specific intent crime and that the only possible degree of murder plausible under 18 Pa. C.S. § 901 is attempted *first-degree murder* because first-degree murder is a specific intent crime. As mentioned, a "person commits an attempt when, *with intent to commit a specific crime*, he does any act which constitutes a substantial step toward the commission of that crime." 18 Pa. C.S. § 901 (emphasis added); *accord Commonwealth v. Clopton*, 299 A.2d 455 (Pa. 1972) (criminal attempt is a specific intent crime).

103. It is also obvious Toni Cherry never discussed or explained the "substantial step test" to Ms. Sprankle. The "substantial step test broadens the scope of attempt liability by concentrating on the acts the defendant has done and does not any longer focus on the acts remaining to be done before the actual commission of the crime." *Commonwealth v. Zingarelli*, 839 A.2d 1064, 1069 (Pa. Super. 2003) (quoting *Commonwealth v. Gilliam*, 417 A.2d 1203, 1205 (1980)). The defendant, in other words, "need not actually be in the process of the crime when arrested in order to be guilty of criminal attempt." *Id.*

104. Furthermore, even if attempted third-degree murder was a cognizable crime in Pennsylvania, based on the *Information* as well as DA Burkett's September 7, 2012 plea offer letter, it was objectively unreasonable for Toni Cherry to advise Ms. Sprankle that the Commonwealth would agree to a plea deal where Ms. Sprankle plead guilty to attempted third-degree murder.

a. *First*, Counts 1 and 2 in the *Information* are for attempted murder. The factual basis for each count makes clear that the District Attorney's Office believed Ms. Sprankle's sole and specific intent on September 8, 2011 was to kill Mr. Sprankle and his girlfriend Alicia:

> **COUNT 1: CRIMINAL ATTEMPT**
> **18 Pa. C.S.A. 901(a)– Homicide 1st DEGREE**
> With intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime, to wit: In that the actor did with the intent to commit the specific act of Criminal Homicide [18§2501(a)] by firing six rounds from a .22 caliber Smith and Wesson revolver at *Elmer Sprankle*, victim, which constitutes a substantial step toward the commission of that [crime].
>
> **COUNT 2: CRIMINAL ATTEMPT**
> **18 Pa. C.S.A. 901(a) – Homicide 1st DEGREE**
> With intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime, to wit: In that the actor did with the intent to commit the specific act of Criminal Homicide [18§2501(a)] by firing six rounds from a .22 caliber Smith and Wesson revolver at *Alicia Ann Caltagarone*, victim, which constitutes a substantial step toward the commission of that [crime].[134]

b. *Second*, if there was any questions about the District Attorney's position regarding the mental state issue, DA Burkett's plea offer letter dispelled these questions by making it crystal clear where he stood on the mental state issue:

> … after reading through the police report and reading the many, many statements that Judy Sprankle made to the police on September 8, 2011, I am absolutely convinced that Judy Sprankle fully intended to kill Elmer Sprankle that day. She repeatedly told the police that this was her exact mental state that day, making such statements as "Don't let me out, 'cause I'll kill him," "I wish I had better aim," "I tried to kill him. He molested my daughter. What would you do?", "Take it easy, it's not you I am going to hurt; it's my husband that I'm going to kill. Other eyewitnesses

[134] Ex. 1.

heard hear yelling, "You son-of-a-bitch, I'm gonna kill you."[135]

105. DA Burkett repeatedly referenced the specific intent to kill. Based on these references, even if attempted third-degree murder was a cognizable crime, a reasonably competent defense attorney would know that the District Attorney's Office would not agree to an attempted third-degree murder plea deal.

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106. Toward the very end of Ms. Sprankle's plea colloquy, as mentioned, ADA Cole caught the third-degree murder mistake and when she did this colloquy occurred:

> ADA Cole: Your Honor, for the purpose of the colloquy, should that be first degree, not third?
>
> Trial Court: *I guess it doesn't matter*. Essentially, it's an attempt at homicide. I would say, I–the Commonwealth is saying you intended to kill him, M[s]. Sprankle. Do you understand that? That would be their charge of criminal attempt, and I should have said that you specifically wanted to kill him. Does that change your mind in any way on your plea?
>
> Sprankle: No.
>
> Trial Court: Okay. You're still – thank you. *I don't think it maters*. We've got it covered. Okay. We'll see you next Tuesday. Thank you. Court is adjourned.[136]

107. Toni Cherry's *first* egregious mistake, as mentioned, was advising Ms. Sprankle that her guilty plea was for a crime that did not even exist under state law, *i.e.*, attempted third-degree murder. Toni Cherry's *second* egregious mistake was not intervening and asking the trial court for a brief recess to consult with her client to make sure Ms. Sprankle knew and intelligently understood the difference between

[135] Ex. 17.
[136] NT, Oral Plea Colloquy, 9/10/2012, pp. 7-8.

first- and third-degree murder and, particularly, the difference between malice, *i.e.*, third-degree murder, and specific intent to kill, *i.e.*, first-degree murder.

108. During her pre-plea consultations with Ms. Sprankle, as noted, Toni Cherry never discussed or explained the elements of first- and third-degree murder, nor discussed or explained the difference between malice and specific intent to kill. Toni Cherry also never discussed or explained the criminal attempt statute, 18 Pa. C.S. § 901, and told Ms. Sprankle that the law of attempt was well settled.

109. Likewise, before Ms. Sprankle answered the trial court's question, Toni Cherry never discussed or explained to Ms. Sprankle that, if she admitted in open court and under oath that her sole and specific purpose on September 8, 2011 was to shoot and kill Mr. Sprankle at the magistrate's office, she most certainly not receive the 5 year prison sentence she, *i.e.*, Toni Cherry, mentioned to her during their pre-plea discussions.

110. Consequently, Toni Cherry had a constitutional duty to do one of two things when ADA Cole pointed out that the plea deal was for attempted first-degree murder, not attempted third-degree murder:

a. *First*, Toni Cherry could have intervened and asked the trial court for a brief recess to make sure Ms. Sprankle understood the ramifications of admitting in open court and under oath that she specifically intended to kill Mr. Sprankle on September 8, 2011. During the recess, Toni Cherry could have then done what she should have done in the first place, *i.e.*, adequately inform Ms. Sprankle of the elements for attempted first-degree murder and inform Ms. Sprankle that if she pled guilty to attempted murder she would have to admit in open court and under oath that her sole and specific purpose on September 8, 2011 was to shoot and kill Mr. Sprankle outside the magistrate's office. Toni Cherry could have then informed Ms. Sprankle that if she admitted that was her sole and specific intent, her admission would make it virtually impossible for her to receive a sentence between 5 prison sentence.

b. *Second*, Toni Cherry could have stopped the oral plea colloquy and withdrawn Ms. Sprankle's plea agreement because Toni Cherry knew Ms. Sprankle only agreed to plead guilty to attempted third-degree murder based on her advise that pleading guilty to attempted third-degree murder would likely result in a 5 year prison sentence.

111. Remarkably, Toni Cherry did neither. Toni Cherry *remained silent* when the trial court asked Ms. Sprankle whether it mattered that, contrary to her counsel's advice she would be pleading guilty to attempted third-degree murder, she was actually pleading guilty to attempted first-degree murder. Toni Cherry's silence was shocking and objectively unreasonable under professional standards. It was Toni Cherry's erroneous advice in the first place that put Ms. Sprankle into this precarious situation and rather than protect her client's clearly-established constitutional rights, Toni Cherry remained silent to protect herself. Toni Cherry, in other words, did not have a strategic or tactical reason for remaining silent and not intervening on Ms. Sprankle's behalf to ensure Ms. Sprankle adequately and intelligently understood the trial court's question as well as the elements for attempted first-degree murder.

112. In her affidavit, Ms. Sprankle explained why she answered, "No," when the trial court asked her if it made a difference that she was admitting to the fact she specifically intended to kill Mr. Sprankle:

> 10. During my on-the-record plea colloquy, the trial judge twice mentioned I was pleading guilty to attempted third-degree murder. At the very end of the plea colloquy, however, the prosecutor said I was pleading guilty to attempted first-degree murder. I had no idea what this meant or how first-degree murder differed from third-degree murder, as Toni Cherry never discussed or explained the elements of these offenses. Toni Cherry never requested a brief recess to discuss and explain the different mental state requirements for first- and third-degree murder and how these differences would impact my sentence.
>
> 11. The trial judge then said something to the effect that the degree of murder did not matter and then tersely mentioned something about intending to kill Mr. Sprankle. The trial judge then asked if I understood his brief explanation. I was completely confused at this point, but was too scared to say something to the trial judge, especially when Toni Cherry never intervened and never ask for a recess. When Toni Cherry did not discuss or explain the difference between first- and third-degree murder and did not ask the trial judge for a brief recess, I assumed there was no real difference between first- and third-degree murder. As a result, when the trial judge asked

> if I understood his terse explanation of attempted homicide, and whether the explanation made a difference regarding my guilty plea, I said, "No." No, it did not make a difference because I did not think there was a difference based on Toni Cherry's silence.
>
> 12. When I met with Mr. Cooley and he discussed and explained the differences between first- and third-degree murder, specific intent versus general intent, and he explained the different types of self-defense, I finally understood the substantial and detrimental ramifications of my response to the trial judge during the oral plea colloquy. Yes, when I fired at Mr. Sprankle on September 8, 2011, I knew that if I struck him he may die. In this sense, consequently, and based on the trial judge's terse explanation of attempted murder and Toni Cherry's silence, I assumed my actions constituted an intent to kill, even though I fired at him to protect myself from death or serious bodily injury. I did not fully comprehend that when I answered, "No," to the trial judge's question, I was admitting under oath that I went to the magistrate's office that morning with the specific intent to kill Mr. Sprankle. Nothing could be further from the truth. I went to the magistrate's office on September 8, 2011 to resolve the specious PFA Mr. Sprankle filed against me. I did not go to the magistrate's office that day for the sole and specific purpose of killing Mr. Sprankle. I fired at Mr. Sprankle because I feared for my life and I believed my fear was reasonable based on the years of abuse I suffered at the hands of Mr. Sprankle.[137]

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113. Where the defendant enters her plea on the advice of counsel, "the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." *Commonwealth v. Hickman*, 799 A.2d at 141. Here, Ms. Sprankle agreed to plead guilty, but only if it was for *attempted third-degree murder*, not attempted first-degree murder. Ms. Sprankle's decision to plead guilty was based on Toni Cherry's clearly erroneous advice that attempted third-

[137] Ex. 20, ¶¶ 10-12.

degree murder was a cognizable crime in Pennsylvania. Consequently, Toni Cherry's advice fell well outside the range of competence required of criminal defense attorneys under the Sixth Amendment making Ms. Sprankle's guilty plea involuntary, unknowing, and unintelligent. *Commonwealth v. Moser*, 921 A.2d 526, 531 (Pa. Super. 2007) ("Allegations of ineffectiveness in connection with the entry of a guilty plea will serve as a basis for relief only if the ineffectiveness caused the defendant to enter an involuntary or unknowing plea.").

114. Based on Toni Cherry's erroneous advice and Toni Cherry's failure to intervene during the plea colloquy, Ms. Sprankle is entitled to have her guilty plea withdrawn. *E.g., Commonwealth v. Kelley*, 2016 Pa. Super. LEXIS 163 (March 15, 2016) (defendant, a state parolee, entered into a plea agreement where his effective sentencing date for his 21 to 60 month sentence was to be the date police arrested him for the charges in his guilty plea; trial counsel, however, was unaware of the Parole Act, 61 Pa. C.S. § 6138(a)(5)(i), which mandated that defendant serve the backend of his previous conviction, meaning the effective start date for the defendant's 21 to 60 month sentence could not start on the date defendant was arrested; rather, defendant's start date for his 21 to 60 month sentence was nearly two years later; based on trial counsel's erroneous advice to plead guilty, which was caused by trial counsel's lack of knowledge regarding the Parole Act, the Superior Court held that defendant's guilty plea was not knowing, voluntary, and intelligent and allowed defendant to withdraw his guilty plea); *Commonwealth v. Hickman*, 799 A.2d at 141 (trial counsel incorrectly assured the defendant he would be eligible for release into boot camp after serving two years of his sentence; based on trial counsel's erroneous advice, defendant pled guilty believing he would receive boot camp; trial counsel's performance was deficient and objectively unreasonable); *Commonwealth v. Rathfon*, 899 A.2d 365 (Pa. Super. 2006) (the appellant entered a guilty plea based in part upon his understanding that, with the Commonwealth's approval, he would be sentenced to county imprisonment rather than incarceration in a state prison. The Commonwealth held up its end of the plea bargain, recommending to the trial court that it sentence the defendant to nine to eighteen months' *county* imprisonment. The trial court imposed that sentence, and purported to remand the defendant to the county jail. However, at the time of these proceedings, the defendant was serving a sentence in state prison for earlier crimes. The Commonwealth, defense counsel, and the trial court all failed to recognize that governing law and Department of Corrections policies mandated that defendant's new sentence be aggregated with his state sentence, requiring that he serve his entire sentence in state prison. Trial counsel's failure to recognize that such a sentence could not result from the plea as negotiated rendered counsel's assistance constitutionally infirm).

115. Ms. Sprankle's guilty plea is unconstitutional and must be vacated.

II. Appellate counsel was ineffective for not raising this meritorious claim on appeal: The trial court committed reversible error when it accepted Ms. Sprankle's guilty plea for attempted murder because it was abundantly clear, based on the totality of circumstances, that Ms. Sprankle did not understand the nature of the attempted murder charge. U.S. Const. amdts. V, VI, VIII, XIV; Pa. Const. art. I, § 9.

116. Paragraphs 1-15 are incorporated as if fully pled herein.

117. Ms. Sprankle had a due process right to effective appellate representation. *Evitts v. Lucey*, 469 U.S. 387, 394, 396 (1985); *accord Penson v. Ohio*, 488 U.S. 75, 85 (1988) ("The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage."). Thus, direct appeal, like trial or the guilty plea stage, "require[s] careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over." *Penson v. Ohio*, 488 U.S. at 85. While appellate counsel need not raise all non-frivolous claims, *Jones v. Barnes*, 463 U.S. 745, 752-753 (1983), she must "examine the record with a view to selecting [and presenting] the most promising issues for review." *Id.* at 752. In short, appellate counsel cannot "abandon" or dismiss "substantial matter[s] of arguable merit," but instead must "brief each significant arguable issue." *Commonwealth v. Townsell*, 379 A.2d 98, 101 (Pa. 1977).

118. Toni Cherry represented Ms. Sprankle on appeal. Toni Cherry failed to raise this meritorious claim on direct appeal: **The trial court committed reversible error when it accepted Ms. Sprankle's guilty plea for attempted murder because it was abundantly clear, based on the totality of circumstances, that Ms. Sprankle did not understand the nature of the attempted murder charge**.

119. A valid guilty plea must be knowingly, voluntarily, and intelligently entered. *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969); *Commonwealth v. Pollard*, 832 A.2d 517, 522 (Pa. Super. 2003). The Pennsylvania Rules of Criminal Procedure mandate that pleas be taken in open court, and require the trial court to conduct an on-the-record colloquy to ascertain whether a defendant is aware of his rights and the consequences of his plea. *Commonwealth v. Hodges*, 789 A.2d 764 (Pa. Super. 2002) (citing Pa.R.Crim.P. 590). Specifically, the trial court must affirmatively demonstrate the defendant understands: (1) the *nature* of the charges to which she is pleading guilty; (2) the factual basis for the plea; (3) her right to trial by jury; (4) the presumption of innocence; (5) the permissible ranges of sentences and fines possible; and (6) that the trial court is not bound by the terms of the agreement unless the court accepts the agreement. *Commonwealth v. G. Watson*, 835 A.2d 786 (Pa. Super. 2003). The trial must

evaluate the adequacy of the plea colloquy and the voluntariness of the resulting plea by examining the totality of the circumstances surrounding the plea's entry. *Commonwealth v. Muhammad*, 794 A.2d 378, 383-384 (Pa. Super. 2002).

120. Based on the following statements and exchanges during Ms. Sprankle's plea colloquy, it had to be abundantly clear to the trial court that Ms. Sprankle did not adequately understand the nature of the attempted murder charge. Ms. Sprankle, as mentioned, believed she was pleading guilty to attempted third-degree murder, not attempted first-degree murder:

121. During the oral plea colloquy, the trial court asked this question to Ms. Sprankle:

> Do you understand that for criminal attempt at homicide, the attempt would mean you would have to take a substantial step towards committing a third degree murder, which would not be a specific intentional killing, but you would have to know the consequences of your actions in attempting to use a weapon on a person. Do you understand that?

122. Ms. Sprankle answered, "Yes."[138]

123. Later during the plea colloquy, the trial court asked:

> Having reviewed those facts and understanding the charge of *criminal attempt at third degree murder*, how do you plead?

124. Ms. Sprankle answered, "Guilty."[139]

125. After ADA Cole pointed out that the attempted murder charge was for attempted first-degree murder, this colloquy ensued:

> ADA Cole: Your Honor, for the purpose of the colloquy, should that be first degree, not third?

[138] NT, Plea Colloquy, 9/10/2012, pp. 5-6.
[139] NT, Plea Colloquy, 9/10/2012, p. 7.

Trial Court: *I guess it doesn't matter*. Essentially, it's an attempt at homicide. I would say, I–the Commonwealth is saying you intended to kill him, M[s]. Sprankle. Do you understand that? That would be their charge of criminal attempt, and I should have said that you specifically wanted to kill him. Does that change your mind in any way on your plea?

Sprankle: No.

Trial Court: Okay. You're still – thank you. *I don't think it matters*. We've got it covered. Okay. We'll see you next Tuesday. Thank you. Court is adjourned.[140]

126. The trial court's "I guess it doesn't matter" and "I don't think it matters" comments are wrong.

a. *First*, there is a monumental legal difference between admitting to wanting to physically harm someone and admitting to wanting to kill that someone–and the trial court should have known the enormous difference between the two. As noted, first-degree murder results in a life without parole sentence, whereas a third-degree murder results in a sentence between 20 and 40 years.

b. *Second*, based on the trial court's own questions regarding attempted *third-degree murder*, the trial court had to know that Ms. Sprankle did not adequately and fully understand the nature of the attempted murder charge. Based on the totality of the circumstances, it was obvious that Ms. Sprankle agreed to plead guilty to attempted third-degree murder because she did not have the specific intent to kill Mr. Sprankle on September 8, 2011.

127. To "satisfy the constitutional requirement that a valid guilty plea must stand as an 'intelligent admission of guilt,' the law of this Commonwealth has long required that before a judge may properly accept a plea of guilty, a colloquy with the defendant must demonstrate that there is a factual basis for the plea *and that the defendant understands the nature and elements of the offense charged*." *Commonwealth v. Hine*s, 437 A.2d 1180, 1182 (Pa. 1981) (emphasis added); *accord Commonwealth v. Tabb*, 383 A.2d 849 (Pa. 1978); *Commonwealth v. Minor*, 356 A.2d 346 (Pa. 1976). Here, the totality of the

[140] NT, Oral Plea Colloquy, 9/10/2012, pp. 7-8.

circumstances demonstrate Ms. Sprankle did not understand the nature and elements of the attempted murder charge.

128. Ms. Sprankle, therefore, is entitled to have her guilty plea withdrawn because she did not knowingly and intelligently plead guilty.

III. Toni Cherry never conveyed DA Burkett's 127 months to 26 year plea offer to Judy Sprankle. Toni Cherry's failure to do so was objectively unreasonable and prejudiced Ms. Sprankle. U.S. Const. amdts. V, VI, VIII, XIV; Pa. Const. art. I, § 9.

129. On September 7, 2012, DA Burkett informed Toni Cherry of his 127 months to 26 year plea offer.[141]

130. Toni Cherry never showed Ms. Sprankle the plea letter or informed Ms. Sprankle of DA Burkett's term of years plea offer.[142]

131. On September 12, 2012, Ms. Sprankle pled guilty and on September 18, 2012 was sentenced to a maximum prison term of 29 years, 3 years longer than DA Burkett's plea offer.

132. Toni Cherry had a constitutional duty to convey the term of years plea offer to Ms. Sprankle. *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012). The American Bar Association recommends defense counsel "promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney." ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(a). Toni Cherry's failure to communicate the offer to Ms. Sprankle was objectively unreasonable and prejudicial because Ms. Sprankle received a maximum sentence 3 years longer than DA Burkett's term of years plea offer. *Cf. Glover v. United States*, 531 U.S. 198, 203 (2001) ("[A]ny amount of [additional] jail time has Sixth Amendment significance").

133. In a case "where a defendant pleads guilty to less favorable terms and claims that ineffective assistance of counsel caused [her] to miss out on a more favorable earlier plea offer, *Strickland's* inquiry into whether the result of the proceeding would have been different, requires looking not at whether the defendant would have proceeded to trial absent ineffective assistance, but whether he would have accepted the offer to plead pursuant to the terms earlier proposed." *Missouri v. Frye*, 132 S. Ct. at 1410.

134. It is reasonably probable Ms. Sprankle would have accepted DA Burkett's plea offer had Toni Cherry informed her of the offer. Ms. Sprankle, therefore, must be resentenced in accordance with DA Burkett's plea offer.

[141] Ex. 17.
[142] Ex. 20, ¶ 8.

IV. Toni Cherry inadequately pled her funding motion for a battered woman/PTSD expert. Toni Cherry conducted an inadequate pre-plea investigation regarding the years of abuse Ms. Sprankle suffered from Mr. Sprankle. Had Toni Cherry adequately and timely investigated Ms. Sprankle's history of abuse, there is a reasonable probability the trial court would have granted Toni Cherry's funding request to hire a battered woman/PTSD expert. Had Toni Cherry received such funding and retained a qualified battered woman/PTSD expert, there is a reasonable probability Ms. Sprankle would have pled not guilty and proceeded to trial. U.S. Const. amdts. V, VI, VIII, XIV; Pa. Const. art. I, § 9.

A. Indigency and Requesting Public Funding in Order to Meaningfully Present a Complete Defense

1. Pleading and Establishing a Defendant's Indigency

135. It is well-established that indigent defendants have a right to access the same resources as non-indigent defendants in criminal proceedings. *Commonwealth v. Curnutte*, 871 A.2d 839, 842 (Pa. Super. 2005). The state has an "affirmative duty to furnish indigent defendants the same protections accorded those financially able to obtain them." *Commonwealth v. Sweeney*, 533 A.2d 473, 480 (Pa. Super. 1987). Procedural due process guarantees that a defendant has the right to present competent evidence in his defense, and the state must ensure that an indigent defendant has fair opportunity to present his defense. *Ake v. Oklahoma*, 470 U.S. 68, 76, (1985).

136. However, "[t]he provision of public funds to hire experts to assist in the defense against criminal charges is a decision vested in the sound discretion of the court[.]" *Commonwealth v. Cannon*, 954 A.2d 1222, 1226 (Pa. Super. 2008) (citations omitted). The Supreme Court and Superior Court, however, have "not established factors a trial court must consider in exercising its discretion when making a determination of indigency for the purpose of appointing an expert." *Commonwealth v. Konias*, 2016 Pa. Super. LEXIS 166, at *10, 2016 PA Super 68, 136 A.3d 1014 (March 18, 2016). In *Cannon*, though, the Superior Court relied on principles established for assessing indigency in determining whether a party may proceed *in forma pauperis*, or is entitled to the appointment of counsel. *Commonwealth v. Cannon*, 954 A.2d at 1226.

137. In *Cannon*, the Superior Court said a party seeking to proceed *in forma pauperis* is "required to file a petition and an affidavit describing in detail the inability to pay the costs of litigation," including the information from the applicant regarding, "present or past salary and wages, other types of income within the preceding year, other contributions for household support, property owned, available assets, debts and obligations, and persons dependent for support." *Id.* at 1226.[143] Following the filing of this affidavit, the trial court must "satisfy itself of the truth of the averment of an inability to pay the costs of litigation." *Id.* A trial court, in exercising its discretion in determining whether a defendant is indigent for the purposes of *in forma pauperis*, "must focus on whether the person can afford to pay and cannot reject allegations in an application without conducting a hearing." *Id.* (emphasis added, citations omitted).

138. Similarly, *Cannon* looked to principles elucidated by the Pennsylvania Supreme Court as to what constitutes indigency in relation to a defendant's request for the appointment of counsel. The Supreme Court opined, "[a]mong other factors that may be relevant to a defendant's financial ability to hire private counsel are the probable cost of representation for the crime charged and the defendant's liabilities." *Id.* at 1226-1227 (emphasis added, citations omitted).

139. The *Cannon* framework presumes the trial court, in determining whether a defendant is indigent and entitled to public funding, has accurate information regarding the defendant's financial status from which it may exercise its discretion. It therefore follows that, "only after the defendant has provided some reliable information as to his inability to pay, is the trial court 'bound to satisfy itself of the truth of the averments of an inability to pay' by conducting a hearing." *Commonwealth v. Konias*, *Commonwealth v. Konias*, 2016 Pa. Super. LEXIS 166, at *12, 2016 PA Super 68, 136 A.3d 1014 (March 18, 2016). (quoting *Commonwealth v. Cannon*, 954 A.2d at 1227).

140. The "Commonwealth is not obligated to pay for the services of an expert simply because a defendant requests one." *Commonwealth v. Curnutte*, 871 A.2d 839, 842 (Pa. Super. 2005). However, "merely retaining private counsel does not, in itself, establish [that the defendant] was not indigent." *Commonwealth v. Konias*, 2016 Pa. Super. LEXIS 166, at *12, 2016 PA Super 68, 136 A.3d 1014 (March 18, 2016).

[143] "A party who is without financial resources to pay the costs of litigation is entitled to proceed *in forma pauperis*." Pa.R.C.P. 240(b). That party is required to file a petition and an affidavit describing in detail the inability to pay the costs of litigation. Pa.R.C.P. 240(c). The Rule expressly prescribes the form of the affidavit requiring, *inter alia,* the following information from the applicant: present or past salary and wages, other types of income within the preceding year, other contributions for household support, property owned, available assets, debts and obligations, and persons dependent for support. Pa.R.C.P. 240(h).

Likewise, though, a "mere averment of indigency and inability to pay is not sufficient to trigger the necessity for a hearing under *Cannon*." *Id.* The defendant, therefore, "must make some specific showing of a financial hardship for the court to afford relief [or hold a hearing]." *Id.*

2. Threshold Showing Demonstrating the Defendant's Mental State is Likely to Be a Significant Factor in Her Defense

141. Pursuant to *Ake v. Oklahoma*, 470 U.S. 68 (1985), when the defendant "is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent. It is in such cases that a defense may be devastated by the absence of a psychiatric examination and testimony; with such assistance, the defendant might have a reasonable chance of success." *Id. at* 82-83; *accord Commonwealth v. Fisher*, 813 A.2d 761, 765 (Pa. 2002).

142. In *Ake*, when trial counsel requested public funds to hire an independent psychiatrist to assess Ake's sanity at the time of the homicides, trial counsel presented the trial court with a wealth of psychiatric evidence demonstrating that Ake likely suffered from a severe mental illness or that he was legally insane when he committed the homicides. For instance, less than six months after the homicide, "the chief forensic psychiatrist at the state hospital [where Ake was evaluated] informed the [trial] court that Ake was not competent to stand trial." *Id.* at 71. Based on this initial showing, the trial court held an evidentiary hearing, where the psychiatrist testified:

> [Ake] is a psychotic… his psychiatric diagnosis was that of paranoid schizophrenia–chronic, with exacerbation, that is with current upset, and that in addition… he is dangerous… [B]ecause of the severity of his mental illness and because of the intensities of his rage, his poor control, his delusions, he requires a maximum security facility within-I believe-the State Psychiatric Hospital system.

Id. at 71.

143. Based on the facts in *Ake*, trial counsel cannot simply assert his client's mental state will be a significant factor in his defense in a funding motion. *Cf. Commonwealth v. Blakeney*, 946 A.2d 645, 660 (2008). Trial counsel, therefore, must present evidence that explains why he has a good faith and reasonable belief his client's mental state will be a significant factor at trial.

3. The Admissibility and Significance of Battered Woman Syndrome and PTSD

144. According to the Pennsylvania Supreme Court,

> A battered woman is a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights. Battered women have been compared to hostages, prisoners of war, and concentration camp victims, and the battered woman syndrome is recognized as a post-traumatic stress disorder.

Commonwealth v. Stonehouse, 555 A.2d 772, 783 (Pa. 1989) (quotations and citation omitted)

145. Researchers "have suggested that the psychological effects of the battered woman syndrome can be compared to classic brainwashing. These effects include fear, hyper-suggestibility, isolation, guilt, and emotional dependency, which culminate in a woman's belief that she should not and cannot escape." *Id.* at 783 n.6. Researchers have also "shown that many battered women are highly competent workers and successful career women, who include among their ranks doctors, lawyers, nurses, homemakers, politicians and psychologists." *Id.* at 784. Furthermore, research has shown that "among battered women who kill [or attempt to kill in self-defense], the final incident that precipitates the [criminal offense] is viewed by the battered woman as more severe and more life-threatening than prior incidents." *Id.* Thus, based on "the unique psychological condition of the battered woman" and "the myths" jurors "commonly h[o]ld about battered women," it is "clear that where a pattern of battering has been shown, the battered woman syndrome must be presented to the jury through the introduction of relevant evidence." *Id.* at 785; accord *Commonwealth v. Dillon*, 598 A.2d 963, 969 (Pa. 1991) (Cappy, J., concurring) ("[T]he necessity for and the importance of expert testimony is clear as it is helpful to the jury to assail these myths and to consider the evidence in a fair and impartial manner.").

146. Stated differently,

> To support the battered woman's argument in a proper case, expert testimony can be introduced to show how a battering relationship generates different perspectives of danger, imminence, and necessary force. Expert testimony

> can also explain why the defendant stayed in the relationship, why she never called the police, or why she feared increased violence. The behavioral patterns that emerge in a study of battered women are collectively referred to as "learned helplessness." This learned helplessness and its resulting feeling of inability to control the beatings lead to a process of victimization, rendering the woman psychologically paralyzed and unable to perceive the existence of any available options.

Commonwealth v. Dillon, 598 A.2d 963, 966 (Pa. 1991) (Nix, C.J., concurring).

147. Put yet another way,

> … it is clear that many jurors believe the myths about battered women and will often be unable to understand either why a woman failed to leave her husband or why she did not contact the police for assistance. These stereotypic beliefs underscore the importance of expert testimony to explain why women remain silent about and in denial of the abuse they have suffered. Without expert testimony, many jurors –who have little knowledge or understanding of the dynamics of batterers and their victims–find the tales of abuse and the reactions of those abused simply beyond their ken.
>
> …
>
> The danger of not presenting expert testimony in these cases is that the jury may well be predisposed to judge the actions and reactions of a woman in a position that they cannot hope to comprehend. In my view, many jurors who know nothing about battered women simply find the tales of abuse too incredible to believe and thus, refuse to keep an open mind about the rest of the evidence, being convinced that "no one would have put up with such abuse therefore it must not be true." The testimony of the expert is intended to refute some of the common prejudices against battered women, thus permitting the jury to have a better ability to judge the evidence rationally, rather than judge it on the basis of an erroneous prejudice. Once the

> jury is educated by an expert about the battered woman syndrome, they are in a much better position to assess the facts before them.
>
> This Court has consistently held that in self-defense cases, the jury must decide whether the acts of the defendant are reasonable in *light of the way in which the defendant perceives the alleged danger*. It is only when the jury understands *how* the defendant perceives the alleged danger are they able to make a rational judgment about the defendant's actions. In a self-defense case in which the defendant is a battered woman, rationally understanding the way in which she perceives danger may not be "within the range of ordinary training, knowledge, intelligence and experience" of the jury.

Commonwealth v. Dillon, 598 A.2d at 970-971 (Cappy, J., concurring) (emphasis in original; citations omitted)

148. "[E]xpert testimony regarding battered woman syndrome," therefore, "is admissible as probative evidence of the defendant's state of mind as it relates to a theory of self-defense." *Commonwealth v. Miller*, 634 A.2d 614, 621-622 (Pa. Super. 1993). "The syndrome does not represent a defense to [attempted homicide] in and of itself, but rather, is a type of evidence which may be introduced on the question of the reasonable belief requirement of self-defense in cases which involve a history of abuse between the victim and the defendant." *Id.* at 622; *accord Commonwealth v. Peck*, 113 A.3d 357 (Pa. Super. 2014). In other words, had Ms. Sprankle gone to trial and Toni Cherry presented a battered woman/PTSD expert, Ms. Sprankle's actions on September 8, 2011, "would have been weighed by the jury in light of how the *reasonably prudent battered woman* would have perceived and reacted to [Mr. Sprankle's] behavior." *Commonwealth v. Stonehouse*, 555 A.2d at 784 (emphasis added).

B. Relevant Facts

149. Toni Cherry requested funding to retain a battered woman/PTSD expert.[144]

150. Toni Cherry's funding request merely averred that Ms. Sprankle was indigent and needed public funds to hire a qualified battered woman/PTSD expert. Toni Cherry's motion averred:

[144] Ex. 14.

> 2. That the Defendant was arrested on September 8, 2011, on these charges as well as other allegedly arising out of the same occurrence and has since that time been continuously in the Jefferson County Prison, on $1,000,000 bail, awaiting trial.
>
> 3. That as a result of the incarceration, Defendant is no longer employed and is destitute and without means to pay further monies to her counsel or to hire experts to help with the defense in this case.[145]

151. Toni Cherry did not attach an IFP affidavit identifying Ms. Sprankle's (1) liabilities, *e.g.*, attorney fees for her civil divorce proceedings and criminal proceedings, (2) lack of assets, *e.g.*, Ms. Sprankle was forced to auction off the land she owned with Mr. Sprankle and had yet to receive the funds from the auction before pleading guilty, and (3) lack of funds due to her liabilities. Toni Cherry also failed to inform the trial court that Ms. Sprankle's attorney fees for her divorce proceedings and criminal proceedings would be in the range of somewhere between $20,000 and $25,000. Indeed, to date, Toni Cherry has charged and collected nearly $25,000 from Ms. Sprankle. In fact, once Ms. Sprankle and Mr. Sprankle's land and house were sold in May 2013, Ms. Sprankle received a little over $19,000 in the settlement agreement. Toni Cherry kept the entirety of $19,000 claiming the $19,000 was owed to her for her civil and criminal representation of Ms. Sprankle.

152. Toni Cherry's funding request also contained inadequate information and allegations regarding Ms. Sprankle's history of abuse. Her funding motion, for instance, did not chronicle the history of abuse Ms. Sprankle suffered at the hands of Mr. Sprankle over their forty year marriage. Nor did Toni Cherry attach affidavits, psychiatric reports, medical reports, or police reports to corroborate the abuse. Toni Cherry's funding request contained bare-boned allegations that Ms. Sprankle was a battered woman:

> 3. Counsel has interviewed the Defendant, has studied the records in this case as well as in other matters arising out of the dissolution of Defendant's marriage to Elmer Aaron Sprankle and has also studied the records arising out of a Protection From Abuse action filed by the daughter of Elmer Aaron Sprankle against him and believes

[145] Ex. 14, p. 1.

> that the Defendant is a battered wife and that the appointment of a psychiatrist is essential to the preparation of the defense in this case.
>
> 4. The preparation of an adequate defense for the Defendant requires that counsel be accurately apprised of the nature of Defendant's mental health at the time of the crime and at the present time, and be able to consult with and, if necessary, have available at trial a psychiatrist engaged in the Defendant's behalf.
>
> 5. An independent psychiatrist is necessary in this case to determine if the Defendant suffers from battered wife syndrome or other mental illness that would bear upon her mental capacity to understand the nature of the acts complained of and to otherwise participate in the proceedings.[146]

153. Not surprisingly, the trial court denied Toni Cherry's funding request on March 19, 2012.[147]

154. Once the trial court denied the funding motion, Ms. Sprankle scraped together $5,000 so Toni Cherry could retain Dr. Joseph Silverman. Dr. Silverman, though, had little to no experience counseling and treating battered women and women who suffered PTSD as a result of the years of abuse they suffered. Dr. Silverman examined Ms. Sprankle on July 27, 2012 at the Jefferson County Jail and drafted two reports that chronicled the years of abuse Ms. Sprankle suffered.

155. After receiving Dr. Silverman's reports, though, Toni Cherry did not file a comprehensive motion asking the trial court to reconsider its initial ruling denying her funding motion. Indeed, had Toni Cherry adequately investigated Ms. Sprankle's history of abuse and adequately reviewed the documents disclosed during discovery, Toni Cherry could have filed a comprehensive reconsideration motion and attached the following reports, records, documents, and affidavits.

a. *First*, Toni Cherry could have attached Dr. Silverman's reports, which chronicled Ms. Sprankle's years of abuse. Although Dr. Silverman was not qualified to interpret and opine on Ms. Sprankle's actions on September 8, 2011, his reports

[146] Ex. 14, p. 1-2.
[147] Ex. 15.

contained a wealth of information relevant to Toni Cherry's initial request for public funding to hire a qualified battered woman/PTSD expert.

b. *Second*, Toni Cherry could have attached the statement Kim Carulli made to State Trooper John P. Young on October 22, 2011. Kim described what it was like growing up with Mr. Sprankle: "Elmer Sprankle has abused myself, [my] brother, and [my] mother our entire lives physically, emotionally, mentally, and sexually."[148]

i. Kim added:

> Growing up I remember Elmer and my mom physically fighting and yelling at each other. I remember my mom and I climbing out our bedroom window, running to the car, and staying in a hotel room… until Elmer found us and knocked on the door and yell[ed] until we returned home. This happened frequently.[149]

ii. Kim added:

> I remember the police showing up at our house and taking us to my grandparents house to stay the night. I remember Elmer hitting [me], my mom, [and] my brother. He [called] use names. He [told] me that he 'wished I was never born' and he used to call me his 'little nigger' when it was just [me and] him.[150]

iii. Kim added:

> Because growing up… [Elmer] was very harmful. He was very mean to us and cruel. I witnessed him punching [Judy] in the face, slapping her… when she would ball up and fall on the floor, he would kick her… when she was down on the ground, he would pull her by her hair into the bedroom, and he would slam it and lock it. I would hear crying, yelling. He was very mean.[151]

[148] NT, Sentencing Hrg., 9/18/2012, p. 23.
[149] Ex. 11.
[150] Ex. 11.
[151] NT, Sentencing Hrg., 9/18/2012, pp. 9-10.

….

> He did mean things to me growing up… if I came home from school and my lips were chapped, I got beat with a belt for having chapped lips."[152]

iv. Kim also described seeing Elmer force himself onto Judy:

> I've seen Elmer punch my mom in the face and point a hand gun in her and my direction. I remember looking into their bedroom and saw [Elmer] on top of [my mom] having sex, and [my mom] was crying.[153]
>
> …
>
> I watched Elmer rape my mother. That's what I meant sexually. That's what I witnessed.[154]

c. *Third*, Toni Cherry could have obtained affidavits from–at the very least- Kim, Kim's husband William, and Jim Schwartz.

i. Toni Cherry interviewed Kim, William, and Jim before Ms. Sprankle's sentencing hearing. Based on her interviews with Kim, William, and Jim, Toni Cherry could have drafted affidavits for each of them summarizing their knowledge about Mr. Sprankle's physical, sexual, and emotional abuse.

ii. As their vivid sentencing hearing testimony makes clear, had Toni Cherry created affidavits for Kim, William, and Jim, and attached these affidavits to a reconsideration motion, the affidavits would have provided the trial court with a wealth of graphic information regarding Ms. Sprankle's years of abuse and torment.

d. *Fourth*, Toni Cherry never obtained Ms. Sprankle's counseling records from the Punxsutawney Area Hospital Counseling Center ("PAHCC") or Cross Roads.

i. Undersigned counsel obtained the PAHCC records and they contained a wealth of information regarding Ms. Sprankle's years of abuse. More importantly, the PAHCC records contained information indicating that Ms. Sprankle was diagnosed with PTSD in December 2010. The PTSD diagnosis surely would

[152] NT, Sentencing Hrg., 9/18/2012, p. 10.
[153] Ex. 11.
[154] NT, Sentencing Hrg., 9/18/2012, p. 24.

have strengthened Toni Cherry's allegation that Ms. Sprankle was a battered woman who suffered from PTSD and that a qualified battered woman/PTSD expert was needed to adequately defend Ms. Sprankle.

ii. Undersigned counsel has yet to obtain the Cross Roads records because Cross Roads will not release Ms. Sprankle's records unless Ms. Sprankle signs a release form in the presence of a Cross Roads staff member. These records, though, most likely contain additional information regarding Ms. Sprankle's years of abuse and mental health. Counsel respectfully requests the Court to issue an order compelling Cross Roads to provide counsel with a copy of Ms. Sprankle's records.

C. Ineffectiveness and Prejudice

156. Toni Cherry properly identified the battered woman/PTSD issue, *i.e.*, Ms. Sprankle was very likely a battered woman who suffered from PTSD and her PTSD very likely impacted her mental state on September 8, 2011.

157. Although she properly identified the battered woman/PTSD issue, Toni Cherry made two significant mistakes.

e. *First*, Toni Cherry failed to adequately establish Ms. Sprankle's indigency in her funding motion. Ms. Sprankle was indigent between September 2011 (arrest) and September 2012 (guilty plea). Ms. Sprankle's liabilities, namely her civil and criminal attorney fees to Ms. Cherry, far exceeded her assets.

f. *Second*, Toni Cherry failed to convey all relevant information to the trial court explaining why she had a good faith basis for believing Ms. Sprankle was a battered woman who suffered from PTSD and why the PTSD likely impacted Ms. Sprankle's mental state on September 8, 2011. Merely asserting–in a bare-bones funding motion–that Ms. Sprankle was a battered woman was far from adequate.

158. Toni Cherry's mistakes were objectively unreasonable. Toni Cherry could have easily obtained the abovementioned information, documents, reports, and affidavits and incorporated this material into a comprehensive *initial* funding motion or a *reconsideration* motion.

159. Toni Cherry's deficient performance prejudiced Ms. Sprankle. There is a reasonable probability that had Toni Cherry obtained the abovementioned material and pled the facts contained in this material into a comprehensive funding motion or reconsideration motion, the trial court would have granted the funding request. Had the trial court granted the funding request and a qualified battered woman/PTSD

expert examined Ms. Sprankle, there is a reasonable probability Ms. Sprankle would have pled not guilty and proceeded to trial and presented a defense of self-defense. *Cf. Dando v. Yukinsl*, 461 F.3d 791 (6th Cir. 2006).

160. Toni Cherry's deficient performance further prejudiced Ms. Sprankle because, by failing to obtain public funding, Toni Cherry could not hire an experienced and qualified battered woman/PTSD expert. Instead, because Ms. Sprankle had limited funds to provide to her defense, Toni Cherry hired a general practitioner psychiatrist with little to no experience treating and counseling battered women and, more importantly, no experience explaining how Ms. Sprankle's years of abuse impacted her actions, decision-making, and mental state before, during, and after the September 8, 2011 shooting.

161. An Internet search of Dr. Silverman reveals he is a board certified psychiatrist with "special expertise" in the following eight areas: (1) ADD/ADHD, (2) bipolar/manic depressive disorder, (3) depression, (4) depressive disorder, (5) insomnia, (6) OCD, (7) schizophrenia, and (7) sleep disorders.[155] There is no mention of battered woman or PTSD. Likewise, at Ms. Sprankle's sentencing hearing, Dr. Silverman said he did not "have any particular specialty area" in which he practiced; instead, he said he practiced "general psychiatry[.]"[156]

162. Indeed, after evaluating Ms. Sprankle, and realizing the depth, duration, and brutality of her abuse, Dr. Silverman realized he was *not qualified* to address how battered woman syndrome/PTSD impacted Ms. Sprankle's mental state on September 8, 2011. This conclusion can be gleaned from the **August 13, 2012** letter Dr. Silverman wrote Ms. Sprankle:

> With Attorney Cherry's permission, I have contacted the National Clearinghouse for the Defense of Battered Women ["NCDBW"], located in Philadelphia. The staff there is pondering your case, looking for something that would justify a plea bargain with a lesser sentence.[157]

163. A qualified battered woman/PTSD expert would not have needed to contact the NCDBW to figure out how Ms. Sprankle's years of abuse impacted her mental state on September 8, 2011.

[155] Ex. 21.
[156] NT, Sentencing Hrg., 9/18/2012, pp. 50-51.
[157] Ex. 16.

D. Request for Public Funds

164. Had Toni Cherry performed effectively before advising Ms. Sprankle to plead guilty, it is reasonably probable the trial court would have granted Ms. Sprankle public funds to hire a qualified battered woman/PTSD expert. Consequently, based on Toni Cherry's ineffectiveness, Ms. Sprankle is entitled to public funding now. The public funding would allow Ms. Sprankle to develop additional facts to demonstrate that her guilty plea was not knowing, intelligent, and voluntary. Had Toni Cherry performed adequately and developed facts and opinions from a qualified battered woman/PTSD expert, it is reasonably probable Ms. Sprankle would not have pled guilty. Stated differently, in the absence of any opinion from a qualified battered woman/PTSD expert, Ms. Sprankle could not have intelligently and knowingly waived her trial rights or pled guilty.

165. Unlike Toni Cherry, who did not contact the NCDBW, counsel has talked extensively with the NCDBW. Based on counsel's conversations with the NCDBW, counsel vetted three battered woman/PTSD experts, including **Dr. Victoria Reynolds**. Dr. Reynolds is a board certified and licensed clinical psychologist from Durham, North Carolina who specializes in "traumatic life experiences," "rape and sexual assault," and "treatment" of PTSD and "complex PTSD."[158] Dr. Reynolds has qualified as an expert witness in multiple state and federal cases involving female defendants who suffered severe domestic violence.[159]

166. To retain Dr. Reynolds, however, Ms. Sprankle needs approximately $10,000 to $15,000.[160] The costs are significant, but reasonable and comparable to other qualified and experienced battered woman/PTSD experts. The costs are significant because Dr. Reynolds will perform a comprehensive evaluation of Ms. Sprankle that includes far more than simply interviewing her as Dr. Silverman did. Dr. Reynolds, in other words, does not perform drive-by evaluations like Dr. Silverman.

[158] Ex. 23.
[159] Ex. 23.
[160] Ex. 24.

EVIDENTIARY HEARING WITNESSES

167. Counsel intends to call the following witnesses at the September 9, 2016 evidentiary hearing:

a. Judy Sprankle: Ms. Sprankle is currently incarcerated at SCI-Cambridge Springs. The substance of Ms. Sprankle's PCRA hearing testimony can be gleaned from her affidavit.[161]

b. Toni Cherry: Toni Cherry's law office is located at 1 North Franklin Street, DuBois, PA 15801; 814-317-5800 (office); 814-371-0936 (fax). Toni Cherry will discuss her representation of Ms. Sprankle, including her pre-plea research, investigation, and decision-making.

CONCLUSION

WHEREFORE, **Judy Sprankle** respectfully requests the following relief:

a. An order vacating her guilty plea based on Toni Cherry's ineffectiveness and/or the trial court's failure to realize Ms. Sprankle did not adequately and intelligently understand the nature of the attempted murder charge.

b. If relief is not summarily granted on the first two claims, an order compelling Cross Roads to disclose Ms. Sprankle's records to counsel Craig M. Cooley.

c. If relief is not summarily granted on the first two claims, an order granting sufficient public funds to retain Dr. Victoria Reynolds.

d. The right to supplement her amended her petition if she or counsel obtains, uncovers, or develops additional facts.

e. Any other relief the Court deems necessary to protect and vindicate her state and federal rights to effective PCRA counsel and fundamentally fair PCRA proceedings.

[161] Ex. 20.

Respecfully submitted this the **1th day** of **August, 2016**.

/s/Craig M. Cooley
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CERTIFICATE OF SERVICE

On **August 1, 2016**, counsel mailed a copy of Ms. Sprankle's *Amended PCRA Petition* to **Jefferson County District Attorney's Office**.

c.