CLEARFIELD COUNTY COMMON PLEAS COURT
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA **Plaintiff-Respondent,**	)	
v.	)	**CP-17-CR-0000106-2015**
	)	**Trial Court: Ammerman, F.J.**
TIMOTHY KEPHART **Defendant-Petitioner.**	)	

Post-Hearing Brief

Defendant-Petitioner, Timothy Kephart, by and through counsel, Craig M. Cooley, respectfully submits his *Post-Hearing Brief*, which is presented in good faith and based on the following facts and authorities.

STATE AND FEDERAL CLAIMS

A. Withdrawing a guilty plea and trial counsel's ineffectiveness

1. Motion to withdraw guilty plea standard

To grant a post-sentencing motion to withdraw a guilty plea, the defendant must show a "manifest injustice." *Commonwealth v. Yeomans*, 24 A.3d 1044, 1046 (Pa. Super. 2011). A "manifest injustice" may be established "if the plea was entered into involuntarily, unknowingly, or unintelligently." *Id.* Ineffectiveness allegations "provide a basis for withdrawal of the 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 Mr. Kephart was "misled or misinformed and acted under that misguided influence" when he pled guilty on June 15, 2015. *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. Trail counsel ineffectiveness standard

In the guilty plea context, 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 (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. 52, 56 (1985) (quoting *McMann v. Richardson,* 397 U.S. 759, 771 (1970)); *Tollett v. Henderson,* 411 U.S. 258, 267 (1973).

To prove prejudice, the defendant must show it's reasonably probable that, but for counsel's errors, he wouldn't have accepted the plea offer and pled guilty. *Hill v. Lockhart,* 474 U.S. at 59. The "reasonable probability test is not a stringent one." *Commonwealth v. Hickman*, 799 A.2d 136, 141 (Pa. Super. 2002); *Cf. Nix v. Whiteside,* 475 U.S. 157, 175 (1986) (reasonable probability standard less demanding than preponderance standard). As the U.S. Supreme Court said in *Hill v. Lockhart*, 474 U.S. at 59:

> In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.

Under state law, a 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 interest(s), and (3) prejudice. *Commonwealth v. Pierce*, 527 A.2d 973, 975–976 (Pa. 1987). *Pierce* and *Strickland* are identical: deficient performance and prejudice. *Commonwealth v. Spotz*, 870 A.2d 822, 829 (Pa. 2005).

When assessing whether trial counsel had a "reasonable basis" for a particular act or omission, the question isn't whether there were other courses of action available, but "whether counsel's decision had any basis reasonably designed to effectuate his client's interest." *Commonwealth v. Williams*, 141 A.3d 440, 463 (Pa. 2016). Put differently, the issue is "whether counsel made an informed choice, which at the time the decision was made reasonably could have been considered *to advance and protect [the] defendant's interests*." *Commonwealth v. Dunbar*, 470 A.2d 74, 77 (Pa. 1983) (emphasis added). Trial counsel's action or omission 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 (Pa. 1998).

> **Claim #1: Trial counsel was ineffective for advising Mr. Kephart to plead guilty to Counts 78 thru 94 regarding the medical premium charges before trial counsel and Mr. Kephart had an opportunity to review the Medova discovery. Trial counsel's ineffectiveness prejudiced Mr. Kephart because the Medova discovery revealed Mr. Kephart and Kephart Trucking didn't commit the *actus reus* in Counts 78 through 94 because Mr. Kephart and Kephart trucking didn't withhold in excess of $200 of medical premiums from the employees listed in these counts during the months of July and August 2013. U.S. Const. admts. 5, 6, 14; Pa. Const. art. I, §§ 8, 9.**

A. Introduction

On June 15, 2015, Mr. Kephart pled guilty to seventeen counts of withholding medical insurance premiums, but not forwarding the premiums to Medova. Specifically, Courts 78 through 94 alleged Mr. Kephart "withheld Medical Insurance Premiums of an employee in excess of $200.00 but less than $2,000.00 and failed to make the required disposition of funds designated" for the named employee.

According to the prosecutor, the plea's factual basis was "set forth" in the "affidavit of probable cause, the criminal complaint and the discovery, all of which ha[d] been provided to [Mr. Kephart]."[1] Based on the *Information*, consequently, for the plea's factual basis to be valid, Mr. Kephart and Kephart Trucking had to have withheld *more than* $200 from the employees named in Counts 78 through 94.

[1] NT, Oral Plea Colloquy, 6/15/2015, p. 5.

The prosecutor's statement regarding the discovery, though, was misleading, if not outright false, because Medova had yet to disclose numerous documents to the Commonwealth regarding Counts 78 through 94 *before* Mr. Kephart's June 15, 2015 plea colloquy. During the plea hearing, for instance, there was confusion regarding the final grading of Counts 78 through 94 because the Commonwealth had yet to obtain the Medova paperwork. The prosecutor, for instance, made these admissions on the record:

> Then there's an issue of medical insurance premiums, where the Commonwealth is claiming that the Defendant was taking insurance premiums from these folks but not paying or purchasing the insurance and, as a consequence, some of these folks may be out medical bills for a specific period of time where he stopped paying for the premiums and then he stopped paying for the insurance altogether, which it was a few months.
>
> So I am in contact with the [Medova] plan administrator to get the very specific information. That may or may not be something that's stipulated to.[2]

Despite not having the critical Medova paperwork regarding Counts 78 through 94, Chris Pentz advised Mr. Kephart to accept the Commonwealth's plea offer regarding Counts 78 through 94.[3] Once the Commonwealth received and disclosed the Medova paperwork on July 8, 2015,[4] however, the prejudice inflicted by Pentz's ineffectiveness was apparent.

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[2] NT, Plea Hrg., 6/15/2015, pp. 9-10.
[3] NT, PCRA Hrg., 3/6/2019, pp. 6-7.
[4] NT, PCRA Hrg., 3/6/2019, pp. 8, 18-19.

The Medova paperwork proves the allegations – particularly the "in excess of $200" allegation – in Counts 78 through 94 are false. The true facts, moreover, could've easily been discovered had Pentz simply requested a continuance until Medova had provided both parties the relevant paperwork.

The Medova paperwork proves the following:

First, the Medova paperwork proves Mr. Kephart and Kephart Trucking paid all premiums to Medova through June 30, 2013.[5] On August 20, 2013, Medova sent Mr. Kephart and Kephart Trucking a letter informing them it had "terminated" Kephart Trucking's account "effective 11:59 p.m. June 30, 2013."[6] Thus, the two months at issue regarding the medical insurance counts are July and August of 2013.

Second, the Medova paperwork proves Mr. Kephart and Kephart Trucking didn't withhold more than $200 from the following employees during the months of July and August 2013:

Name	**Count**
Randy McCracken	78
David Keith	79
Deanna Fuller	80
Frank Wilkinson	81
Thomas Micci	82

[5] NT, PCRA Hrg., 3/6/2019, pp. 18-19.
[6] Ex. 1 (Supplemental Discovery IV/Page 3 or 23).

Steven Williams	83
Michael Sayers	84
Joseph Armahizer	85
Michael Beck	86
James Harden	87
Woodrow Kuhn	88
Dean Owens	89
John Panico III	90
George McCauley	91
John Ralston	92
Steven Ackerman	93
Jason Connor	94

Pentz, however, advised Mr. Kephart to plead guilty to Counts 78 to 94 before he obtained, viewed, and understood the most critical documents from the insurance provider. No reasonably competent trial attorney would've advised Mr. Kephart to plead guilty to Counts 78 through 94 without first reviewing Medova's paperwork to determine regarding when Kephart Truck did or didn't the premiums and the amounts of the paid premiums. Pentz's ineffectiveness prejudiced Mr. Kephart and the prejudice is obvious. The Court, therefore, must grant Mr. Kephart's request to withdraw his

guilty plea because his plea regarding Counts 78 through 94 was unknowing and unintelligent based on Pentz's objectively unreasonable advice and incompetent pre-plea investigation.

B. The PCRA hearing

At the March 6, 2019 PCRA hearing, Mr. Kephart explained the significance of the Medova paperwork before and after his June 15, 2015 plea colloquy and July 31, 2015 restitution/sentencing hearing.

First, Mr. Kephart said they (*i.e.*, he and Pentz) didn't have the Medova paperwork before his June 15, 2015 plea colloquy.[7]

Second, Mr. Kephart said Pentz never sat down with him and tried to figure out how the Commonwealth had landed on the $200 amount alleged in Counts 78 to 94.[8]

Third, during his pretrial discussions with Pentz, Mr. Kephart said he'd communicated to Pentz that he (Kephart) thought the Medova paperwork was a "critical part of the discovery" they needed to review and understand to determine whether Counts 78 to 94 were legitimate and factually sound.[9] Despite their discussions and the apparent importance of the Medova paperwork, Mr. Kephart said Pentz encouraged him to plead guilty to Counts 78 to 94.[10]

[7] NT, PCRA Hrg., 3/6/2019, pp. 8, 17-18.
[8] NT, PCRA Hrg., 3/6/2019, pp. 11-15, 23.
[9] NT, PCRA Hrg., 3/6/2019, p. 17.
[10] NT, PCRA Hrg., 3/6/2019, pp. 6-7.

Fourth, Mr. Kephart explained how Kephart Trucking structured its medical plan with Medova. Under the plan, the employee-company split was 10-90; employees paid 10% of the monthly premium, while Kephart Trucking paid the remaining 90%. Also, if employees sought medical treatment under their plan, they had to pay a $3,000 deductible *before* Medova's medical coverage triggered.[11]

Fifth, based on the 10-90 split, Mr. Kephart explained how the following data from the Medova paperwork proved that Kephart Trucking didn't commit the *actus reus* listed in Counts 78 through 94, *i.e.*, Kephart Trucking didn't withhold more than $200 from the employees listed above:

Count 78: The employee in Count 78 is Randy McCracken. His premium for July 2013 was $1,106.34.[12] Kephart Trucking only withheld $110.65 and paid the remaining portion of the premium. As evidenced by the September 2013 statement, which shows a $1,106.34 credit in Randy McCracken's name for August 2013, July 2013 was the last month McCracken was covered by the Medova plan.[13] On September 6, 2013, Kephart Trucking reimbursed McCracken the $110.65 for the July 2013 withholding. Thus, based on the $110.65 July 2013 withholding, Mr. Kephart and Kephart Trucking didn't withhold more than $200.[14]

[11] NT, PCRA Hrg., 3/6/2019, pp. 7-8.
[12] Ex. 1 (Supplemental Discovery IV/Pages 17 of 23). Exhibit 1 refers to Exhibit 1 in Mr. Kephart's PCRA petition. It's not attached to this pleading.
[13] Ex. 1 (Supplemental Discovery IV/Pages 22 of 23).
[14] NT, PCRA Hrg. 3/6/2019, pp. 23-24.

Count 79: The employee in Count 79 is David Keith. Keith's premium for July and August 2013 was $694.97 for both months.[15] Kephart Trucking only withheld $105.00 collectively and paid the remaining portion of the premium for both months. On September 6, 2013 and September 30, 2013, Kephart Trucking reimbursed Keith the $105.00. Consequently, based on the $105.00 withholding, Mr. Kephart and Kephart Trucking didn't withhold more than $200.[16]

Count 80: The employee in Count 80 is Deanna Fuller. Fuller's premium for July and August 2013 was $1,106.34 for each month.[17] Kephart Trucking only withheld $165.00 collectively and paid the remaining portion of the premium each month. On September 6, 2013 and September 30, 2013, Kephart Trucking reimbursed Fuller the $165.00. Consequently, based on the $165.00 collective withholding, Mr. Kephart and Kephart Trucking didn't withhold more than $200.[18]

Count 81: The employee in Count 81 is Frank Wilkinson. Wilkinson's premium for July and August 2013 was $837.74 for each month.[19] Kephart Trucking only withheld $125.67 collectively and paid the remaining portion of the premium both months. On September 6, 2013 and September 30, 2013, Kephart Trucking reimbursed

[15] Ex. 1 (Supplemental Discovery IV/Pages 13, 17 of 23).
[16] NT, PCRA Hrg., 3/6/2019, pp. 26-27.
[17] Ex. 1 (Supplemental Discovery IV/Pages 13, 17 of 23).
[18] NT, PCRA Hrg., 3/6/2019, p. 27.
[19] Ex. 1 (Supplemental Discovery IV/Pages 15, 18 of 23).

Wilkinson the $125.67. Thus, based on the $125.67 collective withholding, Mr. Kephart and Kephart Trucking didn't withhold more than $200.[20]

Count 82: The employee in Count 82 is Thomas Micci. Micci's premium for July and August 2013 was $1,106.34 each month.[21] Kephart Trucking only withheld $165.96 collectively and paid the remaining portion of the premium each month. On September 6, 2013 and September 30, 2103, Kephart Trucking reimbursed Micci the $165.96. Consequently, based on the $165.96 collective withholding, Mr. Kephart and Kephart Trucking didn't withhold more than $200.[22]

Count 83: The employee in Count 83 is Steven Williams. Williams's premium for July and August 2013 was $837.74 each month.[23] Kephart Trucking only withheld $125.67 collectively and paid the remaining portion of the premium both months. On September 6, 2013 and September 30, 2013, Kephart Trucking reimbursed Williams the $125.67. Consequently, based on the $125.67 collective withholding, Mr. Kephart and Kephart Trucking didn't withhold more than $200.[24]

Count 84: The employee in Count 84 is Michael Sayers. Sayers's premium for July and August 2013 was $837.74 each month.[25] Kephart Trucking only withheld $125.67 collectively and paid the remaining portion of the premium both months. On

[20] NT, PCRA Hrg., 3/6/2019, pp. 27-28.
[21] Ex. 1 (Supplemental Discovery IV/Pages 14, 17 of 23).
[22] NT, PCRA Hrg., 3/6/2019, p. 28.
[23] Ex. 1 (Supplemental Discovery IV/Pages 15, 18 of 23).
[24] NT, PCRA Hrg., 3/6/2019, p. 28.
[25] Ex. 1 (Supplemental Discovery IV/Pages 14, 18 of 23).

September 6, 2013 and September 30, 2013, Kephart Trucking reimbursed Sayers the $125.67. Therefore, based on the $125.67 collective withholding, Mr. Kephart and Kephart Trucking didn't withhold more than $200.[26]

Count 85: The employee in Count 85 is Joseph Armahizer. Armahizer's premium for July and August 2013 was $399.95 each month.[27] Kephart Trucking only withheld $59.94 collectively and paid the remaining portion of the premium both months. On September 6, 2013 and September 30, 2013, Kephart Trucking reimbursed Armahizer the $59.94. Therefore, based on the $59.94 collective withholding, Mr. Kephart and Kephart Trucking didn't withhold more than $200.[28]

Count 86: The employee in Count 86 is Michael Beck. Beck's premium for July and August was $1,106.34 each month.[29] Kephart Trucking only withheld $165.96 collectively and paid the remaining portion of the premium both months. On September 6, 2013 and September 30, 2013, Kephart Trucking reimbursed Beck the $165.96. Accordingly, based on the $165.96 collective withholding, Mr. Kephart and Kephart Trucking didn't withhold more than $200.[30]

Count 87: The employee in Count 87 is James Harden. Harden *wasn't covered by the Medova plan* as evidence by the fact his name doesn't appear on the July and August

[26] NT, PCRA Hrg., 3/6/2019, pp. 28-29.
[27] Ex. 1 (Supplemental Discovery IV/Pages 14, 18 of 23).
[28] NT, PCRA Hrg., 3/6/2019, p. 29.
[29] Ex. 1 (Supplemental Discovery IV/Pages 14, 18 of 23).
[30] NT, PCRA Hrg., 3/6/2019, p. 29

2013 invoices.[31] Harden's last month of coverage was May 2013 as evidenced by the May 2013 invoice.[32] Thus, because Harden wasn't covered in July or August 2013 and Kephart Trucking transferred his May 2013 premium to Medova, Mr. Kephart and Kephart Trucking didn't withhold more than $200.[33]

Count 88: The employee in Count 88 is Woodrow Kuhn. Kuhn *wasn't covered by the Medova plan* as evidenced by the fact his name does not appear on the July and August 2013 invoices.[34] Indeed, Kuhn isn't mentioned in the May, June, July, August, or September 2013 invoices. Thus, because Kuhn wasn't covered during the relevant months, Mr. Kephart and Kephart Trucking didn't withhold more than $200.[35]

Count 89: The employee in Count 89 is Dean Owens. Owens's premium for July 2013 was $837.74.[36] Kephart Trucking only withheld $83.78 and paid the remaining portion of the premium. July 2013 was the last month Owens was covered by the Medova plan as evidenced by the September 2013 invoice which shows a credit of $837.74 for August 2013.[37] On September 6, 2013, Kephart Trucking reimbursed Owens the $83.78. Thus, based on the $83.78 July 2013 withholding and the fact

[31] Ex. 1 (Supplemental Discovery IV/Pages 13, 17 of 23).
[32] Ex. 1 (Supplemental Discovery IV/Page 15 of 23).
[33] NT, PCRA Hrg., 3/6/2019, pp. 30, 33, 45.
[34] Ex. 1 (Supplemental Discovery IV/Pages 14, 17 of 23).
[35] NT, PCRA Hrg., 3/6/2019, pp. 30, 33, 45.
[36] Ex. 1 (Supplemental Discovery IV/Page 14 of 23).
[37] Ex. 1 (Supplemental Discovery IV/Page 22 of 23).

Owens wasn't covered in August 2013, Mr. Kephart and Kephart Trucking didn't withhold more than $200.[38]

Count 90: The employee in Count 90 is John Pancio III. Pancio's premium for July 2013 was $837.74.[39] Kephart Trucking only withheld $83.78 and paid the remaining portion of the premium. July 2013 was Panico's last month covered by the Medova plan as evidenced by the September 2013 invoice showing a $837.74 credit for August 2013.[40] On September 6, 2013, Kephart Trucking reimbursed Panico the $83.78. Therefore, based on the $83.78 July 2013 withholding and the fact Panico *wasn't covered by the Medova plan in August 2013*, Mr. Kephart and Kephart Trucking didn't withhold more than $200.[41]

Count 91: The employee in Count 91 is George McCauley, Jr.. McCauley's premium for July and August 2013 was $837.74 each month.[42] Kephart Trucking only withheld $125.67 collectively and paid the remaining portion of the premium both months. On September 6, 2013 and September 30, 2013, Kephart Trucking reimbursed Armahizer the $125.67. Therefore, based on the $125.67 collective withholding, Mr. Kephart and Kephart Trucking didn't withhold more than $200.[43]

[38] NT, PCRA Hrg., 3/6/2019, p. 30.
[39] Ex. 1 (Supplemental Discovery IV/Pages 14, 18 of 23).
[40] Ex. 1 (Supplemental Discovery IV/Page 22 of 23).
[41] NT, PCRA Hrg., 3/6/2019, p. 30
[42] Ex. 1 (Supplemental Discovery IV/Pages 14, 18 of 23).
[43] NT, PCRA Hrg., 3/6/2019, p. 31.

Count 92: The employee in Count 92 is John Ralston. Ralston's premium for July and August 2013 was $399.54 each month.[44] Kephart Trucking only withheld $59.95 collectively and paid the remaining portion of the premium both months. On September 6, 2013 and September 30, 2013, Kephart Trucking reimbursed Ralston the $59.95. Therefore, based on the $59.95 collective withholding, Mr. Kephart and Kephart Trucking didn't withhold more than $200.[45]

Count 93: The employee in Count 93 is Steven Ackerman. Ackerman's last month of coverage under Medova's plan was March 2013, as evidenced by the credit issued for April and May 2013 and the fact *his name doesn't appear on the June, July, and August 2013 invoices.*[46] Consequently, Mr. Kephart and Kephart Trucking didn't withhold more than $200.[47]

Count 94: The employee in Count 92 is Jason Connor. Connor's premium for July and August 2013 was $694.97 each month.[48] Kephart Trucking only withheld $105.00 collectively and paid the remaining portion of the premium both months. On September 6, 2013 and September 30, 2013, Kephart Trucking reimbursed Connor the $105.00. Therefore, based on the $105.00 collective withholding, Mr. Kephart and Kephart Trucking didn't withhold more than $200.[49]

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[44] Ex. 1 (Supplemental Discovery IV/Pages 14, 18 of 23).
[45] NT, PCRA Hrg., 3/6/2019, p. 31.
[46] Ex. 1 (Supplemental Discovery IV/Pages 11, 14 of 23).
[47] NT, PCRA Hrg., 3/6/2019, pp. 32, 33, 45.
[48] Ex. 1 (Supplemental Discovery IV/Pages 14, 18 of 23).
[49] NT, PCRA Hrg., 3/6/2019, p. 32.

Sixth, after discussing Counts 78 through 94 individually, Mr. Kephart said he would've rejected the Commonwealth's "open plea" offer had Pentz postponed his June 15, 2015 plea colloquy, obtained the Medova paperwork, and reviewed the paperwork with him (as counsel did during the PCRA hearing).[50]

Seventh, after Pentz received the Medova discovery on July 8, 2015, Mr. Kephart said Pentz never compared the data contained in the Medova discovery to the allegations in Counts 78 to 94.[51] Rather, Mr. Kephart reviewed the Medova data and realized it didn't support the allegations made in Counts 78 to 94. He also identified multiple counts – 87 (James Harden), 88 (Woodrow Kuhn), and 93 (Steven Ackerman) – that listed employees who weren't even covered by the Medova plan.[52]

Eighth, before pleading guilty, Mr. Kephart said Pentz never advised him of his rights regarding withdrawing his guilty plea – if he wished to do so after pleading guilty.[53] Pentz, for instance, never explained how when a defendant moves to withdraw his plea *before* sentencing, he need only show a "fair and just" reason for the withdrawal and a lack of substantial prejudice to the Commonwealth. *Commonwealth v. Anthony*, 475 A.2d 1303 (Pa. 1984). Also, Pentz never explained that an "assertion [of innocence] normally warrants the granting of pre-sentence plea withdrawal in the case of a first guilty plea[.]" *Commonwealth v. Gordy*, 73 A.3d 620, 628 (Pa. Super. 2013). Based on the

[50] NT, PCRA Hrg., 3/6/2019, pp. 36, 44-45.
[51] NT, PCRA Hrg., 3/6/2019, pp. 19-20.
[52] NT, PCRA Hrg., 3/6/2019, pp. 19-20.
[53] NT, PCRA Hrg., 3/6/2019, pp. 34-35.

Medova discovery, Mr. Kephart was – and is – factually innocent of the allegations made in Counts 78 to 94. Lastly, Pentz never explained how the standard for granting a motion to withdraw increased substantially after sentencing.[54]

Ninth, instead of advising him he could, in fact, withdraw his guilty plea before or after sentencing, Mr. Kephart said Pentz – and the trial court – both told him he couldn't withdraw his plea once the trial court had accepted it. Thus, he believed he didn't have a right to withdraw his guilty plea and this was why Pentz never filed a motion to withdraw once they received the Medova discovery in early July 2015 – only weeks after he'd pled guilty, but weeks before his July 31, 2015 restitution/sentencing hearing.[55]

Counsel had Mr. Kephart read the follow interaction between the trial court and Pentz during his June 15, 2015 plea colloquy:

> Trial Court: So, Mr. Pentz, do you agree that this is a situation where the Commonwealth would be severely prejudiced in regard to bringing in the witnesses for purposes of trial such that Mr. Kephart, as a matter of law, would not be permitted to withdraw his plea at a later date prior to sentencing?
>
> Pentz: I've already had that discussion with Mr. Kephart. He understands that once this plea is placed on the record, he's not going to be permitted to withdraw it by this Court. It's not an issue for us.[56]

[54] NT, PCRA Hrg., 3/6/2019, pp. 34-35.
[55] NT, PCRA Hrg., 3/6/2019, pp. 34, 54-56.
[56] NT, PCRA Hrg., 3/6/2019, p. 55 (quoting NT, Oral Plea Colloquy, 6/15/2015, p. 12)

Consequently, once he pled guilty on June 15, 2015, Mr. Kephart believed "there was no going back."[57]

C. Application of law to facts

This is a straightforward *Strickland* analysis. Pentz had a duty to reasonably investigate each count in the *Information*. Counts 78 through 94 required him to investigate the Medova premium payments. Pentz didn't do this minimal level of investigation. Thus, he never obtained and reviewed the most basic facts regarding Counts 78 to 94. Pentz didn't have a strategic reason – or a reasonable basis – for not obtaining and reviewing this information *before* advising Mr. Kephart to plead guilty to Counts 78 to 94. Consequently, Pentz's investigation was objectively unreasonable.

Based on Pentz's objectively unreasonable investigation, the advice he gave Mr. Kephart *before* and *after* his June 15, 2015 plea colloquy fell well outside "the range of competence demanded of attorneys in criminal cases." *Commonwealth v. Lynch*, 820 A.2d at 733. Advising a client to plead guilty to seventeen counts when the client didn't commit the *actus rues* in the seventeen counts is the epitome of ineffectiveness, especially when proving this point is as easy as obtaining and reviewing a small set of documents. Consequently, Mr. Kephart's guilty plea is unknowing and unintelligent because he was "misled" and "misinformed" by Pentz and "acted under" this "misguided influence." *Commonwealth v. Flood*, 627 A.2d at 1199.

[57] NT, PCRA Hrg., 3/6/2019, p. 57.

Thus, the Court must grant Mr. Kephart's request to withdraw his entire guilty plea because he has pled and proved a manifest injustice.

> **<u>Claim #2</u>: Trial counsel was ineffective for not objecting to the Commonwealth's medical insurance restitution requests and the victim impact testimony at Mr. Kephart's sentencing – particularly those statements concerning the medical insurance premium counts. U.S. Const. admts. 5, 6, 14; Pa. Const. art. I, §§ 8, 9.**

Mr. Kephart stands by the arguments raised, pled, and argued in his PCRA petition. The PCRA hearing didn't develop additional facts regarding this claim. Trial counsel should've objected to the victim impact witnesses and the trial court should've barred all the irrelevant and prejudicial victim impact testimony regarding the medical insurance premium counts.

> **<u>Claim #3:</u> Trial counsel was ineffective for having Mr. Kephart resentenced in absentia. U.S. Const. admts. 5, 6, 14; Pa. Const. art. I, §§ 8, 9.**

On January 8, 2016, the trial court held a resentencing hearing. At the PCRA hearing, Mr. Kephart said Pentz never informed him of the resentencing hearing and never had him brought to court to appear at the resentencing hearing.[58] The trial court, therefore, resentenced Mr. Kephart in abstentia.

That Mr. Kephart never knew about the January 8, 2016 means he didn't make himself unavailable for the resentencing hearing, nor did he waive his right to be present during this "critical stage" of the criminal process.[59] Rather, had Pentz informed him

[58] NT, PCRA Hrg., 3/6/2019, pp. 41-42.
[59] NT, PCRA Hrg., 3/6/2019, pp. 41-42.

of the resentencing hearing, Mr. Kephart said he would've demanded to be present for his resentencing. Moreover, Mr. Kephart said he'd repeatedly told Pentz, throughout the course of Pentz's representation, that he (Kephart) expected, wanted, and demanded to be present at *every* court proceeding involving his substantial constitutional rights.[60]

Sentencing is a critical and substantial stage of the criminal process. "[T]he hearing at which sentence [is] imposed [is], in reality, the final opportunity for presenting and urging matters and circumstances which, in the discretion of the trial court, may… determine[] the freedom or imprisonment of the accused. Such a sentencing is a critical stage in the proceeding against the accused." *Commonwealth ex rel. Remeriez v. Maroney,* 204 A.2d 450, 451 (Pa. 1964); *accord* *Commonwealth v. D'Amato*, 856 A.2d 806, 822 (Pa. 2004). Thus, "the time of sentencing is a 'critical stage' in criminal proceedings, and it is constitutionally required that *both the defendant* and his counsel be present," *Commonwealth v. Morales*, 444 Pa. 388, 392, 282 A.2d 391, 392 (1971), unless, of course, the defendant waives his right to be present.

Pentz didn't have a reasonable basis for having Mr. Kephart brought in for his resentencing hearing. Pentz's ineffectiveness prejudiced Mr. Kephart because he couldn't present additional evidence, including the evidence presented in Claim #1, to

[60] NT, PCRA Hrg., 3/6/2019, pp. 41-44.

argue in favor of a more reasonable and just sentence based on the fact he didn't commit the *actus reus* in Counts 78 to 94.

CONCLUSION

WHEREFORE, Mr. Kephart respectfully requests the following relief:

1. An order granting Mr. Kephart's request to withdraw his guilty plea based on trial counsel's ineffectiveness regarding the medical insurance premium counts (78 through 94);

2. In the alternative, if the Court rejects Mr. Kephart's motion to withdraw, an order granting him a new sentencing hearing where he can present and argue for a sentence less than 7 to 20 years based on the fact he didn't commit the *actus reus* in Counts 78 through 94.

3. Any other relief the Court deems necessary to protect and vindicate Mr. Kephart's due process rights to fundamentally fair PCRA proceedings.

Respectfully submitted this the 21 day of May, 2019.

/s/Craig M. Cooley
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CERTIFICATE OF SERVICE

On May 21, 2019, counsel served a copy of this pleading on the Clearfield County District Attorney's Office by mailing a copy to the DAO.