IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA

PA Super: 903 WDA 2009

CRIMINAL DIVISION

CC 200503061; 200505726 Allegheny County

VS.

TEQUILLA FIELDS, Defendant

Before: The Honorable
Lawrence J. O'Toole

APPLICATION FOR ALLOCUTOR

By:
Tequilla Fields OK 2327
S.C.I. Muncy
P.O. Box 180
Muncy, PA 17756

To:
District Attorney
401 Courthouse, 436 Grant Street
Pittsburgh, PA 15219

Dated: October 25, 2010

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STATEMENT OF SCOPE AND STANDARD OF REVIEW

Appellate requests the reviewing court to determine whether the factual findings are supported by the record and whether the inferences and legal conclusions drawn therefrom are reasonable. (Commonwealth v. Luv. 735 A.2d 87,90) This court's standard of review is whether the trial court committed an error of law, (Commonwealth v. Wider, 744 A.2d 745, 751) as a claim challenging he sufficiency of evidence is a question of law. (Id.) As this case involves questions of law, this court's scope is plenary. (Phillips A-BEST Products Co. 665 A.2d 1167, 1170) (See also: Commonwealth v. Nester, 709 A.2d 879, 881)

STATEMENT OF QUESTIONS INVOLVED ON ALLOCCUTOR

I, WHETHER THE DEFENDANT WAS ACTING TO PROTECT HER CHILD FROM THE LIFE THREATENING EFFECTS OF A TOXIC DOG, AND WHETHER SHE WAS ENTITLED TO A DEFENSE OF JUSTIFICATION, AND WHETHER SHE EXHIBITED MALICE, OR INTENT TO KILL ANYONE.

II, WHETHER THE FACT-FINDER MADE A FINDING OF MALICE, AS A NECESSARY ELEMENT IN CONVICTION FOR MURDER IN THE THIRD DEGREE, OR WHETHER THE COURT FOUND THAT THE DEFENDANT ACTED TO PROTECT HER SON, INVOKING THE DEFENSE OF JUSTIFICATION, ABSENT MALICE.

III, WHETHER THERE WAS A VALID CHAIN OF CUSTODY OF A KERSOSNE TYPE SUBSTANCE TESTED BY THE LABORATORY.

IV, WHETHER COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A DEFENSE OF JUSTIFICATION, AND LACK OF MALICE, AND A LACK OF INTENT TO KILL ANYONE.

STATEMENT OF THE CASE

TEQUILLA FIELDS, defendant pro se hereby petitions this court for relief from judgment under 42 Pa.C.S. 9543 and says that she has been convicted of crimes under the Commonwealth and is currently serving a sentence of imprisonment, that the conviction resulted from one or more of the following: a violation of the Constitution of this Commonwealth and of the Constitution and laws of the United States and which so undermined the truth seeking process that no reliable adjudication of guilt or innocence could have taken place, and that ineffective assistance of counsel in this particular case so undermined the truth seeking process that no reliable adjudication of guilt or innocence could have taken place, and that THE DEFENDANT IS NOT GUILTY AND HAS SUFFERED A FUNDAMENTAL MISCARRIAGE OF JUSTICE, that these errors have not been previously litigated and could not have been the result of any rational, strategic or tactical decision by counsel, that there are no time, nor procedural bars to this application as defendant is actually not guilty and has suffered the prejudice of a false conviction as a result of a fundamental miscarriage of justice.

Defendant was convicted after a jury trial on October 17-19, 2005 of arson endangering persons, (two counts), causing a catastrophe, endangering property, cruelty to animals, criminal conspiracy, criminal homicide in the second degree (two counts) subsequent to a fire at her residence in which the house was destroyed, her son and daughter died, and a dog died. On appeal, the Superior Court of Pennsylvania (No. 1956 WDA 2005) reversed the convictions for causing a catastrophe, and for cruelty to animals, but did not alter the sentence which was for two counts, life in prison without parole to run consecutive to each other. Appeal followed denial of her petition for post conviction relief by the trial court. Superior Court denied her appeal July 28, 2010.

On/about July 11, 1990, the defendant was an impoverished single mother living with her two children: Montelle Thornhill (age 2) and her daughter: Charita Thornhill (age 3) with, and at the residence of her grandmother, Miss Minnie Bivens at 7053 Apple Street in the City of Pittsburgh, Allegheny County, Pennsylvania.

The son Montelle suffered from severe asthma attacks and was allergic to the dog owned by the grandmother. "Asthma is characterized by inflammation of the air passages resulting in the temporary narrowing of the airways that transport air from the nose and mouth to the lungs. Asthma symptoms can be caused by allergens or irritants that are inhaled into the lungs, resulting

in inflamed, clogged and constricted airways. Symptoms include difficulty breathing, wheezing, coughing, tightness in the chest. In severe cases, asthma can be deadly." (see: Asthma facts and figures, annexed to PCRP as Exhibit A) "Every day in America eleven (11) people die from asthma." About fifty percent of asthma is allergic-asthma, is more common in children (7-10%) than adults (3-5%), affects nearly 5 million children (under 18 years), and asthma accounts for one-quarter of all emergency room visits in the United States each year, with about 2 million emergency room visits. Nearly half of all asthma hospitalizations are for children, and there are more than 4,000 deaths due to asthma each year. Nearly half (44%) of all asthma hospitalizations are for children and asthma is the primary cause of school absenteeism among children accounting for more than 14 million missed days of school.

Montelle was allergic to the dog that lived in the house and it came to the point where he was having so many asthma attacks (N.T. 118) that the defendant mother feared for his life. The mother asked the grandmother to get rid of the dog, but she refused, stating that she would keep the house as clean as possible and that they all could live together. But this did not work as Montelle continued to have serious asthma attacks. (N.T. 118-119) The mother did all she could including keeping the house "spotless, dust-free, (and would) vacuum every day." (N. T. 145: 18-23) They had a humidifier, and Montelle was described as "too young" to take medication" (N.T. 146:1-7) They had nowhere else to live. The mother's own mother kept a less clean house than did the grandmother (Miss Bivens) and was not acceptable. The mother was desperate to protect her son from the dangers posed by the dog, which for practical purposes threatened the life of the son, and generally caused him to periodically suffocate because of the dog-dander induced asthma attacks which constricted his airways. (Danger of death ignored by Superior Court)

The mother was desperate to protect her son and initially asked the grandmother to give away the dog, which she refused to do. Her second recourse was to take the dog downtown to an all-night store on Smithfield Street, "The Smithfield News" where she and her friend Lachan Russell dropped the dog off, then drove away. The next day, the dog returned home. Lachan (age 15) suggested that the dog could be permanently eliminated by killing it, specifically by dousing it with a flammable liquid and immolating it away from the house on the "city steps." (N.T. 150) It is noteworthy that Lachan had a history of starting a mattress fire using an accelerant while at a detention center. THIS DEFENDANT-APPLICANT HAD NOT CONCIEVED, APPROVED NOR IMPLEMENTED ANY PLAN TO INCINERATE THE DOG. HER FRIEND DID.

On the night of July 11, 1990, The mother noticed that the dog had been doused with a liquid that seemed to be kerosene, and she believed that the plan to euthanize the dog was in motion. She bathed the children and sent them to bed, then left the house and went to the city steps to draw the dog away from the house, but noticed that the house was on fire. Apparently, Lachan had lit a fire and the dog became engulfed and in sequence, the couch on the porch ignited, then the porch, then the fire spread into the wall of the house where the "balloon" construction led the fire to the upper floors, engulfing the house and causing the deaths of the children due to smoke inhalation. Regardless of the nature of Lachan's plan, the mother, in her desperation, had not approved of starting a fire near the house, nor did she do anything to set the dog on fire.

I,

THE DEFENDANT WAS ACTING TO PROTECT HER CHILD FROM THE LIFE THREATENING EFFECTS OF A TOXIC DOG, AND SHE ACTED WITH JUSTIFICATION TO PROTECT HER SON AND ABSENT MALICE.

Under the laws of Pennsylvania Justification is a defense applicable to this case. (Title 18, Part 1, Chapters 501 et seq.) In this case, the mother had a child whose was seriously endangered by the dander of the house dog. The child suffered from asthma, which is not infrequently fatal, and as a minimum, causes constriction of the child's airways and resulted in suffocation, a horrible situation for the mother to have to helplessly watch (i.e. to watch her son suffocate because of a dog). The mother attempted to protect her son, first by asking the grandmother to get rid of the dog, which she refused, then, more desperately, she took the dog downtown and released it, hoping that it would find another home, when this failed, and in her desperation to protect her son from suffocation, she countenanced the advice of her 15 year old friend to immolate the dog in a safe place away from the house. She certainly did not agree to any plan that would burn the house, but for reasons unknown, while Lachan was with the dog on the porch of the house, the fire started and quickly spread to the house and resulted in the structure being engulfed and the deaths of the children from smoke inhalation.

If it can be inferred that the defendant acted to protect her child by burning the dog, and SHE DID NOT, then under the defense of justification, Section 502, justification is a defense, and

under Section 503, justification is under the general rule (a) conduct which the actor believes to be necessary to avoid harm or evil to himself or to another (which) is justifiable if (i) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged, and under Section 506 justifiable to protect a third person and (b) she would not be obligated to retreat unless she knows that she can secure the complete safety of such person, and under Section 509, she was entitled to use force to protect her son for whom she had a special responsibility for the care, and safety of, being Montelle's (1) parent and (i) the force was used for the purpose of safeguarding or protecting the welfare of the minor son and (ii) the force used was not designed to cause or known to create a substantial risk of causing death. The mother believed that the efforts Lachan made were necessary to protect her son from suffocation and were not intended to harm others. (See: 18 Pa.C.S.A.. 502, et seq.)

In retrospect, Lachan's plan failed miserably when the fire started on the porch and the child who was being protected died in the fire along with his sister, nevertheless, the mother had never intended that there be a house fire or harm come to anyone. (She had poor judgment even for an 18 year old listening to a 15 year old friend.) Her primary, and only intention was to protect her son, and the seriousness of the risk of suffocation to Montelle from the danger of the dog weighed too heavily on the young mother, and clouded her judgment.

It is well-established that "self-defense" negates two elements of the common-law definition of murder: unlawfulness and malice. (Commonwealth. v. Hilbert, 476 Pa. 288; 382 A.2d 724, 1978 Pa. LEXIS) In Commonwealth v. Mahoney (460 Pa. 201, 331 A.2d 488), the Pennsylvania Supreme Court stated that a killing committed in self-defense is an excusable homicide and therefore is not "unlawful." (See also Mullaney, 421 U.S. at p. 684, 95 S.Ct. 188) The Pennsylvania Supreme Court concluded that ("S)elf-defense negates specific elements of the crime of murder as it existed in this State at common law, i.e. unlawfulness and malice, and it is in contravention of the United States Constitution, as interpreted by *Winship, Mullaney and Hankerson."* (In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 1073; Mullaney v. Wilbur, 421 U.S. 685, 95 S.Ct. 1881; Hankerson v. N.C. , 432 U.S. 233, 97 S.Ct. 2339). The defendant was not specifically defending herself, but was defending her child, and there is no reason to regard the mother's actions as inconsistent with the above legal principles. In fact, the trial court's error has risen to Constitutional magnitude, as a violation of Due Process, as noted above, by impermissibly requiring the defendant to carry the burden of proof regarding an essential element of the crime of

murder since the claim of self-defense negated any element of ill will. (Commonwealth v. Fowlin, 551 Pa. 414, 710 A.2d 1130)

The Superior Court (Decision, July 28, 2010, p. 9, fn. 9) states: "We note that appellant attempts to frame the issue of justification as one involving the defense of others. However, we conclude that the principles underlying the defense of others are not relevant here since appellant pleaded no facts upon which to infer that the killing, or even removal of the dog from the home, was 'immediately necessary' to protect the child." Appellant has made a extensive showing in her PCRA that asthma is potentially fatal to children, and that she feared for his life, and that there were attempts made to remove the dog from the proximity of the child, i.e. asking the grandmother to remove the dog, and secondly by taking the dog elsewhere to find a new home. Trial counsel failed to raise this issue, and the Superior Court inexplicably missed this in her appeal.

The Superior Court decision goes on: "(t)he use of force ... is justifiable when the actor believes that such force is ***immediately necessary*** for the purpose of protecting himself..." (emphasis in decision). Here the Superior Court ignores the applicant's citation of 18 Pa.C.S. 503, and 509 which states that an individual is legally justified in using force to protect a third person and further that an individual is justified to use force to protect one under her special care, i.e. her child. The Superior Court has shown bad faith in selecting and de-selecting the applicable statutes regarding justification, for no better purpose than to allow it to protect a very bad verdict in the trial court, when in fact the child's life was in danger from suffocation.

There arises another question regarding the consequences of the defendant's actions regarding the deaths of her children. That question is whether a mother may take steps to defend her child from what she believes are the injurious effects of a dog on her son's life and have those defensive actions injure innocent bystanders, in this case, the son (and sister) that she was trying to protect. The Pennsylvania Supreme Court has held that: "(A) person who unintentionally injures a third party bystander while using justifiable force in self-defense may ... not be criminally liable." (Commonwealth v. Fowlin, 551 Pa. 414; 710 A.2d 1130, 1998 Pa. LEXIS 803) "If his use of deadly force was justifiable, he may not be prosecuted for either (injuries or death he inflicts on the assailants or on bystanders)." Despite the fact that the mother's actions were harmful to her children, she took those steps for the sole purpose of protecting the life of her son from the dog, and clearly cannot be prosecuted for those actions.

Trial counsel was impermissibly ineffective for failing to raise this defense under the

Strickland standard (466 U.S. 668) to the prejudice of the defendant who was the victim of a false conviction which could not stand under the defense of justification and the due process violation (supra). She was determined not guilty for "cruelty to animals." (Super. Ct.)

II,

THERE WAS NO FINDING OF MALICE BY THE FACT-FINDER. BUT A FINDING THAT THE DEFENDANT ACTED TO PROTECT HER SON.

The court's opinion, dated: June 16, 2009 states:

"First the Defendant claims that trial counsel was ineffective in failing to raise the defense of justification. Specifically, the Defendant claims that she was justified in her actions because she was protecting her son, Montelle, who suffered from asthma and was allergic to her grandmother's dog. **While the Court understands that the defendant wished to prevent her son from having an allergic reaction to her grandmother's dog, setting the dog on fire, in the middle of the night, on the front porch of her grandmother's residence, in which four people including her two young children) were sleeping, was not the *appropriate* way to do so.** In fact, the Defendant would not have been justified in harming the dog in any manner to protect her son from an asthma attack; rather, the defendant should have protected her son by moving him from her grandmother's residence to a residence in which a dog was not present." (Opinion: Judge Lawrence J. O'Toole, June 16, 2009, pp. 4-5)[emphasis was added to highlight relevant portions]

The court finds that the defendant's actions were "not the appropriate way." This is not a finding of criminal intent. This is not a finding of malice, and this is not a finding that there was any intent to kill anyone. This is a finding that the defendant was motivated to protect her son from a toxic dog. The court elevates the dog to being the legal equal to the boy.

Judge O'Toole does not make a finding of "malice". He does make a finding that"...the defendant wished to prevent her son from having an allergic reaction to (the)...dog...." This is a finding of justification, not malice. Judge O'Toole goes on to find that the actions taken in justification were misdirected, and suggested that she take her son somewhere else to live, reflecting no understanding of the limitations on one's life that are imposed by extreme poverty. One should note the defendant did not have another place to go, and living on the street in a

refrigerator box was unacceptable. Poverty limits one's options, and the defendant was too poor to easily find a place to live. That's why she had to live with her grandmother. (One might note that rich and poor alike are penalized by the courts for living under bridges.)

In the circumstances of this case, the mother/defendant was so confused and paralyzed by having to watch her son suffocate that she entertained the "plan" of her co-defendant to kill the toxic dog. There was no plan to destroy the house, and the defendant at best acquiesced in allowing the co-defendant's burning of the dog in the last hope of protecting her son.

"The law provides for a conviction of voluntary manslaughter under two different sets of circumstances. A person is guilty of voluntary manslaughter if either he acted under a sudden and intense passion resulting from a serious provocation or he 'knowingly and intentionally kills an individual' under the unreasonable belief that the killing is justified." [18 PaC.S. 2503(a)(b)] "In order to procure a conviction for voluntary manslaughter the Commonwealth must prove beyond a reasonable doubt that the homicide was not justified." (Commonwealth v. Weston, Pa. Supreme Court, 41 E.D. Appeal Docket 1999, April 17, 2000; citing: Commonwealth v. Correa, 648 A.2d 1199; Commonwealth v. Mehmeti, 462 A.2d 657; Commonwealth v. Mason, 378 A.2d 807; Commonwealth v Butcher, 304 A.2d 150, 153) The government failed to meet this burden.

In this matter, the court failed to find malice. The court also failed to find intention to kill any persons, which is exculpatory for crimes of malice, i.e. murder (Jacobs v. Horn, 395 F.3d 92, 105 [3d. Cir. 2005], quoting Commonwealth v. Cuevas, 932 A.2d 388, 393, Pa. 2003) and for voluntary manslaughter.

Under the court's findings of the defendant's intentions, there are no grounds for finding any degree of murder, and there is no finding that this defendant intentionally killed any person under the circumstances, which could have made her culpable for voluntary manslaughter. Under the circumstances of this case, the most she could be reasonably guilty of would be involuntary manslaughter.

The Commonwealth has failed to meet its burden of proof, and the trial judge as much as says so by admitting that the defendant wished to protect her son from the dog. (One might note that a biting dog can cause acute injury, but a toxic dog can kill an asthmatic child.)

III,

EVIDENCE INTRODUCED AT TRIAL OF A KEROSENE-LIKE ACCELERANT WAS IN THE ABSENSE OF A VALID CHAIN OF CUSTODY OF THE EVIDENCE AND WAS FATALLY FLAWED.

At trial, Senior Forensic Chemist Joseph Abati testified (as an expert): "I received eight items of evidence from the Pittsburg Arson squad." (N.T. 71) THAT'S IT. THAT IS THE CHAIN OF CUSTODY RIGHT THERE. Mr. Abati testified that he identified a kerosene type hydrocarbon mixture in certain samples. There was no indication who procured the samples, when or what time they were taken, or under what conditions, who had custody of them, who did anything with them, or how they were handled. There were no facts in evidence that these substances ever came from any place or situation relevant to the charges against the defendant, consequently she was unable to "confront" in a Constitutional sense, the witnesses against her and there was no reasonable inference that the identity and condition of the exhibits remained unimpaired until they were surrendered to the court. (Commonwealth v. Bennett, 2003 Pa Superior 212; 827 A.2d 469, 2003 Pa. Super. LEXIS 1333) "When a party offers evidence contending either expressly or impliedly that the evidence is connected with a person, place or thing or event, the party must produce evidence sufficient to support a finding of contended connection." (Commonwealth v. Pollock, 414 Pa Super. 66, 606 A.2d 500; Commonwealth v. Hudson, 489 Pa. 620, 414 A.2d 1381) The witness in particular, and the Commonwealth in general failed to provide even the rudiments of a sufficient chain of the evidence. The Commonwealth Court "has held that where a sample is not taken by the laboratory which prepared the test report, the chain of custody must be independently proven before the report may be admitted. (Worthington v. Dpt. Of Agriculture State Horse Racing Comm., 514 A.2d 311 [Pa. Cmwlth. 1986]) There being no facts in evidence concerning the origin of the substances, the defendant was denied her rights to confrontation, cross-examination and assistance of counsel embodied in the Sixth Amendment to the U.S. Constitution (see: Dickson v. Sullivan, 849 F.2d 403, 406, 9th. Cir, 1988) In the absence of a legally sufficient chain of custody, the evidence is fatally flawed and should be stricken from the record. "Trial court erred in denying defendant's post-conviction relief petition, pursuant to 42 Pa.Cons.Stat. 9543(a)(2), where he asserted that his appellate counsel was ineffective for failing to raise the violation of defendant's right to confrontation, pursuant to USCS Const. Amend. 6 and

FIND OUT HOW THE JURY WAS INSTRUCTED BASED ON THE "COCAIN FOUND". SEE IF "INVOLUNTARY INTOXICATION" APPLIES.

Pa. Const. Art. I, S. 9, based on the trial court's erroneous admission of a lab report that identified a substance seized from defendant as cocaine, as the report should not have been admitted under the business records hearsay exception of Pa. R. Evid. 803(6); the report was admitted by testimony of the lab manager, who did not participate in the testing of the substance and did not have a close connection with testing, and further, it was not harmless error because it was the only substantive evidence on the issue of the identity of the substance. (Commonwealth v. Carter, 2004 PA Super 420, 861 A.2d 957, 2004 Pa. Super. LEXIS 3909) In this case, the laboratory Senior Forensic Chemist did not participate in the procurement of the evidence and did not have a close connection with the origin of the samples, and knew nothing of their history before he tested them. The samples he is said to have tested were the only substantive evidence on the identity of the substances. The testimony and evidence should be held inadmissible and stricken.

Counsel was ineffective for not raising the above, to the prejudice of the defendant.

The Superior Court stated: (p. 3) "She (the arson expert) further testified that accelerant was found in the dog's fur." Since there was no evidence that samples were properly taken of the dog's fur, it is improper for the "expert" to testify that there was accelerant in the dog's fur. The Superior Court has shown bad faith in crediting trustworthiness to the "expert's" testimony when there is no evidence that there was accelerant taken from samples of the dog's fur. Somebody is inventing evidence, and the Superior Court has turned a blind eye.

The Superior Court identifies appellant's claim as "frivolous." (p. 11) The Superior Court further misapprehends the appellant's claim. The appellant has actually claimed that there was no trial evidence that samples of "accelerant" were properly sampled at the scene, and since there is no evidence that the "accelerant" was even properly before the court, it is improper for the Superior Court to hold her claim as "frivolous." The plain fact is that there is no proper finding of accelerant before the trial court because the government never established where the "sample" came from. The trial court's finding of arson is predicated upon a finding of accelerant, and this the government has not proven. Without accelerant evidence properly before the trial court, the court could only improperly find the defendant guilty of arson. The Superior Court's decision is specious, and not worthy of a high level court.

IV,

DEFENSE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO IDENTIFY AND PURSUE A DEFENSE OF JUSTIFICATION, AND A DEFENSE OF LACK OF MALICE, AND LACK OF INTENT TO KILL ANY PERSON.

The law defines what constitutes effective assistance of counsel. In general, defense counsel must perform according to the standard of a reasonably competent attorney. (Strickland v. Washington, 466 U.S. 668) A reasonably competent counsel will attempt to learn all the facts of the case . (Hill v. Lockhart, 474 U.S. 52, 56-60) Counsel must communicate the results of his analysis of the case. (McMann v. Richardson, 397 U.S. 759, 769-71) Since the attorney has failed to properly consider that the defendant was acting with justification, and that the defendant did not act with malice, (conceded by the trial judge) the defendant has lost the full benefit of her Sixth Amendment rights. (Hill, supra, 474 U.S. at 59) Counsel may be ineffective where pursuit of a possible defense is curtailed by lack of a reasonable investigation. (Commonwealth v. Maybe, 359 A.2d 369)

Trial counsel excluded evidence of justification and lack of malice which could "never be considered a reasonable strategic decision and provided relief from a murder conviction and a grant of a new trial." (Commonwealth v. McClellan, 2005 Pa. Super. 376, 887 A.2d 291) "(A)ppellant was entitled to relief...where counsel failed to raise meritorious issues and the trial court failed to order an evidentiary hearing." (Commonwealth v. Overall, 418 A.2d 685, 1980 Pa. LEXIS 492)

WHY did THE URT ADMIT THERE AS NO MALICE. How DO YOU GET HE MAX ON 2nd 2gree W/o THE TENT TO KILL OR ALICE ON A PERSON?

Given that the court admits that there was no malice and that the defendant was motivated to protect her son, the defendant, absent malice, or intent to kill, was prejudiced by her conviction for murder in the second degree, which required the Commonwealth to prove malice and/or intent to kill. (Commonwealth v. Kimball, 724 A.2d 326, 333) There was no reliable adjudication of guilt or innocence, under Pennsylvania or United States Constitutional standards. (Kimball, Id.)

Counsel's failure to file and perfect the appeal as requested by the defendant that raised the issue of lack of malice is the "functional equivalent of having no representation at all, and since the Pennsylvania Constitution guarantees the right to appeal, a failure to file or perfect such an appeal results in denial so fundamental as to constitute prejudice per se. " (internal quotes omitted) (Commonwealth v. Lantzy, 736 A.2d 564, 571; under /Strickland v. Washington, 466

U.S. at 692, citing Evitts, 469 U.S. at 396-7) Failure to file an appeal attributable to counsel error entitles defendant to relief without the requirement of demonstrating that his appeal had merit (Lantzy, at 558 Pa. 214, 224, 736 A.2d 564, 570, citing: Anders v. California, 386 U.S. 738, 743-44) "When there is an unjustified failure to file a requested direct appeal , the conduct of counsel falls beneath the range of competence demanded of attorneys in criminal cases, denies the accused the assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and article I, Section 9 of the Pennsylvania Constitution, as well as the right to direct appeal under Article V, Section 9, and constitutes prejudice for purposes of Section 9543(a)(2)(ii). Therefore, in such circumstances, and where the remaining requirements of the PCRA are satisfied, the petitioner is not required to establish innocence or demonstrate the merits of the issue or issues which would have been raised on appeal. (Id. p. 572, Commonwealth v. Haun, 1980, MDA, 2008, filed: November 20, 2009)

Since the failure to perfect a requested appeal is the functional equivalent of having no representation at all (Evits v. Lucey, 469 U.S. 387, 396-97) thus we hold that where there is an unjustified failure to file a requested direct appeal, the conduct of counsel falls beneath the range of competence demanded of attorneys in criminal cases, denies the accused the assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution as well as the right to appeal under Article V, Section 9, and constitutes prejudice for purposes of Section 9543(a)(2)(ii) (Commonwealth v. Lantzy 558 Pa. 214, 226)

CONCLUSION

For the aforestated reasons, the defendant is not guilty, and her conviction should be vacated, and she should be granted such other and further relief as is just and proper. The Supreme Court should determine why the rule of law was compromised by the Superior Court and why law was selectively applied to maintain a conviction contrary to the laws of the Commonwealth, and the United States.

Respectfully submitted,

Tequilla Fields GK 2327
S.C.I. Muncy
P.O. Box 180
Muncy, PA 17756

Dated: October 25, 2010
TF:mm

The Superior Court of Pennsylvania
Office of the Prothonotary

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September 10, 2010

Tequilla Newsome
OK2327
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Muncy, Pa. 17756

In Re: Commonwealth v Tequilla Angela Newsome
No. 903 WDA 2009

Dear Ms. Newsome:

The Court has entered the following Order in the above-captioned matter:

"ORDER

The Court hereby DENIES the application filed August 9, 2010, requesting reargument or reconsideration of the decision dated July 28, 2010.

September 10, 2010

PER CURIAM"

Very truly yours,

Eleanor R. Valecko

DEPUTY PROTHONOTARY

ERV/smc
Cc: Michael Streily, Esquire
Mark Marvin
Honorable Lawrence J. O'Toole

Superior Court Recorder

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

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
TEQUILLA ANGELA NEWSOME, Appellant	:	No. 903 WDA 2009

Appeal from the PCRA Order entered March 26, 2009, in the Court of Common Pleas, Allegheny County, Criminal Division, No. CP-02-CR-0003061-2005; CP-02-CR-0005726-2005

BEFORE: MUSMANNO, ALLEN, JJ., and McEWEN, P.J.E.

MEMORANDUM: FILED: JULY 28, 2010

Appellant, Tequilla Angela Newsome,[1] appeals *pro se*[2] from the order that dismissed, without a hearing, her first petition for post conviction relief[3] from the judgment of sentence to serve two consecutive terms of life imprisonment, a sentence imposed after a jury found her guilty of, *inter alia*, arson and two counts of murder of the second degree. We affirm.

This Court previously summarized the facts underlying appellant's convictions when considering appellant's direct appeal:

> Detective J.R. Smith, of the City of Pittsburgh Police Department, testified that he and his partner, Tim Rush,

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[1] The record reflects that appellant is also known as Tequilla Angela Fields.

[2] As noted below, appellant elected to proceed without the assistance of counsel, a decision which was confirmed by the trial court following a ***Grazier*** hearing. ***See: Commonwealth v. Grazier***, 552 Pa. 9, 713 A.2d 81 (1998).

[3] Appellant sought post conviction relief pursuant to the Pennsylvania Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546.

were assigned to the "cold case" homicide squad in 2004. They were assigned to reinvestigate seven old unsolved homicide cases, including the within case, which involved the death of two young children in a house fire in the early morning of July 11, 1990. After reviewing the old files from 1990, the detectives contacted Sharon Fields, the Defendant's mother, on February 8, 2005, who put them in contact with [appellant]. [Appellant] was very happy that the case was being reopened and she offered her assistance in finding the "killers of her babies."[4] After doing additional investigation and other interviews, the detectives contacted [appellant] again on February 15, 2005. They requested that she provide them with photographs of her two children that had died in the fire and that she answer some additional questions. [Appellant] took the detectives to her mother's residence where they retrieved photographs (which were introduced as Commonwealth Exhibit 5) and then they went to the detectives' office. After advising [appellant] of her constitutional rights, the detectives began their questioning of [appellant]. [Appellant] stated that she and her two children were living on the north side of the city with her grandmother (Minnie Bivins), who had a dog named Fay Lou. [Appellant's] son, Montelle, was allergic to the dog, but her grandmother would not agree to get rid of the dog. So, she and a friend, Lachan Russell, who was dating her brother, plotted how to get rid of the dog. Initially, they took the dog to a convenience store downtown, but he found his way home. Then, they decided that they would douse the dog with kerosene, untie him, [appellant] would call him to follow her, and they would set the dog on fire until it died. Late in the evening on July 10, 1990, [appellant] and Lachan took a bus to [appellant]'s mother's house in the Hill District Section of the city. They picked up [appellant]'s two young children and took another bus back to [appellant]'s grandmothers' house shortly after midnight. While on the bus, [appellant] and Lachan decided to carry out their plan that evening. When they arrived at [appellant]'s grandmother's house, the front door was locked and they had to pound on the door to wake Ms. Bivins. While [appellant] was pounding on the door, Lachan poured

[4] Appellant was eighteen years old at the time the fire occurred.

kerosene on the dog, who was tied up on a leash on the front porch. Ms. Bivins finally came to the door and [appellant] hid the kerosene-soaked dog from her sight. They went inside the house. [Appellant] took the children upstairs, bathed them, and put Montelle to sleep in a bedroom on the second floor and Charita to sleep with Ms. Bivins. [Appellant] and Lachan then left the house. [Appellant] headed for the "city steps" where she was to call for the dog so he could be set on fire. Once she got there, she called for the dog several times, but he did not come. A few minutes later, Lachan came running down the steps and [appellant] saw that the house was on fire. They went back up to the house and [appellant]'s grandmother was already outside. The house was fully engulfed in flames. Ms. Bivins told her that Montelle was dead and that her brother, Andre, had Charita. [Appellant] ran around to the back of the house and saw Andre, with Charita in his arms, trying to open a window. He could not open the window with one hand, so he set the child down and got the window open, but now the child was gone. Andre attempted to find Charita, but he was eventually blown out the window by an explosion. Once the emergency and fire vehicles arrived, [appellant] and Lachlan made a "street pact" never to tell anyone how the fire started.

... At the trial, the Commonwealth's arson expert testified that after reviewing the 911 calls and the scene, the fire that killed [appellant]'s children began on the front porch and that at one point, the dog and a couch on the porch were both on fire. The arson expert testified that all natural and accidental causes of the fire were ruled out. She further testified that accelerant was found in the dog's fur. She also testified that the dog was set on fire while it was still tethered to the home. Finally, she testified that the fire spread from the couch and that it was entirely possible that the dog jumped on the couch or somehow caught the couch on fire. The dog's body was found on the second floor, under the bed where one of [appellant]'s children had been sleeping. Following her trial, the jury convicted [appellant] of second degree murder as well as all of the other charges and the trial court sentenced her to life imprisonment.

Commonwealth v. Newsome, 919 A.2d 974 (Pa.Super. 2007) (unpublished memorandum) [1956 WDA 2005, at pp. 2–4], ***appeal denied***, 592 Pa. 788, 927 A.2d 623 (2007) (internal quotations and record citations omitted).

Appellant took a direct appeal, and this Court, on January 22, 2007, affirmed the judgment of sentence and appellant's convictions for criminal homicide, arson, and criminal conspiracy, but reversed the convictions for causing a catastrophe and cruelty to animals. ***Id***. [1956 WDA 2005, p. 15].[5] Appellant filed a petition for allowance of appeal, which the Pennsylvania Supreme Court denied on June 26, 2007. ***Commonwealth v. Newsome***, 592 Pa. 788, 927 A.2d 623 (2007).

The remaining procedural history giving rise to the present appeal was ably summarized by the trial court:

> On May 10, 2008, [appellant] filed a *pro se* [PCRA petition]. In said petition, [appellant] specifically refused the appointment of counsel, stating that she desired to represent herself. At a ***Grazier*** hearing on September 12, 2008, the [trial] court held an on-the-record colloquy and granted [appellant's] request to represent herself. [Appellant] then filed a petition, to which the Commonwealth filed an answer. After review of the

[5] This Court, in appellant's direct appeal, concluded that the evidence was insufficient to establish that the fire in which appellant had been involved caused devastation or destruction necessary to convict her of the offense of causing a catastrophe. ***Commonwealth v. Newsome***, 919 A.2d 974 (Pa.Super. 2007) (unpublished memorandum) [1956 WDA 2005, p. 8], ***appeal denied***, 592 Pa. 788, 927 A.2d 623 (2007). Moreover, we concluded that appellant's conviction for cruelty to animals was defective since the statute of limitations for that charge had expired. ***Id***. [1956 WDA 2005, p. 14].

> petition, answer, and the court record, the petition was dismissed without a hearing on March 26, 2009.[6]

Trial Court Opinion, June 16, 2009, p. 2. Appellant filed a timely notice of appeal, and this appeal followed.[7]

Appellant, in the brief she has submitted *pro se* in support of this appeal, presents four question for our review, which we have reordered as follows:

> Whether [appellant] was acting to protect her child ... and whether she was entitled to a defense of justification, and whether she exhibited malice, or intent to kill anyone?
>
> Whether the fact-finder made a finding of malice, as a necessary element in conviction for murder in the third degree [sic] ... or whether the court found that the defendant acted to protect her son, invoking the defense of justification, [and] the [absence] of malice?
>
> Whether [trial] counsel was ineffective for failing to raise a defense of justification, and lack of malice and intent to kill anyone?
>
> Whether there was a valid chain of custody of evidence of a kerosene like accelerant?

Brief of Appellant, p. 1.

The standards governing our review of the decision of a trial court to dismiss a PCRA petition are well settled. This Court, when reviewing an order denying a petition under the PCRA, must determine whether the

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[6] The trial court, on February 27, 2009, issued prior notice of its intent to dismiss the petition pursuant to Pa.R.Crim.P. 907.

[7] The trial court did not order appellant to file a statement of errors complained of on appeal, ***see:*** Pa.R.A.P. 1925, but did file an opinion in response to the appeal.

decision of the trial court is supported by the evidence of record and is free of legal error. ***Commonwealth v. Ragan***, 592 Pa. 217, 220, 923 A.2d 1169, 1170 (2007). The findings of the trial court will not be disturbed unless there is no support for those findings in the certified record. ***Commonwealth v. Carr***, 768 A.2d 1164, 1166 (Pa.Super. 2001). Moreover, the trial court may decline to hold a hearing on the petition if it determines that the petitioner's claim is patently frivolous and is without a trace of support in either the record or from other evidence. ***Commonwealth v. Jordan***, 772 A.2d 1011, 1014 (Pa.Super. 2001).

We are further mindful that in order for appellant to prevail on claims raising the ineffective assistance of trial counsel, she must demonstrate by a preponderance of the evidence that: (1) the underlying claim of legal error is of arguable merit, (2) that counsel had no reasonable strategic basis for his or her action or inaction, and (3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. ***Commonwealth v. Kimball***, 555 Pa. 299, 312-313, 724 A.2d 326, 333 (1999). Moreover, it is well settled that appellant, as petitioner, bears the burden of proving all three prongs of the test. ***Commonwealth v. Meadows***, 567 Pa. 344, 357, 787 A.2d 312, 319-320 (2001). Furthermore, we presume that counsel was not ineffective, and appellant is obliged to rebut that presumption. ***See: Commonwealth v. Williams***, 557 Pa. 207, 227, 732 A.2d 1167, 1177 (1999).

Appellant, in her first three questions, frames the arguments that the trial court erred in dismissing her claims that trial counsel was ineffective for failing to assert certain defenses against the charges of murder of the second degree and arson. Specifically, appellant contends that counsel was ineffective by reason of a failure to establish defenses based upon (1) her lack of an intent to kill or malice toward the human victims, and (2) justification.

By way of background to these arguments, appellant was convicted of murder of the second degree and arson. The Pennsylvania Crimes Code defines murder of the second degree in relevant part as follows:

> **(b) Murder of the second degree.**—A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony.
>
> * * *
>
> **(d) Definitions.**—As used in this section the following words and phrases shall have the meanings given to them in this subsection:
>
> * * *
>
> **"Perpetration of a felony."** The act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit ... arson[.]

18 Pa.C.S. § 2502(b), (d). The Pennsylvania Crimes Code further defines the predicate offense of arson, in relevant part, as:

> A person commits a felony of the first degree if he intentionally starts a fire or causes an explosion, or if he

> aids, counsels, pays or agrees to pay another to cause a fire or explosion, whether on his own property or on that of another, and if:
>
> (i) he thereby recklessly places another person in danger of death or bodily injury ...

18 Pa.C.S. § 3301(a)(1)(i).[8]

While appellant asserts that trial counsel was ineffective for failing to present a defense based upon a lack of intent to kill or malice, neither the lack of a specific intent to kill, nor the lack of malice constituted valid defenses to the charge of murder of the second degree. As this Court reiterated in ***Commonwealth v. Lambert***, 795 A.2d 1010 (Pa.Super. 2002), ***appeal denied***, 569 Pa. 701, 805 A.2d 521 (2002), the malice or intent to commit the predicate offense to a charge of murder of the second degree is "imputed to the killing to make it second-degree murder, regardless of whether the defendant intended to physically harm the victim." ***Id.*** at 1022. Consequently, since our review reveals no legal merit to appellant's underlying contentions that her lack of an intent to kill, or malice, constituted proper defenses to the charges of murder of the second degree, we detect no basis upon which to upset the ruling of the trial court that dismissed appellant's ineffectiveness claims that were predicated upon the failure to assert such defenses.

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[8] The arson statute further provides that "[a] person who commits arson endangering persons is guilty of murder of the second degree if the fire or explosion causes the death of any person ...." 18 Pa.C.S. § 3301(a)(2).

Appellant further argues that the trial court erred when it found no arguable merit to her claim that trial counsel was ineffective for failing to present a defense of justification. This Court, when considering this argument, is mindful that appellant presently asserts that the burning of her grandmother's dog was justified by her concern for the welfare of her child, who suffered from asthma and/or allergies to the dog.[9] Therefore, we conclude that the appropriate principles of justification are set forth in 18 Pa.C.S. § 510, which provides:

> Conduct involving the appropriation, seizure or destruction of, damage to, intrusion on or interference with property is justifiable under circumstances which would establish a defense of privilege in a civil action based thereon, unless:
>
> (1) this title or the law defining the offense deals with the specific situation involved; or
>
> (2) a legislative purpose to exclude the justification claimed otherwise plainly appears.

18 Pa.C.S. § 510.

[9] We note that appellant attempts to frame the issue of justification as one involving the defense of others. However, we conclude that the principles underlying the defense of others are not relevant here since appellant pleaded no facts upon which to infer that the killing, or even removal of the dog from the home, was "immediately necessary" to protect the child. ***See:*** 18 Pa.C.S. § 506(a)(1) (use of force to protect another requires that the actor would be justified in using force to protect herself from the injury she believes to be threatening the person whom she seeks to protect); 18 Pa.C.S. 505(a) ("[t]he use of force ... is justifiable when the actor believes that such force is ***immediately necessary*** for the purpose of protecting himself ...." (emphasis supplied)).

Even if the principles of justification set forth in section 510, when read in conjunction with the arson statute, could exculpate a defendant from intentionally setting fire to a dog based upon a concern for a child, the arson statute itself makes clear that one may not do so in a manner that recklessly endangers others.[10] ***See:*** 18 Pa.C.S. § 3301(a)(1)(i) ("[a] person commits [arson] if he intentionally starts a fire or causes an explosion, or if he aids, counsels, pays or agrees to pay another to cause a fire or explosion ... and if he thereby ***recklessly*** places another person in danger of death or bodily injury[.]" (emphasis supplied)). Thus, we conclude that, under the circumstances alleged by appellant and established at trial, the arson statute itself dealt with the specific situation involved in this case, and that appellant's references to counsel's failure to pursue a justification defense are not well founded. Accordingly, we affirm the decision of the trial court

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[10] The Pennsylvania Crimes Code defines "recklessly" as follows:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element ... will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation

18 Pa.C.S. § 302(b)(3).

This Court, during appellant's direct appeal, has already summarized the ample evidence supporting the conclusion that appellant's execution of the plan to set fire to the dog was reckless.

that appellant's claim that counsel was ineffective for failing to present a justification defense did not warrant the grant of relief.

Appellant lastly contends that trial counsel was ineffective for not challenging the chain of custody of the real evidence upon which the Commonwealth's expert opined that an accelerant had been placed on the dog. This claim, however, is frivolous. Appellant's underlying complaint is that the Commonwealth's expert should not have been permitted to testify about the presence of an accelerant at the scene of the burned residence. However, appellant's own confession, which was introduced into evidence at trial, established that there was an accelerant on the dog and around the porch of the burned home. Thus, any error with regard to the testimony of the Commonwealth's expert that an accelerant had been placed on the dog was harmless beyond a reasonable doubt, and appellant cannot now argue that the outcome at trial would have been different as would be necessary to establish her claim of ineffectiveness. Accordingly, we detect no basis upon which to disturb the ruling of the trial court that dismissed this claim.

Order affirmed.

Judgment Entered:

Eleanor R. Valecko

Deputy Prothonotary

DATE: JULY 28, 2010