

PENNSYLVANIA SUPREME COURT
EASTERN DISTRICT
No. _____ E.D. ALLOC. DKT 2016

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| COMMONWEALTH OF |) | |
| PENNSYLVANIA |) | |
| Respondent-Appellee, |) | |
| v. |) | 1277 EDA 2015 |
| |) | CP-51-CR-0013121-2007 |
| |) | Non-Capital Homicide PCRA |
| |) | PCRA Court: McDermott, B. |
| ARMEL BAXTER |) | |
| Petitioner-Appellant. |) | |
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Petition for Allowance of Appeal

Petition for Allowance of Appeal from the Unpublished Superior Court Panel Opinion Dated November 17, 2016 (1277 EDA 2015) Affirming the March 4, 2015 Order Dismissing Armel Baxter’s Timely PCRA Petition Entered by the Honorable Barbara McDermott of the Philadelphia County Common Pleas Court, Criminal Division, CP-51-CR-0013121-2007

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STATEMENT OF JURISDICTION

Armel Baxter's *Petition for Allowance of Appeal* is properly before the Court.

Pa. C.S. § 724(a).

ORDER OR OTHER DETERMINATION IN QUESTION

Armel Baxter seeks review of the Superior Court's November 17, 2016 unpublished opinion (1277 EDA 2015),¹ affirming the March 4, 2015 *Order* dismissing his timely PCRA petition,² entered by the Honorable Barbara McDermott of the Philadelphia County Common Pleas Court, Criminal Division, CP-51-CR-0013121-2007.

STANDARD AND SCOPE OF REVIEW

This Court reviews PCRA dismissal orders in the light most favorable to the Commonwealth. *Commonwealth v. Burkett*, 5 A.3d 1260, 1267 (Pa. Super. 2010). Review is limited to the PCRA court's findings and the record. *Id.* The PCRA court's ruling will not be disturbed if it is supported by the record. *Id.* The Court reviews constitutional questions *de novo*. *City of Philadelphia v. FOP Lodge No. 5 (Breary)*, 985 A.2d 1259, 1269 (Pa. 2009).

¹ Ex. 1.

² Ex. 12.

PROCEDURAL HISTORY

In November 2007, the Commonwealth charged Armel Baxter and his co-defendant, Jeffery McBride (CP-51-CR-0013114-2007), with first-degree murder and other charges in connection with Demond Brown's April 21, 2007 shooting death.

On January 29, 2009, Mr. Baxter pled not guilty and proceeded to a jury trial before the Honorable Renee Cardwell Hughes. Mark Greenberg represented Mr. Baxter. The Commonwealth jointly tried Mr. Baxter and McBride.

On February 5, 2009, the jury convicted Mr. Baxter and McBride of first-degree murder, conspiracy, and possession of an instrument of crime.

Mr. Baxter appealed (437 EDA 2009), Greensburg served as his appellate attorney, and on March 3, 2010 the Superior Court affirmed.³

On March 25, 2010, Mr. Baxter filed a *Petition for Allowance*, which this Court denied on February 23, 2011. Mr. Baxter did not seek review from the U.S. Supreme Court, making his conviction final on May 24, 2011.

On September 23, 2011, Mr. Baxter filed a timely PCRA petition,⁴ which was assigned to the Honorable Barbara A. McDermott ("PCRA court").

On March 8, 2012, Mr. Baxter filed a supplemented petition.⁵

On November 2, 2012, Gary Sever was appointed to represent Mr. Baxter.

On February 8, 2013, Mr. Baxter filed another supplemental petition.⁶

³ Ex. 2.

⁴ Ex. 4.

⁵ Ex. 5.

On September 24, 2013, Server filed an amended petition.⁷

On November 11, 2013, after receiving Server's amended petition, Mr. Baxter filed a *Grazier* motion.⁸

On June 9, 2014, the PCRA court granted Mr. Baxter's request to proceed *pro se*.⁹ It then required Mr. Baxter to argue the merits of his claims, and after arguments, the PCRA court (1) denied Mr. Baxter's requests to amend his claims, (2) dismissed several of his claims, (3) appointed an investigator to assist him in obtaining affidavits from witnesses relevant to his trial counsel's ineffectiveness claims, and (4) granted him the right to amend his petition limited to the claims of trial counsel's failure to present key witnesses and refusal to impeach Rachel Marcelis with her immunity agreement.¹⁰

On September 8, 2014, Mr. Baxter filed another supplemental PCRA petition based on the affidavits his investigator obtained.¹¹

On October 25, 2014, Mr. Baxter retained undersigned counsel.

On November 21, 2014, the PCRA court granted an evidentiary hearing for two trial counsel ineffectiveness claims.

On January 20, 2015, the PCRA court held the evidentiary hearing.

⁶ Ex. 6.

⁷ Ex. 7.

⁸ Ex. 8.

⁹ Ex. 9.

¹⁰ NT, *Grazier Hrg.* 6/9/2014, at 23, 42, 63, 64, 70, 71, 73, 74, 75, 83.

¹¹ Ex. 10.

On February 5, 2015, Mr. Baxter filed a *Post-Hearing Brief*.¹²

On March 4, 2015, the PCRA court entered an *Opinion and Order* dismissing Mr. Baxter's PCRA petition.¹³

On March 27, 2015, Mr. Baxter appealed (1277 EDA 2016).¹⁴

On November 17, 2016, the Superior Court affirmed.¹⁵

On December 17, 2016, Mr. Baxter filed the instant *Petition for Allowance of Appeal* with this Court.

¹² Ex. 11.

¹³ Ex. 12.

¹⁴ Ex. 13.

¹⁵ Ex. 1.

QUESTIONS PRESENTED

On April 21, 2007, two hooded gunmen entered a public basketball court at Kenderton Elementary School during the middle of the day and fired multiple shots at Demond Brown, killing him instantly. Armel Baxter is serving a life without parole sentence for Brown's murder, but has maintained his innocence since his arrest. The Commonwealth premised its case against Mr. Baxter on two eyewitnesses, Hasan Durant and Anthony Harris, and an alleged after-the-fact, yet uncharged and immunized, accessory, Rachel Marcelis. The identification testimony bolstered Marcelis' testimony and vice versa. The Commonwealth's case, therefore, hinged on their credibility. Trial counsel, however, failed to present substantial exculpatory evidence discrediting the identifications and significant impeachment evidence discrediting Marcelis' narrative and credibility.

The four questions presented focus on three of Mr. Baxter's trial counsel ineffectiveness claims and how and why the Superior Court did or did not address them. The questions presented raise "special and important" issues because the Superior Court erred in one way or another when it addressed these three claims; its holdings either conflict with clearly-established precedent from this Court or the U.S. Supreme Court or they reflect an abuse of discretion because its rulings have no basis in fact or the record. Pa.R.A.P. 1114(a).

Questions #1 and #2

The Commonwealth jointly tried Mr. Baxter and co-defendant, Jeffery McBride, in January 2009. Mark Greenberg represented Mr. Baxter. Before trial, McBride's attorney, Michael Wallace, subpoenaed two eyewitnesses, Gregory Blackmon and Kyle Carter, who would have testified that the 5' 6" Mr. Baxter could not have been either of the 6' 1" or taller gunmen. Greenberg piggy-backed off of Wallace's subpoenas.

Blackmon and Carter attended the first three days of trial. On February 4, 2009, when it was Mr. Baxter's and McBride's opportunity to present their defenses, Philadelphia was hit with a significant snow storm. Due to the heavy snow, Blackmon and Carter both incorrectly assumed the courthouse was closed that day. The trial court denied Wallace's request for a continuance to locate Blackmon and Carter. Wallace objected, but neither he nor Greenberg explained the significance of Blackmon's and Carter's exculpatory testimony to the trial court. Greenberg never requested a continuance, nor joined Wallace's objection. More importantly, neither Wallace nor Greenberg requested that bench warrants be issued for Blackmon and Carter to compel their favorable testimony under the Compulsory Process Clauses in the U.S. and Pennsylvania Constitutions. Greenberg, as a result, presented no defense witnesses on Mr. Baxter's behalf.

Instead, Greenberg merely presented a character witness stipulation that discussed Mr. Baxter's good character.

Greenberg served as Mr. Baxter's direct appeal attorney (437 EDA 2009) and challenged the trial court's refusal to grant a continuance. In his opening brief, Greenberg argued that Mr. Baxter "was prejudiced by the [trial] court's abuse of discretion in failing to grant a continuance in order to allow him to present defense witnesses that would have *exonerated* [him]."¹⁶ Greenberg added that Blackmon and Carter "were... at the playground on the date of the shooting" and "were prepared to testify that [Mr.] Baxter was not one of the individuals that shot Brown."¹⁷ The Superior Court ruled Greenberg failed to object or join Wallace's objection and therefore waived the continuance claim. The court still reviewed the claim, but ultimately rejected it.¹⁸

Mr. Baxter alleged in his timely September 23, 2011 PCRA petition that Greenberg was ineffective for not vindicating his compulsory process rights by failing to request bench warrants for Blackmon and Carter.¹⁹ At a January 20, 2015 PCRA hearing, Blackmon and Carter both testified (1) they attended multiple days of Mr. Baxter's trial because they intended to testify on his behalf, (2) they incorrectly assumed court was closed on February 4, 2009 due to the heavy snow,

¹⁶ Ex. 3, p. 18. (emphasis added).

¹⁷ Ex. 3, p. 19

¹⁸ Ex. 2., pp. 13-15.

¹⁹ Ex. 4, pp. 2a, 4a, 26-27, 29-31.

(3) Mr. Baxter could not have been either of the gunmen because both gunmen were 6'1" or taller, and (4) after returning to the basketball courts several minutes after the shooting, they saw and heard pivotal Commonwealth witness, Anthony Harris, accuse, *not* Mr. Baxter but, Malik Ware of being one of the gunmen.²⁰

Greenberg testified at the PCRA hearing that he did not request bench warrants for Blackmon and Carter because the trial court had already denied Wallace's continuance request. He reasoned that if the trial court denied the continuance request, it would have surely denied a request to issue bench warrants for Blackmon and Carter. Greenberg also testified it never dawned on him to make the bench warrants request, if to preserve the compulsory process claim for appellate review.²¹

The PCRA court mistakenly believed Greenberg litigated this claim on direct appeal and therefore previously litigated.²² Despite finding the issue waived, the PCRA court reviewed and denied the claim, finding that the jury would not have found Blackmon's and Carter's testimony credible, based on Hasan Durant's and Anthony Harris' positive identifications.²³

On appeal, the Superior Court affirmed the PCRA court's rejection of this claim, but on different grounds, holding that this ineffectiveness claim had

²⁰ NT, PCRA Hrg., 1/20/2015, pp. 109-130, 161-185.

²¹ NT, PCRA Hrg., 1/20/2015, pp. 210-262.

²² Ex. 12, p. 7 n.3.

²³ Ex. 12, pp. 5-9.

“arguable merit” and that Greenberg “*should have requested a bench warrant... because Carter and Blackmon were subpoenaed.*”²⁴ According to the Superior Court, because Blackmon’s and Carter’s “testimony would have directly contradicted the testimony of the two primary Commonwealth witnesses,” *i.e.*, Durant and Harris, “there was a factual dispute regarding identification that would have been for the jury to resolve.”²⁵ The Superior Court said the PCRA court “incorrectly assume[d] the jury would find Carter’s and Blackmon’s testimony incredible.”²⁶

Despite finding that Blackmon’s and Carter’s testimony would have “directly contradicted” Durant’s and Harris’ testimony, the Superior Court ruled that Greenberg “pursued a reasonable trial strategy with respect [to] Carter and Blackmon based on the circumstances of the case”²⁷ and held that Greenberg was “correct to infer that the [trial] court would not grant them even more additional time to procure a bench warrant and that such an attempt would be futile.”²⁸ The Superior Court then mentioned its rejection of the continuance claim on direct appeal stating, “Because the trial court was so decisive in its decision to move the case forward and [the direct appeal] panel determined the trial court did not abuse its discretion with regard to this action, we cannot conclude that [Mr.] Baxter’s

²⁴ Ex. 1, p. 17 (emphasis added).

²⁵ Ex. 1, p. 17.

²⁶ Ex. 1, p. 17 n.10.

²⁷ Ex. 1, p. 18.

²⁸ Ex. 1, p. 18.

counsel was ineffective for failing to also pursue a bench warrant as it would have been considered a non-meritorious or frivolous claim.”²⁹ By finding Greenberg had a “reasonable trial strategy,” the Superior Court never addressed whether Blackmon’s and Carter’s testimony would have undermined confidence in Mr. Baxter’s conviction.

Based on these facts, Mr. Baxter presents two interrelated questions:

1. When trial counsel knows that his two subpoenaed eyewitnesses, who will “directly contradict” the eyewitness testimony of the Commonwealth’s “primary” witnesses, fail to appear at court to testify on the defendant’s behalf due to a reasonable misunderstanding, does trial counsel have an obligation under the Sixth Amendment of the U.S. Constitution and Article 1, § 9 of the Pennsylvania Constitution to vindicate the defendant’s compulsory process rights under the Sixth Amendment of the U.S. Constitution and Article 1, § 9 of the Pennsylvania Constitution, by requesting bench warrants for the two subpoenaed eyewitnesses to compel their favorable testimony on the defendant’s behalf, even if it is evident from the trial court’s previous “decisive” rulings that the trial court would deny the bench warrants request?

2. If defense counsel is fairly certain the trial court will deny or overrule a motion, request, or objection, yet defense counsel firmly believes, based on his experience and professional judgment, the motion, request, or objection is meritorious, does the Sixth Amendment of the U.S. Constitution and Article 1, § 9 of the Pennsylvania Constitution require defense counsel to file the motion or make the request or objection to preserve the underlying substantive or procedural claim for appellate review?

Question #3

In June 2008, Rachel Marcelis testified as a key Commonwealth witness in *Commonwealth v. Cordell Young*, CP-51-CR-0013578-2007, a murder prosecution

²⁹ Ex. 1, p. 19.

regarding Fatima Whitfield's April 21, 2007 murder. Whitfield's murder occurred during the early morning hours of April 21, 2007, while Demond Brown's occurred later that afternoon. In a May 2, 2007 statement to detectives, Marcelis told detectives she knew Mr. Baxter and McBride were the gunmen who shot and killed Brown and she knew McBride's older brother, Cordell Young shot and killed Fatima Whitfield. Marcelis dated Young off-and-on before the Whitfield's homicide. Thus, Marcelis' May 2, 2007 statement discussed both murders.³⁰

In terms of Whitfield's murder, Marcelis said she, Mr. Baxter, and McBride attended a party on the night of April 20, 2007. Antonio Pemberton threw the party at the 15th Street and Allegheny Street apartment he had been squatting at for several weeks. Marcelis said she, Mr. Baxter, and McBride spent the night at Pemberton's apartment and all three left together the morning of April 21, 2007. Ten to fifteen minutes after they left, Cordell Young called McBride and told him Whitfield had been shot and killed at Pemberton's apartment. Marcelis, Mr. Baxter, and McBride returned to 15th Street and Allegheny Street and picked up Young, who supposedly confessed to them that he had accidentally shot Whitfield.³¹

³⁰ Ex. 14.

³¹ Ex. 14.

In terms of Brown's murder, Marcelis said later that afternoon she was with Mr. Baxter, McBride, and Darryl Mack in her white SUV shortly before the shooting, when Mr. Baxter and McBride asked her to drop them off near the basketball courts. Marcelis obliged and minutes later heard gunshots before seeing Mr. Baxter and McBride running toward her SUV with a group of people. Mr. Baxter and McBride got into her SUV and made incriminating statements regarding Brown's murder while she drove them from the scene.³² Despite the fact Marcelis allegedly served as an accessory-after-the-fact for both murders, the Commonwealth never charged her in connection with either murder. Instead, the Commonwealth gave Marcelis immunity for both murders in exchange for her testimony against Cordell Young, Mr. Baxter, and McBride.

At Cordell Young's June 2008 murder trial, Marcelis repeatedly told the prosecutor that her May 2, 2007 statement was false. Marcelis testified under oath that she had falsely implicated Cordell Young because detectives would not allow her to leave Homicide until she gave a statement and because she was mad at Young at the time. Marcelis agreed with the prosecutor that she had "kill[ed] two bird with one stone" by fabricating a statement falsely implicating Young. The false statement allowed Marcelis to leave homicide and get back at Young.³³ The transcripts from Young's trial were filed with the Common Pleas Court in October

³² Ex. 14.

³³ NT, Cordell Young Trial, 6/10/2008, at 194-196, 199, 201, 207-208, 221-222. Marcelis' testimony from Cordell Young's trial is attached as Ex. 15.

2008–three months before Mr. Baxter’s trial. Greenberg never obtained and reviewed the transcripts.

In contrast, at Mr. Baxter’s trial, Marcelis testified that her May 2, 2007 statement was now true, contradicting her testimony from Cordell Young’s trial. Also, Marcelis’ narrative as to what occurred the morning and afternoon of April 21, 2007 was inconsistent with the narrative she gave at Cordell Young’s trial. According to Marcelis’ testimony at Mr. Baxter’s trial, shortly before the shooting, she was driving in her SUV with Darryl Mack, Mr. Baxter, and McBride. Mack sat in the front passenger seat, while Mr. Baxter and McBride sat in the back.³⁴

Marcelis testified on direct that she had been driving past Kenderton Elementary School when either Mr. Baxter or McBride made a “generalized statement” about seeing someone on the basketball courts. One or both then asked Marcelis to drive around the block so they could double-check and confirm whom they thought they saw.³⁵ After driving around the block, and confirming their sighting of this person, Marcelis dropped off Mr. Baxter and McBride on the 15th Street side of the basketball courts. Marcelis said the basketball courts were to her left when Mr. Baxter and McBride exited her SUV.³⁶ When they exited,

³⁴ NT, Trial, 1/30/2009, pp. 116-117.

³⁵ NT, Trial, 1/30/2009, pp. 118, 120, 122.

³⁶ NT, Trial, 1/30/2009, pp. 120, 122. This is impossible because 15th Street in a one-way street running north to south, meaning if Marcelis dropped them off on 15th Street, the basketball courts would have been to her *right*.

Marcelis said it was no one's plan to have her serve as the getaway driver because there was no plan to shoot and kill Demond Brown.³⁷

Marcelis drove south on 15th Street toward Allegheny Avenue.³⁸ After crossing over Ontario Street heading south toward Westmoreland Street, Marcelis saw fifty or more people, including Mr. Baxter and McBride, in her rearview mirror running from the basketball courts toward her SUV.³⁹

After Mr. Baxter and McBride jumped into her SUV, a large group of people ran past her SUV, making no attempt to stop the gunmen from driving away.⁴⁰ Once back in the SUV, McBride supposedly said "his gun didn't work, [and] that he couldn't get any rounds off."⁴¹ Marcelis then drove to Mack's aunt's house on Broad Street.⁴² They were there for less than an hour before Marcelis drove Mr. Baxter and McBride to Wilkes-Barre, before returning to Philadelphia by herself two days later on April 23, 2007.⁴³ Greenberg did not impeach Marcelis with her prior inconsistent testimony from Young's trial because Greenberg never obtained and reviewed these transcripts.

³⁷ NT, Trial, 1/30/2009, p. 133.

³⁸ NT, Trial, 1/30/2009, p. 118.

³⁹ NT, Trial, 1/30/2009, pp. 118, 120, 122-123, 133.

⁴⁰ NT, Trial, 1/30/2009, p. 135.

⁴¹ NT, Trial, 1/30/2009, p. 123.

⁴² NT, Trial, 1/30/2009, pp. 122-124.

⁴³ NT, Trial, 1/30/2009, pp. 125-126.

In his September 23, 2011 PCRA petition, Mr. Baxter alleged, “Petitioner seeks a new trial based upon several independent errors of trial counsel, trial court, and prosecutor, standing alone, would entitle him relief. These claims are addressed within.”⁴⁴ On the following page, under the section titled, “Facts in Support of Alleged Errors,” Mr. Baxter made numerous factual allegations in support of his this global claim, including:

3A. Prosecutor withheld evidence of Rachel Marcelis’ immunity agreement and prior inconsistent testimony.

4A. Trial counsel did not discover that Rachel Marcelis was given immunity in regards to the incident and gave a [sic] prior inconsistent testimony.

5A. Prosecutor presented Rachel Marcelis’ testimony while knowing it to be perjured.⁴⁵

In his fourth claim under the section titled “Asserted Matters for Argument,” Mr. Baxter alleged, “Trial counsel violated appellant’s constitution amendment 6 [sic], right to effective counsel, for failing to interview, investigate, and discover that Rachel Marcelis gave a prior inconsistent statement and was given immunity.”⁴⁶ In the argument section of the fourth claim, Mr. Baxter specifically alleged Greenberg was ineffective for failing to obtain Marcelis’ testimony from Young’s trial and to impeach her with her prior inconsistent testimony.⁴⁷ Mr.

⁴⁴ Ex. 4, p. 1a.

⁴⁵ Ex. 4, p. 2a.

⁴⁶ Ex. 4, p. 22.

⁴⁷ Ex. 4, p. 26-27, 29-31.

Baxter even cited to the Cordell Young's transcripts because he had obtained and read them before preparing and filing his September 23, 2011 PCRA petition.

On November 2, 2012, Gary Server was appointed to represent Mr. Baxter. On September 24, 2013, Server filed a four-page, three claim (counseled) amended PCRA petition.⁴⁸ One of the three claims briefed in Server's amended PCRA petition was, "The Petitioner's Fourteenth Amendment constitutional right to due process was denied where the Commonwealth failed to disclose that Rachel Marcelis had been given immunity for her testimony which she disclosed at a prior trial for the co-defendant."⁴⁹ Server did not mention or brief Mr. Baxter's claim regarding Greenberg's failure to impeach Marcelis with her prior inconsistent testimony from Young's trial.

After receiving Server's amended PCRA petition, Mr. Baxter filed a motion to proceed *pro se* on November 13, 2013, alleging Server refused to "argue meritorious issues" raised in his PCRA petition.⁵⁰ At a June 9, 2014 *Grazier* hearing, the PCRA court permitted Mr. Baxter to proceed *pro se*.⁵¹ On September 8, 2014, Mr. Baxter filed his "*Uncounseled*" *Pro Se Supplemental Petition and Consolidated Memorandum of Law*. In his first claim, Mr. Baxter again alleged, "Trial counsel

⁴⁸ Ex. 7.

⁴⁹ Ex. 7, pp. 2, 3-4. Server obviously got the facts wrong because Cordell Young was *not* Mr. Baxter's co-defendant. Cordell Young, as mentioned, was tried and convicted for an entirely separate murder that occurred the morning of April 21, 2007.

⁵⁰ Ex. 8, p. 1.

⁵¹ Ex. 9.

violated Constitution Amendment 6 [sic], effective assistance of counsel and right to confrontation, by failing to cross-examine and impeach Rachel Marcelis' testimony regarding immunity given by the Commonwealth and prior inconsistent statement[sic]."⁵² Mr. Baxter then argued why Greenberg was ineffective for not impeaching Marcelis with her immunity agreement *and* prior inconsistent testimony at Young's trial.⁵³

On November 21, 2014, the PCRA court granted Mr. Baxter a PCRA hearing on two ineffectiveness issues, one being whether Greenberg was ineffective for not impeaching Marcelis based on her immunity agreement with the Commonwealth. The PCRA court never mentioned the part of the ineffectiveness claim regarding Greenberg's failure to impeach Marcelis with her prior inconsistent testimony at Young's trial. After the January 20, 2015 PCRA hearing, Mr. Baxter filed a *Post-Hearing Brief* and alleged, in his fourth claim, that Greenberg was ineffective for not impeaching Marcelis with her prior inconsistent testimony from Young's trial.⁵⁴

On appeal to the Superior Court, Mr. Baxter again argued Greenberg was ineffective for failing to impeach Marcelis with her prior inconsistent testimony from Cordell Young's trial. The Superior Court said this claim was "waived"

⁵² Ex. 10, p. 1.

⁵³ Ex. 10, pp. 3-9.

⁵⁴ Ex. 11, pp. 25-29.

because Mr. Baxter “fail[ed] to properly preserve” it for appellate review.⁵⁵ After reviewing the record, the Superior Court said this claim was “not contained” in Mr. Baxter’s “*amended* PCRA petition or addressed at the January 2015 PCRA hearing” and because it was not included in the *amended* petition or raised at the PCRA hearing, this claim was “not properly before the court.”⁵⁶

Based on these facts, Mr. Baxter presents the following question:

3. If a petitioner properly raises a claim in his timely *pro se* PCRA petition, but PCRA counsel does not address, brief, or incorporate this claim in or into his counseled amended PCRA petition, is the claim still properly preserved for appellate review?

Questions #4

On February 5, 2009, Greenberg missed court for a family medical reason, and asked Michael Doyle to cover for him. Doyle had only three years of civil litigation experience and no experience with criminal matters. The jury asked three questions while Greenberg was absent:

We have a few questions. Please explain the difference between 1st & 3rd degree murder. We are unclear.

Also, please explain accessory (being responsible about other persons [sic] acts -vs- conspiracy).

Also, can we have Ms. Marcelis [sic] testimony and statement to police relating to what the conversation was in the car, after they got back in [the] car.⁵⁷

⁵⁵ Ex. 1, p. 26.

⁵⁶ Ex. 1, p. 26-27. (emphasis added).

⁵⁷ NT, Trial. 2/5/2009, at 4-5.

After receiving the jury's questions, the trial court called Greenberg, who was in Baltimore at the time, and asked him if he wanted to participate telephonically when it addressed the jury. Greenberg refused and instructed Doyle to defer all decision-making to Michael Wallace, McBride's attorney. After consulting with *only* Wallace, the trial court agreed to read back the instructions for first- and third-degree murder, conspiracy, and accomplice liability,⁵⁸ but it refused to read back Marcelis' testimony or provide the jury with Marcelis' May 2, 2007 statement.⁵⁹

On March 8, 2012, Mr. Baxter filed a *Supplemental Post Conviction Petition with Consolidated Memorandum of Law*, in which he raised one claim: "Did trial counsel provide Appellant with a wholesale denial of counsel when he directed substitute counsel to defer to whatever codefendant's counsel agreed to at a critical stage of trial, supplemental jury instructions?"⁶⁰ Server briefed this claim in his (counseled) amended PCRA petition.⁶¹

On appeal to the Superior Court, Mr. Baxter again raised this claim, but the Superior Court said the claim was "not properly preserved with the PCRA court"

⁵⁸ NT, Trial, 2/5/2009, at 5-14.

⁵⁹ NT, Trial, 2/5/2009, at 17-21.

⁶⁰ Ex. 5, p. II.

⁶¹ Ex. 7, pp. 2, 3.

because Mr. Baxter “did not raise” this claim “in his PCRA petition or at the PCRA evidentiary hearing,” but instead raised this claim “for the first time on appeal.”⁶²

Based on these facts, Mr. Baxter presents the following question:

4. If Mr. Baxter raised an abandonment of counsel claim in his March 3, 2012 supplemental PCRA petition and appointed PCRA counsel raised and briefed this claim in his (counseled) amended PCRA petition, did the Superior Court abuse its discretion when it ruled that Mr. Baxter did not properly preserve this claim for appellate review?

STATEMENT OF REASONS FOR ALLOWING APPEAL

The Court should exercise its discretion and allow Mr. Baxter’s appeal for several “special and important reasons.” Pa.R.A.P. 1114(a).

First, the Superior Court’s adjudication of Mr. Baxter’s trial counsel ineffectiveness claim regarding Greenberg’s failure to request bench warrants for Gregory Blackmon and Kyle Carter “conflicts with a holding of the Pennsylvania Supreme Court or the United States Supreme Court on the same legal question[.]” Pa.R.App.P. 1114(b)(2).

Mark Greenberg knew the significance of Blackmon’s and Carter’s *exculpatory* testimony. This is evident from Greenberg’s opening brief where he challenged the trial court’s refusal to grant a continuance so he could locate Blackmon and Carter and get them to court as soon as possible. There he argued that Mr. Baxter “was prejudiced by the [trial] court’s abuse of discretion in failing to grant a continuance in order to allow him to present defense witnesses that

⁶² Ex. 1, p. 33.

would have exonerated [him].”⁶³ Greenberg added that Blackmon and Carter “were... at the playground on the date of the shooting” and “were prepared to testify that [Mr.] Baxter was not one of the individuals that shot Brown.”⁶⁴

Despite recognizing the significance and exculpatory value of Blackmon’s and Carter’s testimony, Greenberg testified at the PCRA hearing he did not request bench warrants for either simply because the trial court had already denied Wallace’s continuance request. Greenberg reasoned that if the trial court denied the continuance request, it would have surely denied a request to issue bench warrants for Blackmon and Carter. Greenberg also testified it never dawned on him to make the bench warrants request, if only for the purpose of preserving the compulsory process claim for appellate review.

On appeal, the Superior Court said Mr. Baxter’s ineffectiveness/compulsory process claim had “arguable merit” and that Greenberg “should have requested a bench warrant... because Carter and Blackmon were subpoenaed.”⁶⁵ According to the Superior Court, Blackmon’s and Carter’s “testimony would have directly contradicted the testimony of the two primary Commonwealth witnesses,” *i.e.*, Durant and Harris, creating a “factual dispute regarding identification that would have been for the jury to resolve.”⁶⁶ The Superior Court also found the PCRA court

⁶³ Ex. 3, p. 18 (emphasis added).

⁶⁴ Ex. 3, p. 19 (emphasis added).

⁶⁵ Ex. 1, at 17.

⁶⁶ *Id.*

“incorrectly assume[d] the jury would find Carter’s and Blackmon’s testimony incredible.”⁶⁷

The Superior Court’s findings demonstrate that Greenberg’s failure to request bench warrants *cannot* be considered *reasonable* trial strategy. Blackmon’s and Carter’s testimony would have “directly contradicted” Durant’s and Harris’ identifications. “[T]he *only* duty of a jury in cases in which identification evidence has been admitted will often be to assess the reliability of that evidence.” *Watkins v. Sowders*, 449 U.S. 341, 347 (1981) (emphasis in original). The jury’s accuracy determination will inevitably turn on how *credible* it finds the eyewitness. Consequently, the “jury’s estimate” of the eyewitness’s credibility “may well be determinative of guilt or innocence.” *Napue v. Illinois*, 360 U.S. 264, 269 (1959). As a result, “when the Commonwealth’s case is... dependent upon the credibility of its witnesses, trial counsel must explore the testimony of any witness... whose testimony *might cast doubt* on the testimony of the Commonwealth’s witnesses.” *Commonwealth v. Nock*, 606 A.2d 1380, 1382 (Pa. Super. 1992) (emphasis added). Stated differently, “[i]n a case where *virtually the only issue is the credibility of the Commonwealth’s witness versus that of the defendant, failure to explore all alternatives available to assure that the jury heard the testimony of a known witness who might be capable of casting a shadow upon the Commonwealth witness’s truthfulness is ineffective assistance of counsel.*” *Commonwealth v. Abney*, 350 A.2d

⁶⁷ *Id.*, at 17 n.10.

407, 410 (Pa. 1976) (quoting *Commonwealth v. Twiggs*, 331 A.2d 440, 443 (Pa. 1975)) (emphasis in original).

Even if Greenberg believed the trial court would have denied the bench warrants request, *Abney* and *Twiggs* make clear there can be no reasonable or strategic basis why Greenberg did not even attempt to make a proffer regarding the significance of Blackmon's and Carter's exculpatory testimony and did not request bench warrants based on their proffered testimony. Had the trial court denied Greenberg's bench warrant requests, Greenberg would have preserved the claim for appellate review and Mr. Baxter would have been awarded a new trial under the state and federal compulsory process case law. *Martinez v. Ryan*, 566 U.S. 1, 12 (2012) ("Effective trial counsel preserves claims to be considered on appeal.").

Remarkably, despite finding that Blackmon and Carter "directly contradicted" Durant's and Harris' identifications, and despite *Abney's* and *Twiggs's* "all alternatives available" principle, the Superior Court ruled that Greenberg pursued a "reasonable trial strategy" based on the trial court's refusal to grant Wallace's continuance request. The Superior Court's holding not only conflicts with *Strickland*, it has the very real potential of significantly weakening the fundamental right to effective trial counsel as well as other fundamental rights.

Specifically, based on the Superior Court's holding, trial judges now have the ability to substantially impact defense counsel's trial strategies. This will have a significant and adverse impact not only on a defendant's fundamental right to effective trial counsel, but also his or her right to meaningful appellate review and other fundamental constitutional protections. A simple, yet entirely foreseeable, example exposes the slippery slope created by the Superior Court's ruling.

If a trial judge has a strong tendency to summarily reject, without a hearing, the great majority of suppression motions filed in his court challenging a confession's voluntariness, members of the local defense bar will, over time, stop filing suppression motions because these attorneys are certain the trial judge will deny their motions without a hearing and admit their clients' confessions.

Based on the Superior Court's holding, any convicted defendant who files a PCRA petition alleging his trial attorney was ineffective for not filing a suppression motion and requesting a pre-trial suppression hearing to determine the voluntariness of his confession, would automatically lose based on defense counsel's reasoning that they quote unquote "knew" that that trial judge would summarily reject the suppression motion.

In this scenario, the Superior Court's holding not only minimizes a defendant's fundamental right to effective trial counsel, it also *eviscerates* his self-incrimination and appellate review rights. In terms of appellate review, the

defendants in these hypothetical cases could not raise a Fifth Amendment claim on direct appeal because defense counsel never challenged the voluntariness of his confession. Pa.R.A.P. 302(a) (issues not raised before the trial court are waived).

Thus, if the defendants want their Fifth Amendment claims reviewed, they would be forced to raise trial counsel ineffectiveness claims during PCRA proceedings, alleging trial counsel was ineffective for not litigating a meritorious Fifth Amendment claim. Even so, if defense counsel did not file a suppression motion because he knew the trial judge routinely denied suppression motions, and therefore would have likely denied his motion, the merits of the *underlying* Fifth Amendment claim would never be *completely* reviewed by a court because defense counsel's reasoning for not filing a suppression motion would be considered a reasonable trial strategy.⁶⁸

In other words, even if the underlying Fifth Amendment claim is meritorious and the defendant's illegally admitted confession prejudiced him at trial, the defendant cannot obtain relief based on the Superior Court's reasoning: If trial counsel had a "reasonable trial strategy" for not filing a suppression motion, trial counsel's decision not to file the suppression motion cannot be considered deficient performance. According to the Superior Court's reasoning, it is

⁶⁸ Counsel emphasized the word "completely" because, like here, while the reviewing court will do an initial "arguable merit" analysis, if the court finds a "reasonable basis" for trial counsel's decision not to file a suppression motion, the reviewing court will never address the prejudice issue.

“reasonable” for defense counsel not to file a suppression motion when he is fairly certain the trial judge will deny the motion, regardless of whether the motion’s underlying substantive or procedural issue is meritorious.

This situation is not limited to Fifth Amendment claims and could be applied to every type of motion, objection, argument and decision trial counsel files, makes, and presents before the trial court and it would impact every state and federal statutory and constitutional right afforded to criminal defendants. Consequently, the Superior Court’s opinion not only conflicts with *Strickland*, it requires this Court’s “prompt and definitive resolution” because the question presented “is one of such substantial public importance[.]” Pa.R.A.P. 1114(b)(4).

Second, the Superior Court “so abused its discretion” that this Court must intervene and exercise its “supervisory authority.” Pa.R.A.P. 1114(b)(6). The Superior Court held that two of Mr. Baxter’s trial counsel claims were waived because Mr. Baxter did not properly preserve them. The record clearly proves the Superior Court abused its discretion as its waiver findings were manifestly unreasonable because they have no basis in fact or the record. *Commonwealth v. Jones*, 826 A.2d 900, 907 (Pa. Super. 2003). Mr. Baxter unequivocally and repeatedly raised the claim regarding Greenberg’s failure to impeach Marcelis with her prior inconsistent testimony from Young’s trial. Mr. Baxter cited to the Young trial transcripts in both his September 23, 2011 PCRA petition and September 8, 2014

supplemental PCRA petition.⁶⁹ Despite citing to Young’s trial transcripts and thoroughly explaining why Greenberg was ineffective for not impeaching Marcelis with them, the Superior Court found this claim waived because it was “not contained in [Mr.] Baxter’s *amended* PCRA petition or addressed at the January 2015 PCRA hearing.”⁷⁰

The fact Server may not have raised or briefed this claim in his (counseled) amended PCRA petition does not mean Mr. Baxter withdrew or abandoned this claim. In fact, immediately after receiving Server’s amended PCRA petition, Mr. Baxter filed a *Grazier* motion because Server failed to raise and brief “meritorious issues” in his September 23, 2011 PCRA petition. Mr. Baxter has, from day one, recognized the significance of this issue and always pursued it due to Marcelis’ inconsistent testimony at his and Young’s trials.

The Superior Court made the same mistake regarding Mr. Baxter’s abandonment of counsel claim. In his March 8, 2012 supplemental PCRA petition, Mr. Baxter raised one claim, alleging Greenberg abandoned him during a “critical stage” of his trial when Greenberg refused to appear in person or telephonically on February 5, 2009 when the trial court addressed the jury regarding its three questions.⁷¹ Despite Mr. Baxter’s properly filed March 8, 2012 supplemental petition, the Superior Court found the claim “not properly preserved with the

⁶⁹ Ex. 4, pp. 2a, 4a, 26-27, 29-31; Ex. 10.

⁷⁰ Ex. 1, p. 26 (emphasis added).

⁷¹ Ex. 5.

PCRA court” because Mr. Baxter “did not raise” the claim “in his PCRA petition” or “at the PCRA evidentiary hearing,” rather Mr. Baxter “raised” this claim “for the first time on the appeal.”

REASONS FOR ALLOWING APPEAL

I. THE SUPERIOR COURT’S LEGAL CONCLUSION THAT MARK GREENBERG HAD A REASONABLE TRIAL STRATEGY NOT TO REQUEST BENCH WARRANTS FOR GREGORY BLACKMON AND KYLE CARTER CONFLICTS WITH *STRICKLAND* AND *PIERCE*

A. The Duty to Explore and Use All Available Alternatives to Assure the Jury Hears Testimony from Witnesses Capable of Casting Doubt on the Accuracy and/or Truthfulness of the Commonwealth’s Primary Witnesses

When the Commonwealth’s case “is... dependent upon the credibility of its witnesses, trial counsel must explore the testimony of any witness... whose testimony *might cast doubt* on the testimony of the Commonwealth’s witnesses.” *Commonwealth v. Nock*, 606 A.2d at 1382 (emphasis added). Which is why “[i]n a case where virtually the only issue is the credibility of the Commonwealth’s witness versus that of the defendant, failure to explore all alternatives available to assure that the jury heard the testimony of a known witness who might be capable of casting a shadow upon the Commonwealth witness’s truthfulness is ineffective assistance of counsel.” *Commonwealth v. Abney*, 350 A.2d at 410 (emphasis in original); *Commonwealth v. Twiggs*, 331 A.2d at 443.

The Commonwealth's case depended primarily on Durant's, Harris', and Marcelis' credibility. If the jury found Durant's and Harris' identifications accurate and credible, the jury could then use this credibility finding to find Marcelis' testimony credible, *i.e.*, if Durant and Harris correctly identified the gunmen as Mr. Baxter and McBride, Marcelis' testimony must be true.

Based on Greenberg's direct appeal brief, he knew the Commonwealth's case hinged entirely on Durant's, Harris', and Marcelis' credibility which is why he challenged the trial court's refusal to grant a continuance. Greenberg knew Blackmon's and Carter's exculpatory testimony was "capable of casting a shadow upon the truthfulness" of Durant's, Harris', and Marcelis' testimony. *Commonwealth v. Abney*, 350 A.2d at 410; *Commonwealth v. Twiggs*, 331 A.2d at 443. As a result, Greenberg had a duty to utilize "all alternatives available to assure that the jury heard" Blackmon's and Carter's exculpatory testimony, which would have included exercising Mr. Baxter's compulsory process rights by requesting bench warrants for Blackmon and Carter. *Id.*

B. Reasonable Trial Strategy

The Superior Court said Greenberg should have requested bench warrants because Blackmon's and Carter's testimony "directly contradicted" Durant's and Harris' identifications. Despite this finding, the Superior Court said Greenberg's decision not to request bench warrants was a "reasonable trial strategy" because

the trial court had already denied the continuance request and Greenberg felt certain it would deny a bench warrant request. The Superior Court's "reasonable basis" analysis is wrong and conflicts with *Strickland* and this Court's trial counsel ineffectiveness jurisprudence.

To prevail on an ineffectiveness claim, Mr. Baxter must demonstrate that trial counsel performed deficiently and the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). 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." *Strickland v. Washington*, 466 U.S. at 687. The prejudice prong requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome." *Id.* at 694.

Under state law, a petitioner must show: (1) the underlying legal claim is of arguable merit, (2) counsel's action or inaction lacked any objectively reasonable basis designed to effectuate his client's interest, and (3) prejudice. *Commonwealth v. Pierce*, 527 A.2d 973, 975-976 (Pa. 1987). Though slightly different, *Pierce* and *Strickland* are substantively the same. *Commonwealth v. Spatz*, 870 A.2d 822, 829 (Pa. 2005).

When assessing whether trial counsel had a “reasonable basis” for his act or omission, the question is not whether there were other courses of action available, but rather “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).

Greenberg’s decision not to request bench warrants was *not* “designed to effectuate” Mr. Baxter’s compulsory process, effective counsel, and fair trial interests. *Commonwealth v. Williams*, 141 A.3d at 463. Likewise, Greenberg’s decision did not and could not “advance and protect” Mr. Baxter’s compulsory process, effective counsel, and fair trial interests. *Commonwealth v. Dunbar*, 470 A.2d at 77. To the contrary, Greenberg’s decision extinguished his compulsory process interest and significantly impaired his effective counsel and fair trial interests. In the end, Greenberg’s decision was designed to “advance and protect” *his own interests*, not Mr. Baxter’s. Greenberg simply did not want to be rejected

by the trial court in open court, like Wallace when he requested a continuance. Greenberg saw and heard how the trial court reacted to Wallace's request and he did not want to be on the other end of another tongue lashing by the trial court.

Lastly, the "alternative not chosen," *i.e.*, requesting bench warrants for Blackmon and Carter, "offered a potential for success substantially greater than the course actually pursued." *Commonwealth v. Howard*, 719 A.2d at 237. Indeed, the Superior Court's finding that Greenberg "should have requested" bench warrants proves this very point.⁷² If Greenberg "should have requested" bench warrants, then he "should have requested" bench warrants. End of story. It is illogical to say, in one breath, that counsel "should have" done something on his client's behalf, but then, in a second breath, find that trial counsel "did not have to do" what it "should have" in the first place.

Greenberg "should have" requested bench warrants because the likelihood of an acquittal would have been "substantially greater" had the jury heard Blackmon's and Carter's exculpatory testimony because, as illustrated below, their testimony "directly contradicted" several critical aspects of Durant's and Harris' identifications:

⁷² Ex. 1, p. 17.

| Harris/ Durant | Carter/ Blackmon |
|--|--|
| 1. The gunmen’s hoods did not cover their faces. | 1. The gunmen’s hoods were pulled tightly around their heads, making it impossible to see their faces. |
| 2. Harris and Durant didn’t run, but stared at the gunmen throughout the shooting. | 2. Everyone ran from the schoolyard; no one stood and watched the gunmen. |
| 3. Harris and Durant both immediately recognized Mr. Baxter as one of the gunmen. | 3. Both gunmen were 6’1” or taller, meaning neither could be Mr. Baxter. |
| | 4. When Blackmon and Carter returned to the courts several minutes after the shooting, they saw and heard Harris accuse Malik Ware of being one of the gunmen. |

Even if the trial court denied Greenberg’s request, the compulsory process case law supported Mr. Baxter’s bench warrant argument. Again, the Superior Court’s finding that Greenberg “should have” requested bench warrants proves this point. If the compulsory process case law did *not* support Mr. Baxter’s bench warrant argument, the Superior Court would have ended its analysis at the “arguable merit” prong; it did not. Rather, it said Mr. Baxter’s claim had “arguable merit” and said Greenberg “should have” requested bench warrants, meaning the Superior Court found Blackmon’s and Carter’s testimony “material” *and* “capable of affecting the outcome of [Mr. Baxter’s] trial.” Ex. 1, p. 11 (quoting *Commonwealth v. McKenzie*, 581 A.2d 655, 657 (1990) (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982))).

Consequently, even if the trial court denied Greenberg's request, Greenberg would have preserved a meritorious issue for direct appeal, which is what "effective trial counsel" is constitutionally obligated to do in these situations. *Martinez v. Ryan*, 566 U.S. at 12 ("Effective trial counsel preserves claims to be considered on appeal."). Greenberg's ineffectiveness, therefore, adversely impacted Mr. Baxter's trial *and* direct appeal.

In short, Greenberg's decision not to request bench warrants was objectively unreasonable and prejudicial. There is a reasonable probability the outcome of Mr. Baxter's trial would have been different had Blackmon and Carter both told the jury (1) Mr. Baxter could not have been either of the gunmen because both were much taller than Mr. Baxter and (2) Harris actually identified someone other than Mr. Baxter and McBride, *i.e.*, Malik Ware, only minutes after the shooting and before identifying Mr. Baxter. Both facts would have significantly undermined Durant's and Harris' identifications, which in turn would have impacted the jury's assessment of Marcelis' credibility and believability, *i.e.*, if Mr. Baxter cannot be either of the gunmen, as Blackmon and Carter testified, then Marcelis must be lying and is not credible. Consequently, in the absence of Blackmon's and Carter's exculpatory testimony, this Court can have no confidence in Mr. Baxter's conviction warranting a new trial.

Accordingly, because the Superior Court’s “reasonable basis” analysis conflicts with *Strickland* and *Pierce* and because the absence of Blackmon’s and Carter’s testimony undermines confidence in his conviction, Mr. Baxter respectfully requests the Court to grant his appeal so it can thoroughly review the Superior Court’s legal analysis and determine, *de novo*, that Greenberg did *not* have a “reasonable basis” for not requesting bench warrants.

II. THE SUPERIOR COURT ABUSED ITS DISCRETION BECAUSE IT ERRONEOUSLY FOUND TWO CLAIMS NOT PROPERLY PRESERVED, WHEN THESE CLAIMS WERE, IN FACT, TIMELY AND PROPERLY RAISED AND PRESERVED BEFORE THE PCRA COURT

A. Mr. Baxter's Ineffectiveness Claim Regarding the Failure to Impeach Rachel Marcelis with Her Prior Inconsistent Testimony From Cordell Young's Trial

Contrary to the Superior Court's finding, Mr. Baxter timely and properly raised this claim in his September 23, 2011 PCRA petition.⁷³ Mr. Baxter titled claim 4, "Trial counsel violated appellant's constitution amendment 6 [sic], right to effective assistance, for failing to interview, investigate, and discover that Rachel Marcelis gave a prior inconsistent statement and was given immunity,"⁷⁴ and alleged, "Trial counsel prejudiced Appellant *for not investigating Marcelis to discover her prior inconsistent testimony at Cordell Young's trial* and the fact she was given immunity which would have contradicted her testimony and attached her credibility."⁷⁵

Mr. Baxter raised the identical claim in his September 8, 2014 supplemental PCRA petition.⁷⁶ In the facts/argument section of this claim, Mr. Baxter alleged,

Regarding Marcelis' prior inconsistent statement, pr[ior] to Appellant's trial[,] Marcelis testif[ied] at Cordell Young's (CP-51-CR-0013578-2007) on June 10, 2008. The relationship between Cordell Young's trial and Appellant's trial is the [May 2, 2007] statement given to

⁷³ Ex. 4, pp. 2a, 4a, 22, 26-27, 29-31.

⁷⁴ Ex. 4, p. 22.

⁷⁵ Ex. 4, p. 22 (emphasis added)

⁷⁶ Ex. 10.

Philadelphia detectives from Marcelis which contains here statement regarding both incidents. At Young's trial[,] the record reflects Marcelis' testimony to be contrary to her testimony at Appellant's trial, which constitutes a prior inconsistent statement... In the present matter this prior inconsistent statement could have indeed been used as impeachment evidence as well as substantive evidence. Marcelis' prior inconsistent statement was made under oath at a prior legal proceeding and counsel was aware of this evidence. Had counsel attacked Marcelis' credibility with this evidence, casting doubt on this witness's truth and veracity, the outcome of the proceedings would have surely been different.⁷⁷

The Superior Court, therefore, "so abused its discretion as to call for the exercise of... [this] Court's supervisory authority[.]" Pa.R.A.P. 1114(6).

This *meritorious* claim was properly preserved. Undermining Marcelis' testimony and credibility would have called into question Harris' and Durant's identifications. If the jury had doubts or concerns with their identifications, Marcelis' testimony eliminated them. The same can be said regarding Marcelis' testimony. If the jury had doubts or concerns with her testimony, Harris' and Durant's identifications eliminated them.

For instance, based on Marcelis' testimony, a crowd of people from the basketball courts ran alongside Mr. Baxter and McBride as they made their way toward her SUV running south on 15th Street toward Westmoreland Street, yet no one reported running alongside the gunmen or seeing them get into a large white

⁷⁷ Ex. 10, pp. 3-4.

SUV.⁷⁸ Officer Donald West, the first responding officer, who heard the gunshots from 16th Street and Ontario Street, did not see a white SUV or people running in the direction Marcelis claimed they were running.⁷⁹ Harris' and Durant's identifications, however, mooted any doubts these inconsistencies likely created.

In short, Marcelis' testimony had a symbiotic relationship with Harris' and Durant's testimony because, individually, they had a hard time proving guilt beyond a reasonable doubt, but, collectively, they made each other's testimony stronger and more convincing. Consequently, it was imperative for Greenberg to develop and present evidence capable of undermining Marcelis' credibility, and there was no better way to do this than to impeach her with her prior inconsistent testimony from Cordell Young's trial.

Marcelis repeatedly testified at Young's trial that her May 2, 2007 statement was false and that she lied to detectives because detectives used coercive interrogation tactics on her for thirty-six hours. Marcelis testified she finally broke down and concocted a statement out of thin air so detectives would let her go home. Marcelis also said she falsely implicated Cordell Young, *her on-again, off-again boyfriend*, because she was mad at him at the time.⁸⁰

⁷⁸ NT, Trial, 1/30/2009, at 134.

⁷⁹ NT, Trial, 1/30/2009, at 169-178.

⁸⁰ Ex. 14.

Accordingly, if detectives coaxed and coerced Marcelis to falsely implicate Cordell Young in connection with Fatima Whitfield's murder, detectives surely could have coaxed and coerced her to falsely implicate two other people in connection with Demond Brown's murder, *i.e.*, Mr. Baxter and McBride. If Marcelis could so easily fabricate a false narrative regarding Fatima Whitfield's homicide to protect her *own* interests, then logically, there is no doubt she could have easily done the same thing to Mr. Baxter and McBride in connection with Demond Brown's homicide. McBride, moreover, is Cordell Young's younger brother. If Marcelis was so angry with Cordell Young that she did not think twice about falsely implicating him in a murder case, Marcelis' anger could have easily extended to Young's siblings and family members, including McBride, as well as Young's and McBride's friends, including Mr. Baxter.

Had the jury known Marcelis was this vindictive, selfish, and heartless, the jury would have viewed her testimony with much greater skepticism and afforded it far less weight and credibility. This, in turn, would have cast doubt on Durant's and Harris' identifications. Thus, had Greenberg impeached Marcelis with her prior inconsistent testimony from Young's trial, there is a reasonable probability the outcome of Mr. Baxter's trial would have been different.

B. Mr. Baxter's Abandonment of Counsel Claim

Contrary to the Superior Court's finding, Mr. Baxter timely and properly raised this claim in his March 8, 2012 supplemental PCRA petition.⁸¹ Indeed, the sole claim raised in this petition is the abandonment of counsel claim.⁸² Moreover, Gary Server briefed this claim in his (counseled) amended PCRA petition.⁸³ The Superior Court, therefore, "so abused its discretion as to call for the exercise of... [this] Court's supervisory authority[.]" Pa.R.A.P. 1114(6).

This *meritorious* claim was properly preserved. Mr. Baxter had a right to have counsel present at all "critical stages" of his trial. *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). A "critical stage" is one that holds "significant consequences for the accused," *Bell v. Cone*, 535 U. S. 685, 696 (2002); accord *Mempa v. Rhay*, 389 U.S. 128, 135 (1967), like when the trial court has the "opportunity" to "exercise... judicial discretion" or when "certain legal rights may be lost if not exercised at that stage." *Commonwealth v. Johnson*, 828 A.2d 1009, 1014 (Pa. 2003). Counsel's presence "is essential" during these "critical stages" because "they are the means through which" their client can vindicate those trial rights afforded to them under the U.S. and Pennsylvania Constitutions. *United States v. Cronin*, 466 U.S. 648, 653 (1984).

⁸¹ Ex. 5.

⁸² Ex. 5, p. 1.

⁸³ Ex. 7, pp. 2-3.

If trial counsel is “totally absent” from a critical stage, prejudice is presumed, *United States v. Cronin*, 466 U.S. at 659 n.25, because prejudice, in these situations, is “so likely” that the “cost of litigating” the effect of trial counsel’s complete absence “is unjustified.” *Id.* at 658. The Court may also presume prejudice if trial counsel “entirely fails to subject the prosecution’s case to meaningful adversarial testing.” *Id.* at 659; accord *Bell v. Cone*, 535 U.S. at 695.

The trial court’s jury instructions represent a critical stage, *Commonwealth v. Johnson*, 828 A.2d at 1014, because trial courts have broad discretion in phrasing their charges, *Commonwealth v. Hawkins*, 701 A.2d 492, 511 (Pa. 1997), and trial counsel “may object to the instructions or suggest an alternative wording.” *Commonwealth v. Johnson*, 828 A.2d at 1014. Moreover, “[r]egardless of whether the instructions were initial, supplemental, or reiterative,” counsel’s total absence “when the jury is being instructed on the law of the case impugns the fairness and impartiality of the trial itself.” *Id.* at 1014. Jury deliberations also constitute a critical stage, *Commonwealth v. D’Amato*, 856 A.2d 806, 822 (Pa. 2004), “when communications between the trial court and the jury... become necessary, including instances in which the jury has questions, requests, or considers itself deadlocked.” *Commonwealth v. Williams*, 959 A.2d 1272, 1280 (Pa. Super. 2008).

Greenberg was “totally absent,” *United States v. Cronin*, 466 U.S. at 659 n.25, on February 5, 2009 during a “critical stage,” *i.e.*, when the trial court received and addressed the jury’s three questions, *Commonwealth v. Johnson*, 828 A.2d at 1014, *Commonwealth v. Williams*, 959 A.2d at 1280, meaning prejudice is presumed. *United States v. Cronin*, 466 U.S. at 659 n.25. Greenberg’s standby counsel, Michael Doyle, did not eliminate the constitutional violation or the presumption of prejudice.

First, Doyle never entered his appearance and this Court “do[es] not approve of an attorney sending stand-in counsel, whose appearance has not been entered, to represent his or her client during criminal proceedings[.]” *Commonwealth v. D’Amato*, 518, 856 A.2d at 823. *Second*, Doyle never consulted with Mr. Baxter, never read the discovery, including Marcelis’ May 2, 2007 statement, and had no criminal law experience “whatsoever.”⁸⁴ Because Doyle (1) knew nothing about Mr. Baxter’s case, (2) only had three years of legal experience, (3) *none of which concerned criminal matters*, and (4) Greenberg specifically instructed him not to act on Mr. Baxter’s behalf, but to defer all questions to McBride’s attorney, it was impossible for Doyle to provide the “assistance of counsel” envisioned and required under the U.S. and Pennsylvania Constitutions.

⁸⁴ NT, Trial, 2/5/2009, at 16.

Consequently, despite Doyle's presence in court on February 5, 2009, Greenberg was still "totally absent" from a "critical stage" of Mr. Baxter's trial and prejudice must be presumed.

CONCLUSION

WHEREFORE, Mr. Baxter respectfully requests this Court to exercise its discretion and allow his appeal so it can review the Superior Court's November 17, 2016 opinion and grant the relief entitled to Mr. Baxter.

Respectfully submitted this the 17th day of December, 2016.

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CERTIFICATE OF SERVICE

On December 17, 2016, counsel e-filed Mr. Baxter's *Petition for Allowance of Appeal* ("PAA") via PAC-File. Once e-filed the Commonwealth received email notification of the filing as well as PDF copy of Mr. Baxter's PAA.

CERTIFICATE OF COMPLIANCE

Pursuant to Pa.R.A.P. 1115(f), counsel certifies Mr. Baxter's PAA is under 9,000 words.

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

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

ARMEL J. BAXTER

Appellant

No. 1277 EDA 2015

Appeal from the PCRA Order March 4, 2015
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0013121-2007

BEFORE: FORD ELLIOTT, P.J.E., OTT, J., and MUSMANNO, J.

MEMORANDUM BY OTT, J.:

FILED NOVEMBER 17, 2016

Armel J. Baxter appeals the order entered March 4, 2015, in the Philadelphia County Court of Common Pleas, dismissing his first petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541 *et seq.* Baxter seeks relief from the judgment of sentence of life imprisonment imposed on February 5, 2009, after a jury found him guilty of first-degree murder, criminal conspiracy, and possession of an instrument of crime ("PIC").¹ On appeal, he raises multiple ineffective assistance of counsel claims. For the reasons that follow, we affirm.

¹ 18 Pa.C.S. §§ 2502(a), 903(a)(1), and 907(a), respectively.

The facts underlying Baxter's convictions were recited, as follows, in the decision by this Court affirming his judgment of sentence on direct appeal:

On April 21, 2007, approximately twenty (20) to fifty (50) people were in the Kenderton Elementary playground. Demond Brown (decedent/victim, also identified on the record as "Demond") had recently finished a game of basketball and was standing on the sideline. The decedent's cousin, Anthony Harris (also identified on the record as "Tony"), and best friend, Hassan Durant, were standing on the basketball court.

[Baxter]¹ and Jeffrey McBride² were in the backseat of their friend Rachel Marcelis' car, driving to their friend Daryl Mack's (also identified on the record as "Mack") aunt's house. Either, [Baxter] or McBride said they saw someone on the playground and told Rachel Marcelis to go back so they could be sure. Rachel Marcelis drove around the block, and [Baxter] and McBride exited the car.

¹ "[Baxter]" also identified on the record as "Snubbs" and "Jay-Jay[.]"

² "McBride", also identified on the record as "Fraddo" and "Fra[.]"

Anthony Harris and Hassan Durant saw [Baxter] and McBride enter the playground with "hoodies"³ on. People on the playground noticed [Baxter] and McBride because both men were wearing hoodies on a very hot day. The decedent turned around, noticed [Baxter] and McBride, and began to run. [Baxter] and McBride began shooting, and continued to shoot as they walked together side by side. The decedent ran in a "zigzag" pattern toward the 15th Street exit. The decedent stumbled out of the playground and fell in the middle of the street.

³ A "hoodie" is a long sleeved sweatshirt with a hood.

[Baxter] and McBride ran out of the playground, and headed east on Ontario Street, then south on 15th Street. Rachel Marcelis saw [Baxter] and McBride running in her direction, and let them back in her car. While in the car, Rachel Marcelis heard [Baxter] and McBride talking about how McBride's gun did not work and he could "not get any rounds off". When they arrived at Daryl Mack's aunt's house, Rachel Marcelis asked McBride "if that was the person who shot De-Nyce." McBride answered "Yes". After they left the house, Rachel Marcelis, [Baxter] and McBride drove to Wilkes-Barre for the weekend, but only Rachel Marcelis returned the following Monday.

An arrest warrant was issued for both [Baxter] and McBride on May 4, 2007. McBride was arrested in Wilkes-Barre on May 7, 2007, after police were informed of his outstanding warrant. [Baxter] was found at a motel in Wilkes-Barre on July 10, 2007, after the police received a call regarding a domestic violence issue. [Baxter] was initially arrested for false identification, after he gave officers three false names. He was subsequently arrested [i]n this case after further investigation by law enforcement.

Commonwealth v. Baxter, 996 A.2d 535 [437 EDA 2009] (Pa. Super. 2010) (unpublished memorandum at 1-2) (footnote omitted), *quoting* Trial Court Opinion, 7/8/2009, at 2-3 (citations omitted).

Baxter's case proceeded to a jury trial on January 29, 2009.² As noted above, on February 5, 2009, the jury convicted him of first-degree murder, criminal conspiracy, and PIC. On that same day, the court sentenced Baxter to life imprisonment, without the possibility of parole, for the murder conviction, with concurrent sentences of ten to 20 years' imprisonment for the conspiracy charge and one to two years' incarceration for the PIC crime.

² Baxter and McBride were tried together.

On March 3, 2010, we affirmed his judgment of sentence, and the Pennsylvania Supreme Court denied his petition for allowance of appeal on February 23, 2011. ***See id.***, *appeal denied*, 17 A.3d 1250 (Pa. 2011).³

On September 23, 2011, Baxter filed a *pro se* PCRA petition.⁴

On November 2, 2012, Gary Server, Esquire[,] was appointed to represent [Baxter]. On September 24, 2013, Mr. Server filed an amended petition, raising various issues [Baxter] identified in his *pro se* filings. On November 13, 2013, [Baxter] filed a motion to proceed *pro se*. On June 9, 2014, after [Baxter] declined to participate in a video conference, he was transported from SCI Coal Township for a ***Grazier***^[5] hearing. At the conclusion of the hearing, this Court held that [Baxter]'s waiver of counsel was knowing, intelligent, and voluntary, permitted [Baxter] to represent himself, and appointed an investigator to assist him. On October 27, 2014, Craig Cooley, Esquire[,] entered his appearance as counsel for [Baxter].

PCRA Court Opinion, 3/4/5015, at 1-2.

An evidentiary hearing was held on January 20, 2015. The PCRA court limited the hearing to the following issues:

- Trial counsel's ineffectiveness for failure to cross-examine a witness as to her immunity petition; and
- Trial counsel's ineffectiveness for failure to examine Gregory Blackmon, Stefon Studivent, Kyle Carter, Darryl Mack, and Deborah McBride.

³ Mark Greenberg, Esquire, represented Baxter at trial and on direct appeal. We note McBride also filed a direct appeal, which was docketed at 440 EDA 2009.

⁴ Baxter also filed supplemental petitions on March 8, 2012, September 8, 2014, and September 16, 2014.

⁵ ***Commonwealth v. Grazier***, 713 A.2d 81 (Pa. 1998).

Order, 11/21/2014. On March 4, 2015, the PCRA court entered an order and opinion, dismissing Baxter's petition. This appeal followed.⁶

Baxter raises the following issues on appeal:

1. The PCRA court erred because the record contained sufficient evidence to find Mark Greenb[e]rg made several objectively unreasonable decisions that individually and collectively undermine confidence in Arnel Baxter's convictions warranting a new trial. U.S. Const. amends. V, VI, VIII, XIV; Pa. Const. art. §§ 8, 9, 23.^[7]
 - a. Mark Greenb[e]rg's decision not [to] exercise Arnel Baxter's compulsory process right, by not requesting bench warrants for two subpoenaed witnesses – Kyle Carter and Gregory Blackmon – was objectively unreasonable and prejudiced Baxter because Carter and Blackmon were both fact witnesses whose testimony would have undermined Anthony Harris's and Hassan Durant's identifications.
 - b. Mark Greenb[e]rg's decision not to subpoena Stephon Studivant and present him at trial was objectively unreasonable and prejudiced Arnel Baxter because Studivant was a fact witness whose testimony significantly undermined Anthony Harris's and Hassan Durant's identifications.
 - c. Mark Greenb[e]rg's decisions not to present Darryl Mack and to cross-examine Rachel Marcelis with her Cordell Young trial testimony and immunity agreements with the Commonwealth were objectively unreasonable

⁶ The court did not order Baxter to file a concise statement of errors complained of on appeal under Pa.R.A.P. 1925(b).

⁷ With respect to the first issue, we note Baxter focuses on the legal standard regarding ineffectiveness of counsel and certain duties of counsel, rather than specific incidences of counsel's ineffectiveness. **See** Baxter's Brief at 35-37. Therefore, our analysis will begin with the first sub-issue.

and prejudiced Armel Baxter because they would have individually and cumulatively undermined Marcelis's testimony. The absence of Mack's testimony, Marcelis's testimony at Cordell Young's trial, and her immunity agreements with the Commonwealth undermines confidence in Baxter's convictions warranting a new trial.

- d. Mark Greenb[e]rg's cumulative errors undermine confidence in Armel Baxter's conviction warranting a new trial where Baxter can introduce the exculpatory and impeachment evidence not presented by Greenb[e]rg.
2. Mark Greenb[e]rg violated Armel Baxter's right to counsel by being "totally absent" when the trial court addressed the jury and answered its three questions and by sending an inexperienced attorney who had no criminal defense experience and knew nothing about the case or Baxter's defense. The court should presume prejudice under these circumstances and grant a new trial. U.S. Const. amends. V, VI, VIII, XIV; Pa. Const. art. §§ 8, 9, 23.

Baxter's Brief at 35, 37, 50, 54, 63, and 64 (some capitalization removed).

Our standard and scope of review for the denial of a PCRA petition is well-settled:

[A]n appellate court reviews the PCRA court's findings of fact to determine whether they are supported by the record, and reviews its conclusions of law to determine whether they are free from legal error. The scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the trial level.

Commonwealth v. Charleston, 94 A.3d 1012, 1018-1019 (Pa. Super. 2014) (citation omitted), *appeal denied*, 104 A.3d 523 (Pa. 2014).

To be eligible for PCRA relief, [the a]ppellant must prove by a preponderance of the evidence that his conviction or sentence resulted from one or more of the enumerated circumstances found at 42 Pa.C.S. § 9543(a)(2) (listing, *inter alia*, the

ineffective assistance of counsel and the unavailability at the time of trial of exculpatory evidence, which would have changed the outcome of the trial had it been introduced).

Commonwealth v. Koehler, 36 A.3d 121, 131-132 (Pa. 2012).

In Baxter's first sub-issue, he contends counsel was ineffective for failing to exercise Baxter's compulsory process right pursuant to the 6th Amendment of the United States Constitution and Article 1, Section 9 of the Pennsylvania Constitution by not requesting that bench warrants be issued for two subpoenaed witnesses, Carter and Blackmon, who did not appear at trial. Baxter's Brief at 37. Baxter argues, "If subpoenaed witnesses fail to appear for whatever the reason, *e.g.*, bad weather, trial counsel must exercise his client's compulsory process rights and request the trial court's assistance by asking it to issue bench warrants to compel and produce these favorable witnesses." *Id.* at 37.⁸ Baxter states Greenberg's actions were

⁸ He further explains:

Michael Wallace[, co-defendant's counsel,] subpoenaed Carter and Blackmon, and Greenb[e]rg piggybacked off Wallace's subpoena. Carter spoke with Greenb[e]rg the first day he went to court, while Blackmon signed a written statement saying the gunmen were 6'2" or taller. Thus, by subpoenaing both and speaking with Carter at trial, Greenb[e]rg knew or should have known the substance and significance of their testimony and how it undermined Harris's and Durant's identifications. Carter and Blackmon were both at court multiple days waiting to testify on Baxter's behalf. Unfortunately, due to bad weather on February 4, 2009, they incorrectly assumed the courthouse was closed.

(Footnote Continued Next Page)

unreasonable based on the following: (1) counsel never made a proffer to the court explaining the substance and significance of Carter's and Blackmon's testimony, which would have undermined the identifications made by Harris and Durant as well as Marcelis' testimony; (2) if counsel had made an on-the-record request and objection after the court denied the request, he would have preserved the issue for appellate review, but by not doing so, he waived the issue; and (3) Baxter suffered great harm because counsel made certain the jury would not hear the relevant and exculpatory testimony of Carter and Blackmon. *Id.* at 39-40. Furthermore, he states:

To be clear, because Baxter is arguing Greenb[e]rg erred by not raising and preserving this issue for *direct appeal*, the Court's prejudice analysis must focus on how this Court would have adjudicated this issue on direct appeal - *not* post-conviction. The distinction is significant in terms of prejudice. Had Greenb[e]rg properly preserved this issue for direct appeal, all Baxter would have had to demonstrate is that Carter's and

(Footnote Continued) _____

Wallace requested a continuance to contact Carter and Blackmon, but he [n]ever made a proffer to the trial court explaining the significance of their proposed testimony and how it undermined the Commonwealth's identification evidence, so the trial court denied his request. Greenb[e]rg, on the other hand, as this Court pointed out on direct appeal, never requested a continuance. More importantly, Greenb[e]rg never exercised Baxter's compulsory process rights by requesting the trial court to issue bench warrants for Carter and Blackm[o]n. At the PCRA hearing, Greenb[e]rg and Wallace both said they never requested bench warrants because, if the trial court denied Wallace's continuance request, they assumed it would have denied bench warrant requests.

Id. at 39.

Blackmon's proposed testimony was both relevant and favorable to his defense.

Id. at 41 (italics in original).

Lastly, with respect to this claim, Baxter asserts the PCRA court made the following errors: (1) it erroneously stated Baxter presented this claim on direct appeal and a panel of this Court determined it was "meritless;" (2) by finding the panel previously adjudicated this claim, the PCRA court misconstrued the substance of his claim and incorrectly analyzed it as a failure to call a witness claim instead of a compulsory process issue; and (3) the court improperly found the testimony of Harris and Durant was credible merely because both men knew Baxter and "the jury 'credited' their testimony." ***Id.*** at 42.

We begin with the following:

In evaluating claims of ineffective assistance of counsel, we presume that counsel is effective. ***Commonwealth v. Rollins***, 558 Pa. 532, 738 A.2d 435, 441 (Pa. 1999). To overcome this presumption, Appellant must establish three factors. First, that the underlying claim has arguable merit. ***See Commonwealth v. Travaglia***, 541 Pa. 108, 661 A.2d 352, 356 (Pa. 1995). Second, that counsel had no reasonable basis for his action or inaction. ***Id.*** In determining whether counsel's action was reasonable, we do not question whether there were other more logical courses of action which counsel could have pursued; rather, we must examine whether counsel's decisions had any reasonable basis. ***See Rollins***, 738 A.2d at 441; ***Commonwealth v. (Charles) Pierce***, 515 Pa. 153, 527 A.2d 973, 975 (Pa. 1987). Finally, "Appellant must establish that he has been prejudiced by counsel's ineffectiveness; in order to meet this burden, he must show that 'but for the act or omission in question, the outcome of the proceedings would have been different.'" ***See Rollins***, 738 A.2d at 441 (quoting ***Travaglia***, 661 A.2d at 357). A claim of ineffectiveness may be denied by a

showing that the petitioner's evidence fails to meet any of these prongs. **Commonwealth v. (Michael) Pierce**, 567 Pa. 186, 786 A.2d 203, 221-22 (Pa. 2001); **Commonwealth v. Basemore**, 560 Pa. 258, 744 A.2d 717, 738 n.23 (Pa. 2000); **Commonwealth v. Albrecht**, 554 Pa. 31, 720 A.2d 693, 701 (Pa. 1998) ("If it is clear that Appellant has not demonstrated that counsel's act or omission adversely affected the outcome of the proceedings, the claim may be dismissed on that basis alone and the court need not first determine whether the first and second prongs have been met."). In the context of a PCRA proceeding, Appellant must establish that the ineffective assistance of counsel was of the type "which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt [or] innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(ii). **See also (Michael) Pierce**, 786 A.2d at 221-22; **Commonwealth v. Kimball**, 555 Pa. 299, 724 A.2d 326, 333 (Pa. 1999).

Commonwealth v. Washington, 927 A.2d 586, 594 (Pa. 2007).

The Sixth Amendment of the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defence." U.S.Const. amend. VI. Likewise, Article 1, Section 9 of the Pennsylvania Constitution states, "In all criminal prosecutions the accused hath a right to be heard by himself and his counsel" Pa.Const. art. I, § 9.

"It is clear that under both our state and federal constitutions, a criminal defendant has a right of compulsory process to obtain witnesses in his favor." **Commonwealth v. Lahoud**, 339 Pa.Super. 59, 64, 488 A.2d 307, 310 (1985) (*allocatur denied*), quoting **Commonwealth v. Allen**, 501 Pa. 525, 531, 462 A.2d 624, 627 (1983). "The right to compulsory process encompasses the right to meet the prosecution's case with the aid of witnesses, and the right to elicit the aid of the Commonwealth in securing those witnesses at trial, both of which are fundamental to a fair trial." **Commonwealth v. Jackson**, 457 Pa. 237, 243, 324 A.2d 350, 354-355 (1974); **Commonwealth v. Lahoud**,

supra. “Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.” **Washington v. Texas**, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019, 1023 (1967). “[The] constitutional right, though fundamental, is not, however, absolute.” **Commonwealth v. Jackson, supra** 457 Pa. at 243, 324 A.2d at 355. In order to compel the attendance of a witness at trial, it must be shown that the information possessed by the witness is material, i.e., capable of affecting the outcome of the trial, and that it is favorable to the defense. **United States v. Valenzuela-Bernal**, 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982).

Commonwealth v. McKenzie, 581 A.2d 655, 657 (Pa. Super. 1990).

Even though case law is very limited on this subject, in **Commonwealth v. Twiggs**, 331 A.2d 440 (Pa. 1975), the Pennsylvania Supreme Court considered a substantially similar issue:

In determining whether counsel’s failure to secure the attendance of the witness or to have the notes of his previous testimony read to the jury constituted constitutionally ineffective assistance of counsel, we are guided by the standards established in **Commonwealth ex rel. Washington v. Maroney**, 427 Pa. 599, 235 A.2d 349 (1967). There we held that

“counsel’s assistance is deemed constitutionally effective once we are able to conclude that the particular course chosen by counsel had some reasonable basis designed to effectuate his client’s interests. The test is *not* whether other alternatives were more reasonable, employing a hindsight evaluation of the record. Although weigh the alternatives we must, the balance tips in favor of a finding of effective assistance as soon as it is determined that trial counsel’s decision had any reasonable basis.”

Id. at 604, 235 A.2d at 352.

If counsel's decision not to secure [the witness]'s appearance or to have the notes of [the witness]'s previous testimony read to the jury was based on a reassessment of its worth and a conclusion that it was of little or no value in the posture of this case, then that decision clearly had some reasonable basis designed to effectuate [the appellant]'s interests. In such circumstances, counsel's conduct would not constitute ineffectiveness. See ***Commonwealth ex rel. Washington v. Maroney, supra***. Had counsel reached this decision on a basis designed to advance his client's interest, this case would be analogous to those situations in which, as a matter of trial strategy, counsel decides not to call a witness at all. See ***Commonwealth v. Dancer***, 460 Pa. 95, 331 A.2d 435 (1975); ***Commonwealth v. Owens***, 454 Pa. 268, 275, 312 A.2d 378, 382 (1973); ***Commonwealth v. Karchella***, 449 Pa. 270, 296 A.2d 732 (1972); ***Commonwealth v. Ellis***, 445 Pa. 307, 284 A.2d 735 (1971); ***Commonwealth v. Hawkins***, 445 Pa. 282, 284 A.2d 730 (1971).

If, however, counsel's failure to seek compulsory process to obtain [the witness]'s testimony or to have his prior testimony read to the jury was the result of sloth or lack of awareness of the available alternatives, then his assistance was ineffective. In a case where virtually the only issue is the credibility of the Commonwealth's witness versus that of the defendant, failure to explore all alternatives available to assure that the jury heard the testimony of a known witness who might be capable of casting a shadow upon the Commonwealth's witness's truthfulness is ineffective assistance of counsel.

Twiggs, 331 A.2d at 442-443.

A review of the record reveals the following. Counsel for McBride, Michael Wallace, Esquire, subpoenaed both Carter and Blackmon to testify at both defendants' trial. On February 4, 2009, during the defense's case-in-chief, Wallace asked for a brief continuance to determine which witnesses were there. When he learned Carter and Blackmon were not in the courthouse, he then called them to determine their whereabouts. Wallace

stated Carter and Blackmon had been at the trial, and assured him they would be there. He told the trial court that he assumed their absence was based on the weather conditions. He attempted to ask for a continuance, but the court interrupted him, stating there was no problem with public transportation and there was no line outside the courthouse. Wallace then asked for time to make additional phone calls, which the trial court granted. **See** N.T., 1/20/2015, at 198-204.

At the January 20, 2015, PCRA evidentiary hearing, Wallace testified he did not obtain a bench warrant for the two men based on the following: “[B]ecause the judge immediately said no, we’re moving forward, so it would have been a waste of time, because if [the judge] wasn’t going to give me an opportunity to go back and try and get them, she wasn’t going to give me an opportunity to sit around and wait two days for a bench warrant.” **Id.** at 209. Wallace indicated he did object “to the fact that [the judge] told me to go right on. I think the words are in the record, you’re taking my client’s defense away from me, my defense, whatever I said.” **Id.**

Greenberg also testified at the PCRA evidentiary hearing. He indicated he worked jointly with Wallace “to get the witnesses in court” and “coordinated subpoenaing these witnesses.” **Id.** at 213, 241-242. Greenberg stated, “The judge allowed me to follow Mr. Wallace’s lead when it came to subpoena so we did not have to duplicate the process.” **Id.** at 213. Greenberg further testified the defense at trial was mistaken

identification and hypothesized potential concerns with presenting Carter and Blackmon as defense witnesses. *Id.* at 244-245. He noted they were good friends of Baxter's and based on his experience with juries, "if the witness is a good friend, he or she has more of a bias than a total stranger." *Id.* at 245. Additionally, he stated that a witness could be impeached by his or her criminal record but he could not remember if Carter or Blackmon had criminal records. *Id.* Third, Greenberg testified, "[P]eople see different things from different perspectives. Whether or not a hoody would have covered the face of a witness from one perspective doesn't mean it would have covered the face of a witness from a different vantage point." *Id.*

Lastly, Carter and Blackmon both testified at the PCRA hearing. The court summarized their testimony as follows:

Blackmon testified that he was at the basketball game where the shooting occurred, and that prior to the shooting he saw two tall, slender men in hooded sweatshirts approach the game. He said that he could not see their faces because the hoods obscured them. Blackmon asserted that he would have testified to these facts and that he appeared at trial. However, when asked why he did not testify, he initially explained that one of the attorneys said that he did not need Blackmon to testify. Later, Blackmon contradicted this testimony by stating that he did not appear for court because of the weather.

Carter testified that he, too, was at the basketball game on the day of the shooting, and saw the hooded shooters but did not witness the actual shooting. Carter described the shooters as taller than himself but stated that he could not see their faces because of their hoods. Carter was inconsistent within his testimony regarding where he was located when the shooting began. During his testimony he stated he was in three different locations: just off the basketball court, sitting on a car, and running to get under a car. He was impeached with his affidavit

from October 14, 2013, in which he said he was running at the time of the shooting, which he admitted was wrong. Carter was also inconsistent regarding the reason he did not testify at trial. Carter said that he was present at the trial but did not testify because “[m]y services weren’t needed.” Carter did not mention anything regarding a snow storm or courts being closed until prompted by the District Attorney, after which he indicated he believed that court was cancelled.

PCRA Court Opinion, 3/4/2015, at 5 (record citations omitted).

With respect to this claim, the PCRA court noted the following:

² Carter and Blackmon were subpoenaed by McBride’s attorney, Michael Wallace, Esquire. However, it is clear from the record at trial that there was communication and cooperation between Mr. Greenberg and Mr. Wallace with regards to locating witnesses.

³ This Court notes that [Baxter]’s argument that trial counsel should have made a proffer to the trial court as to the testimony of Blackmon and Carter and pursued bench warrants was found to be meritless by [the] Superior Court. On appeal, [Baxter] argued that the court erred and abused its discretion in denying a continuance to the defense on February 4, 2009 for these witnesses. Although the Superior Court found that the claim was waived, it also found it to be meritless based on the fact that there were no guarantees that the witnesses would have shown up, should the trial have been continued.

Id. at 6, 7.

In dismissing the claim, the PCRA court found Baxter had “failed to establish that the witnesses were willing and able to cooperate on behalf of

[Baxter] and that proposed testimony was necessary to avoid prejudice.”

Id. at 5.⁹ Specifically, the court determined:

[Baxter] has also failed to establish that the proposed testimony of Carter, Blackmon, and Studivant was necessary to avoid prejudice as the testimony does not discredit the persuasive testimony provided at trial by Anthony Harris and Hassan Durant. On the day of the shooting, Durant was at the park when he noticed [Baxter] and McBride. Durant immediately paid attention to [Baxter] and McBride when they arrived at the park because it was a hot day and Durant thought it was odd that they were wearing hoodies. Durant was about twenty feet from the shooters when they shot Brown and “[he] seen [sic] it perfect.” Durant identified [Baxter] and McBride at trial and indicated that [he] had seen [Baxter] around the neighborhood for about a year before the shooting. Durant explained that although the shooters had hoods on, he could see their faces.

Harris was also present in the park for the shooting. Harris saw [Baxter] and McBride before they entered the park and they put their hoods up. Harris saw [Baxter] pull out a gun and shoot Brown. Harris identified [Baxter] as the shooter and explained that Harris had known [Baxter] for over twenty years as he lived three doors down from him. Harris explained that even when [Baxter] and McBride had their hoods up, Harris could see their faces.

Harris and Durant’s testimony was credited by the jury, and is not rendered vulnerable by the after-the-fact testimony of Carter, Blackmon, and Studivant. Carter, Blackmon, and Studivant stated that they could not see the shooters’ faces because of their hoods, a claim that was implausible. The shooting took place during the daytime in front of a crowd; in those conditions, it is not plausible that a hood would completely obscure a person’s face. Further, neither Carter, Blackmon, nor Studivant knew [Baxter] prior to the shooting whereas both

⁹ We note the PCRA court also discusses another witness’s, Studivant, testimony in conjunction with its analysis of Carter and Blackmon. Baxter’s second argument concerns Studivant. Therefore, for ease of discussion, we have included the court’s findings regarding Studivant as well.

Harris and Durant were well acquainted with [Baxter]. Carter, Blackmon, and Studivant's incredible and vague assertion that ... the shooters were taller than [Baxter], a man they did not know, would not have swayed the jury to discredit Harris and Durant's testimony that Durant saw his neighborhood acquaintance and Harris saw his neighbor of over twenty years shoot Brown in broad daylight. [Baxter]'s claim that trial counsel was ineffective for failing to present testimony from Carter, Blackmon, and Studivant is meritless.

Id. at 7-8 (record citations omitted).

Although we agree with the court's ultimate determination, we do so pursuant to alternative basis.¹⁰ In applying the ineffective assistance of counsel standard, we find there was arguable merit to Baxter's claim. **See *Washington, supra***. Counsel should have requested a bench warrant, as opposed to a continuance, because Carter and Blackmon were subpoenaed. Moreover, because the witnesses' testimony would have directly contradicted the testimony of the two primary Commonwealth witnesses, there was a factual issue regarding identification that would have been for the jury to resolve.

¹⁰ "This Court is not bound by the rationale of the trial court, and we may affirm the trial court on any basis." ***Commonwealth v. Williams***, 73 A.3d 609, 617 n.4 (Pa. Super. 2013) (citation omitted), *appeal denied*, 87 A.3d 320 (Pa. 2014).

Here, the PCRA court largely dismissed the claim based on credibility determinations concerning the trial witnesses. In accordance with ***Twiggs***, this type of determination would not overcome the ineffectiveness hurdle. ***Twiggs***, 331 A.2d at 443. The court incorrectly assumes the jury would find Carter and Blackmon's testimony incredible.

Nevertheless, we are compelled to conclude trial counsel pursued a reasonable trial strategy with respect Carter and Blackmon based on the circumstances of the case. We note Greenberg worked jointly with Wallace and therefore, Wallace's actions with respect to procuring the witnesses should be applied to Greenberg. Wallace subpoenaed Carter and Blackmon. Both men stated they were at trial on the days leading up to the date they were supposed to testify. Therefore, both Greenberg and Wallace would have no reason to believe that the two witnesses would not show up on the designated day. Furthermore, Wallace did ask for time to call the missing witnesses and ascertain their whereabouts. When he attempted to ask for a continuance after failing to find them, the court denied his request. Therefore, both counsels were correct to infer that the court would not grant them even more additional time to procure a bench warrant and that such an attempt would be futile.¹¹

Counsel's strategy is further supported by the fact that on direct appeal, a panel of this Court determined the trial court did not abuse its

¹¹ It merits mention that Wallace even objected to the court's denial of his request for a continuance, asserting the court denied Baxter's co-defendant a defense. Furthermore, the PCRA court noted: "The bench warrant is not meaningless. The bench warrant could have been issued and each of the potential witnesses could have been held in contempt, but it would not have helped the defense in this case when the [trial] judge said she's not granting a continuance for the witnesses to be located and brought in." N.T., 1/20/2015, at 256.

discretion in denying the attempted request for a continuance.¹² **Baxter**, 996 A.2d 535 [437 EDA 2009] (Pa. Super. 2010) (unpublished memorandum at 13). Specifically, the panel opined:

After a review of the record, it is clear that the trial court did not abuse its discretion in refusing to grant a continuance. Although the weather conditions were poor, court was in session, the weather did not prevent the jury or the other witnesses from appearing, and public transportation was still operational. N.T., 2/4/09, at 24. Also, the potential witnesses did not communicate with [Baxter] or his counsel as to their absence. **Id.** [Baxter] hired a private detective to locate one of the witnesses and was unable to locate him. **Id.** at 18-19. No information was presented to the trial court that the witnesses would appear if a continuance was granted. As the court had no basis to believe that any further delay would have produced these witnesses, the trial court did not abuse its discretion in refusing to grant a continuance.

Id. at 14-15.

Because the trial court was so decisive in its decision to move the case forward and the panel determined the trial court did not abuse its discretion with regard to this action, we cannot conclude Baxter's counsel was ineffective for failing to also pursue a bench warrant as it would have been considered a non-meritorious or frivolous claim. **See Commonwealth v.**

¹² We acknowledge the panel primarily found Baxter waived the issue because he, himself, did not request a continuance or object to the court's decision not to grant a continuance. **Baxter**, 996 A.2d 535 [437 EDA 2009] (Pa. Super. 2010) (unpublished memorandum at 13), *citing Commonwealth v. Cannady*, 590 A.2d 356, 362 (Pa. Super. 1991) (holding where the defendant did not object, and he did not join in his co-defendant's objection, the issue was waived as to the defendant for purposes of appeal, even if the objection was identical to claim raised on appeal), *appeal denied*, 600 A.2d 950 (Pa. 1991).

Fears, 86 A.3d 795, 803 (Pa. 2014) (holding counsel cannot be deemed ineffective for failing to raise a meritless claim). Furthermore, we cannot find Baxter's counsel failure to seek compulsory process with respect to Carter and Blackmon was "the result of sloth or lack of awareness of the available alternatives[.]" **Twiggs**, 331 A.2d at 443. Accordingly, Baxter failed to satisfy the reasonable trial strategy prong of the ineffective assistance of counsel test. **See Washington**, 927 A.2d at 594. Therefore, we reject Baxter's first sub-claim of PCRA court error.

Next, Baxter argues counsel was ineffective for not subpoenaing Studivant and presenting him at trial. Baxter's Brief at 50. Baxter states:

Greenb[e]rg knew about Studivant because he wrote him before trial and Studivant spoke with Greenb[e]rg's investigator before trial. Even if Studivant did not speak with Greenb[e]rg's investigator, the record, as the PCRA Court found, "is clear" that Greenb[e]rg knew of [or] should have known about Studivant's testimony because, as the PCRA Court found, "there was communication and cooperation between Mr. Greenb[e]rg and Mr. Wallace with regards to locating witnesses." Thus, despite knowing about Studivant's testimony, as the PCRA Court found, Greenb[e]rg never subpoenaed him.

At the PCRA hearing, Studivant's testimony was consistent with Carter's and Blackmon's regarding the shooting: (1) he could not identify the gunmen because their hoodies were pulled tightly over their heads; (2) the gunmen were approximately 6'1" to 6'2"; and (3) when people returned to the basketball courts several minutes after the shooting to assess the situation, he saw and heard Anthony Harris accuse Malik Ware of being one of the gunmen. These facts, as mentioned, would have been tremendously favorable to Baxter's defense.

Id. at 50-51. Baxter again argues the PCRA court misinterpreted his claim by analyzing it as a failure to call a witness argument as opposed to a compulsory process issue. ***Id.*** at 51.

Here, the PCRA court stated the following: "Studivant was not subpoenaed, however, according to a letter from Mark Shaffer dated December 2008, it is clear that trial counsel made multiple unsuccessful attempts to locate Studivant. Additionally, Studivant testified that he was aware of [Baxter]'s trial and the need for his testimony." PCRA Court Opinion, 3/4/2015, at 6 (citations omitted). The court also found that Studivant did not give credible testimony at the PCRA hearing with regard to why he did not appear at trial. ***Id.***

The record supports the court's finding. Multiple attempts were made to contact Studivant. First, on September 3, 2008, Greenberg sent a letter to Studivant, stating: "Mr. Baxter insists that he is innocent and advises that you may have some relevant information about the case. Please contact me at your earliest convenience so that we can talk about the case in greater detail." Baxter's Post-Hearing Brief, 2/5/2015, at Exhibit 3. Approximately three months later, Mark H. Shaffer, the hired private investigator, sent a letter to Greenberg regarding the witnesses he was hired to locate. With regard to Studivant, Shaffer stated: "There was no answer at the time of our arrival. We left a sealed envelope requesting that he telephone us. He

has not telephoned.” *Id.* at Exhibit 5. Subsequently, on January 20, 2009, Shaffer wrote a second letter to Greenberg, in which he averred:

No record was found for [Studivant] in our databases. The provided residence address of 3433 N 16th Street, Philadelphia, PA 19140 is deeded to Deborah Willis as of 1999. No criminal record surfaced.

We traveled to the provided residence address but on this occasion residents directed us to go across the street to 3444 N 16th Street where the door was answered by a black female identifying herself only under the first name of Josephine and as the grandmother of Stefon [Studivant].

She states that Stefon [Studivant] is away at college, does not live at home and has a cell phone. She refused to give us his cell number or the house number. She refused to provide us with his college address but did advise he is presently a student at Lincoln University, Oxford, PA.

We gave Josephine the letter we had prepared in advance and related the urgency of Stefon [Studivant] telephoning us. She stated that she would only promise to pass the letter onto Stefon [Studivant]’s mother.

We have not received a call.

Id. at Exhibit 6, pg. 2.

At the January 20, 2015, hearing, Studivant testified Greenberg and Shaffer never contacted him directly or subpoenaed him. N.T., 1/20/2015, at 82. He also stated he came to the courthouse for one day of Baxter’s trial but could not remember which day it was. *Id.* at 86.

Again, Baxter has failed to establish Greenberg’s failure to seek compulsory process with regard to Studivant was “the result of sloth or lack of awareness of the available alternatives[.]” *Twiggs*, 331 A.2d at 443.

Multiple attempts were made to ascertain Studivant's whereabouts but none were successful. Studivant even admitted he was at the trial but did not indicate he went up to Baxter or Greenberg to indicate his willingness to testify. The evidence surrounding Studivant demonstrated he was not prepared to cooperate with Baxter's defense. As such, we agree with the PCRA court that Studivant's testimony as a willing witness was incredible. **See Commonwealth v. Pate**, 617 A.2d 754, 760 (Pa. Super. 1992) (noting credibility of witnesses in PCRA proceedings is exclusively within the province of the trial court). Accordingly, Baxter's second ineffectiveness sub-claim fails.

Baxter's third sub-issue involves counsel's failure to effectively undermine the testimony of Rachel Marcelis. By way of background, Marcelis testified she was driving the two co-defendants to Daryl Mack's aunt's house when they made her stop at the schoolyard/playground and drop them off. She said she subsequently saw them running in her direction, and let them back in the car. She heard the two men discuss how McBride's gun did not work and he could not fire any rounds. She asked McBride "if that was the person[, the victim,] who shot De-Nyce" and he answered in the affirmative. **Baxter**, 996 A.2d 535 [437 EDA 2009] (Pa. Super. 2010) (unpublished memorandum at 2). Marcelis testified she drove the two men to Mack's aunt's house and then to Wilkes-Barre, Pennsylvania. Baxter states counsel was ineffective for not cross-examining Marcelis

regarding her trial testimony from an unrelated case (the Cordell Young trial¹³), and her immunity agreements with the Commonwealth. **See** Baxter's Brief at 54. He also contends counsel failed to present Mack as an impeachment witness with respect to Marcelis. **Id.** Mack would have purportedly testified that he was at a party with Marcelis on the night before the shooting took place, and observed her consuming numerous amounts drugs and alcohol. N.T., 1/20/2015, at 19-20. He stated he did not see Baxter at this party. The following morning, he saw Marcelis driving her vehicle with no passengers. **Id.** at 22. He asked her for a ride and she told him that he could drive her car because he had a license. **Id.** at 24. He then drove to a paramour's house and visited for approximately two hours while Marcelis fell asleep in the vehicle. **Id.** at 25-26. Afterwards, he was driving back to his neighborhood when he received a phone call about the shooting. **Id.** at 27-28. Mack was not interviewed by investigators but did speak with Wallace at the courthouse. **Id.** at 28-32. Consequently, Baxter complains Greenberg failed to "present readily available witness testimony and evidence capable of undermining Marcelis's credibility." Baxter's Brief at 54.

¹³ Baxter alleges detectives "coaxed Marcelis to falsely implicate" Young in connection with the murder of a woman named Fatima Whitfield to protect her own interests. Baxter's Brief at 56. Baxter does not provide any background information regarding this non-related case. He does not recite the statement or point to any part of it, which he claims is false.

First, Baxter states Greenberg never specifically spoke with Mack, but rather relied on Wallace's conversation with Mack to make the decision not to call him. *Id.* at 55. Second, he asserts Greenberg did not adequately interview Marcelis to obtain and review her allegedly fabricated May 3, 2007, statement in the Cordell Young trial.¹⁴ Baxter also claims Mack's purported testimony contradicts Marcelis's narrative of the events unfolding in relation to the present case. He argues:

A competent trial attorney could have persuasively argued detectives chose not to interview Mack because they coerced Marcelis's May 3, 2007 statement and did not want to interview a witness who could expose their coercion.

...

Competent trial counsel could have also persuasively argued detectives chose not to interview Mack because they knew the eyewitness statements did not corroborate Marcelis's narrative that, after the shooting, Baxter and McBride supposedly ran toward her SUV with a group of scared onlookers from the basketball courts. To hammer this point home, competent trial counsel would have highlighted the fact the Commonwealth did not present one witness who said they saw a white SUV near the basketball courts immediately before or after the shooting or who saw the gunmen jump into a white SUV immediately after the shooting.

¹⁴ A cursory review of the record reveals that this 2007 statement was not included in the certified record. We note that it was mentioned in Baxter's post-hearing brief as Exhibit 2, but was not attached to the corresponding brief. *See* Baxter's Post-Hearing Brief at 4 n. 2. "It is the responsibility of an appellant to ensure that the record certified on appeal is complete in the sense that it contains all of the materials necessary for the reviewing court to perform its duty." *Commonwealth v. Bongiorno*, 905 A.2d 998, 1000 (Pa. Super. 2006) (*en banc*), *appeal denied*, 917 A.2d 844 (Pa. 2007).

Id. at 56-57. Third, Baxter maintains Greenberg should have impeached Marcelis by introducing her immunity agreements with the Commonwealth in the present matter and in the Cordell Young case. **Id.** at 57. Further, he states:

Despite having the opportunity to tell the whole truth, without fearing prosecution, Marcelis's testimony at both trials cannot possibly be true. Her testimony at Cordell Young's trial differed from her testimony at Baxter's trial because, at Young's trial, she said she fabricated her May 3, 2007 statement, but at Baxter's trial she said her statement was true.

Id. Baxter suggests that "all Greenb[e]rg did was cross-examine Marcelis and get her to admit she occasionally heard voices when she did drugs" and this testimony "did little, if anything, to the Commonwealth's overall narrative." **Id.** at 58. Baxter also claims Marcelis's marred testimony and credibility would have called into question Harris's and Durant's identifications. **Id.** at 59.

To the extent Baxter argues counsel was ineffective for not cross-examining Marcelis regarding her testimony at the Cordell Young trial, or her allegedly contradictory statements at both trials, and for failing to put Mack on the stand to demonstrate that detectives chose not to interview him because they coerced Marcelis's May 3, 2007 statement, we find these arguments waived for failure to properly preserve the issue. A review of the record reveals these claims were not contained in Baxter's amended PCRA petition or addressed at the January 2015 PCRA hearing. It merits mention again that the PCRA court limited the hearing to two claims, neither of which

touched upon these arguments. Further, at the end of the hearing, the court provided the parties with two weeks to file submissions. Counsel for Baxter stated, "I know [Baxter] has done a tremendous amount of pleadings already. I think you know the case very well. I'll just highlight what's here and the case law." N.T., 1/20/2015, at 295. Nevertheless, Baxter did raise these new assertions in his post-hearing brief. **See** Baxter's Post-Hearing Brief, 2/5/2015. However, because they were not included in the petition or raised at the PCRA hearing, these arguments were not properly before the PCRA court.¹⁵ **See** Pa.R.A.P. 302(a) ("[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal."). Accordingly, we conclude these contentions are waived. **See Commonwealth v. Wharton**, 811 A.2d 978, 986 (Pa. 2002) (waiving claim where appellant failed to raise it in PCRA petition).

We now turn to the remainder of Baxter's argument that was properly preserved for appeal. With respect to his claim that counsel was ineffective for failing to call Mack as a witness, we are guided by the following:

When raising a claim of ineffectiveness for the failure to call a potential witness, a petitioner satisfies the performance and prejudice requirements of the [**Strickland v. Washington**, 466 U.S. 668 (1984)] test by establishing that: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of, the existence of the witness; (4) the witness was willing to testify for the

¹⁵ This is evidenced by the fact that the PCRA court did not address these claims in its Rule 1925(a) opinion.

defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial **Commonwealth v. Johnson**, 600 Pa. 329, 966 A.2d 523, 536 (Pa. 2009); **Commonwealth v. Clark**, 599 Pa. 204, 961 A.2d 80, 90 (Pa. 2008). To demonstrate **Strickland** prejudice, a petitioner "must show how the uncalled witnesses' testimony would have been beneficial under the circumstances of the case." **Commonwealth v. Gibson**, 597 Pa. 402, 951 A.2d 1110, 1134 (Pa. 2008). Thus, counsel will not be found ineffective for failing to call a witness unless the petitioner can show that the witness's testimony would have been helpful to the defense. **Commonwealth v. Auker**, 545 Pa. 521, 681 A.2d 1305, 1319 (Pa. 1996). "A failure to call a witness is not *per se* ineffective assistance of counsel for such decision usually involves matters of trial strategy." *Id.*

Commonwealth v. Sneed, 45 A.3d 1096, 1108-1109 (Pa. 2012).

Moreover,

"[t]he inquiry of whether trial counsel failed to investigate and present mitigating evidence turns upon various factors, including the reasonableness of counsel's investigation, the mitigation evidence that was actually presented, and the mitigation evidence that could have been presented." **Commonwealth v. Simpson**, 620 Pa. 60, 66 A.3d 253, 277 (Pa. 2013) (citation omitted). The reasonable basis prong of an ineffectiveness claim does "not question whether there were other more logical courses of action which counsel could have pursued; rather, we must examine whether counsel's decisions had any reasonable basis." [**Commonwealth v. Chmiel**, 30 A.3d 1111, 1127 (Pa. 2011)] (citation omitted).

Commonwealth v. Treiber, 121 A.3d 435, 471 (Pa. 2015).

Here, the PCRA court found the following:

[Baxter] argues that trial counsel was ineffective for failing to present testimony from Darryl Mack. Mack testified that on the night before the shooting, he attended a party at the home of a man named Antoine. At that party, he saw Rachel Marcelis consume large amounts of alcohol, smoke PCP and marijuana, and take pills. He left the party, but saw Marcelis again the next morning; to him, she appeared to be inebriated. He asked for a

ride, and she suggested that he drive her white truck while she rode along. He drove to the Frankford section of Philadelphia, in order to visit a woman he was seeing. He visited this woman for approximately two hours and fifteen minutes, and when he returned to Marcelis's truck, she was sleeping where he had left her in the passenger seat. Mack also testified that he showed up to testify at [Baxter]'s trial, but was told by co-defendant's counsel that he should leave because his testimony would be unhelpful.

At trial, Mr. Wallace, indicated that he decided not to call Mack as a witness as his testimony was not helpful. This Court cannot help but conclude that both Mr. Wallace and trial counsel exercised good judgment in refraining from offering Mack's testimony, which failed to contradict Marcelis's testimony and was redundant.⁴ Marcelis freely acknowledged at trial that she used Xanax, wet, marijuana, and alcohol on the night before the shooting, that she did so to an extreme degree, and that the substances were still affecting her on the day of the shooting. Mack's testimony regarding Marcelis's drug use was cumulative. Also, Mack's testimony did not undermine Marcelis's testimony that she was with [Baxter] and McBride during the shooting. Mack merely testified that he drove Marcelis's car to his girlfriend's house, left Marcelis in the car, and two hours later when he returned, she was in the car. Mack was driving Marcelis and her car back to Broad Street and Allegheny Avenue when a friend called Mack and informed him of Brown's murder. Nothing in Mack's testimony precludes the possibility that Marcelis drove [Baxter] and McBride to the shooting. Additionally, to the extent that Mack denies being present in the car with Marcelis, McBride, and [Baxter] at the time of the shooting, this Court finds this testimony incredible. Trial counsel was not ineffective for failing to present testimony from Mack.

⁴ Again, this Court notes that there was communication and cooperation between Mr. Greenberg and Mr. Wallace. Although the record states that Mr. Wallace told Mack to leave, Mr. Wallace stated this fact in front of Mr. Greenberg and [Baxter]. It is clear that Mr. Greenberg was aware of the fact that Mack had been told to leave and agreed with this decision.

...

Finally, [Baxter] argues that trial counsel was ineffective for failing to cross-examine Marcelis on the basis that she had entered into an immunity agreement with the Commonwealth in exchange for her testimony. At this Court's hearing in this matter, Mr. Greenberg testified that he chose not to cross-examine Marcelis as to the immunity agreement because he felt that it might actually bolster her credibility with the jury, both by further establishing the likelihood that she had been the getaway driver in this shooting, and by allowing the Commonwealth to point out that the immunity agreement required that she tell the truth at trial, and exposed her to criminal liability if she failed to do so. Because he had already gotten Marcelis to acknowledge her significant drug use during the time period in question, he felt that he had already called her reliability as a witness into question, and thus using the agreement would not offer much and might, in fact, backfire.

Mr. Greenberg expressed a reasonable trial strategy, with a sound basis designed to effectuate the petitioner's interests at trial. "Generally, where matters of strategy and tactics are concerned, counsel's assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis designed to effectuate his client's interests." *Commonwealth v. Puksar*, 597 Pa. 240, 256-57, 951 A.2d 267, 277 (2008)(quoting *Commonwealth v. Miller*, 572 Pa. 623, 819 A.2d 504, 517 (2002)). "A chosen strategy will not be found to have lacked a reasonable basis unless it is proven 'that an alternative not chosen offered a potential for success substantially greater than the course actually pursued.'" *Commonwealth v. Williams*, 587 Pa. 304, 899 A.2d 1060, 1064 (2006)(quoting *Commonwealth v. Howard*, 553 Pa. 266, 719 A.2d 233, 237 (1998)). This Court agrees that cross-examining Marcelis as to the immunity agreement would have had, at best, greatly diminished returns given what had already been accomplished, and may have had the effect of bolstering her credibility to [Baxter]'s detriment. Further, this Court notes that the jury was aware that Marcelis was never charged with crimes resulting from the murder. Because trial counsel pursued a reasonable trial strategy, this claim must fail.

PCRA Court Opinion, 3/4/2015, 8-9, 11-12 (record citations omitted).

Based on our review, we agree with the PCRA court's well-reasoned analysis that no relief is due on this claim. First, we note the PCRA court explicitly found Mack's testimony incredible. "[S]uch credibility findings, if supported by the record, are binding on this Court." **Treiber**, 121 A.3d at 471 (citations omitted). Second, with respect to Mack, Baxter would like us to reweigh the evidence in his favor, which we may not do. Furthermore, Mack could not account for two hours of Marcelis's time as well as the whereabouts of Baxter and McBride during the shooting. Therefore, the absence of his testimony was not so prejudicial as to have denied Baxter a fair trial. **See Treiber, supra**. Lastly, with respect to Baxter's contention regarding evidence of Marcelis's immunity agreement, we emphasize that the question is not whether there were more logical courses of action but whether counsel's decision had any reasonable basis. **See id.**

Indeed, the following exchange occurred between Greenberg and Baxter's PCRA counsel regarding the issue:

[PCRA Counsel]: So you saw harm, you say you saw harm in bringing up the immunity agreement?

[Greenberg]: Yes. Well, I didn't see a whole lot of good, but I think it could hurt him. The DA, for example, in redirect can emphasize the fact that the immunity agreement obligates her to tell the truth and I've been in cases - I've been in a million cases where DAs use plea agreements and immunity agreements to emphasize that the witness is obligated to tell the truth, otherwise the witness is going to be prosecuted for perjury, and I don't want that to corroborate the witness' testimony or credibility.

[PCRA Counsel]: You think it's impactful to the jury that somebody has to be instructed to tell the truth? That wouldn't have any impact on the jury's assessment of her credibility? The Commonwealth is giving the document informing you you must tell the truth, why? Aren't you going to tell the truth anyway?

[Greenberg]: Because there are consequences to not telling the truth and I have found that plea agreements and immunity agreements that are used that require the witness to tell the truth adds to the seriousness of the witness' demeanor and state of mind when he or she testifies. So the answer is yes, it can come back to hurt the defendant

...

[Marcelis's] lawyer was smart enough to protect his client from any murder prosecution by getting a broad immunity agreement. That's the reason why she got the agreement, that was to protect her. But when I'm representing Mr. Baxter and I have a choice of whether or not to use that agreement, I have to evaluate what the purpose of the agreement is, where it is in the context of the facts of the case, and what can be done by the prosecutor on redirect examination to hammer home to the jury that this witness was obligated to tell the truth and that as a result she's going to be that much more careful in recollecting things correctly and truthfully.

[PCRA Counsel]: Or could a trier of fact say, well, she's locked into this set of facts, if she goes outside of this set of facts that the prosecution wants her to testify to, she will get charged with perjury, therefore she's simply following marching orders? Could a trier of fact reasonably make the inference that, you know what, she's just following marching orders?

[Greenberg]. Of course.

[PCRA Counsel]: And would that benefit Mr. Baxter?

...

[Greenberg]: The answer is yes, but understand here that usually in that context the prosecutor brings that up on direct examination and then the defendant goes to town about the significance of the immunity agreement and locking a witness in.

In our case the prosecutor did not, so if I had brought it up on cross-examination or Mike Wallace had brought it up on cross-examination, that would have given the prosecutor the last word on redirect to elicit facts about that plea agreement that were basically favorable to him and would have hurt Mr. Baxter.

N.T., 1/20/2015, at 231-232, 234-235. The PCRA court found, and we agree, that Greenberg had acted reasonably by not introducing evidence regarding Marcelis's immunity agreement. **See** PCRA Court Opinion, 3/4/2015, at 11-12. Accordingly, Baxter's third sub-claim fails.

With regard to Baxter's remaining two claims, we will address them together. In his fourth sub-issue, Baxter asserts Greenberg's cumulative errors warranted a new trial so that Baxter could introduce exculpatory and impeachment evidence not presented by Greenberg. Baxter's Brief at 63. In Baxter's final claim, he alleges Greenberg violated his right to counsel by being "totally absent" when the trial court addressed the jury and answered its three questions and by sending in his place an inexperienced attorney who had no criminal defense experience and knew nothing about the case or Baxter's defense. **Id.** at 64.

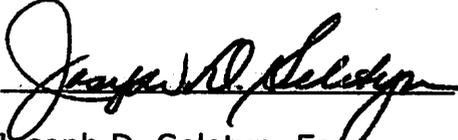
We find both claims were not properly preserved with the PCRA court. **See** Pa.R.A.P. 302(a); **see also Wharton, supra.** Baxter did not raise either issue in his PCRA petition or at the PCRA evidentiary hearing. Rather, he raised the fourth sub-issue in his post-hearing brief and the last argument for the first time on appeal. Accordingly, both claims are waived and we need not address them further.

J-S11024-16

Based on our disposition, we affirm the order of the PCRA court denying Baxter relief.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/17/2016

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

| | | |
|-------------------------------|---|--------------------------|
| COMMONWEALTH OF PENNSYLVANIA, | : | IN THE SUPERIOR COURT OF |
| | : | PENNSYLVANIA |
| Appellee | : | |
| | : | |
| v. | : | |
| | : | |
| ARMEL BAXTER, | : | |
| | : | |
| Appellant | : | No. 437 EDA 2009 |

Appeal from the Judgment of Sentence Entered February 5, 2009,
Court of Common Pleas, Philadelphia County,
Criminal Division, at No. CP-51-CR-0013121-2007.

BEFORE: PANELLA, SHOGAN and POPOVICH, JJ.

MEMORANDUM:

FILED MARCH 3, 2010

Appellant, Armel Baxter, appeals from the judgment of sentence entered on February 5, 2009. We affirm.

The trial court summarized the relevant facts of the case as follows:

On April 21, 2007, approximately twenty (20) to fifty (50) people were in the Kenderton Elementary playground. Demond Brown (decedent/victim, also identified on the record as "Demond") had recently finished a game of basketball and was standing on the sideline. The decedent's cousin, Anthony Harris (also identified on the record as "Tony"), and best friend, Hassan Durant, were standing on the basketball court.

[Appellant]¹ and Jeffrey McBride² were in the backseat of their friend Rachel Marcelis' car, driving to their friend Daryl Mack's (also identified on the record as "Mack") aunt's house.^[1] Either, [Appellant] or McBride said they saw someone on the

¹ We note that McBride's appeal is docketed at 440 EDA 2009.

Exhibit A

playground and told Rachel Marcelis to go back so they could be sure. Rachel Marcelis drove around the block, and [Appellant] and McBride exited the car.

¹ "[Appellant]" also identified on the record as "Snubbs" and "Jay-Jay[.]"

² "McBride", also identified on the record as "Fraddo" and "Fra[.]"

Anthony Harris and Hassan Durant saw [Appellant] and McBride enter the playground with "hoodies"³ on. People on the playground noticed [Appellant] and McBride because both men were wearing hoodies on a very hot day. The decedent turned around, noticed [Appellant] and McBride, and began to run. [Appellant] and McBride began shooting, and continued to shoot as they walked together side by side. The decedent ran in a "zigzag" pattern toward the 15th Street exit. The decedent stumbled out of the playground and fell in the middle of the street.

³ A "hoodie" is a long sleeved sweatshirt with a hood.

[Appellant] and McBride ran out of the playground, and headed east on Ontario Street, then south on 15th Street. Rachel Marcelis saw [Appellant] and McBride running in her direction, and let them back in her car. While in the car, Rachel Marcelis heard [Appellant] and McBride talking about how McBride's gun did not work and he could "not get any rounds off". When they arrived at Daryl Mack's aunt's house, Rachel Marcelis asked McBride "if that was the person who shot De-Nyce." McBride answered "Yes". After they left the house, Rachel Marcelis, [Appellant] and McBride drove to Wilkes-Barre for the weekend, but only Rachel Marcelis returned the following Monday.

An arrest warrant was issued for both [Appellant] and McBride on May 4, 2007. McBride was arrested in Wilkes-Barre on May 7, 2007, after police were informed of his outstanding warrant. [Appellant] was found at a motel in Wilkes-Barre on July 10, 2007, after the police received a call regarding a domestic violence issue. [Appellant] was initially arrested for false identification, after he gave officers three false names. He

was subsequently arrested on this case after further investigation by law enforcement.

Trial Court Opinion, 7/8/09, at 2-3 (citations omitted).

On February 5, 2009, a jury convicted Appellant of first degree murder, criminal conspiracy and possession of an instrument of crime (PIC). Appellant was sentenced to life imprisonment without the possibility of parole for the murder conviction, with concurrent sentences of ten (10) to twenty (20) years imprisonment for conspiracy and one (1) to two (2) years for the PIC. Following his conviction and sentencing, Appellant filed a timely notice of appeal and, as directed by the trial court, a statement of errors pursuant to Pa.R.A.P. 1925(b).

On appeal, Appellant raises four issues:

[I.] Did the trial court err in overruling Appellant's objection when the prosecutor vouched for a Commonwealth witness during closing arguments?

[II.] Did the trial court err in allowing the Commonwealth to introduce evidence that Appellant gave the police a false name to the Wilkes-Barre Police Department and as a result provided a consciousness of guilt instruction to the jury?

[III.] Did the trial court err in allowing Detective Hagan to testify to the contents of Anthony Harris's statement to the police on April 21, 2007 when he was not there to witness the statement being made?

[IV.] Did the trial court err in denying Appellant's request for a continuance in order to obtain the testimony of witnesses Tyrone Lewis, Jeffrey Blackman and Kyle Carter when it was acknowledged that inclement weather may have caused issues?

Appellant's Brief at 6.

In his first issue, Appellant alleges prosecutorial misconduct. Appellant asserts that the prosecutor improperly vouched for a Commonwealth witness during closing arguments.

Our standard of review of a trial court's decision to reject a claim of prosecutorial misconduct is limited to a determination of whether the trial court abused its discretion. ***Commonwealth v. Rolan***, 964 A.2d 398, 410 (Pa. Super. 2008).

Generally, a prosecutor's arguments to the jury are not a basis for the granting of a new trial unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility towards the accused which would prevent them from properly weighing the evidence and rendering a true verdict.

A prosecutor must have reasonable latitude in fairly presenting a case to the jury and must be free to present his or her arguments with logical force and vigor. The prosecutor is also permitted to respond to defense arguments. Finally, in order to evaluate whether the comments were improper, we do not look at the comments in a vacuum; rather we must look at them in the context in which they were made.

Id. (quoting ***Commonwealth v. May***, 898 A.2d 559, 567 (Pa. 2006), *cert. denied*, 549 U.S. 557 (2006)). In considering such a claim, the court's attention is focused on whether a defendant was deprived of a fair trial, not a perfect one. ***Rolan***, 964 A.2d at 410 (citation omitted).

A prosecutor does not engage in misconduct when his statements are based on the evidence. ***Commonwealth v. Carson***, 590 Pa. 501, 530, 913 A.2d 220, 237 (2006), *cert. denied*, 552 U.S. 954 (2007). A prosecutor

must be permitted to respond to arguments made by the defense. *Id.* Additionally, it is misconduct for a prosecutor to express a personal opinion of a defense witness' credibility. *Commonwealth v. Bricker*, 506 Pa. 571, 579, 487 A.2d 346, 350 (1985). However, the prosecutor is permitted to comment on the credibility of a witness where the witness' credibility has been attacked by the defense. *Commonwealth v. Barren*, 501 Pa. 493, 499, 462 A.2d 233, 235 (1983).

Further, a "trial court's curative instruction is presumed to be sufficient to cure any prejudice to Appellant." *Commonwealth v. Thornton*, 791 A.2d 1190, 1193 (Pa. Super. 2002) (quoting *Commonwealth v. Dennis*, 552 Pa. 331, 344, 715 A.2d 404, 410 (1998)). Juries are presumed to follow the court's instructions. *Thornton*, 791 A.2d at 1193; *Commonwealth v. Blackham*, 909 A.2d 315, 319 (Pa. Super. 2006), *appeal denied*, 591 Pa. 710, 919 A.2d 954 (2007).

Here, the statement of the prosecutor in question is as follows:

Prosecutor: I want you to think about when Rachel Marcelis got there and she told you in no uncertain terms that when she got down there, she lied through her teeth. I don't know nobody; I didn't see anything; I didn't hear anything; I don't know nothing. You got a girl there two -- that two sources have told you may have information not about just this murder but another dead girl, as well, and [Appellant's counsel] and [co-defendant's counsel] would have you believe at that point, okay, no big deal; there you go; we're not going to get to the bottom of this.

No. The truth is they had information that she did know. And while [the victim] or Fatima Whitfield's murder may not

have made CNN or may not have made the cover of the Inquirer, they cared about it. And they were not going to let someone with information on two dead bodies walk out of there until they got the truth. And that's exactly --

Co-defendant's counsel:² Objection.

The Court: Overruled.

Prosecutor: -- what Rachel Marcelis told you when she got up there on the stand. She didn't sit up there and say, That statement I gave to the police, that was a bunch of bunk. Up there in that chair, well rested, without being questioned, not in the little room, here under oath in court, she got up and told you the things she saw and the things she heard exactly the same way she told the police. That's the truth.

N.T., 2/4/09, at 122-123. Upon review of the closing statement in its entirety, there is no support in the record that the Commonwealth's statement formed in the jury's mind a fixed bias or hostility towards the accused, nor did it infringe upon the jury's responsibility to consider the evidence impartially. Rather, the prosecutor merely informed the jury that the detectives had reason to believe that the witness was lying.³ The prosecutor never vouched for or discussed the credibility of the police or any other witness in this proceeding.

² Appellant's counsel joined in the objection and thus properly preserved the issue for appeal. N.T., 2/4/09, at 130-131.

³ Upon reviewing the record, it also appears that the prosecutor was responding to the arguments made by Appellant's and co-defendant's counsel in their closing arguments where they attacked Marcelis' credibility as a witness. N.T., 2/4/09, at 79-80, 97-99.

Furthermore, the trial court instructed the jury that the attorney's statements were not to be considered evidence and that credibility determinations were to be made by the jury themselves. N.T., 1/29/09, at 24; N.T., 2/4/09, at 47, 49-50 135-138, 145-147. Because the jury was given a curative instruction, Appellant would have incurred no prejudice. **Thornton**, 791 A.2d at 1193. As such, Appellant's first claim is without merit.

Appellant's second issue alleges that the trial court erred in allowing the Commonwealth to introduce evidence that Appellant gave false names to officers at the time he was arrested and that it was error for the trial court to instruct the jury on consciousness of guilt.⁴ Appellant appears to combine the two distinct issues of admissibility of evidence and improper jury instruction into this single issue.

Appellant first argues that the trial court erred in allowing the Commonwealth to introduce the fact that Appellant gave false names to police into evidence. Evidence was presented that Appellant provided three

⁴ The Commonwealth argues that this claim is waived due to Appellant not objecting to the instruction, not challenging the instruction in his statements of matters complained of on appeal, or not including it in his statement of questions involved. Counsel for Appellant objected to the jury charge at trial and the issue of the consciousness of guilt instruction is clearly presented in Appellant's 1925(b) statement and brief. N.T., 2/4/09, at 177; Pa.R.A.P. 1925(b) at paragraph 3; Appellant's Brief at 14-15. Accordingly, this Court does not find the alleged error regarding the jury instruction waived.

false names before being arrested at the hotel room in Wilkes-Barre. N.T., 2/3/09, at 100. However, counsel for Appellant failed to object to the statements regarding Appellant giving false names to the arresting officers. **Id.** Accordingly, this issue is waived for purposes of appellate review. **See Commonwealth v. Duffy**, 832 A.2d 1132 (Pa. Super. 2003), *appeal denied*, 577 Pa. 694, 845 A.2d 816 (2004) (holding party must make timely and specific objections at trial to preserve issue for appellate review).

As to Appellant's contention that it was error for the trial court to instruct the jury on consciousness of guilt, our standard of review is as follows:

[W]hen evaluating the propriety of jury instructions, this Court will look to the instructions as a whole, and not simply isolated portions, to determine if the instructions were improper. We further note that, it is an unquestionable maxim of law in this Commonwealth that a trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration. Only where there is an abuse of discretion or an inaccurate statement of the law is there reversible error.

Commonwealth v. Trippett, 932 A.2d 188, 200 (Pa. Super. 2007). "A jury instruction is proper if supported by the evidence of record."

Commonwealth v. Clark, 599 Pa. 204, 224, 961 A.2d 80, 92 (2008).

"Generally, the trial court can use a flight/concealment jury charge when a person commits a crime, knows that he is a suspect, and conceals himself, because such conduct is evidence of consciousness of guilt, which may form

the basis, along with other proof, from which guilt may be inferred.”

Commonwealth v. Bruce, 717 A.2d 1033, 1037-1038 (Pa. Super. 1998),
appeal denied, 568 Pa. 643, 794 A.2d 359 (1999) (citations omitted).

The challenged instruction reads, in pertinent part, as follows:

[T]here was evidence presented in this proceeding, specifically, the testimony of Police Officers Charles Casey and Officer John Majikes from Wilkes-Barre, and that testimony, if believed by you, tended to show that [Appellant] gave false names to law enforcement to avoid being arrested in this case. Now, [Appellant] has asserted and maintained that he gave false names to avoid being arrested for drugs which were found in his hotel room.

You also heard evidence from these same officers . . . well, additional officers, . . . Detective Edward Rocks, that there was evidence that both Jeffrey McBride and [Appellant] left Philadelphia and went to Wilkes-Barre to avoid being arrested for this matter. Both defendants assert that the trip to Wilkes-Barre was preplanned and had nothing to do with this case.

Ladies and gentlemen, the credibility and weight of this evidence is solely for you to decide. Generally speaking, when a crime has been committed and a person thinks that they may be accused of committing that crime and the person flees from the location or conceals themselves in such a manner, such flight or concealment is a circumstance tending to prove that the person is conscious of guilt. Now, flight or concealment does not necessarily show consciousness of guilt. A person may flee or hide for some other motive and may do so though innocent.

Whether the evidence of flight and concealment in this case should be considered by you as tending to prove guilt depends on all of the facts and circumstances in the case and upon the motives that may have prompted the flight and/or concealment. Evidence of flight or concealment is insufficient as a sole basis for a guilty verdict, but is a factor that you may consider if you deem it relevant and give it the weight you deem to be proper.

J. S79017/09

N.T., 2/4/09, at 154-156.

As previously discussed, evidence of record shows that Appellant gave multiple false names prior to being arrested in a Wilkes-Barre hotel room. N.T., 2/3/09, at 100. The record also demonstrates that Appellant left the area where the crime was committed; did not return to the area; and was arrested two and a half months later in Wilkes-Barre. N.T., 2/3/09, at 108; 2/4/09, at 125-126.

As the jury instruction in question is supported by evidence of record and contains no inaccurate statements, we discern no error. *Clark*, 599 Pa. at 224, 961 A.2d at 92. Therefore, the trial court did not abuse its discretion in instructing the jury on consciousness of guilt. Accordingly, this claim fails.

In his third issue, Appellant claims that the trial court erred in allowing Detective Hagan to testify regarding a statement that witness Anthony Harris had given to two other detectives. The testimony consisted of Detective Hagan stating that Harris had given a statement to Detectives Morton and Cohill in which Harris identified Appellant and co-defendant by their nicknames, provided a home address, and identified Appellant from a photographic array. N.T., 2/3/09, at 34-36. Appellant contends that allowing the testimony of Detective Hagan prejudiced Appellant by allowing the hearsay testimony of Harris. Furthermore, Appellant asserts that his

Sixth Amendment right to confront witnesses against him was violated as a result.⁵

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pa.R.E. 801(c). Hearsay is not admissible unless a specific exception applies. Pa.R.E. 802. Statements in police reports are hearsay. ***Commonwealth v. May***, 587 Pa. 184, 898 A.2d 559 (2006), *cert. denied*, 549 U.S. 1022 (2006). Thus, the individual statements taken by Detectives Morton and Cahill are inadmissible hearsay, admissible only if there is a separate hearsay exception for each statement in the chain.⁶ ***Id.*** (citations omitted). The Commonwealth does not articulate any exception and likewise, our review reveals none. Thus, Appellant's objection to Detective Hagan's testimony regarding Harris' statement should have been sustained.

However, if a trial court wrongly admits hearsay, this Court will not disturb a verdict on that basis alone if the admission amounts to harmless

⁵ Appellant claims that he was deprived of the opportunity to explore the certainty of Harris in making his statements. However, Appellant cites nothing in his brief indicating uncertainty nor did he explore the possibility when he had cross-examined Harris himself.

⁶ Arguably, Officer Hagan's testimony was admissible merely to explain the course of action he took during the investigation and upon reading Harris' statement. However, the record does not indicate whether the testimony was allowed for that limited purpose.

error. **Commonwealth v. Hardy**, 918 A.2d 766, 777 (Pa. Super. 2007), *appeal denied*, 596 Pa. 703, 940 A.2d 362 (2008). An error is harmless if (1) the error did not prejudice the defendant or the prejudice was *de minimis*; (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict. **Commonwealth v. Gray**, 867 A.2d 560, 571-572 (Pa. Super. 2005), *appeal denied*, 583 Pa. 694, 879 A.2d 781 (2005).

Our review of the record indicates that Detective Hagan's testimony regarding Harris' statement did not prejudice Appellant as Detective Hagan simply testified to the contents of the statement, something that Harris himself testified to earlier in the trial. N.T., 1/30/09, at 24-26. Furthermore, Detective Hagan's testimony regarding the contents of Harris' statement was merely cumulative of other properly admitted evidence. Due to the non-prejudicial and cumulative nature of Detective Hagan's statements, we conclude that their admission, if improper, was harmless. **Gray**, 867 A.2d at 572. Appellant's third claim fails.

In his final issue, Appellant asserts that the trial court abused its discretion in refusing to grant a request for a continuance in order to allow

Appellant to present defense witnesses, Tyrone Lewis, Jeffrey Blackman, and Kyle Carter. Appellant claims that the three witnesses were prepared to testify that Appellant was not one of the individuals who shot the deceased. Appellant contends that the witnesses were unable to testify due to the inclement weather.

However, the record fails to reflect that Appellant requested a continuance, or objected to the trial court's decision not to grant a continuance. Upon review of the record, it appears counsel for the co-defendant attempted to request a continuance from the court before being interrupted. N.T., 2/4/09, at 24. No specific request for a continuance was made by counsel for Appellant or by counsel for co-defendant.⁷ This claim is, therefore, waived. *Duffy*. Furthermore, assuming *arguendo* that the issue had been properly preserved by counsel, we would still find it meritless.

A trial court's decision regarding whether or not to grant a continuance will not be disturbed absent an abuse of discretion. *Commonwealth v. McAleer*, 561 Pa. 129, 135, 648 A.2d 670, 673 (2000). An abuse of discretion is not merely an error of judgment; rather, discretion is abused

⁷ Even if co-defendant's counsel's attempted request was to be considered a request for a continuance, a defendant cannot rely solely on an objection by co-defendant to preserve the claim for appeal. *Commonwealth v. Cannady*, 590 A.2d 356, 360 (1991), *appeal denied*, 529 Pa. 631, 600 A.2d 950 (1991).

when "the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence or the record." *Id.* (quoting ***Commonwealth v. Chambers***, 546 Pa. 370, 387, 685 A.2d 96, 104 (1996)).

The factors to be considered to determine whether the trial court's discretion was properly exercised are: (1) the necessity of the witness to strengthen the defendant's case; (2) the essentiality of the witness to defendant's defense; (3) the diligence exercised to procure his presence at trial; (4) the facts to which he would testify; and (5) the likelihood that he could be produced at the next term of court.

Commonwealth v. Robinson, 581 Pa. 154, 237, 864 A.2d 460, 509 (2004), *cert. denied*, 546 U.S. 983 (2005) (citations omitted).

After a review of the record, it is clear that the trial court did not abuse its discretion in refusing to grant a continuance. Although the weather conditions were poor, court was in session, the weather did not prevent the jury or the other witnesses from appearing, and public transportation was still operational. N.T., 2/4/09, at 24. Also, the potential witnesses did not communicate with Appellant or his counsel as to their absence. *Id.* Appellant hired a private detective to locate one of the witnesses and was unable to locate him. *Id.* at 18-19. No information was presented to the trial court that the witnesses would appear if a continuance was granted. As the court had no basis to believe that any further delay would have produced

these witnesses, the trial court did not abuse its discretion in refusing to grant a continuance. Accordingly, this claim is meritless.

In conclusion, Appellant's claims lack merit and his convictions of first degree murder, criminal conspiracy, and PIC must be affirmed.

Judgment of sentence affirmed.

Judgment Entered.


Prothonotary

Date: MAR 3 2010

PAA Ex.4

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY, CRIMINAL DIVISION

No. CP-51-CR-0013121-2007

DOCKET

COMMONWEALTH OF PENNSYLVANIA

v.

ARMEL BAXTER
Petitioner

MEMORANDUM OF LAW
IN SUPPORT OF PETITION
FOR POST CONVICTION RELIEF
PURSUANT TO 42 PA.C.S.A. §9543

Armel Baxter, submits the instant Memorandum of Law in support of his petition for post conviction collateral relief.

Armel Baxter
HX-3302
SCI Coal Township
1 Kelley Drive
Coal Township, Pa. 17866
Petitioner

PETITIONER'S ELIGIBILITY FOR P.C.R.A. RELIEF:

Petitioner stands convicted of first degree murder, and is currently incarcerated on a sentence arising from that conviction. Petitioner maintains that he is innocent of this offense and further maintains that his conviction resulted from one or more of the following:

a) a violation of the Constitution of the United States and/or the Constitution of this Commonwealth which, in the circumstances of this case, so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place; and/or

b) ineffective assistance of counsel which, in the circumstances of this case, so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place.

Accordingly, petitioner is eligible for review of his claims under the P.C.R.A. 42 Pa.C.S.A. §9543 (a).

CLAIMS OF ERRORS:

Petitioner seeks a new trial based upon several independent errors of trial counsel, trial court, and prosecutor, standing alone, would entitle him relief. These claims are addressed within.

FACTS IN SUPPORT OF ALLEGED ERRORS

- 1A. Trial counsel elicited that drugs were found in the motel room where Appellant was arrested.
- 1B. Trial counsel effectively stripped Appellant of his good character, leaving him defenseless.
- 1C. Trial counsel did not attempt to investigate Shariah Jabbar-Mitchell to ascertain if there was a particular reason Appellant gave false names to police.
- 2A. Trial court allowed Appellant's trial counsel to elicit that drugs were found in the motel room where Appellant was arrested.
- 2B. Trial court violated Pa.R.E. 403 and Pa.R.E. 404.
- 2C. Trial court allowing trial counsel to elicit other criminal activity left Appellant defenseless.
- 3A. Prosecutor withheld evidence of Rachel Marcelis' immunity agreement and prior inconsistent testimony.
- 4A. Trial counsel did not discover that Rachel Marcelis was given immunity in regards to this incident and gave a prior inconsistent testimony.
- 5A. Prosecutor presented Rachel Marcelis' testimony while knowing it be perjured.
- 6A. Counsel failed to inform himself of Rachel Marcelis' immunity agreement and the and the fact that her statement consisted of self incriminating evidence.
- 7A. Trial counsel failed to request a brief continuance and bench warrants to obtain essential witnesses.
- 8A. Trial court and or court reporter omitted dialogue of Appellant requesting a continuance.
- 9A. Appellate counsel failed to federalize claims to preserve for federal review.
- 10A. Trial counsel failed to request a cautionary or limiting instruction after he elicited other criminal activity which the jury was free to view that evidence for which it was inadmissible.
- 11A. Trial counsel did not subpoena essential witnesses.
- 12A. Trial counsel didn't inform Appellant of his right to take the stand.
- 12B. Trial counsel didn't fully consult Appellant about taking the stand.
- 12C. Trial counsel gave unreasonable advice not to take the stand.
- 13A. Trial counsel didn't inform Appellant of the importance and right to character evidence.
- 13B. Trial counsel didn't inform Appellant of the right and importance of character witnesses and the possible uses of such evidence.
- 13C. Trial counsel didn't pursue a character defense prior to trial.

- 13D. Trial counsel was unprepared to present a character defense.
- 13E. Trial counsel did not conduct pre-trial investigations of character witnesses.
- 13F. Trial counsel failed to interview potential character witnesses.
- 13G. Trial counsel failed to present character testimony.
- 14A. Trial counsel failed to interview, investigate, locate, call, and produce essential witnesses.
- 15A. Trial counsel was overall unprepared for trial.

ASSERTED MATTERS
FOR
ARGUMENT

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ARGUMENTS

TRIAL COUNSEL VIOLATED APPELLANT'S CONSTITUTION AMENDMENT 6, EFFECTIVE ASSISTANCE OF COUNSEL, BY REVEALING OTHER CRIMINAL ACTIVITY TO THE JURY

The Appellant was prejudiced by counsel revealing other criminal activity to the jury. During the cross examination of Officer Casey of Wilks-Barre police, Appellant's counsel questioned Officer Casey about drugs being found inside the motel room where the Appellant was arrested (N.T. 2/3/09, at 107). The record reveals: (Questions made by Appellant's counsel, Mark Greenberg.)

Q. Officer Casey, after Mr. Baxter was arrested for false identification to authorities, was the motel room searched?

A. Yes

Q. And were drugs found inside the motel room, controlled substances?

A. Yes

Mr. Greenberg: Thank you sir. That's all I have.

Counsel cross examination of Officer Charles Casey divulges to the jury that Appellant engaged in other criminal activity. The above referenced record of counsel's cross examination of Officer Casey is in its entirety. Although there is a brief reference to drugs being found in the motel room the Appellant was arrested in, "even a passing reference may constitute evidence of other crimes, wrongs, or acts". West's Pennsylvania Practice, Evidence § 404-8 (3rd ed.). "The Turner" court states that in determining whether evidence represents proof of other criminal activity, the court must determine whether a jury could reasonably infer from the evidence that the accused had engaged in other criminal activity. *Com. v. Turner*, 311 A.2d 899, 454 Pa. 434, (1973). Merely the way this evidence was presented to the jury they could reasonably infer Appellant engaged in other criminal activity. Connecting Appellant with these controlled substances would be the natural inference of the jury because they do not know the reason why this evidence is being presented initially. All they hear is that these drugs were found in the motel room Appellant was just in before he was arrested. There are also other instances where the jury could reasonably infer that Appellant engaged in this other criminal activity. In the Commonwealth's closing arguments while speaking on the proposition of Appellant's consciousness of guilt, the prosecution states: "Now, Mr. Greenberg says, well, he (Appellant) had drugs in the room". (N.T. 2/4/09, at 126). This statement made by the Commonwealth directly puts in the minds of the jury that the drugs found in the motel room belonged to Appellant. Thus giving the jury the inference. In the trial court's instructions on consciousness of guilt to the jury it speaks on Appellant's reason he gave false names to law enforcements. The trial court states: "Now, Armel Baxter has asserted and maintained that he gave false names to avoid being arrested for drugs which were found in his hotel room". (N.T. 2/4/09, at 155). This theory

that was explained to the jury of why Appellant gave false names to police, to avoid being arrested for his drugs. Simultaneously, trial court states that these drugs were found in "his" (Appellant's) hotel room, giving Appellant ownership of the hotel room. It is common knowledge to the average human being that anything found on one's person or property is presumed to belong to that individual unless there is evidence that proves otherwise. Therefore, it can properly and reasonably be inferred that Appellant has engaged in other criminal activity. These instances that create this inference can be concluded individually and upon cumulation.

According to counsel his purpose for revealing drugs were found in the motel room where Appellant was arrested, was to create the notion that Appellant gave police false names because he didn't want to be associated or connected with those drugs. Counsel explains this in his closing arguments to the jury about consciousness of guilt (N.T. 2/4/09, at 101). This evidence may have been relevant to show the jury Appellant had reason to conceal himself other than his knowledge of being wanted for murder in Philadelphia but it exposed him to unfair prejudice. It is stated "there would rarely be a time when the introduction of such evidence would produce some result favorable to the defendant". *Com. v. Zapata*, 314 A.2d 299, 455 Pa. 205, (1974). "Prejudice results where testimony conveys to the jury, either expressly or by reasonable implication, the fact of a prior criminal offense". *Com. v. Nichols* 400 A.2d 1281, 485 Pa. 1, (1979).

In a mid-trial conference between counsel and trial court they converse about counsel eliciting drugs being found in the motel room where Appellant was arrested (N.T. 2/3/09, at 74-77). During this mid-trial conference counsel states that he not only wants the drugs to be apart of the evidence he also wants the domestic disturbance call revealed. This demonstrates counsel's additional incompetence because he condones the introduction of a domestic disturbance call that brought police to the motel room, compounded on top of drugs being found in the motel room and the arrest of Appellant for giving false names to law enforcements. All for the purpose of giving the jury multiple options for why Appellant gives false names opposed to consciousness of guilt for the charges in which he is being tried. The jury had no right to hear about these additional references to criminal activity because the probative value was significantly outweighed by unfair prejudice.

In addition, counsel's only concern about eliciting drugs being found is if that would open the door for Commonwealth to talk about what types of drugs were found, how they were packaged, or if they were possessed with the intent to distribute versus that of unfair prejudice. Counsel is totally unconcerned for the prejudicial effect that will arise from eliciting this evidence to the jury. In this mid-trial conference trial court explains to counsel that this evidence is only going to be perceived negatively by the jury (N.T. 2/3/09, at 76-77). Trial court states: "All

it does is make your client look worst, but its your call. I don't think you need to go any further. It's irrelevant to you because what the jury is going to hear is that he committed a crime in Wilks-Barre, if you put it in that way". After trial court expresses it's disapproval counsel still decides to proceed with revealing to the jury that drugs were found in the motel room by stating that it is his strategic decision to do so.

Pa.R.E. 404 (b) (3) provides that other acts evidence may be admitted in criminal cases "only upon showing that the probative value of the evidence outweighs its potential for prejudice". Thus, consistent with prior Pennsylvania law, evidence of other crimes, wrongs or acts may be inadmissible even though it is relevant for a permitted purpose because it's negative impact may require it;s exclusion. Like Pa.R.E. 404 (b) (3), pre-rule Pennsylvania law required that the trial court to determine whether the probative value of the evidence outweighed it's prejudicial impact". West's Pennsylvania Practice, Evidence § 404-9 (b). "The district court must apply [F.R.E.] Rule 404 (b) in conjunction with [F.R.E.] Rule 403 which allows exclusion of otherwise admissible evidence" if it's probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.... "This weighing process is primarily for the District Court to perform; trial judges are much closer to the pulse of the trial then we can ever be, and "broad discretion" is necessarily accorded them in balancing probative value against prejudice. U.S. v. Juarez 561 F.2d 65, (1977). Unlike F.R.E. 403, which permits exclusion only if the probative value is "substantially outweighed" by the negative impact, Pa.R.E. 403 permits exclusion if the negative characteristics merely outweigh the probative value. Nevertheless, this evidence should've been excluded under either Federal rule or Pennsylvania rule 403 and 404.

It is obvious that trial court balanced the probative value of the evidence against it's prejudicial effect and determined that this evidence should be excluded because it prejudiced the Appellant. Counsel disregarded trial court's judgment and trial court didn't intervene because counsel's decision was said to be based on strategy. Although trial court didn't intervene in counsel's decision, it still doesn't negate the fact that, regardless, the probative value was substantially outweighed by it's negative impact. Therefore, counsel was aware of the negative characteristics of this evidence and intentionally denied Appellant his Sixth Amendment right to effective assistance of counsel.

To perform the balancing test called by Pa.R.E. 403, however, the trial judge must assess the weight of the evidence to determine whether it's value warrants admitting it despite it's negative characteristics. The probative value to be weighed is the tendency of the evidence to establish the proposition for which it is fairly

admissible. The point to which the evidence is relevant was so limited that the probative value is easily outweighed by the potential unfair prejudice. The trial court had to balance the probative value of the evidence as it related to the future value of the degree with the unfair prejudice which would have resulted if the jury had learned of this other criminal activity. In the light of the exceedingly small probative value, trial court properly advised counsel to exclude revealing this evidence.

Pa.R.E. 404 (b) (1): Evidence of other crimes, wrongs, or acts is not admissible to the character of a person in order to show action in conformity therewith. "The Court explained the purpose of the rule excluding evidence of other crimes or acts against accused as follows: To prevent the conviction of an accused for one crime by the use of evidence that he committed other unrelated crimes, and to preclude the inference that because he has committed other crimes he was more likely to commit the crime for which he is being tried. The presumed effect of such evidence is to predispose the minds of the jurors to believe the accused guilty, and thus effectually to strip him of the presumption of innocence". *Com v. Spruill* 391 A.2d 1048, 480 Pa. 601, (1978). It is a fundamental principal of the accused to be considered innocent until proven guilty. If the presumption of innocence is not present, as it isn't in this case due to counsel's revealing other criminal activity, Appellant's Constitution right of due process was also violated.

Exclusion is based on the concern that the evidence would cause the jury to base it's decision on something other then the legal proposition relevant to the case or would divert the jury's attention away from their duty of weighing the evidence impartially. Evidence of other criminal activity generates the risk that the jury will not limit the evidence to it's proper role and will use it as evidence against the party as to which it is inadmissible, unfairly prejudicing that party. For these same reasons is why evidence of other criminal activity is inadmissible to the prosecution. It is a fundamental precept of the common law that the prosecution may not introduce evidence of the defendant's [other] criminal conduct as substantive evidence of his guilt of the present charge. Hence, the introduction of this evidence benefited the Commonwealth's case versus that of Appellant's because it exhibits propensity for which it is inadmissible.

At trial the only form of defense that was offered by Appellant's counsel was a generic stipulation of character (N.T. 2/4/09, at 45-46). This is the sole and in totality, the defense of the Appellant. There is no evidence presented by the Appellant to contradict Commonwealth's theory of the case or attacking credibility of Commonwealth's witnesses, in a case where Appellant's only link to the crime is the testimony of the Commonwealth's witnesses. Thus, Appellant is relying solely

on his good character to prevail against the charges against him. "[A]n accused may not be able to produce any other evidence to exculpate himself from the charges he faces except his own oath and evidence of good character". Com. v. Carter, 597 A.2d 1156, 409 Pa.Super 184, (1991). This Court has made it clear that "in a case.... where intent and credibility are decisive factors leading to either acquittal or conviction, the accused's reputation is of [409 Pa.Super 197] paramount importance. Indeed, evidence of good character may, in spite of all evidence to the contrary, raise a reasonable doubt in the minds of the jury". Such evidence has been allowed on a theory that general reputation reflects the character of the individual and a defendant in a criminal case is permitted to prove his good character in order to negate his participation in the offense charged. Evidence of good character is substantive and positive evidence, not mere make weight to be considered in a doubtful case, and,.... is an independent factor which may of itself engender reasonable doubt or produce a conclusion of innocence. Com. v. Gaines, 75 A.2d 617, 167 Pa.Super 485, (1950). Reputation evidence is not to be used merely to tip the balance where the Commonwealth's case is weak, but may raise doubt even when the case against the defendant is strong.

The Appellant's case rested squarely on his good character and due to counsel's decision to elicit evidence of other criminal activity it ridiculed Appellant's character. Trial counsel's decision to question Officer Casey about drugs being found served only to invite the jury to perceive Appellant negatively. The jury was permitted to consider evidence of other criminal activity other than the one for which Appellant was being tried and the introduction of such evidence unjustifiably blackened character of Appellant in the minds of the jury and improperly showed propensity to commit crime charged. This effectively stripped Appellant of the believability of having good character and ultimately his defense. Evidence of other criminal activity negates the Appellant's good character. Appellant was prejudiced because the only evidence he had to exculpate himself was destroyed by his counsel revealing other criminal activity that the jury can reasonably infer the Appellant engaged in.

"To be sure, it [good character] is to be considered with all other evidence in the case. But it is not to be measured with all the other evidence. It's probative value, it's power of persuasion, does not depend upon, and is not to be measured by, or appraised according to, the might or infirmity in the Commonwealth's case. Eventhough, under all the other evidence a jury could reach a conclusion of guilt, still if the character evidence creates a reasonable doubt or establishes innocence a verdict of acquittal must be rendered". Com. v. Neely, 539 A.2d 1317, 372 Pa.Super 519, (1988). The reasonable doubt that the Appellant's character evidence creates is immediately erased in the minds of the jury by other crimes evidence that

contradicts Appellant's good character. Counsel's decision can not be said to have been reasonably designed to effectuate his client's interest when it clearly undermines his client's only defense. The Pennsylvania Supreme Court stated: "A man of good standing is less likely to commit crime, and evidence of good reputation may in itself work an acquittal by creating a reasonable doubt of guilt where absent of such evidence there would be no reasonable doubt". *Com. v. Tenbroeck*, 108 A.2d 635, 265 Pa. 251, (1919). The value of such evidence is, indeed, that it is accompanied by reasonable doubt. Once character evidence is not accompanied by reasonable doubt in which it is meant to, the value of that evidence is worthless. Counsel underestimates the intelligence of the jury by eliciting unrelated criminal activity and expect them to view the Appellant's character evidence impartially, when a reasonable inference is present in the minds of that jury that Appellant engaged in this criminal activity. When the power of persuasion is nonexistent and reasonable doubt is absent character evidence becomes irrelevant. As a result counsel's actions leaves Appellant without a viable defense, hence, rendering counsel's decision incompetent and unreasonable. Consequently, Appellant was prejudiced by his attorney whom invalidated his defense and effectively robbing Appellant of his sole form of defense, leaving Appellant defenseless against the charges brought against him. There is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different.

"The Sixth Amendment, however, guarantees more than the appointment of competent counsel. By its terms, one has the right to 'Assistance of Counsel' [for] his defense. Assistance begins with the appointment of counsel, it does not end there. In some cases the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided. Clearly, in such cases, the defendant's Sixth Amendment right to have assistance of counsel is denied". *U.S. v. Decoster*, 624 F.2d 196, (1976). Obviously, the Appellant is denied his Sixth Amendment guarantee of effective assistance by counsel who undermined Appellant's defense that left Appellant defenseless. During the colloquy between the Appellant and trial court about Appellant taking the stand, trial court informs Appellant that his counsel has worked to keep things out of the record that the jury has no right to know; things that could be interpreted very negatively (N.T. 2/4/09, at 37-38). This demonstrates that counsel's strategy was to conceal Appellant's prior convictions and criminal activity, that the jury may very well interpret negatively. Yet and still, counsel elicits evidence of criminal activity. This evidence contradicts what is sought to be achieved in the overall defense.

Trial counsel is also ineffective for not requesting a cautionary or limiting instruction to the jury. A cautionary or limiting instruction would've explained the limited purpose for which the evidence was relevant and admissible. This evidence

for which it was inadmissible. When evidence is admissible for a limited purpose, a defendant is entitled to a limiting instruction. see *Com. v. Covil* 378 A.2d 841, 474 Pa. 375, (1977). Without specific instructions, one could only speculate as to whether or not the jury in this case "clearly understood" the limited purpose for which the evidence was admissible. see *Com. v. Amos*, 284 A.2d 748, 455 Pa. 297, (1971). It can not be reasonably determined that the jury knew to disregard the negative characteristics of that evidence and limit it for what counsel intended. This neglect and inattention constitutes ineffectiveness of counsel.

Lastly, counsel did not explore the alternative of interviewing Shariah Jabbar-Mitchell to ascertain if there was another reason why the Appellant gave false names. In the supplement report of the arrest of Appellant it states: "Jabbar-Mitchell explained that she and her boyfriend (Appellant), 'Haneef' had an argument over him staying out late". This reveals that Jabbar-Mitchell doesn't know the Appellant's name and may provide a reason why Appellant gives false names. If Appellant gives his girlfriend a false name and she has nothing to do with this case it can be reasonably determined that Appellant gives false names to police other than to avoid being arrested for a murder. Counsel should've interviewed Jabbar-Mitchell to discover if she knew the reason Appellant gives false names. The value of that interview is to inform counsel of the facts of the case so that he may formulate strategy. There is a reasonable probability that Jabbar-Mitchell may have provided counsel with a explanation for why Appellant does this. Also, presenting this witness' testimony alone demonstrates that Appellant gave his girlfriend a false name, and at minimum, leaves the jury to ponder that the Appellant may have gave police false names for personal reasons if he gives her a false name, whose relationship stems before this crime occurred. Not presenting and or interviewing Jabbar-Mitchell displays counsel's unpreparedness for trial because this alternative not chosen offered a potential for success substantially greater than the tactic utilized.

TRIAL COURT VIOLATED APPELLANT'S CONSTITUTION AMENDMENT 14, DUE PROCESS, BY ALLOWING TRIAL COUNSEL TO REVEAL OTHER CRIMINAL ACTIVITY TO THE JURY

Trial court erred by not excluding evidence of other criminal activity, elicited by Appellant's counsel, resulting in prejudice to Appellant. In a mid-trial conference between Appellant's counsel and trial court they converse about counsel eliciting drugs being found in the motel room where Appellant was arrested (N.T. 2/3/09,

at 74-77). This conversation consisted of counsel requesting that trial court give him the opportunity to talk with Appellant about whether or not he should elicit drugs being found in the motel room where Appellant was arrested in. After, counsel conversed with Appellant about this situation, counsel states that he was unable to get an answer from Appellant one way or the other. Counsel states:

"I think this might be something at the discretion of the lawyer, frankly.
THE COURT: Me, too". (N.T. 2/3/09, at 75).

Trial court also explains to counsel that this evidence is only going to be perceived negatively by the jury. Trial court states: "All it does is, it makes your client look worst, but its your call. I don't think you need to go any further. It is irrelevant to you because what the jury is going to hear is that he committed a crime in Wilks-Barre, if you put it in that way". (N.T. 2/3/09, at 76-77). Following, counsel states that it is his strategic decision to do so. Due to trial court's error for not excluding Appellant's counsel from using evidence of other criminal, was a abuse of discretion and ultimately, caused unfair prejudice to Appellant.

The record reveals: (Questioning by counsel, Mark Greenberg.)

Q. Officer Casey, after Mr. Baxter was arrested for false identification to authorities, was the motel room searched?

A. Yes.

Q. And were drugs found inside the motel room, controlled substances?

A. Yes.

Mr. Greenberg: Thank you sir. That's all I have. (N.T. 2/3/09, at 107).

By trial court allowing counsel to cross examine Officer Charles Casey about drugs being found in the motel room where Appellant was arrested divulges to the jury that Appellant engaged in other criminal activity. The above referenced record of counsel's cross examination of Officer Casey is in its entirety. Although there is a brief and vague reference to drugs, "even a passing reference may constitute evidence of other crimes, wrongs, or acts". West's Pennsylvania Practice, Evidence § 404-8 (3rd ed.). "The Turner" Court states that in determining whether evidence represents proof of other criminal activity, the court must determine whether the jury could reasonably infer from the evidence that the accused had engaged in other criminal activity. *Com. v. Turner*, 311 A.2d 899, 454 Pa. 439, (1973). Merely the way this evidence was presented to the jury they could reasonably infer the Appellant engaged in other criminal activity. Connecting the Appellant with these controlled substances would be the natural inference of the jury because they do not know the reason why this evidence is being presented. All they hear is that drugs were found in the motel room the Appellant was in just before he was arrested and this was expressed to counsel by trial court at the aforementioned conference.

Further instances where the jury could reasonably infer Appellant engaged in other criminal activity is in the Commonwealth's closing arguments pertaining to the proposition of Appellant's consciousness of guilt. The prosecution stated: "Now,

Mr. Greenberg says, well, he (Appellant) had drugs in the room". (N.T. 2/4/09, at 126). This statement made by the Commonwealth directly puts in the minds of the jury that the drugs found in the motel room belonged to Appellant. Thus intertwining the possession of drugs and criminal activity to the Appellant. Thus giving the jury the inference. Moreover, in trial court's instructions to the jury on consciousness of guilt it speaks on Appellant's reason he gave false names to law enforcements. "Now, Armel Baxter has asserted and maintained that he gave false names to avoid being arrested for drugs which were found in his hotel room" (N.T. 2/4/09, at 155). This theory that was explained to the jury of why Appellant gave false names gives the jury the notion of guilt that those drugs belonged to him and this is his reasoning, to avoid being arrested for his drugs. At the same time, trial court states that these drugs were found in "his" (Appellant's) hotel room, giving Appellant ownership of the hotel room. It is common knowledge to the average human being that anything found on one's person or property is presumed to belong to that individual unless there is evidence to prove otherwise. Therefore, it can properly and reasonably be inferred that Appellant engaged in other criminal activity.

Trial court has a duty to ensure each criminal defendant receives a fair trial. In pursuit of fulfilling this duty trial court has the paramount responsibility to make admissibility determinations based on it's discretion. The term "discretion of the trial court" might be interpreted by trial judge that it is controlled by no fixed rules of evidence or trial procedures but instead may act in each case as his or her judgment indicates. It is clear, however, that the term does not mean that there are no rules of evidence. There are rules, and failure to observe them will be error. Trial court took some consideration of Pa.R.E. 403 and 404 when it explained to counsel it's opinion and disapproval of counsel eliciting that drugs were found when Appellant was arrested. Abuse of discretion and error is present when trial court decides to ignore excluding evidence that possesses severe prejudicial impact on the jury.

Pa.R.E. 404 (b) (3) provides that other acts evidence may be admitted in criminal cases "only upon showing that the probative value of the evidence outweighs its potential for prejudice". Thus, consistent with prior Pennsylvania law, evidence of other crimes, wrongs, or acts may be inadmissible even though it is relevant for a permitted purpose because its negative impact may require its exclusion. Like Pa.R.E. 404 (b) (3), pre-rule Pennsylvania law required that the trial court to determine whether the probative value of the evidence outweighed its prejudicial impact". West's Pennsylvania Practice, Evidence § 404-9 (b). "The district court must apply [F.R.E.] Rule 404 (b) in conjunction with [F.R.E.] Rule 403 which allows exclusion of otherwise admissible evidence" if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.... "This weighing

process is primary for the district court to perform; trial judges are much closer to the pulse of the trial than we can ever be, and "broad discretion" is necessarily accorded them in balancing the probative value against prejudice". U.S. v. Juarez 561 F.2d 65, (1977). Unlike F.R.E. 403, which permits exclusion only if the probative value is substantially outweighed by the negative impact, Pa.R.E. 403 permits exclusion if the negative characteristics merely outweigh the probative value. Nevertheless, this evidence should've been excluded by trial court under either Federal rules or Pennsylvania rules 403 and 404.

It is obvious that trial court balanced the probative value of the evidence against its prejudicial effect and determined that this evidence should not be elicited because of its negative characteristics. Because Appellant's counsel states that its his strategic decision to elicit drugs being found in the motel room after the Appellant was arrested in is why trial court doesn't exclude this evidence. Although Appellant's counsel said his decision was based on strategy, it still doesn't negate the fact that, regardless, the probative value was substantially outweighed by its negative impact. Therefore, trial court had a duty to exclude that evidence in the interest of justice. Consequently, trial court was aware of the negative characteristics of this evidence and intentionally allowed counsel to elicit other criminal activity, knowing this evidence would be prejudicing Appellant. This abuse of discretion denied Appellant his right to a fair trial.

To perform the balancing test called for by the Pa.R.E. 403, however, the trial judge must assess the weight of the evidence to determine whether its value warrants admitting it despite its negative characteristics. The probative value to be weighed is the tendency of the evidence to establish the proposition for which it is fairly admissible. The point to which the evidence is relevant was so limited that the probative value was easily outweighed by the potential unfair prejudice. The trial court had to balance the probative value of the evidence as it related to the future value of the degree with the unfair prejudice which would have resulted if the jury had learned of this other criminal activity. In the light of the exceedingly small probative value and excessive amount of prejudice, trial court abused its discretion by not excluding this evidence.

Pa.R.E. 404 (b) (1): Evidence of other crimes, wrongs, or acts is not admissible to the character of a person in order to show action in conformity therewith. "The Court explained the purpose of the rule excluding evidence of other crimes or acts against an accused as follows: To prevent the conviction of an accused for one crime by the use of evidence that he committed other unrelated crimes, and to preclude the inference that because he has committed other crimes he was more likely to commit the crime for which he is being tried. The presumed effect of such evidence is to predispose the minds of the jurors to believe the accused guilty, and thus effectually to strip him of the presumption of innocence" *Com. v. Spruill*, 391 A.2d 1048, 480

character evidence impartially. As a result trial court error leaves Appellant without a viable defense, rendering trial court's decision abuse of discretion. Unfortunately, Appellant was prejudiced by trial court whom allowed counsel to invalidate Appellant's defense and effectively robbing Appellant of his sole form of defense, leaving Appellant defenseless against the charges brought against him. There is a reasonable probability that, but for trial court's error, the result of the proceeding would have been different.

In addition, trial court also erred by not administering a cautionary or limiting instruction to the jury. A cautionary or limiting instruction would've explained the limited purpose for which the evidence was relevant and admissible. When evidence is admissible for a limited purpose, a defendant is entitled to a limiting instruction. *Com. v. Covil*, 378 A.2d 841, 474 Pa. 375, (1977). The evidence here was not only highly prejudicial and at most marginally probative, it was also misleading. Admitting other criminal activity, with nothing at all to keep the jury from being misled, no limiting instruction, no redaction, violated Rule 403. Without specific instructions, one could only speculate as to whether or not the jury in this case "clearly understood" the limiting purpose for which the evidence was admissible. *Com. v. Amos*, 284 A.2d 748, 445 Pa. 297, (1971). It can be not reasonably determined that the jury knew to disregard the negative characteristics of that evidence and limit it for what counsel intended.

PROSECUTION COMMITTED BRADY VIOLATION AND VIOLATED APPELLANT'S CONSTITUTION AMENDMENT 14, DUE PROCESS, BY WITHHOLDING EVIDENCE OF RACHEL MARCELIS IMMUNITY AGREEMENT AND PRIOR INCONSISTENT TESTIMONY

The prosecution violated Appellant's Constitution Amendment 14, due process, by withholding evidence of Rachel Marcelis' testimony in Cordell Young's trial, and the immunity agreement given in return for her testimony, which constitutes a Brady violation and a violation of the confrontation clause. "A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused". *Youngblood v. West Virginia*, 126 S.Ct 2188, 547 U.S. 867, (2006). This evidence was 'nt disclosed at Appellant's trial, prejudicing Appellant. This case boiled down to the credibility of witnesses and Marcelis' testimony went unchallenged and uncontradicted. If this evidence was presented at trial it would've put the case in such a different light creating a reasonable possibility the result of the proceeding would have been different.

In Rachel Marcelis' statement to police she gives information regarding two incidents. One involving Cordell Young and other involving Appellant. Because Marcelis gives a statement regarding both incidents they are directly intertwined. Therefore, in the first instance, we must look to Marcelis' testimony in Young's trial. At Appellant's trial Marcelis

was presented by Commonwealth to corroborate prior testimony of Anthony Harris and Hassan Durant as well as testifying to additional evidence of guilt. Marcelis' testimony consisted of Appellant being present in her car on the date of April 21, 2007 while driving around the Kenderton School. She states that she dropped Appellant off in the vicinity of the school yard and shortly after she seen Appellant running amongst a crowd of people. Then Appellant got back in her car when she heard either Appellant or co-defendant state, they got him. She then states that they proceeded to Daryl Mack's (other occupant of car) aunt house where co-defendant admitted that the person who was shot (the victim), was the guy who shot Appellant's friend D-Nyce (Derrick McMillan), giving both defendant's motive to kill Demond Brown. Marcelis then states that shortly after she drove both Appellant and his co-defendant to Wilks-Barre. These circumstances in which Marcelis testified to were the crippling blows to the Appellant's case. She gives the jury a perspective that she dropped them off near the crime scene, seen them running amongst a chaotic crowd, getting back in her car and admitting to have "got him". Then giving the jury a motive to kill. Also stating that she drove Appellant Philadelphia where it was considered to be flight and concealment. This testimony was essential to the Commonwealth's case and was the most compelling evidence presented by the Commonwealth because Marcelis admits to befriending Appellant and co-defendant, being the reason prosecutor states Marcelis doesn't have any reason to lie.

More importantly, Marcelis' testimony was compelling due to the fact that it went unchallenged and uncontradicted. Trial counsel did not present any evidence which which contradicted or challenged what Marcelis testified to. This left the jury to view Marcelis' testimony with favor because of the lack of evidence that proved otherwise. Simultaneously, Marcelis testified directly to the details of her statement to the police. This added to the believability of her testimony. These aforementioned circumstances ultimately were the most contributing factors of the jury's determination of guilt.

Prior to Appellant's trial Marcelis testified at Cordell Young's trial on June 8, 2008. The relation between Young's trial and Appellant is Marcelis gave information to police involving both incidents in that one statement. Also it is provided on the record that Young is Appellant's co-defendant's brother, also a friend of Appellant according to Marcelis (N.T. 1/30/09, at 115-116). This information plays a key role in the importance Marcelis' testimony at Cordell Young's trial. Now we must look to the content of Marcelis' testimony at Young's trial.

One of the most important circumstances Marcelis testifies to in Young's trial is when she admits to dating Young, which is Appellant's friend according to Marcelis and Appellant's co-defendant's brother. Although this was displayed at Appellant's trial the core of Marcelis' feeling towards Young weren't. Her feelings

for Young will clearly exhibit her corrupt motive to implicate Appellant falsely. Initially Marcelis states that she had dated Young but they had a bad break up and a lot of bad feelings inbetween (Young N.T. 6/8/08, at 162). Throughout her testimony she expresses her bad feelings for Young which went as deep as her testifying that she hated him (Young N.T. 6/8/08, at 219). More importantly is when she states: "People are aware that I lied to police because I was mad at Cordell. And if it got me to go home and got him into trouble, it killed two birds with one stone is my mindset". (Young N.T. 6/8/08, at 220). This clearly reveals that Marcelis lied to police when she was giving her statement as well as her ill will towards Young and the connection between Young and Appellant has relevance. Marcelis testified to knowing Appellant through Young (N.T. 1/30/09, at 116). This association and through association is Marcelis' reasoning for falsely implicating Appellant through her hatred for Appellant's friend, while giving police her statement. Marcelis goes further and testifies that due to her relationship with Young she felt that Young screwed her over so she would screw him over, getting the last laugh (Young N.T. 6/8/08, at 221-222). Marcelis' testimony displays no regret for falsely implicating Young in a murder, which extends to Appellant because she only knows him through Young. Her anger and hatred at the time for Young can be directly connected to Appellant due to his affiliation with Young. It is apparent that Marcelis' emotions towards Young suggest hostility towards Appellant. If she could falsely implicate Young in a murder she could most certainly falsely implicate Appellant. Simultaneously, having hateful feelings towards Young, Marcelis had another goal to accomplish and that was to go home, go back to school, get her car back, and basically get back to her life, which she stated as killing two birds with one stone. Marcelis' bias, interest, and corrupt motive is clearly shown through her testimony at Young's trial. She admits to having conscious false intent. This evidence would've had strong probative value as impeachment evidence at Appellant's trial.

Further, not only did Marcelis want to go back to school, get her car back, go home and have her life back, she openly states that she had to sign her statement and was forced to tell police what they wanted her to. Marcelis testified that she had to sign her statement or the police weren't going to let her leave and she would miss her finals (Young N.T. 6/8/08, at 192). She goes further and testifies that police informed her she was a prisoner and she was not allowed to leave, they took her car with her school work and she wasn't going to leave without giving them the statement the way they wanted it (Young 6/8/08, at 208-209). Marcelis states that the detective would come in and ask her a question and if it wasn't the answer he wanted he would leave as to punish her (Young N.T. 6/8/08, at 211). She also states that they weren't accepting what she believed to be the truth (Young N.T. 6/8/08, at 221). In addition to those circumstances Marcelis also testified that the only way she was allowed to

leave to make it back to school for finals if she consented to the videotape, what police wanted and told them what they wanted (Young N.T. 6/8/08, at 194); also stating that she was going to give police what they wanted and not what she had originally had stated to them (Young 6.8.08, at 199). Marcelis additionally testifies that the police omitted things from the video consent tape where she stated that it was two days from hell, they forced her to tell them what they wanted and how horrible it was for her giving the statement (Young N.T. 6/8/08, at 199-200). These things were all expressed by Marcelis to her lawyers, that she was kidnapped by Philadelphia police detectives and they refused to let her leave unless she agreed to sign a statement that wasn't true and agreed to be videotaped saying things that weren't true (Young N.T. 6/8/08, at 195). All of these circumstances testified to by Marcelis would have significantly aided Appellant's defense because they are relevant to the statement she gave and testified to at Appellant's trial.

At Appellant's trial Marcelis didn't portray these aforementioned circumstances to the jury while testimony about the statement she gave police. Marcelis' testimony regarding her statement portrays that she wasn't under coercion and duress while giving her statement nor was it untruthful. This directly contradicts what is testified at Cordell Young's trial. Marcelis does testify that she was not allowed to leave while being questioned by police (N.T. 1/30/09, at 139-140) but she does not state that police weren't going to allow her to leave until she gave them the statement the way they wanted it like she testified at Young's trial. She also testified that if she gave police an answer that they didn't like they basically disregarded it and would leave her in the room and ~~locked~~ the door (N.T. 1/30/09, at 141) but doesn't inform the jury that police weren't accepting what she believed to be the truth like she stated at Young's trial. Marcelis was asked if she had to be videotaped and she testified that she was under that impression. She states that she didn't want her parents to find out she was hanging out in North Philly. That she didn't want them to find out who she was friends with. Also she wanted her car back, was told she wouldn't have to come to court, and her life would go back to normal if she consented which is what police told her (N.T. 1/30/09, at 142-143). This is her rationale for consenting to the video portion of her statement. This differs from her testimony at Young's trial, where she states that she had to be videotaped, they made her give them what they wanted, how they wanted, and how she was forced to give them what they wanted. Relevant to the content of the consent to videotape it wasn't revealed by Marcelis that things were omitted, such as, her expressing that her time in police custody was two days from hell, police forced her tell them what they wanted, and how horrible it was for her. Additionally, she informed her lawyers that police kidnapped her made her sign a statement that wasn't true and agree to be videotaped saying things that weren't true. Moreover, at Cordell Young's trial Marcelis testified

that her whole statement is not accurate (Young N.T. 6/8/08, at 204). These major inconsistencies between testimonies should have been disclosed to the defense and revealed to the jury. The prosecutor's failure to disclose this favorable evidence prejudiced Appellant.

The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origin to early 20th century structures against misrepresentation and is of course most prominently associated with this Court's decision in *Brady v. Maryland*. *Kyles v. Whitley*, 115 S.Ct 1555, 514 U.S. 419, (1995). The prosecutor failed to disclose Marcelis' prior inconsistent testimony which would have directly attacked her credibility and significantly aided Appellant's defense. A party may impeach the credibility of an adverse witness by introducing evidence that the witness has made one or more statements inconsistent with his trial testimony. However, it must be established "that when attempting to discredit a witness'[s] testimony by means of a prior inconsistent statement, the statement must have been made or adopted by the witness whose credibility is being impeached". *Croyle v. Smith*, 918 A.2d 142, (2007). Clearly Marcelis prior testimony has been adopted by her due to her giving her oath at the prior proceeding. This case boiled down to the credibility of witnesses due to the fact there was no other direct evidence of guilt but the testimony of witnesses. That credibility was of the utmost importance.[T]he Supreme Court extended its holding in *Brady v. Maryland*, *supra*, to include evidence which bears materially upon credibility of a key prosecution witness. The Court observed that "[w]hen the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule". *Com. v. Santiago*, 654 A.2d 1062, 439 Pa.Super 447, (1994). Not only does Marcelis' prior testimony provide impeachment evidence it also provides exculpatory evidence. [E]xculpatory evidence includes "evidence affecting" witness "credibility", where the witness "reliability" is likely "determinative of guilt or innocence". *U.S. v. Ruiz*, 122 S.Ct 2450, 536 U.S. 622, (2002). It is apparent that this undisclosed evidence bears materiality because it discredits Marcelis and undermines the confidence in the outcome of the trial. Evidence is material if "the disclosed information could have substantially affected the efforts of defense counsel to impeach the witness, thereby calling into question the fairness of the ultimate verdict". *U.S. v. Cuffie*, 80 F.3d 514, (1996). Furthermore, had the prosecution disclosed the evidence there would be a reasonable probability the result of the proceeding would have been different.

Rachel Marcelis was the most crucial and essential witness because her testimony was uncontradicted and because the Commonwealth's other witnesses may have not been believable to the jury. Hassan Durant and Anthony Harris were the prosecution's only other witnesses who implicated Appellant in the incident but there were circumstances in which the jury could have deemed their testimonies untruthful. Both Harris and Durant testified to having very close relationships to the victim, and

although it was vaguely asserted they have a friendship with each other. Because of these relationships between these individuals compounded with the emotional effect it had, which was also testified to, gave the jury a reasonable inference of possible bias to testify falsely and interest on the outcome of the trial. Further, both Harris and Durant lied under oath about not seeing each other and being in each other's presence after the shooting. It is not until Durant's preliminary testimony is furnished that Durant finally admits to seeing Harris a good three times, yet Harris still denied (N.T. 1/29/09, at 136-137). The significance of this untruthfulness is it exhibits to the jury that they are trying to hide the fact that they may have conspired, talked about this case and about their testimonies to give them believability, and that they have a common corrupt motive. What furthers this reasonable inference is the fact that Hassan Durant's statement he gave police is different from his trial testimony, which his trial testimony resembles Harris'. Also, Harris was asked if he ever talked to anyone about the case including people from his neighborhood and he answered no. But during his testimony he admits to receiving information from people in the neighborhood about the Appellant being seen with Marcelis in a white truck, calling police and giving tag numbers (N.T. 1/30/09, at 28). There is undeniable evidence that Harris and Durant had interaction with each other that they were trying to conceal and Harris and Durant received information other than their own perceptions about the case. Along with these aforementioned circumstances both witnesses testimonies were scattered with a long list of inconsistencies between the two. Although both implicated Appellant, these inconsistencies and additional evidence very well may have led the jury to deem these witnesses incredible. By impeaching and discrediting Marcelis with her prior testimony it would have put the case in a different light by inducing the jury to focus it's attention on Harris and Durant's bias, interest, corrupt motive, and inconsistencies, giving that evidence greater importance. Overall, nondisclosure of the evidence caused unfairness of the ultimate verdict.

The jury was erroneously lead to believe that Marcelis had no personal stake, bias, interest, corrupt motive, or reason to be untruthful when implicating Appellant in the murder. Again, there was no evidence presented to contradict Marcelis testimony so it was free from conflict, with nothing to overshadow or directly challenge what she testified to. This gave her the greatest reliability of all the Commonwealth's witnesses. The prosecution portrayed her not to have any motive to lie. On the record there is no indication of a relationship with the victim or any other Commonwealth witness and Marcelis but there is with Appellant and his codefendant. This strengthens her believability because she's testifying against those she befriended. She also portrayed to be tearing up as she was on the stand, not lying and putting the defendant's in a murder over her finals or anything, and saying she wouldn't do that (N.T. 2/4/09, at 121). The prosecution also talks about the demeanor of Marcelis at the end of the consent to videotape as giggling and laughing and not being treated

badly while giving her statement. He also speaks on the fact that Marcelis didn't get up on the stand and say that the statement was a bunch of bunk in his closing arguments (N.T. 2/4/09, at 123). Prosecution goes further and improperly vouches for Marcelis' credibility (N.T. 2/4/09, at 122-124) which is a separate issue, but displays the prosecution may have additional evidence that supports her truthfulness and is prosecution's personal belief, placing the prestige of the Commonwealth behind Marcelis. Ultimately, in the eyes of the jury Marcelis apparently was deemed credible and reliable because of her affiliation with Appellant, she testified to the content of her statement and not renouncing it, being perceived not having a reason to lie, and because there was no evidence to contradict her testimony. Where as though her prior testimony at Cordell Young's trial divulges everything to the contrary. Showing that she had hateful feelings towards Young which directly connects to Appellant because she only knows Appellant through him., she was coerced and forced to give police a statement the way they wanted it, she was forced to sign a statement that wasn't true and consented to be videotaped saying things that wasn't true, and that she had her own personal interest and corrupt motive to falsely implicate Appellant. She admitted that her whole statement was not accurate; Also revealing that although its wrong to accuse someone of murder, that's what she did (Young N.T. 6/8/08, at 196). These circumstances can not be overlooked because it is apparent that the Appellant was prejudiced due to this nondisclosure. These errors which infect the process of determining guilt or innocence can not be overlooked by pointing to the strengths of the Commonwealth's case. see *Com. v. Cherry*, 378 A.2d 800, 474 Pa. 295, (1977).

Not only was Appellant prejudiced by not being able to contradict and impeach Marcelis with her prior testimony, he was prejudiced by the fact that it denied the opportunity of the jury being given a inconsistent statement instruction. This would have given the jury the law on how it should consider a inconsistent statement. And with this instruction there is a reasonable probability that the jury would have properly discredited Marcelis according to the law.

Furthermore, there is another instance of undisclosed evidence by the Commonwealth and it is the immunity agreement given to Rachel Marcelis in return for her testimony. It was never revealed by the prosecutor that Marcelis was under any type of agreement with the Commonwealth. In Young's trial it was explained that although she was given immunity it was geared towards the second incident (Young N.T. 6/8/08, at 164), indicating the Appellant's incident. This evidence also goes to Marcelis' credibility, reliability and the jury's determination of guilt. This impeachment evidence would have been of high probative value to the defense. Appellant was also prejudiced because he could not impeach this crucial witness with this evidence because it was suppressed by the prosecution, giving way to unfairness of the ultimate verdict

and undermining the truth determining process. Because Marcelis was given immunity it indicates that she would be incriminating herself without the agreement if she testified. Since there was no indication of immunity she was viewed by jury not to possess a motive to cooperate with the Commonwealth. There was no evidence which indicated to the jury that Marcelis had an interest in the outcome of this trial. And if such interest existed the jury had a right to know about it, where as it apparently does here.

In a hypothetical scenario of the Commonwealth taking away Marcelis' immunity because she renounced her statement and content within, in Cordell Young's trial, her immunity agreement would still be relevant and essential evidence to the present matter. It would still display to the jury that she did indeed commit a crime and incriminated herself with her statement and testimony. Therefore, it acknowledges that the Commonwealth would be well within the range of the law to charge her with crimes. Crimes which stem to being an accessory, aiding and abetting, and obstruction of justice, due to her incriminating statement. Now, in her testimony she clearly incriminates herself with her involvement in the incident and afterwards allegedly aids Appellant, providing transportation, while being fully aware what took place. At face value, Marcelis was portrayed to be an innocent witness having no reason to lie about her testimony. It is obvious that this is not the case. In Constitution Amendment 5 a witness has a right to refuse to testify because of self incrimination. Because Marcelis testifies to circumstances in which she incriminates herself it can be stated that she hoped for favorable treatment from the prosecutor. [P]romise of favorable consideration in exchange for testimony deemed credible gave witness "a direct personal stake" in defendant's conviction; "The fact that a specific reward was not guaranteed through promise or a consummated plea agreement, but was expressly contingent on the state's good faith and satisfaction with [the witness's] testimony, served only to strengthen any incentive to testify falsely in order to secure [the defendant's] conviction. *Com. v. Strong*, 761 A.2d 1167, 563 Pa. 455, (2000). [W]henver a prosecution witness may be biased in favor of the prosecution because of outstanding criminal charges or because of any non-final criminal disposition against him within the same jurisdiction, that possible bias, in fairness, must be made known to the jury. Even if prosecutor has made no promises, either on the present case or on other pending criminal matters, the witness may hope for favorable treatment from the prosecutor if the witness presently testifies in a way that is helpful to the prosecution. And if that possibility exist, the jury should know about it. *Com. v. Corely* 816 A.2d 1109, (2003). It is of no matter if the prosecution was still honoring the immunity agreement or not, it should have still been disclosed to the defense because it exhibit to the jury that Marcelis committed a crime in regards to this case and could have been charged, the prosecutor may have took back her immunity

and the reason she did testify favorable to the Commonwealth at Appellant's trial because she hoped for favorable treatment with their satisfaction of her testimony.

Nevertheless, "It is well-settled that Commonwealth has a duty not to conceal the existence of a promise or of an agreement to recommend a specific sentence or leniency for a crucial prosecution witness". *Com. v. Hartey*, 621 A.2d 1023, 424 Pa.Super. 29, (1993). This evidence of a immunity agreement equate with the nondisclosure of Marcelis' prior inconsistent testimony because it is relevant to those same principle of affecting credibility. The jury determination of Appellant's innocence or guilt in this case was based on the credibility of witnesses, giving these determinations paramount importance, hence, giving Rachel Marcelis' credibility paramount importance. Any implication, promise or understanding that the government would extend leniency in exchange for a witness's testimony is relevant to the witness's credibility. *Giglio v. United States*, 405 U.S. 150, 92 S.Ct 763, (1972). The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such 'subtle factors as the possible interest of the witness in testifying falsely that a defendant's life and liberty may depend. *Napue v. Illinois* 79 S.Ct 1173, 360 U.S. 264, (1959). This is true in the present case and Appellant was prejudiced due to the nondisclosure, in the jury's eyes Marcelis possessed no interest in the outcome of the case and had no reason to falsely implicate Appellant, testifying favorably for prosecution. Marcelis was the Commonwealth's most reliable witness because there was no evidence to induce the jury to look at her testimony being colored with bias, and having a personal stake on the conviction of Appellant. Had the defense been armed with full disclosure of her agreement with the Commonwealth it would have put the case in a different light. Appellant was denied a fair trial where prejudice was a product of the prosecutor's nondisclosure, concealing a agreement that should have been made known in the interest of justice.

The prosecution was aware of this immunity agreement as well as her prior inconsistent testimony and or should have known about it. [T]he individual prosecutor has a duty to learn of any favorable evidence known to others acting in the government's behalf in the case, including police. *Youngblood v. West Virginia*, 126 S.Ct 2188, 547 U.S. 867, (2006). The prosecution's office forwarded the discovery to the defense on November 20, 2007. It wasn't until approximately January of 2009, the month of trial when the defense was forwarded Rachel Marcelis' statement and was aware that she was apart of this case. This indicates that the prosecutor wasn't aware of Marcelis' relevance to this case until over a year later. This means that someone within the entity of the prosecution's office relayed information of Marcelis' relevance to this case to the prosecutor trying this case. The prosecution's office knew that Marcelis testified in June of 2008 in Cordell Young's trial, which means

that they knew that her testimony would be favorable to the defense. "The staff lawyers in a prosecutor's office have the burden of letting the left hand know what the right hand is doing or has done". *Santobello v. New York*, 92 S.Ct 495, 404 U.S. 257, (1971). Also there is no question that the prosecutor knew of the immunity agreement with Marcelis. They also knew that she was given immunity in regards to both incidents. Because she was given immunity in Young's trial and her testimony wasn't favorable to the Commonwealth is why they made preparations to ensure that her testimony was favorable at Appellant's trial. The immunity agreement links both cases and was the duty of the prosecutor to know about it. [W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and such it is the spokesmen for the government. A promise made by one attorney must be attributed, for these purposes, to the government. *Com. v. Strong*, 761 A.2d 1167, 563 Pa. 455 (2000). The staff of the prosecution is a unit and each member must be presumed to know the commitments made by any other member. If responsibility could be evaded that way, the prosecution would have designed another deceptive 'contrivance' akin to those condemned in *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct 340, (1935) and *Napue v. Illinois* 360 U.S. 264, 79 S.Ct 1173, (1959). *Santobello v. New York*.

The Appellant was also denied his Sixth Amendment right to confrontation by the prosecutor's failure to disclose the favorable evidence of Rachel Marcelis. By the prosecution withholding evidence Appellant was deprived of the right to confront Marcelis with evidence that was withheld. Prejudice ensued because the jury did not hear the withheld evidence which hendered them from appraising them, along with cross examination about the withheld evidence, which revealed her bias, interest, corrupt motive, and reason to give a false statement as well as testify falsely against Appellant. "We can not overemphasize the importance of allowing full and fair cross examination of government witness testimony is important to the outcome of the case. Out of necessity, the government frequently relies on witnesses who have themselves engaged in criminal activity and whose record for truthfulness is far from exemplary. These witnesses often have a major personal stake in their credibility contest with the defendant. Full disclosure of all relevant information concerning their past record and activities through cross examination and otherwise is indisputably in the interest of justice. *U.S. v. Brooke*, 4 F.3d 1480, (1993).

It is apparent that prejudice ensued from both instances of nondisclosure from the prosecutor. Credibility was of paramount importance, being the primary focus of the jury's determination of innocence or guilt. Because favorable evidence was not disclosed the jury did not hear evidence that would establish Marcelis' reasoning for lying to police about her statement and reasoning for testifying falsely, ultimately blackening her credibility. Marcelis was thee most reliable and believable

Pa. 1, (1978). Under our system of criminal justice, defendants are to be presumed innocent until proven guilty. This Court can not permit this type of evidence to overcome the presumption of innocence. If the presumption of innocence is not present, as it isn't in this case due to trial court not excluding evidence of other criminal activity, Appellant's Constitution Amendment 14 of due process is violated.

Exclusion is based on the concern that the evidence would cause the jury to base it's decision on something other than the legal proposition relevant to the case or would divert the jury's attention away from their duty of weighing the evidence impartially. Evidence of other criminal activity generates the risk that the jury will not limit the evidence to its proper role and will use it as evidence against the party as to which it is inadmissible, unfairly prejudicing that party. For these same reasons is why this is admissible to the prosecution. It is a fundamental precept of the common law that the prosecution may not introduce evidence of the defendant's [other] criminal conduct as substantive evidence of his guilt of the present charge. Hence, trial court abused it's discretion, for the introduction of this evidence benefitted the Commonwealth's case versus that of Appellant's right to a fair trial because it exhibits propensity for which it is inadmissible.

The Appellant's case rested squarely on his good character and due to trial court allowing Appellant's counsel to elicit evidence of other criminal activity it ridiculed Appellant's character defense. Questioning of Officer Casey about drugs being found only served to invite the jury to perceive Appellant negatively and this was openly expressed by trial court. The jury was permitted to consider evidence of other criminal activity unjustifiably blackened character of Appellant in the minds of the jury and improperly showed propensity to commit crime charged. This effectively stripped Appellant of the believability of having good character and ultimately his defense. The Appellant was prejudiced because the only evidence he had to exculpate himself was destroyed by trial court allowing counsel to reveal other criminal activity that the jury reasonably inferred Appellant engaged in.

The reasonable doubt that the Appellant's character evidence creates is immediately erased in the minds of the jury by other crimes evidence that contradicts the Appellant's good character. Trial court deprives Appellant of his right to a fair trial when it's decision clearly undermines the Appellant's only defense. The Pennsylvania Supreme Court stated: "A man of good standing is less likely to commit crime, and evidence of good reputation may in itself work an acquittal by creating a reasonable doubt of guilt where absent of such evidence there would be no reasonable doubt". Com. v. Tenbroeck 108 A. 635, 265 Pa. 251, (1919). The value of such evidence is, indeed, that it is accompanied by reasonable doubt. Once character evidence is not accompanied by reasonable doubt in which it is meant to, the value of that evidence is worthless. Trial court must have underestimated the intelligence of a jury by not excluding evidence of other criminal conduct and expect them to view Appellant's

witness the prosecutor presented in the eyes of the jury because those instances of evidence were not disclosed. The jury was improperly led by prosecutor to believe that Marcelis didn't possess a bias, interest, corrupt motive, personal stake, or reason to police, also reason to lie in open court. When by the disclosed evidence it undoubtably signifies the opposite. It can not be pronounced that because of the nondisclosure no prejudice exist nor does it undermine the confidence of the ultimate verdict of the Appellant received a fair trial. The nondisclosure speaks volumes in regards to the prejudice that resulted and unfairness of the verdict which can not be denied.

TRIAL COUNSEL VIOLATED APPELLANT'S CONSTITUTION AMENDMENT 6, RIGHT TO EFFECTIVE ASSISTANCE, FOR FAILING TO INTERVIEW, INVESTIGATE, AND DISCOVER THAT RACHEL MARCELIS GAVE A PRIOR INCONSISTENT STATEMENT AND WAS GIVEN IMMUNITY

Trial counsel was ineffective for failing to interview, investigate, and discover that Rachel Marcelis gave a prior inconsistent statement and was given immunity. Rachel Marcelis was the Commonwealth's most essential witness. She was presented to corroborate Anthony Harris and Hassan Durant's testimony as well as provide additional evidence of guilt. Marcelis testified to driving Appellant around the scene of the incident and also dropping Appellant off in the vicinity. Shortly after dropping Appellant off Marcelis testified to seeing Appellant and co-defendant, Jeffrey McBride, running amongst a crowd of people coming from the direction of the incident. She states Appellant got back in the car where she heard either Appellant or co-defendant say "I got him." After, she proceeds to Daryl Mack's (other occupant of car) aunt's house, where co-defendant admits that the person who was shot at the incident (Demond Brown) was the guy who shot Appellant and co-defendant's friend D-Nyce (Derrick McMillan). This gave the Commonwealth a motive for the shooting. Marcelis also testified to driving Appellant to Wils-Barre shortly thereafter. These circumstances were the paralyzing blows to Appellant's case. Marcelis testimony gave the jury a more intimate account of the incident then any other witness presented by Commonwealth. Her testimony showed her participation in the incident when she states that she drove Appellant past the crime scene, dropping him off, seeing him run amongst a crowd of people, heard I got him, went to Mack's aunt's house where co-defendant admits that the victim shot their friend, and driving Appellant to Wilks-Barre. She testified to inculpatory evidence, a motive, and evidence of flight and concealment. Marcelis corroborative and uncontradicted testimony was too much for the Appellant to overcome. Trial counsel prejudiced Appellant for not investigating Marcelis to discover her prior inconsistent testimony at Cordell Young's trial and the fact she was given immunity, which would have contradicted her testimony and attacked her credibility.

Prior to Appellant's trial Marcelis testified at Cordell Young's trial on June 8, 2008. The relationship between Cordell Young's trial and Appellant is that Marcelis gave information to police involving both incidents in her statement. At Young's trial the record reflects Marcelis' testimony to be contrary to her testimony at Appellant's trial. Marcelis' testimony at Young's trial exhibits crucial circumstances that were not portrayed at Appellant's which would have changed the whole complexion of Appellant's trial. Trial counsel's failure to present evidence of Marcelis' prior inconsistent testimony to contradict or challenge what Marcelis testified to, prejudiced Appellant. Her testimony went unchallenged and uncontradicted which gave the jury the impression that there weren't any blemishes on her credibility. This left the jury to view Marcelis' testimony with favor because of the lack of evidence that proved otherwise. She testified to the details of her statement to the police and was said not to have any reason to lie because of her relationship with Appellant. If counsel would have conducted a adequate investigation of Rachel Marcelis and discovered her prior inconsistent testimony there is a reasonable probability that the outcome of the proceeding would have been different.

An important circumstance Marcelis testified to in Young's trial is when she admits to dating Young, which is Appellant's friend and Appellant's co-defendant's brother according to Marcelis. Although this was displayed at Appellant's trial the core of Marcelis' feelings towards Young weren't. Marcelis' feelings for Young will clearly exhibit her corrupt motive to implicate Appellant falsely. Initially Marcelis states that she dated Young but they had a bad break up and a lot of bad feelings inbetween (Young N.T. 6/8/08, at 162). Throughout Marcelis testimony she expresses her bad feelings for Young which went as deep as hatred for him (Young N.T. 6/8/08, at 219). More importantly is Marcelis' testimony when she states: "People are aware that I lied to police because I was mad at Cordell. And if it got me to go home and got him into trouble, it killed two birds with one stone is my mindset." (Young N.T. 6/8/08, at 220). This clearly reveals that Marcelis lied to police when she was giving her statement as well as her ill will towards Young and the connection between Young and Appellant has relevance. Marcelis testified at Appellant's trial to knowing Appellant through Young (N.T. 1/30/09, at 116). This association and through association is Marcelis' reasoning for falsely implicating Appellant due to her hatred for Appellant's friend, while giving police her statement. Marcelis goes further and testifies that due to her relationship with Young she felt that Young screwed her over so she would screw him over, getting the last laugh (Young N.T. 6/8/08, at 221-222). Marcelis' testimony displays no regret for falsely implicating Young in a murder which extends to Appellant because she only knows Appellant through Young. Her anger and hatred at the time for Young can directly be connected to Appellant due to his

affiliation with Young. It is apparent that Marcelis' emotions towards Young suggest hostility towards Appellant. If she could falsely implicate Young in a murder she could most certainly implicate Appellant. Simultaneously, having hateful feelings and anger towards Young, Marcelis had another goal she wanted to accomplish and that was to go home, go back to school, get her car back, and basically get back to her life, which she stated as killing two birds with one stone. Marcelis bias, interest, and corrupt motive is clearly shown through her testimony at Young's trial. She admits to having conscious false intent. This evidence would've had strong probative value as impeachment evidence at Appellant's trial.

Further, not only did Marcelis want to go back to school, get her car back, go home and have her life back, she openly states that she had to sign her statement and was forced to tell police what they wanted. Marcelis testified that she had to sign her statement or the police weren't going to let her leave and she would miss her finals (Young N.T. 6/8/08, at 192). She goes further and testifies that police informed her she was a prisoner and she was not allowed to leave, they took her car with her school work and she wasn't going to leave without giving them the statement the way they wanted it (Young N.T. 6/8/08, at 208-209). Marcelis states that the detective would come in and ask her a question and if it wasn't the answer he wanted he would leave as to punish her (Young N.T. 6/8/08, at 211). She also states that they weren't accepting what she believed to be the truth (Young N.T. 6/8/08, at 221). In addition to those circumstances Marcelis also testified that the only way she was allowed to leave to make it back to school for finals if she consented to be videotaped, what the police wanted and told them what they wanted (Young N.T. 6/8/08, at 194); also stating that she was going to give police what they wanted and not what she originally stated to them (Young N.T. 6/8/08, at 199). Marcelis additionally testifies that the police omitted things from the video consent tape where she states that it was two days from hell, they forced her to tell them what they wanted and how horrible it was for her giving the statement (Young N.T. 6/8/08, at 199-200). These things were all expressed by Marcelis to her lawyers, that she was kidnapped by Philadelphia police detectives and they refused to let her leave unless she agreed to sign a statement that wasn't true and agreed to be videotaped saying things that weren't true (Young N.T. 6/8/08, at 195). All of these circumstances testified to by Marcelis would have significantly aided Appellant's defense.

At Appellant's trial Marcelis didn't portray the aforementioned circumstances to the jury while giving her statement to police. Marcelis testimony regarding her statement portrays that she wasn't under coercion and duress while giving her statement nor was it untruthful. This directly contradicts what is testified at Cordell Young's trial. Marcelis does testify that she was not allowed to leave while being questioned by police (N.T. 1/30/09, at 139-140) but she does not state that police weren't going

to allow her to leave until she gave them the statement the way they wanted it like she testified at Young's trial. She also testified that if she gave police a answer that they didn't like they basically disregarded it and would leave the room and locked the door (N.T. 1/30/09, at 141) but doesn't inform the jury that police weren't accepting what she believed to be the truth like she stated at Young's trial. Marcelis was asked if she had to be videotaped and she testified that she was under that impression. She states that she didn't want her parents to find out she was hanging out in North Philly. That she didn't want them to find out who she was friends with. Also she wanted her car back, was told she wouldn't have to come to court, and her life would go back to normal if she consented which is what police told her (N.T. 1/30/09, at 142-143). This is her rationale for consenting to the video portion of her statement. This differs from her testimony at Young's trial where she states that she had to be videotaped, they made her give them what they wanted, how they wanted, and how she was forced to give them what they wanted. Relevant to the content of the consent videotape it wasn't revealed by Marcelis that things were omitted, such as, her expression that her time in police custody was two days from hell, police forced her to tell them what they wanted, and how horrible it was for her. Additionally, she informed her lawyers that police kidnapped her, made her sign a statement that wasn't true and agree to be videotaped saying things that wasn't true. Moreover, at Cordell young's trial Marcelis testified that her whole statement is not accurate (Young N.T. 6/8/08, at 204). This evidence was essential to Appellant's defense. Because this evidence wasn't presented at Appellant trial he was prejudiced.

Rachel Marcelis was the most crucial and essential witness to the Commonwealth's case. Marcelis was their most reliable witness because her testimony was uncontradicted and because their other witnesses may have not been believable to the jury. Hassan Durant and Anthony Harris were the prosecution's only other witnesses who implicated Appellant in the incident but there were circumstances in which the jury could have deemed their testimonies untruthful. Both Harris and Durant testified to having a very close relationship with the victim, and although it was vaguely asserted, they have a friendship with each other. Because of these relationships between these individuals compounded with the emotional effect it had, which was also testified to by both of these witnesses, gave the jury a reasonable inference of possible bias to testify falsely and interest on the outcome of the trial. Further, both Harris and Durant lied under oath about not seeing each other and being in each other's presence after the shooting. It is not until Durant's preliminary testimony is furnished that Durant finally admits to seeing Harris a good three times, yet, Harris still denied (N.T. 1/29/09, at 136-137). The significance of this untruthfulness is it exhibits to the jury that they are trying to hide the fact that they seen each other. This raised suspicion of the jury that they may have conspired,

talked about this case and about their testimonies to give them believability, and that they have a common corrupt motive. What furthers this reasonable inference is the fact that Hassan Durant's statement he gave police different from his testimony, which his trial testimony resembles Harris'. Also, Harris was asked if he ever talked to anyone about this case including people from his neighborhood and he answered no. But during his testimony he admits to receiving information from people in the neighborhood about the Appellant being seen with Marcelis in a white truck, calling police and giving them tag numbers (N.T. 1/30/09, at 28). There is undeniable evidence that Harris and Durant had interaction with each other that they were trying to conceal and Harris and Durant received information other than their own perceptions about the case. Along with these aforementioned circumstances both witnesses' testimony were scattered with a long list of inconsistencies between the two. Although both implicated Appellant, these inconsistencies very well may have led the jury to deem these witnesses incredible. By impeaching and discrediting Marcelis with her prior testimony it would have put the case in a different light by inducing the jury to focus it's attention on Harris and Durant's bias, interest, corrupt motive, and inconsistencies giving it greater importance, creating a reasonable probability that the outcome of the proceeding would have been different.

The jury was erroneously led to believe that Marcelis had no bias, interest, corrupt motive, or reason to be untruthful when implicating Appellant in this incident. Again, there was no evidence presented to contradict Marcelis' testimony so it was free from conflict, with nothing to overshadow or directly challenge what she testified to. This gave her the greatest reliability of all the Commonwealth's witnesses. The prosecution portrayed Marcelis not to have any motive to lie. On the record there is no indication of a relationship with the victim or any other Commonwealth witness but there is with Appellant and his co-defendant. This strengthens her believability because because she testifying against those she befriended. She was also portrayed by prosecution to be tearing up as she was on the stand, not lying and putting the defendants in a murder over her friends or anything, and saying she wouldn't do that (N.T. 2/4/09, at 121). The prosecution also talks about the demeanor of Marcelis at the end of the consent to videotape as giggling and laughing, and not being treated badly while giving her statement. He also speaks on the fact that Marcelis didn't get up on the stand and say the statement was a bunch of "bunk" in his closing arguments (N.T. 2/4/09, at 123). Prosecution goes further and improperly vouches for Marcelis' credibility (N.T. 2/4/09, at 122-124) which is a separate issue, but it displays the prosecution may have additional evidence that supports her truthfulness and is prosecution's personal belief, placing the prestige of the Commonwealth behind Marcelis. And this is prejudicial in itself. Ultimately, in the eyes of the jury Marcelis apparently was deemed credible and reliable because of her affiliation with

Appellant, she testified to the content of her statement and not renouncing it, being perceived to not having any reason to lie, and because there was no evidence to contradict her testimony. Where as though her prior testimony at Cordell Young's trial divulges everything to the contrary. The compelling aspect of her testimony at Young's trial was when she admits that her whole statement is not accurate. Also stating that although it is wrong to accuse someone of murder, that's what she did (Young N.T. 6/8/08, at 196). These circumstances can not be overlooked because of the prejudice Appellant suffered at the hands of counsel's ineffectiveness.

There is another instance of ineffectiveness of counsel regarding the immunity agreement given to Rachel Marcelis in return for her testimony. It was never revealed by the prosecutor that Marcelis was under any type of agreement with the Commonwealth. In Cordell Young's trial it was explained that the Commonwealth gave Marcelis immunity for her testimony. The prosecutor explained that although she was given immunity it was geared towards the second incident (Young N.T. 6/8/08, at 164), indicating the Appellant's incident. This evidence also goes to credibility, reliability and the jury's determination of guilt. This evidence would have been of high probative value. Appellant was also prejudiced because he could not impeach this crucial witness with this evidence because counsel failed to conduct a adequate investigation regarding Marcelis, giving way to the unfairness of the ultimate verdict and undermining the confidence in the outcome of the trial. Because Marcelis was given immunity it indicates that she would be incriminating herself without the agreement if she testified. Since there was no indication of immunity she was viewed by the jury not possess a motive to cooperate with the Commonwealth. There was no evidence which indicated to the jury that Marcelis had a interest on the outcome of this trial. And if such interest exist the jury had a right to know about it, whereas it does here.

In a hypothetical scenario of the Commonwealth taking away Marcelis' immunity, as it seems highly likely that is the case, because she renounced her statement and content within, in Cordell Young's trial, her immunity agreement would still be relevant and essential evidence to the present matter. It would be more compelling because it would show why Marcelis is testifying favorable for the Commonwealth in this instance due to her testimony not being protected by immunity. It would also display to the jury that Marcelis did indeed commit a crime and incriminated herself with her statement and testimony. Therefore, it acknowledges that the Commonwealth would be well within the range of the law to charge her with crimes. Crimes which stem to being a accessory, aiding and abetting, and obstruction of justice, due to her incriminating statement. Now, in her testimony she clearly incriminates herself with her involvement in the incident and afterwards allegedly aids Appellant, providing transportation, while being fully aware what took place. At face value Marcelis was

portrayed to be a innocent witness having no reason to lie about her testimony. It is obvious that this is not the case. In Constitution Amendment 5 a witness has a right to refuse to testify because of self incrimination. Because Marcelis testified to circumstances in which she incriminates herself it can be stated that she hoped for favorable treatment from the prosecutor. [P]romise of favorable consideration in exchange for testimony deemed credible gave witness a "direct personal stake" in defendant's conviction; The fact that a specific reward was not guaranteed through promise or a consummated plea agreement, but was expressly contingent on the state's good faith and satisfaction with [the witness's] testimony, served only to strengthen any incentive to testify falsely in order to secure [the defendant's] conviction. *Com. v. Strong*, 761 A.2d 1167, 563 Pa. 455, (2000). [W]henver a prosecution witness may be biased in favor of the prosecution because of outstanding criminal charges or because of any non-final criminal disposition against him within the same jurisdiction, that possible bias, in fairness, must be made known to the jury. Even if the prosecutor has made no promises, either on the present case or on other pending criminal matters, the witness may hope for favorable treatment from the prosecutor if the witness presently testifies in a way that is helpful to the prosecution. And if that possibility exist, the jury should know about it. *Com. v. Corley*, 816 A.2d 1109, (2003). It is of no matter if the prosecution was still honoring the immunity agreement or not, it still is essential to proving Marcelis' personal stake to testify falsely, because it exhibits to the jury that she committed a crime in regards to this case and she could have been charged, the prosecution took back her immunity agreement because she didn't testify favorable to the Commonwealth at Young's trial, and for this reason she testified favorable to the Commonwealth at Appellant's trial because she hoped for favorable treatment with their satisfaction of her testimony.

This evidence of immunity agreement equates with counsel's failure to discover Marcelis' prior inconsistent testimony because its relevant to those same principles of affecting credibility. The jury's determination of Appellant's innocence or guilt in this case was based on the credibility of witnesses, giving these determinations paramount importance, hence, giving Rachel Marcelis' credibility paramount importance. Any implication, promise or understanding that the government would extend leniency in exchange for a witness's testimony is relevant to the witness's credibility. *Giglio v. United States*, 405 U.S. 150, 92 S.Ct 763, (1972). Appellant was prejudice due to counsel's failure to investigate because in the eyes of the jury Marcelis possessed no interest in the outcome of the case and had no reason to falsely implicate Appellant, testifying favorable for Commonwealth. Marcelis was a necessity to the Commonwealth and not disclosing evidence of the immunity agreement was improper strategic decision of the prosecutor. This was for the purpose of

presenting her testimony free from evidence that would suggest that her testimony was colored with bias, and having a personal stake on the conviction of Appellant. "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life and liberty may depend. *Napue v. Illinois*, 79 S.Ct 495, 360 U.S. 264, (1959). This is true in the present case and counsel's error undermined the truth determining process where no reliable adjudication of guilt or innocence took place.

Counsel was ineffective for not interviewing, investigating, and discovering that Marcelis gave a prior inconsistent statement and was given immunity in regards to this case. "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and the penalty in the event of conviction... The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities." *Rompilla v. Beard*, 125 S.Ct 2456, 545 U.S. 374, (2005). Counsel conducted no investigation whatsoever regarding Marcelis, therefore, failing to discover essential evidence necessary to attack this witness's credibility and contradict the events in which she testified to. It evident that Appellant's right to a fair trial was surely undermined by an attorney who negligently refrained from investigating witness and ultimately failed to present readily available exculpatory evidence. Cordell Young's trial transcripts of Rachel Marcelis' prior inconsistent statement was public document and the existence of the immunity agreement was within. Marcelis' statement alone gives a vivid indication that she may have potentially testified at another trial because she gives police information on a separate incident. At the same time the mere content of the statement reveals that she indeed incriminates herself due to her participation in the incident and may have received leniency in return for favorable testimony. These circumstances justified a proper investigation from defense counsel.

It is unreasonable, where there is limited amount of evidence of guilt, not to attempt to investigate and interview known eyewitnesses in connection with defenses that hinge on the credibility of witnesses. It can not be pronounced that counsel made a competent professional judgment to decline investigating Marcelis and discovering that there was extremely beneficial evidence that was damaging to the Commonwealth's case, even if he had to interview this witness. Nor can it be pronounced that counsel declined to investigate Marcelis simply because he chose to pursue a alternative strategy. "[I]neffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation whe s/he has not yet obtained the facts on which such a decision could be made. *McGahee v. U.S.*, 570 F.Supp.2d 723, (2008). Counsel's decision not to investigate and interview Marcelis wasn't based

on strategy, it was based on sloth and neglect. The only information of Marcelis counsel was in possession of was Marcelis' statement that prosecution added to the discovery. It is counsel's duty to counter the state's evidence and he was in possession of no such evidence which countered Marcelis' testimony, prior to trial. At trial counsel was only able to attempt to impeach Marcelis with her drug use because she freely indicated that she was under the influence of drugs during this incident. But it is apparent that the jury believed her testimony despite Marcelis being under the influence of drugs because of the verdict. If the aforementioned instances of evidence was presented by counsel that contradicted her testimony and attacked her credibility there is a reasonable probability that the outcome would have been different. Counsel's decision not to investigate the witness can not be said to have been reasonably designed to effectuate his client's interest.

Counsel had a duty to investigate and should not have relied solely on the information provided to [him] by the Commonwealth. This court has stated... "The Constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be. Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provisions." *Von Moltke v. Gillis*, 68 S.Ct 316, 332 U.S. 708, (1948). Prosecution's file is not a substitute for independent investigation by defense counsel to meet effective counsel standard. *Com. v. Baxter*, 640 A.2d 1271, 531 Pa. 41, (1994). Here counsel totally disregarded his duty to properly investigate a witness and failed to ascertain readily available evidence which would have put this case in a different aspect. This failure is simply an abdication of the minimum performance required of defense counsel.

There is no question that Appellant was denied his Sixth Amendment guarantee of effective assistance of counsel. A defendant's right to a fair trial consist of effective representation and without this effective representation a fair and reliable trial can not be determined. The purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of the legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendant's receive a fair trial. *Strickland v. Washington*, 104 S.Ct 2052, 466 U.S. 668, (1984). Appellant was also denied his Sixth Amendment right to confrontation. Because of counsel's errors Appellant was deprived of the right to confront Marcelis with the aforementioned evidence. This hindered the jury from properly appraising Marcelis' credibility as well as denying a full cross examination about the evidence. This case boiled down to the credibility of witnesses and it was imperative to Appellant's defense that this evidence was measured by the jury. Without the evidence of the inconsistent testimony and immunity agreement the

jury was erroneously led to believe that she possessed no bias, interest, corrupt motive, personal stake, or reason to lie to police, or reason to testify falsely. By revealing this evidence it would've been quite evident to the jury that each characteristic of Marcelis' personal gain is what fueled her testimony. Compounded with admitting that her whole statement is not accurate, she knowing accused another of murder and admitted it, and being forced to give a statement the way police wanted. Prejudice is most certainly present by counsel's failure to investigate and Appellant was denied effective assistance.

THE PROSECUTOR VIOLATED APPELLANT'S CONSTITUTION AMENDMENT 14, DUE PROCESS, BY PRESENTING FALSE PERJURED TESTIMONY OF RACHEL MARCELIS

The prosecutor violated Appellant's due process by using false perjured testimony of Rachel Marcelis. Prosecution presented Marcelis' false testimony at Appellant's trial which it knew to be false according to her prior testimony at Cordell Young's trial on June 8, 2008. At Young's trial Marcelis testified that her statement she gave police was not accurate and the things in which she stated within she did not believe to be true. This was testified to by Marcelis under oath at a official legal proceeding which was adopted by her and certified as truth. Because prosecutor allowed Marcelis to testify to the content of her statement it prejudiced Appellant because the substance of the statement was previously testified to be false and not what Marcelis believed to be true. In *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct 1173, (1959), the United States Supreme Court confirmed the principle that "a state may not knowingly use false evidence, including false testimony, to obtain a tainted conviction...

At Cordell Young's trial Marcelis openly admits that her statement she gave police was coerced. She testified that police told her that she was going to give them her statement the way they wanted it and not how she originally stated to them (Young N.T. 6/8/08, at 199). Marcelis also states that she was told she was a prisoner and she would not be allowed to leave unless she gave them the statement the way they wanted it (Young N.T. 6/8/08, at 208-209). She says that she was told that she had to sign this false statement or police weren't going to let her leave and she would miss her finals (Young N.T. 6/8/08, at 221). At the time of Marcelis' interrogation by police she was adamant about her concern for making it back to school for her finals and police used this to coerce her into giving a statement to their satisfaction and not what she believed to be the truth. It was said that police weren't accepting what she believed to be the truth (Young N.T. 6/8/08, at 194). She was told that the only way she would make it back to school for finals if she consented to what they wanted her to do and told them what they wanted her to (Young N.T. 6/8/08, at 194). These

accounts from Marcelis about her statement to police clearly displays the coercion and duress she was subjected to. What is more compelling is when Marcelis testified to informing her lawyers that she was kidnapped by Philadelphia police detectives, where they refused to let her leave unless she agreed to sign a statement that wasn't true and agreed to be videotaped saying things that weren't true (Young N.T. 6/8/08, at 195). Additionally, at Young's trial it is admitted by Marcelis that the whole statement is not accurate (Young N.T. 6/8/08, at 204). There is an overabundance of evidence that the statement Marcelis gave police wasn't what she believed to be the truth and by testifying at Young's trial under oath this statement was adopted by this witness and was perjured by being presented at Appellant's trial.

Furthermore, to complement the aforementioned circumstances there are other reasons for Marcelis to give police a false statement. At Young's trial she openly admits to having bad feelings for Young that went as deep as hatred for him because of a bad break up (Young N.T. 6/8/08, at 162, 219). These negative feelings for Young directly connect to Appellant due to his affiliation with Young and Marcelis only knowing Appellant through Young. Marcelis admits that it is wrong to falsely accuse someone in a murder but that's what she did (Young N.T. 6/8/08, at 196). "People are aware that I lied to police because I was mad at Cordell. And if it got me to go home and got him in trouble, it killed two birds with one stone is my mindset." (Young N.T. 6/8/08, at 220). This testimony by Marcelis exhibits that Marcelis had conscious false intent and a corrupt motive to give false information to authorities. Also Marcelis testified that things were omitted from the video consent tape where she states it was two days from hell, they forced her to tell them what they wanted and how horrible it was for her giving the statement (Young N.T. 6/8/08, at 199-200). Simultaneously, Marcelis' other interest in giving information in which she didn't believe to be true is that she wanted to basically go home, go back to school, get her car back, and go back to her life (Young N.T. 6/8/08, at 221-222). With Marcelis' it is apparent that the information she gave police was false and the substance of that statement she testified that she does not believe it to be true. This statement was drowned in coercion, duress, conscious false intent, corrupt motive, and personal incentives of Marcelis. Because Marcelis' false testimony about the substance of her statement was presented at Appellant's trial by prosecution it prejudiced Appellant due to it being perjured.

Appellant's trial consisted of Marcelis testifying everything to the contrary of what she testified at Young's trial. At Appellant's trial Marcelis' testimony was consistent to her statement she gave police. Her statement was the center piece of her testimony. Her testimony revolved around her statement, exclaiming that the content within was truth. Marcelis never admitted to the circumstances which she admitted to in Cordell Young's trial that circled her statement she gave to police. There were

no indications of her statement being coerced, that she was under duress and forced to give police the statement the way they wanted it. It was not portrayed that her emotional hatred for Appellant's friend fueled the false statement. It was not stated that she had conscious false intent and personal incentives to give the statement. Moreover, it was not divulged that Marcelis under oath, previously admitted and or adopted as truth that her whole statement was not accurate and overall she did not believe it to be true. "Whoever, having taken a oath before a competent tribunal, officer, or person, in any case in which law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, disposition, or subscribes any material matter which he does not believe to be true, is guilty of perjury." U.S. v. Ruedlinger, 990 F.Supp 1295, (1997), 18 U.S.C.A. § 1621. What constitutes Marcelis perjury is the fact that she openly admits, while being granted immunity at Young's trial, that the information she gave police was not accurate and she does not believe it to be true. This is amplified by the additional details and reasoning for giving police false information. But by all means she testified that ultimately she lied to police and doesn't believe the information given in the statement to be truth, is what she stated out of her lips. Yet, she is presented by the Commonwealth, where she testified nearly verbatim to her statement when questioned by prosecutor.

Marcelis knowingly gives perjured false testimony at Appellant's trial. A witness commits perjury if he or she "gives false testimony, rather than as a result of confusion, mistake, or faulty memory." U.S. v. Hoffecker, 530 F.3d 137, (2008). Marcelis' testimony is not a result of any of alternatives. Her testimony was of sound mind and body and answered questions concisely, clearly, and directly. While giving answers to questions regarding her statement or any other question for that matter, there is no indication on the record that indicates she was confused, mistaken, or questions answered were caused by faulty memory. Marcelis' cooperation with Commonwealth and reasoning for falsely testifying is due to her hope for favorable treatment from Commonwealth. In this witness's statement it is in plain sight that she commits a crime by the provided information. Her criminal conduct appears when she allegedly aids Appellant by providing transportation to Wils-Barre, fully aware of what allegedly transpired. Accordingly, in Cordell Young's trial she was given immunity, whereas it was stated that it was geared towards the present case (Young N.T. 6/8/08, at 163-164). As previously stated Marcelis did not testify favorable for the Commonwealth at Young's proceeding. It was also revealed that Marcelis did not want to give that statement and speak with prosecutor about her statement prior to Young's trial (Young N.T. 6/8/08, at 200-202). Nevertheless, it was not revealed at Appellant's trial that Marcelis was given immunity regarding this case or that she testified unfavorably to Commonwealth, admitting that her statement given

she did not believe to be true. This was a calculated move on the behalf of the prosecution. It has long been established that the prosecution's "deliberate deception of a court and jurors by the presentation of false evidence is incompatible with the rudimentary demands of justice." *Banks v. Dretke*, 124 S.Ct 1256, 540 U.S. 668, (2004).

The prosecution concealed and did not disclose that Marcelis did not believe the content of her statement she gave police to be true because it would have nullified her testimony. The Commonwealth was aware of these facts and didn't want Marcelis to renounce her statement like she did at Young's trial so it deceived this proceeding by not disclosing these facts and used Marcelis' incriminating circumstances to coerce her to testify favorable for Commonwealth by testifying consistent to her statement. Commonwealth knew that Marcelis didn't testify favorable at Young's trial and didn't want to testify to that statement, so secure a favorable testimony pressure was applied regarding her incriminating statement to police to be used against her if she didn't cooperate. Preparations were indeed made to solidify the desired testimony from Marcelis. Obviously, the Commonwealth failed to acknowledge the previous agreement, therefore, leaving Marcelis to try and save her own skin by testifying biasly to secure leniency from the Commonwealth. [W]henver a prosecution witness may be bias in favor of the prosecution because of any outstanding criminal charges or because of any non-final criminal disposition against him within the same jurisdiction, that possible bias, in fairness, must be made known to the jury. Even if the prosecutor has made no promises, either on the present case or on other pending criminal matter, the witness may hope for favorable treatment from the prosecutor if the witness presently testifies in a way that is helpful to prosecution. And if that possibility exist, the jury should know about it. *Com. v. Corley*, 816 A.2d 1109, (2003). Promise of favorable consideration in exchange for testimony deemed credible gave witness "a direct personal stake" in defendant's conviction; "The fact that a specific reward was not guaranteed through a promise or a consummated plea agreement, but was expressly contingent on the state's good faith and satisfaction with [the witness's] testimony, served only to strengthen any incentive to testify falsely in order to secure [the defendant's] conviction. *United States v. Bagley*, 473 U.S. 667, 105 S.Ct 3375, (1985).

In addition, the record reveals that Marcelis' direct examination and cross examination were to serve two different purposes. These two different purposes are direct indicators that Marcelis was aware that she had to satisfy the Commonwealth, at the same time, she knew that she was falsely testifying against the Appellant. The purpose intended by Marcelis on direct examination was to completely concur with the statement and anything that would further the Commonwealth's theory of the case. Any answer that the Commonwealth wanted from Marcelis she gave them. This was to ensure that they were fully satisfied by her testimony. The purpose intended by Marcelis

on cross examination was to try and discredit herself. She at times subtly gave inconsistencies for the defense to use as ammunition against her. Such as stating a different amount of people at the playground (N.T. 1/30/09, at 120,132), going to a different location after the shooting (N.T. 1/30/09, at 123-124,133), and stating that she was threatened into signing her statement by police or they wouldn't let her leave in order to take her finals (N.T. 1/30/09, at 166-167), just to name a few. What was more clear to Marcelis' purpose for cross examination is when she purposely tries to discredit herself by revealing that she was extremely under the influence of drugs at the time of the incident (N.T. 1/30/09, at 153-160). Trial counsel was not aware of Marcelis being under the influence of various drugs prior to trial or at trial until she divulged that information to him voluntarily. Counsel's questioning was not meant to elicit that information and there was no evidence that insinuated that Marcelis was under the influence of narcotics, not even at Young's trial. Marcelis volunteered that information in a attempt to impeach herself and what promotes her intent is when she puts emphasis on how much drugs she did and how it effected her senses, amplifying the inference that because of her drug use her observations and accounts of the incident were so distorted one could not deem them to be believable. She testified to taking 45 xanax, smoking 10 jars of wet (embalming fluid), and drank 40 ounces of beer, vodka, tequila, and whatever else she could get her hands on (N.T. 1/30/09, at 153-156). She also explained how the drugs effected her. Xanax would make her dumb, the embalming fluid would kill her brain cells and make her feel like she was floating when she was actually walking, and her drug use caused a unhealthy loss in weight of 100 pounds (N.T. 1/30/09, at 157). Marcelis went further and admitted to hearing voices and seeing purple bunnies (N.T. 1/30/09, at 159-160). Marcelis chose to testify in this manner because she was aware that she was falsely against Appellant and wanted to discredit herself without contradicting her statement. It is even more apparent that Marcelis had two agendas when immediately after answering questions from trial counsel, she answers prosecutor's questions regarding the same subject contradictory to what she previously stated to trial counsel, in order to stay in the Commonwealth's good graces. This is when she said she wouldn't put Appellant in murder because of finals and she didn't imagine that she heard or saw what happened that day (N.T. 1/30/09, at 167-168). At this particular moment is when Marcelis starts to cry, which suggest her emotional reaction after testifying falsely towards Appellant. It is clear that this witness was fully alert of what she was doing and prejudice ensued from prosecutor presenting Marcelis' false testimony that it knew to be perjured.

The prosecution was well aware that Marcelis' testimony was false and or should have known it was. As previously stated Marcelis was given immunity at Young's trial. The connection between the immunity agreement and Marcelis' false testimony

at Appellant's trial is that she testified unfavorably at Young's trial and prosecutor didn't want this to be known to the defense. Because of this immunity Marcelis freely testified unfavorably against the Commonwealth because she knew that her testimony would not be used against her. This is completely different at Appellant's trial because Commonwealth did not disclose and or honor that immunity agreement, therefore, leaving Marcelis open to criminal charges. This speaks volumes to the untruthfulness at Appellant's trial because Marcelis was threatened with actions against her unlike at Cordell Young's trial. Anyway, it can not be pronounced that Commonwealth knew nothing about the immunity agreement given to Marcelis, stated at Young's trial. More in depth, it was stated it was preferably directed to this case. It is undeniable that the Commonwealth knew of the existence of this agreement because of their responsibility to know the commitments that are made by each other. The million dollar question is, "if the Commonwealth knew about the immunity agreement why didn't it disclose and or honor it at Appellant's trial? The answer to the question is they didn't because they knew and were fully aware that Marcelis didn't believe her statement to be true, she didn't testify favorably for the Commonwealth at a previous trial regarding the statement and they didn't want it to be known that her testimony would be perjured if she testified favorably at Appellant's trial. Knowing of the immunity agreement the Commonwealth had to know about Marcelis' perjury because they go hand and hand. "The staff lawyers in a prosecutor's office have the burden of letting the left hand know what the right hand is doing or has done." *Santobello v. New York*, 92 S.Ct 495, 404 U.S. 257, (1971). The staff of the prosecutors is a unit and each member be presumed to know the commitments by any other member. If responsibility could be evaded that way, the prosecution would have designed another deceptive 'contrivance' akin to those we condemned in *Mooney v. Holohan*, 294, U.S. 103, 55 S.Ct 340, (1935), and *Napue v. Illinois*, 79 S.Ct 1173, 360 U.S. 264, (1959). *Santobello v. New York*.

It is well settled that to obtain a conviction by the use of testimony known by the prosecutor to be perjured offends due process. *Jacobs v. Scott*, 115 S.Ct 711, 513 U.S. 1067, (1995). Appellant was prejudiced by prosecution use of perjured testimony because this case boiled down to the credibility of witnesses. The credibility of Marcelis was of the utmost importance. She was viewed to be the most reliable witness because of her relationship with Appellant, she gave an intimate account of the incident, and her testimony was uncontradicted. When the prosecutor presented Marcelis' perjured testimony which corroborated other testimony it was the dagger in the Appellant's case because it was the most compelling evidence presented. The prosecutor's error undermined the confidence in the outcome of the trial. Without this violation there is a reasonable probability that the outcome of the proceeding

would have been different. "[A] prosecutor) is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 55 S.Ct 629, (1935).

COUNSEL VIOLATED APPELLANT'S CONSTITUTION AMENDMENT 6, EFFECTIVE ASSISTANCE AND RIGHT TO CONFRONTATION, BY NOT CROSS EXAMINING RACHEL MARCELIS AS TO WHETHER SHE HAD AN EXPECTATION OF LENIENCY AS A RESULT TESTIMONY AGAINST APPELLANT

Counsel was ineffective by not cross examining Rachel Marcelis as to whether she had an expectation of leniency as a result of her testimony against Appellant. It was extremely obvious and well within counsel's reach of evidence that revealed Marcelis was receiving favorable treatment for testimony in favor of the prosecution. Counsel denied Appellant's confrontation clause by not cross examining Marcelis and discovering that she possessed bias against the Appellant. Purpose of confrontation clause of Sixth Amendment is to provide an accused with effective means of challenging evidence against him by testing recollection and probing conscious of an adverse witness. U.S.C.A. Const. Amend. 6. Prejudice was the result of counsel's error and absent this error there is a reasonable probability that the outcome of trial would have been different.

There was sufficient evidence available to counsel that inferred Marcelis had an expectation of leniency. In Marcelis' statement she gave police there is a specific instance of self incrimination information provided. Marcelis stated that when Appellant and co defendant (Jeffrey McBride) got back in the car after being seen running with a crowd, she heard either of them say "I got him", referring to the victim. Then she goes on about hearing Appellant's co defendant say that his gun jammed up and Appellant's gun supposedly was the only one that worked. More importantly, she states in her statement that she asked McBride, was the boy they shot the one who shot D-Nyce, and McBride answered "yea". With the afore mentioned evidence alone is suffice for counsel to conclude that Marcelis may receive favorable treatment for her cooperation. She clearly incriminates herself by knowingly providing transportation for individuals whom she is aware supposedly committed this crime. It is law that "Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory. 18 U.S.C.A. § 3. Also, "A

person commits an offense if, with intent to hinder the apprehension, prosecution, conviction or punishment of another for crime, he": "provides or aids in providing a weapon, transportation, disguise or other means of avoiding apprehension or effecting escape. 18 Pa.C.S. § 5105 (a) (2). Apparently counsel failed to properly review discovery material. In plain sight the evidence needed for counsel to question Marcelis regarding favorable treatment was available.

In addition, there is more readily available evidence counsel failed to pursue and ascertain that Marcelis had an expectation of leniency. On June 8, 2008 Marcelis testified at Cordell Young's trial regarding the statement she gave police in relevance to both incidents. At that proceeding it was revealed that Marcelis was given immunity and that immunity agreement is really geared towards the second incident; referring to the Appellant's case (Young N.T. 6/8/09, at 164). The fact that Marcelis was given immunity exhibits that her testimony possessed some incriminating circumstances, therefore, she was afforded immunity so her testimony could not be used against her. Moreover, by stating at Young's trial the immunity agreement was geared towards Appellant's case clearly shows that the agreement is preferably tailored to this incident. Also shown by Young's trial is, although Marcelis was given immunity by the Commonwealth she testified unfavorably. She renounced her statement and basically testified in favor of Cordell Young. The relevance of her being given this immunity and testifying unfavorably to the Commonwealth at Young's trial is that nowhere in the discovery or on the record at Appellant's trial is this information disclosed and or honored. The prosecution didn't disclose and or honor the immunity agreement because it didn't want Marcelis to testify unfavorably to the Commonwealth at Appellant's trial like she did at Young's trial, so they may have invalidated the agreement because she testified unfavorably, and didn't disclose this evidence because it didn't want to alert defense to the existence of the agreement. Absent a immunity agreement Marcelis testimony is incriminating. The prosecution used this collateral to secure her favorable testimony. It is of no matter if prosecutor guaranteed Marcelis favorable treatment through a contract, verbally, other, or not because it is crystal clear that prosecutor purposely turned his head to her obvious criminal activity. It will not be discovered on Marcelis' record that she was charged or prosecuted regarding her criminal actions in this matter. This is certain leniency from the prosecutor when he deliberately fails to prosecute a individual who knows to allegedly have committed a serious crime, one it which it has confessional evidence of this crime. Accordingly, the aforementioned information is all public record in which counsel had access to. Counsel's sloth, neglect, and inattention denied Appellant the opportunity to confront Marcelis and question her as to her expectations, therefore rendering counsel ineffective.

"It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction..." *Rompilla v. Beard*, 104 S.Ct 2456, 545 U.S. 374, (2005). From the facts presented here, it can easily be inferred that the time Marcelis agreed to testified for the Commonwealth, she had expectations of leniency with regard to incriminating participation in the incident, and that she did so testify , she obliged to tailor her testimony in favor of the prosecution. see *Com. v. Nolen*, 634 A.2d 192, 535 Pa. 77, (1993). We can not overemphasize the importance of allowing full and fair cross examination of government witness whose testimony is important to the outcome of the case. Out of necessity, the government frequently relies on witnesses who have themselves engaging in criminal activity and whose record for truthfulness is far from exemplary. These witnesses often have a major personal stake in their credibility contest with the defendant. "[W]henever a prosecution witness may be bias in favor of the prosecution because of outstanding criminal charges or because of any non final criminal disposition against him within the same jurisdiction, that possible bias, in fairness, must be made known to the jury. Even if the prosecutor has made no promises, either on the present case or on other pending criminal matters, the witness may hope for favorable treatment from the prosecutor if the witness presently testifies in a way this is helpful to the prosecution. And if that possibility exist, the jury should know about it. *Com. v. Corley*, 816 A.2d 1109, 2003 Pa.Super 34, (2003).

"Thus, we hold that the right guaranteed by Art. I Section 9 of the Pennsylvania Constitution to confront witnesses against a defendant in a criminal case entails that a criminal defendant in a criminal case entails that a criminal defendant must be permitted to challenge a witness's self interest by questioning him about possible or actual favored treatment by the prosecuting authority in the case at bar, or in any other non final matter involving the same prosecuting authority. *Com. v. Evans*, 512 A.2d 626, 511 Pa. 214, (1986). Counsel violated Appellant's right guaranteed by Pennsylvania and the United State's Constitutions, confrontation clause, by failing to cross examining Marcelis as to her expectation of leniency. This violation prejudiced Appellant because counsel denied the opportunity for Appellant to show Marcelis' bias, which is what colored her testimony, hindering the jury from appraising her credibility. It denied Appellant a substantial right and withdrew one of the safeguards essential to a fair trial. This case boiled down to the credibility of witnesses, leaving Marcelis' credibility being of the utmost importance because credibility was the primary factor of the jury's determination of innocence or guilt. Marcelis was the Commonwealth's most reliable witness because of her relationship with Appellant, she gave an intimate account of the incident, was said by prosecution that she had no reason to lie, and her testimony was uncontradicted.

Furthermore, in the eyes of the jury Marcelis apparently had no bias against Appellant, as she was supposedly his friend. This is significant because the only other eyewitnesses to Appellant's alleged crime were Anthony Harris and Hassan Durant's testimony may have not been believable to the jury due to a long list of inconsistencies between their testimonies and untruthfulness that were shown through cross examination. Thus, when Marcelis testified and corroborated many of the allegations set forth by Harris and Durant, it was crucial that trial counsel attempt to show that Marcelis too was bias against Appellant. Under these circumstances, it can be concluded that if trial counsel had impeached Marcelis by showing bias, there is a reasonable probability that the outcome of the trial would have been different. Not only does Marcelis implicate Appellant in the crime she gave evidence of consciousness of guilt when she testified to driving Appellant to Wilks-Barre, which was stated by prosecution Appellant did to avoid being apprehended. Marcelis gave the prosecution a motive as well. By impeaching Marcelis' credibility it discredits these additional circumstances of her testimony. There is no reasonable basis for trial counsel's decision not to so question Marcelis, as attacking Marcelis' credibility would only be beneficial to Appellant in light of the inculpatory nature of Marcelis' testimony. There was no reasonable professional judgment or strategy calculated by counsel to forego cross examination about Marcelis' expectations to pursue some other approach. Counsel's decision can not be said to be reasonably designed to effectuate his client's interest. There is a reasonable probability that counsel's error contributed to the verdict, prejudicing Appellant and denying him of his Sixth Amendment right to effective assistance.

TRIAL COUNSEL VIOLATED APPELLANT'S CONSTITUTION AMENDMENT 6, EFFECTIVE ASSISTANCE OF COUNSEL, BY NOT REQUESTING A BRIEF CONTINUANCE AND BENCH WARRANTS TO OBTAIN KYLE CARTER AND GREGORY BLACKMAN, WHO WOULD HAVE PRESENTED EXCULPATORY TESTIMONY

Trial counsel was ineffective for not requesting a brief continuance and bench warrants to obtain Kyle Carter and Gregory Blackman, who would have presented exculpatory testimony for Appellant's defense. The record reveals that counsel never requested that trial court grant a brief continuance so that witnesses could be obtained and presented before the jury. As Pa.R.Crim.P. 106 (A) provides in pertinent part, "The court... may, in the interest of justice, grant a continuance, on its own motion, or on the motion of either party." *Com. v. Bozic*, 997 A.2d 1211, 2010 Pa. Super 114, (2010). Failure for counsel to request a continuance in this instance prejudiced Appellant, for his life and liberty depended on the jury hearing from these exculpatory witnesses.

The record reveals an attempt to ask for a short continuance from co defendant's counsel, Michael Wallace (N.T. 2/4/09, at 23-26) but was denied by trial court. Trial court denied the request on the basis that while the weather was exceedingly bad, there was basically were no issues with public transportation or no impediments to getting in the city. Further stating that witnesses were capable of communicating with defense if they were going to be late and ultimately stating witnesses refused to come in. Wallace then assured trial court that witnesses did not refuse to come and assumed these witnesses absence were due to weather conditions. The relevance of this dialogue is that although Wallace attempted to request a continuance, the record does not exhibit him actually requesting one. It displays "I would ask for a short --" (N.T. 2/4/09, at 24), which isn't sufficient to constitute a proper request for a continuance. More importantly, Appellant's counsel neither states that he would like to join this purported request or attempted request a continuance himself. It can not be suggested that trial counsel may transfer his responsibility of his client's interest to co defendant's counsel and ignore reasonable efforts to secure witnesses in his client's behalf.

The grant or denial of a motion for a continuance is within the sound discretion of trial court and will be reversed only upon a showing of an abuse of discretion. *Com. v. Pantano*, 836 A.2d 948, 2003 Pa.Super 423, (2003). "The refusal to grant a continuance constitutes reversible error only if prejudice or a palpable and manifest abuse of discretion is demonstrated." *Com. v. Roser*, 914 A.2d 447, 2006 Pa.Super 365, (2006). Here it is apparent that trial court basis on denying Wallace's attempted request for continuance would be prejudicing both defendants. In this case the jury's determination of innocence or guilt was based upon the credibility of witnesses, by denying a continuance to secure witnesses would be precluding jury from hearing evidence of exculpatory testimony which would have contradicted the Commonwealth's theory of the case, which a reasonable probability the outcome would have been different is present. Trial court erroneously focused its decision on available transportation of witnesses and erroneously concluded that witnesses refused to come in, instead of focusing on the paramount importance of Appellant's life, liberty, and how the interest of justice requires a continuance to be granted. The nature of the charge in the instant case is the most serious, first degree murder, which carries a mandatory life sentence. Trial court should have took in consideration the criteria necessary to grant such continuance because in this circumstance one was due.

Criteria to determine proper exercise of discretion (1) the necessity of the witness to strengthen the defendant's case (2) the essentiality of the witness to defendant's defense (3) diligence exercised to produce his presence at trial (4) the facts to which he could testify; and (5) the likelihood that he could be produced

at the next term of court. see *Com. v. Robinson*, 864 A.2d 460, 581 Pa. 154, (2004). By these prongs it can be properly shown that trial court would have abused its discretion by refusing to grant a continuance. Firstly, we must look to the necessity of these witnesses to strengthen the Appellant's case. Counsel failed to produce any witness or evidence that would aid Appellant's defense. The only form of evidence presented to undermine the allegations of Appellant was a generic stipulation to character of Appellant being peaceful and nonviolent in the community. Even this was insignificant and undermined by Appellant's own counsel revealing other criminal activity that was reasonably inferred by jury Appellant engaged in. This negated Appellant's evidence of good character because it exhibits propensity to commit the present crime by evidence of another, for which it is inadmissible. And the jury was free to consider that evidence for which it is inadmissible because it wasn't accompanied by a limiting instruction. Further, the Commonwealth presented incriminating testimony from Anthony Harris and Hassan Durant which was corroborated by Rachel Marcelis. It can properly be pronounced that in all actuality the Appellant didn't have a viable defense. The jury's decision was based on a incomplete showing of evidence which resulted in a one sided trial. Necessity is a understatement of how severe the importance was that the jury heard the testimony of witnesses who would have exculpated Appellant. As stated prior, this case boiled down to the credibility of witnesses and that credibility was of paramount importance because it was the jury's primary factor when determining innocence or guilt. The essentiality of these witnesses to the Appellant's defense is visually clear to a blind man. The witnesses' testimony would have been the single most important possible addition to Appellant's defense. These witnesses would have gave exculpatory testimony which negates the theory upon which the Commonwealth relies. Their testimony would have been damaging to the Commonwealth's case would it have been presented to the jury. Had their testimonies been presented to the jury it would have undermined the confidence in the outcome of of the proceeding.

Consequently, Appellant was prejudiced by counsel failing to request a continuance because the aforementioned witnesses were not heard. As stated by Wallace, by trial court denying a request for a continuance would be taking away his defense, as well as Appellant's (N.T. 2/4/09, at 25). So for trial court to deny just a brief continuance, for a day at the maximum, would be denying Appellant's defense and extremely prejudicing him. "By far the most important factor to consider, however, is the defendant's need for a continuance and the prejudice resulting from it's denial." *U.S. v. West*, 828 F.2d 1468, (1987). In *U.S. v. West* it states, "In this case, the fact that the denial of a continuance precluded the defense from attempting to obtain the presence at trial of the only eyewitness who might presented exculpatory testimony, warrants reversal regardless of appellant's showing on the other factor. The testimony

was important and the prejudice resulting from the denial of a continuance was severe." The present case some what resembles that of U.S. v. West, but what is the common denominator is the prejudice resulting from a denial of continuance and this severe prejudice alone warranted a continuance.

Nevertheless, there was diligence exuded to obtain Carter and Blackman's presence. The record reveals that co defendant's counsel, Wallace, subpoenaed both Carter and Blackman and trial court informed Appellant's counsel he need not double subpoena them because Wallace had done so (N.T. 2/4/09, at 20). Counsel also informed trial court that he made efforts independently of Mr. Wallace to locate Blackman and Carter (N.T. 2/4/09, at 27). Also trial court provided the opportunity for the defense to telephone witnesses which outcome was unsuccessful (N.T. 2/4/09, at 25-26). There was sufficient diligence exercised to produce these witnesses for trial.

The facts to which these witnesses could testify were essential to the Appellant's defense. Accordingly, Blackman and Carter's testimonies would have not been cumulative because this evidence was not presented, therefore, giving it essentiality and being paramount that it was heard by jury. Because counsel was unable to produce testimony from any witness, Carter and Blackman's testimony would have been unheard evidence by the jury. If testimony which an absent witness would give is merely cumulative or available from another source, then a continuance may be properly denied. *Com. v. Howard*, 353 A.2d 438, 466 Pa. 445, (1976). These witnesses were prepared to give testimony regarding their presence at the incident and assuring that Appellant was not present and a shooter in this crime. Their testimonies would have consisted of explaining how the gunmen were wearing hoodies and how they wore their hoods over their heads, their faces were unable to be seen. Also these witnesses would have testified that when the shooting started everyone at the scene was running to get to safety and that Harris and Durant weren't just standing around watching as the shooters were shooting at the victim. Moreover, these witnesses would have testified that after the shooting had stopped they witnessed Anthony Harris accuse Malik Ware of being the shooter and proceeded to inform police that it was indeed Ware who committed the crime but was confronted by Ware. Additional testimony would have consisted of the closeness and the relationship of Harris and Durant, which would be relevant to their common corrupt motive to falsely implicate Appellant. Lastly, their testimony would've explained how Harris and Durant have a reputation in the community of being untruthful, also explaining how Appellant's reputation in the community is that of a peaceful and nonviolent person.

The facts indicate that it was highly likely that the witnesses could be produced if only a short continuance had been granted. Counsel for Appellant never subpoenaed either witness prior to trial to compel their presence at the proceeding, yet their presence at all other dates of trial was due to their willingness and free

will to testify in the behalf of Appellant. Also it was stated on the record by Wallace that these witnesses have all appeared for trial on the previous days of trial (N.T. 2/4/09, at 23-25). In deciding whether a continuance is required, "[t]he showing of willingness [to testify] is essential to insure that judicial resources are not wasted." U.S. v. Botello, 991 F.3d 189, (1993). Here it is clearly shown that witnesses exhibited a abundance of willingness to testify and their presence at prior days of trial displays that there is a very high probability if a continuance was granted until the following day they would have been produced. Furthermore, witnesses' addresses were known as well as phone numbers so direct communication with witnesses were available. Due to these circumstances it can be pronounced that it was highly likely that witnesses could have been produced at the next term of court.

Counsel was provided with all the factors necessary to meet the criteria for trial court to grant a continuance. Counsel should have requested a continuance and made argument in support of motion for continuance. "However, there is no mechanical test for determining whether a continuance should be granted, and the circumstances of each case must be carefully examined, especially the reasons presented to the trial judge at the time the request is denied. *Alfred v. U.S.*, 709 F.2d 418, (1983). Providing trial court with the aforementioned reasoning would have been suffice for the granting of the continuance in light of the circumstances. Especially focusing on the prejudice ensuing from a denial. Should trial court deny a hypothetical continuance in this matter, if counsel requested such, would have been a clear abuse of discretion. A court's denial of a continuance does not constitute an abuse of discretion unless the movant shows that he was seriously prejudiced by the denial. *U.S. Khan*, 728 F.2d 676, (1984). And such prejudice existed due to the witnesses absence precluding Appellant from asserting his defense, rendering the viability of the Appellant's defense compromised and destroyed. When trial court denied Wallace's supposed continuance it's decision was arbitrary and despotic. Error only exist if the district court's decision was "arbitrary or unreasonable and materially prejudiced the defendant." *U.S. v. Pursley*, 577 F.3d 1204, (2009). Trial court's rationale for denying Wallace's attempted request does not outweigh the interest of justice. As justice demanded a continuance if one was requested. Regardless, a continuance was warranted and counsel should have requested one.

There is no reasonable basis for why counsel did not request a continuance in this matter. Counsel's decision was incompetent and unreasonable because ensuring material witnesses' testimony was heard by jury would have only been beneficial to Appellant's defense. Consequently, counsel's ineffectiveness induced Appellant to proceed with trial without the material testimony in which may have resulted in a different verdict. This can not be said to have been reasonably designed to effectuate Appellant's interest. Counsel's obligation to his client is the responsibility of

furthering the defendant's interest to the fullest extent that the law and applicable standards of professional conduct permit, whereas he didn't in this instance. "In a case where virtually the only issue is the credibility of the Commonwealth's witness versus that of the defendant, failure to explore all alternatives available to assure that the jury heard the testimony of a known witness who might be capable of casting a shadow upon the Commonwealth's witness's truthfulness is ineffective assistance of counsel." see *Com. v. White* 450 A.2d 63, 303 Pa.Super 550, (1982). For these same reasons of why counsel should have requested a continuance, counsel should have requested bench warrants to help secure witnesses because this alternative not chosen offered a potential for success substantially greater than the tactics utilized. Even trial court stated that she could drop bench warrants for these witnesses (N.T. 2/4/09, at 40-41), but counsel negligently declined to pursue this alternative. Ultimately, counsel provided Appellant ineffective assistance and denied effective assistance guaranteed by the Sixth Amendment.

TRIAL COURT AND OR COURT REPORTER VIOLATED APPELLANT'S CONSTITUTION AMENDMENT 14, DUE PROCESS, BY OMITTING DIALOGUE OF APPELLANT REQUESTING CONTINUANCE

Appellant was prejudiced by trial court or court reporter because of dialogue absent in the record. Appellant requested and inquired about continuance to trial court regarding Kyle Carter and Gregory Blackman but the record fails to reflect neither. This is prejudicial to Appellant because it is hindering him from developing claim. 28 U.S.C. § 753 (b) provides for the recording of a verbatim transcript of trial proceeding in order to safeguard a defendant's right to appellate review. see *U.S. v. Gillis*, 733 F.2d 549, (1985). Because this safeguard was violated, Appellant's due process is violated, precluding him from developing claim due to incomplete record.

In the colloquy of Appellant's decision of whether or not he wishes to take the stand, there is dialogue between Appellant and trial court. In this dialogue is where Appellant inquires and request continuance to trial court. The instance where Appellant inquires and request continuance is substituted for hyphens in the record. The record reflects: DEFENDANT BAXTER: "I do not wish to testify. But I have a question for Your Honor. Why aren't -- not character witnesses, but why aren't, to be exact, Kyle Carter, Gregory Blackman, witnesses like that, that were actually able to see, they were actually at the scene." (N.T. 2/4/09, at 39). The hyphens that are displayed on the record is error. The record should reflect "Why aren't continuances being granted for, not character..." According to Pa.R.A.P. Rule 1926 Correction or Modification of the Record, a defendant can recreate the record to the best of his recollection, as it is here, pursuant to that rule. see *Com. v. Stokes*, 839 A.2d 226, 576 Pa. 299, (2003). This recreation of the record is to the best of Appellant's recollection and is hereby adopted by him.

The other instance of improper omitted dialogue from transcripts is when Appellant actually requested a continuance. Hyphens are also used to substitute actual dialogue from Appellant. The record reflects: DEFENDANT BAXTER: "Don't you think the importance of my life --" (N.T. 2/4/09, at 41). The hyphens that are displayed are error. The correct record should read, "Don't you think the importance of my life needs you to grant this request for continuance?" This recreation of the record is to the best of Appellant's recollection and is hereby adopted by him. Because the record reflects an incomplete dialogue from Appellant it precludes him from asserting trial court's abuse of discretion for not granting continuance on appeal due to the record reflecting no such request existing, when Appellant properly requested one. The preservation and accuracy of trial transcripts are constitutionally mandated only to the extent that they are necessary to provide an adequate and effective record for appellate review. see *Griffen v. Illinois*, 351 U.S. 12, 76 S.Ct 585, (1956). This incomplete record is unacceptable. It is apparent that Appellant's sentences are incomplete and the additional dialogue was erroneously omitted. Merely the way this dialogue is recorded is evidence of that. A criminal defendant has a right to record on appeal which includes a complete transcript of the proceeding at trial." *U.S. v. Carrillo*, 902 F.2d 1405, (1990).

Further there is another instance of incomplete record that furthers Appellant's argument that dialogue was improperly omitted. In the Judge's robing room Appellant's co-defendant's counsel, Michael Wallace, requested a continuance from trial and that request is also nonexistent on the record. The record reflects: MR. WALLACE: "In any event, they have all been here. And they all assured me that they would be here today, and I can only assume that because of the snow and the weather conditions, that they're not here. I would ask for a short --" (N.T. 2/4/09, at 24). Again hyphens are present where imperative dialogue is excluded. It is far past coincidence that every instance where a continuance is requested it is nonexistent on the record. It is crystal clear that Wallace has requested a continuance but the record fails to include one essential word needed to constitute a proper request, continuance. Even trial court acknowledges that a request has been made by stating that she denies it but without the record actually displaying that a request for a continuance being requested, it is looked upon by appellate courts as not existing.

"[I]t is beyond cavil that an appellate court is limited to considering only those facts which have been duly certified in the record on appeal. For purposes of appellate review, what is not record does not exist..." see *Steglick v. W.C.A.B. (Delta Gulf Corp.)*, 755 A.2d 69, (2000). "An appellate court may consider only the facts which have been duly certified in the record on appeal." *Richner v. McCance*

13 A.3d 950, 2011 Pa.Super 4, (2011). Therefore, since the aforementioned dialogue is not part of the record, appellate courts may properly conclude it does not exist. This is where prejudice ensues because Appellant can not raise a claim of abuse of discretion of trial court for not granting continuance. "The appellant must demonstrate that the missing portion of the transcript specifically prejudices his appeal before relief will be granted." see U.S. v. Carillo. It is obvious that Appellant is prejudiced by omitted dialogue simply because it prevents him from developing claim with proof of the record that trial court erroneously denied request for continuance in which should have been granted in the interest of justice.

It is highly likely that trial court may be responsible for the incomplete record. In the record it reveals that trial court gives frivolous reasoning for denying the attempted request for continuance. She stated to Appellant that they're (witnesses) not coming in and she can't make the Commonwealth call them. She can't make people show up but can drop a bench warrant on them. Also stating that she doesn't have the ability to force them to testify and they refused to show up (N.T. 2/4/09, at 39-41). Trial court's rationale for not granting Appellant's requested continuance is error and abuse of discretion. By trial court denying Appellant's request would be prejudicing Appellant because of his overwhelming need for the purported witnesses' testimony to be heard. This case boiled down to the credibility of witnesses where their credibility was the jury's primary factor when determining Appellant's guilt or innocence. Kyle Carter and Gregory Blackman were prepared to testify that Appellant was not a shooter in this incident, Commonwealth's witnesses Anthony Harris and Hassan Durant were not just standing around watching the shooting take place, everyone present at the school yard ran to get to safety once the shooting started, and after the shooting they witnessed Harris accuse another person as being the shooter in this incident. Also testifying about the closeness of Harris and Durant's relationship which is relevant to their common corrupt motive and conspiring to falsely implicate Appellant, and give character evidence regarding Commonwealth's witness's untruthfulness and Appellant's peacefulness in the community. These witnesses testimony would have been the single most important possible addition to Appellant's defense and not granting a short continuance would be prejudicing Appellant because it was paramount that the jury heard this evidence. Without hearing the testimony of these witnesses would be denying Appellant of his defense. Had the jury heard this evidence there is a reasonable probability that the outcome of the proceeding would have been different. By trial court denying Appellant's request a reliable determination of guilt can not be made at trial. The incomplete record of Appellant requesting continuance relieves trial court of responsibility for why a continuance was not granted and ultimately why Appellant was denied his defense. It then transfers that responsibility back to counsel because if a continuance was

essential it would be counsel's duty to request such. This possibly can be credited to bias in regards to Appellant and trial court being aware that it would be prejudicing Appellant if a continuance was denied. In addition, trial court, Renee Cardwell Hughes was recused after she ordered a court reporter to alter the transcripts of a P.C.R.A. hearing. see Commonwealth v. Dougherty, PICS No. 11-0834 (Pa. April 28, 2011) Per Curiam, Baer, J., concurring; Saylor, J. dissenting. Hughes is known to improperly omit dialogue at her convenience. This instance is just a pebble in her road of inappropriate behavior and reveals that she considers herself immune from upholding the integrity of her position. "To alter a record is to strike at the very pillars of meaningful appellate review, and concomitantly therewith, the basic tenets of due process." Baer, J., concurring.

The court reporter is unquestionably responsible for this incomplete record, regardless if it was ordered by trial court to omit dialogue from transcripts or not. Statute requiring court reporter to record all proceedings in criminal cases had in open court is designed to preserve correct and authentic record of criminal proceedings free from infirmities of human error and safeguard defendant's rights. U.S. v. Taylor, 303 F.2d 165, (1962). Court reporter had a duty to record transcripts accurately to preserve record for appellate review. "[F]ailure to provide accurate verbatim does not require a per se rule of reversal... [r]ather some prejudice to the defendant must occur before reversal will be contemplated." Henthorn v. Turrentine, 5 F.3d 536, (1993), unpublished opinion, citing U.S. v. Carillo. Whether by fault of trial court, or court reporter this incomplete record violates Appellant's due process caused by the hinderance of raising claim for holding trial court responsible for not granting his requested continuance. This prejudices his appeal and a certified supplemental record is warranted.

Lastly, at trial there were various witnesses who can corroborate Appellant's assertions which include those who were present. This includes prosecutor (James Barardinelli), co-defendant's counsel (Michael Wallace), and Appellant's counsel (Mark Greenberg). By request of Appellant, may these aforementioned individuals be interviewed to provide evidence that Appellant did indeed request trial court to grant a continuance so that Kyle Carter and Gregory Blackman could be presented by the next term of court.

APPELLATE COUNSEL VIOLATED APPELLANT'S CONSTITUTION AMENDMENT 6, EFFECTIVE ASSISTANCE OF COUNSEL, BY FAILING TO ADEQUATELY FEDERALIZE CLAIMS

Appellant's counsel was ineffective for failing to adequately federalize Appellant's claim. Appellate counsel's failure deprived Appellant of the opportunity to have claims adjudicated under federal constitutional standards. This prejudiced Appellant because issues were not exhausted in state court for federal review. "A

federal court may not grant a writ of habeas corpus unless the applicant has exhausted all available remedies in state court." *Wagner v. Smith*, 581 F.3d 410, (2009). Counsel did not fairly present claim, thus, claim will not be acknowledged upon federal review, denying Appellant of a appellate process vital to his life and liberty.

The issue which counsel failed to federalize claim is in counsel's second argument on direct appeal regarding trial court error of allowing Commonwealth to introduce evidence that Appellant gave false names to police at the time he was arrested on July 10, 2007. In appellate counsel's brief he uses various state case law which only catered to Pennsylvania state law. In counsel's argument the federal nature of the claim is nonexistent. Therefore, counsel did not fairly present claim to the state court. A petitioner can "fairly present" his claim through; (a) reliance on pertinent cases; (b) reliance on state cases employing constitutional analysis in like fact situations; (c) assertion of the claim in terms so particular as to call to mind specific right protected by the Constitution; and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation. *Nara v. Frank*, 488 F.3d 187, (2007) citing *McCandless v. Vaughn*, 172 F.3d 255, (1999). Counsel failed to present claim in a federal aspect pursuant to the aforementioned prongs. Also, "ordinarily a state prisoner does not fairly present a claim to a state court if that court must look beyond a petition or a brief (or similar document) that does not alert it to the presence of a federal claim in order to find material, such as lower court opinion!" *Nara v. Frank*, also see *Baldwin v. Reese*, 541 U.S. 27, 124 S.Ct 1347, (2004). As is the case here nothing about counsel's argument alerts to or insinuates a federal claim. This negligence rendered appellate counsel ineffective.

A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or simply by labeling the claim "federal". *Baldwin v. Reese*. Counsel declined using a simple tactic to federalize Appellant's issue to be preserved for federal review. There is no reasonable basis for counsel declining federalizing this issue when it would only be beneficial to his client. The prejudice that Appellant suffered is this issue will not be recognized for federal review because it was not fairly presented and exhausted in state court, rendering appellate counsel ineffective.

TRIAL COUNSEL VIOLATED APPELLANT'S CONSTITUTION AMENDMENT 6, EFFECTIVE ASSISTANCE OF COUNSEL, BY NOT REQUESTING A CAUTIONARY OR LIMITING INSTRUCTION AFTER COUNSEL ELICITED OTHER CRIMINAL ACTIVITY TO THE JURY THAT JURY INFERRED APPELLANT ENGAGED IN

Trial court was ineffective for not requesting a cautionary or limiting instruction when counsel elicited other criminal activity to the jury. This is relevant to the same principles of Appellant's prior issue and a accumulative error of counsel's ineffectiveness regarding that issue. see Appellant's prior issue: TRIAL COUNSEL VIOLATED APPELLANT'S CONSTITUTION AMENDMENT 6, EFFECTIVE ASSISTANCE OF COUNSEL, BY REVEALING OTHER CRIMINAL ACTIVITY TO THE JURY. Counsel questioned Officer Casey about drugs being found inside the motel room where Appellant was arrested (N.T. 2/3/09, at 107). As a result the jury reasonably inferred that Appellant engaged in other criminal activity. This afforded the jury the inference that because Appellant engaged in other criminal activity he is more likely to commit the crime for which he is being tried, stripping Appellant of his presumption of innocence. see West's Pennsylvania Practice, Evidence § 404-8 (3rd ed.), citing Com. v. Spruill, 391 A.2d 1048, 480 Pa. 601 (1978). Counsel's failure to request a cautionary or limiting instruction prejudiced Appellant because the jury was not properly instructed on how it should perceive the evidence of other criminal activity.

The most compelling instance that led to the jury to the inference that Appellant engaged in this other criminal activity came from trial court. In trial court's instructions to the jury on consciousness of guilt it inserts and engraves this inference in the minds of the jury. Trial court states: "Now, Arnel Baxter has asserted and maintained that he gave false names to avoid being arrested for drugs which were found in his hotel room." (N.T. 2/4/09, at 155). Trial court's statement was made in her instructions to the jury giving her statement paramount importance because the jury was aware that these instructions were to govern their deliberations. Trial court's theory creates the notion that Appellant gave false names to avoid being arrested for his drugs that were in his possession. At the same time, trial court states that these drugs were found in "his" (Appellant's) hotel room, giving Appellant ownership of that motel room, which indeed it was not. It is common knowledge to the average human being that anything found on one's person or property is presumed to belong to that individual unless there is evidence that proves otherwise. It is well known that a jury holds the statements of trial court very highly, especially in it's instructions. [U]nder our system trial judge is properly presented to the jury as the ultimate authority figure, for this reason juries are traditionally "highly sensitive" to every utterance of the trial judge. see Bursten v. U.S., 395 F.2d 976 (1968). Therefore, it can properly and reasonably inferred that jury believed Appellant to have engaged in other criminal activity. Additionally, merely the way counsel elicited drugs being found in the motel room where Appellant was arrested gives the jury the inference that Appellant engaged in other criminal activity. And prosecution

gives jury a statement where the jury could reasonably infer this also when he states: "Now, Mr. Greenberg says, well, he [Appellant] had drugs in the room." (N.T. 2/4/09, at 126). With these statements made it can be pronounced that the jury believed Appellant engaged in other criminal activity and counsel was ineffective for not requesting a cautionary or limiting instruction because jury was free to view the evidence for which it was inadmissible.

There is no reasonable basis for counsel declining requesting a limiting or cautionary instruction. It would have only benefited Appellant to have jury instructed on the limited purpose in which that evidence was intended and not for which it was inadmissible, prejudicing Appellant. The concern of that evidence is it may cause the jury to base it's decision on something other then the legal proposition relevant to the case or would divert the jury's attention away from their duty of weighing the evidence impartially. Evidence of other criminal activity generates the risk that the jury will not limit the evidence to its proper role and will use it as evidence against the party as to which it is inadmissible. Pa.R.E. 404 (b) (1) states: Evidence of other crimes, wrongs, or acts is not admissible to the character of a person in order to show action in conformity therewith. That's exactly what happened by counsel elicited drugs being found in the motel room where Appellant was arrested because it exhibits propensity for which it is inadmissible. Thus, it was unreasonable for counsel to fail to request a cautionary or limiting instruction, because such instruction was warranted, for prejudice is present absent instruction.

A cautionary or limiting instruction would've explained the limited purpose for which the evidence was relevant and admissible. This evidence was only admissible for a limited purpose but the jury was free to view this evidence for which it was inadmissible. When evidence is admissible for a limited purpose, a defendant is entitled to a limited instruction. see *Com. v. Covil*, 378 A.2d 841, 474 Pa. 375, (1977). Without specific instructions, one could only speculate as to whether or not the jury in this case "clearly understood" the limited purpose for which the evidence was admissible. see *Com. v. Amos*, 284 A.2d 748, 455 Pa. 297, (1971). It can not be reasonably determined that the jury knew to disregard the negative characteristics of that evidence and limit it for what counsel intended. This neglect and inattention constitutes ineffectiveness of counsel.

TRIAL COUNSEL VIOLATED APPELLANT'S AMENDMENT 6, EFFECTIVE ASSISTANCE OF COUNSEL AND COMPULSORY PROCESS, BY NOT SECURING THE ATTENDANCE OF ESSENTIAL WITNESSES

TYRONE LEWIS

Tyrone Lewis gave a statement to police on April 22, 2007 in regards to this incident. His statement gave beneficial evidence that could've been utilized

by Appellant. Lewis stated to police that before the shooting began he just made a lay-up on the basketball court. The importance of this lay-up is that it places him closer to the shooters than the Commonwealth primary witnesses Anthony Harris and Hassan Durant. In the statement Lewis explained where he ran once the shooting began and this general direction Lewis ran is the alleged route Appellant used for his escape from the scene according to the Commonwealth's witnesses. This provided Lewis with another opportunity to get an additional look at the shooters. The most important observation made by Lewis was, throughout this whole ordeal he never saw the shooters' faces. This observation was necessary to negate the Commonwealth's witnesses' testimonies that they were able to see the faces of the shooters. This observation made by Lewis, being closer to those shooters, indicates that the shooters' faces were unable to be seen by the way their hoodies were worn. Lewis clearly informs police that he did not see the shooters' faces because they had hoodies on. This directly contradicts the identification of Appellant and how the hoodies were supposedly worn according to Harris and Durant. Also, this witness is very familiar with Appellant as well as Harris and Durant because he lived in this neighborhood for a significant amount of time at 1538 W. Tioga St. Lewis knew Appellant for the same amount of time as Harris and if Appellant was one of the shooters Lewis would have been able to identify him immediately if what was testified by was true. Lewis has significant knowledge of witnesses and persons involved in this case and may have provided additional substantive evidence in this matter but due to counsel's ineffectiveness in his regard he prejudiced Appellant.

It is on the record that counsel subpoena Lewis pursuant to Appellant's request (N.T. 2/3/09, at 13-14). This attempted subpoena was unsuccessfully served on February 3, 2009. If it wasn't for Appellant insisting that counsel subpoena this witness counsel would not have done so. Nevertheless, counsel was ineffective in this regard because he didn't subpoena this witness until the eve of the day the defense was suppose to be presented by counsel. Counsel had ample time to subpoena witness prior to trial and investigate, interview this witness to discover what benefit this witness had to the defense. It was unreasonable for counsel to wait for the conclusion of trial to attempt to subpoena a essential eyewitness to the crime who would have provided beneficial testimony. It also can not be said that this was reasonably designed to effectuate his client's interest. Counsel should have properly reviewed discovery materials, learned of the benefits as well as the potential benefits of this witness, pursued this witness prior to trial, and used the compulsory process prior to trial. This alternative not chosen offered a potential for success substantially greater then the tactics utilized, thus, cultivating a reasonable probability that the outcome of the proceeding would have been different.

SHAWN LOWRY

Shawn Lowry gave a statement to police in reference to this incident on the day this incident occurred, April 21, 2007. Certain observations made by Lowry stated by him in his statement would've been beneficial to Appellant. His statement consisted of observations that would've negated and contradicted the Commonwealth's witnesses, casting a shadow upon their truthfulness. Lowry states that Demond Brown was standing on the sideline when he got shot at. This differs from Harris and Durant's testimonies. To amplify this circumstance of Demond Brown being on the sideline when the shooting occurred, Lowry informs police that Harris and Durant was standing with Brown when the shooting occurred. Not only does this contradict Harris and Durant's testimonies of where each other and Brown was standing it puts both witnesses in peril and grave danger, being in the immediate line of fire, casting a colossal cloud over both witnesses' testimonies that they both just stood at their alleged locations and watched the shooting transpire. To corroborate this observation Lowry also told police that when he turned around after hearing gunshots he witnessed everyone running. This would include Harris and Durant. Also, Lowry states that he observed that the people present were all from the neighborhood. A neighborhood where Appellant lived his whole life. If Appellant's face was clearly able to be seen, according to Harris and Durant, everyone present present would have been able to identify Appellant as one of the shooters when obviously none did except Harris and Durant, both of which have reservations. This speaks volumes to the proposition of Harris and Durant's common corrupt motive to implicate Appellant, being word on the street, and their interest on the outcome of the trial due to their close relationships to the victim. This eyewitness would have provided very beneficial evidence to the Appellant's defense but counsel prejudiced him by ineffective use of the compulsory process.

Like Tyrone Lewis, Lowry was subpoenaed pursuant to the request from a representative on the behalf of Appellant (N.T. 2/3/09, at 13-14). This subpoena was also unsuccessfully served on February 3, 2009. Counsel's persuaded attempt to subpoena Lowry so late at trial displays his obvious incompetency because no competent lawyer would have done so. Especially because of the potential benefit and observations made in his statement. It was unreasonable for counsel to wait to the conclusion of trial, relying on the judgment of Appellant and not his own, to subpoena a essential eyewitness to the crime who would have provided beneficial testimony. To add insult to injury, counsel never interviewed, investigate, or pursued Lowry at all prior to trial. In this instance it was counsel's duty to familiarize himself with the witness because he was a eyewitness to the crime. Nonetheless, counsel should have properly reviewed discovery materials, learned of the benefits as well as the potential benefits of this witness, pursued this witness prior to trial, and exercised the compulsory process prior to trial. This alternative not chosen offered a potential for success substantially greater than the tactics utilized, rendering counsel ineffective.

MALIK WOODEN

In regards to Malik Wooden counsel denied Appellant the compulsory process by not subpoenaing this eyewitness and compelling his attendance at trial. This witness gave police a statement and this statement contained extremely beneficial evidence to the Appellant. Wooden informed police of observations that would directly contradict the Commonwealth's testimony and negate the Commonwealth's theory of the case. Wooden informed police of the description of one of the shooters and the description he gave was contradictory to that of the Commonwealth's witnesses. He stated that he seen a man in a big black hoody, with a black gun, and was of a dark complexion. This does not fit the description of Appellant because he is light skinned, nor does it fit the description of his co-defendant, Jeffrey McBride. At the same time Wooden was unable to identify the shooter he did see, while knowing both defendants in this case. This exculpatory evidence was essential to the Appellant's defense and Wooden's testimony in this regard would've changed the whole complexion of the trial because ~~it is completely inconsistent with the identification made by~~ Anthony Harris and Hassan Durant. Also Wooden states in his statement that he ran when the shooting started but waited 10 minutes before he returned to the school yard to retrieve his car. When he walked back to the school yard he states he saw Tone a.k.a. Anthony Harris and Harris told him that Demond (the victim) got shot. The significance of Wooden speaking with Harris approximately 10 minutes after Wooden ran out of the school yard and approximately 10 minutes after the shooting is because it was erroneously tried to be portrayed by the prosecution that Harris informed Officer Brian Graves, at Temple Hospital at 1:15 p m, that he witnessed the shooting of Demond Brown. It is evident that Harris could not have possibly told Graves that he was a witness at Temple Hospital at 1:15 p.m. when he was obviously at the Kenderton school yard conversating with Wooden. This incident occurred approximately at 1:06 p.m. and 10 minutes later Wooden told police that he was talking to Harris which would be approximately 1:16 p.m. Harris can't be at two places at once and by Wooden's testimony approximately 1:15 p.m. Harris was still present at the incident of the crime. Graves was lead by prosecutor on redirect examination to testify that he met Harris at 1:15 p.m. (N.T. 2/3/09, at 24-25) after he already admitted on cross examination that he met Harris at 2:26 p.m. and this is when Harris informed Graves he was a witness to this incident (N.T. 2/3/09, at 22-23). This aspect was paramount because counsel was trying to prove that Harris took approximately a hour and a half to finally inform police that he was a witness and in this hour and a half Harris could have received all types of information about the case other then his own perceptions that he told police. This would indicate and give the jury the inference that Harris falsely implicated Appellant in this incident not because he witnessed Appellant shoot Brown but because it was what he heard from others in this unaccounted

for time period, which provided Harris to speak with others and receive rumored information about the incident. It would also be additional evidence tending to prove Harris' bias and corrupt motive he had towards Appellant. Malik Wooden was a very crucial witness in this case and counsel was ineffective by not exercising the compulsory process to obtain this witness's testimony. There was no reasonable basis for counsel not to subpoena this witness when this eyewitness provided police with exculpatory evidence that creates a reasonable probability that the outcome of the proceeding would have been different if he had done so.

McCOY MATTHEWS

Counsel was ineffective for denying Appellant the compulsory process for not compelling McCoy Matthews presence at trial. Matthews provided police with information in his statement that would have benefited Appellant. Yet, counsel never subpoenaed Matthews. Matthews informed police that he was sitting by the fence on the 3400 block of Sydenham St. with his back to the basketball courts. The importance of Matthews' location is according to the Commonwealth's witnesses the shooters would have had to walk past Matthews in order to enter the school yard providing him with the closest view of these shooters then anyone mentioned in this case. Also Matthews lives down the street from Appellant's residence and has known Appellant for as long as Anthony Harris and had owned a store on the corner of Sydenham and Ontario street that Appellant frequented since kindergarden until it closed. But Matthews is very familiar with Appellant and if Appellant would've been a shooter Matthews would've been able to identify him, especially being the closest person to the shooters while allegedly the shooters were not wearing the hoodies over their heads until they entered the school yard according to Harris and Durant. This evidence would have helped further contradict the testimony of the Commonwealth's witnesses. Matthews never indicated the Appellant at all and because of his location right before the shooting occurred and being familiar with Appellant this was essential for the jury to hear. Counsel was ineffective for failing to use the compulsory process to obtain Matthews presence and testimony at trial when it clearly would have aided the Appellant's defense. There was nothing holding counsel back from doing so but his own incompetency.

THERESA BROWN

In reference to Theresa Brown counsel's failure to use the compulsory process to compel this eyewitness's presence and testimony at trial was ineffective and prejudiced Appellant. In the discovery T. Brown was interviewed by detectives where she gave very beneficial exculpatory evidence that was essential that the jury should have heard at trial. T. Brown informed police that she was standing in her doorway, of 3436 N. Sydenham St., watching the basketball game. She claims that she saw two males in light colored hoodies, with their "hoodies up", shooting. She also stated that she saw where the shooters ran after the shooting. There are various aspects of her observations that are extremely beneficial to Appellant especially the aspect

where although she has made these observations she never seen the faces of the shooters. Which indicates that the shooters faces were not able to be seen because of them wearing their hoodies up, contradicting Commonwealth's witnesses' testimonies. Another important circumstances was that Theresa was standing in her doorway watching the basketball game. Theresa Brown resides at 3436 N. Sydenham St. which is located across the street from the school yard where this incident occurred. The importance of T. Brown's location is, according to the Commonwealth's witnesses the shooters had to have walked past her address to enter the school yard giving T. Brown the opportunity of having a very close view of the shooters. And according to the Commonwealth's witnesses the shooters didn't put their hoods over their heads until they entered the school yard, therefore, T. Brown had one of the closest views of the shooters to see them without the hoods on. But as this witness states, she never saw the faces of the shooters and they had their hoods up. This cast a shadow over the Commonwealth's witnesses' truthfulness and contradicts the Commonwealth's theory of the case. Counsel should have subpoenaed this crucial eyewitness and presented her testimony at trial. Counsel was ineffective in this regard and denied Appellant of his right to the compulsory process.

SHARIAH JABBAR-MITCHELL

Jabbar-Mitchell was not subpoenaed by counsel denying Appellant of the compulsory process so that this witness could provide beneficial testimony. This witness had crucial evidence that would have aided the Appellant's defense. The prosecutor argued that Appellant showed consciousness of guilt by going to Wilks-Barre after the crime and never returning to Philadelphia in hopes of not being found (N.T. 2/4/09, at 125-126). This was for the purpose of providing Appellant's flight and concealment. Jabbar-Mitchell testimony would have rebutted the prosecution's theory of Appellant's consciousness of guilt. She gave a statement to the Wilks-Barre police and informed them that she and Appellant made arrangements to come to Wilks-Barre and drove from Philadelphia on 7/9/07. This negates this theory that was asserted by prosecutor to the jury. Also prosecutor offered other consciousness of guilt evidence when it argued that Appellant gave false names to police in order to avoid being arrested for this crime (N.T. 2/4/09, at 126-127). But when asked by police Jabbar-Mitchell explained Appellant's name was Haneef. This may provide a different rationale for why Appellant gave false names to police if his own girlfriend doesn't know his real name whose relationship was before this incident occurred. Jabbar-Mitchell may have provided the reasoning why Appellant gave false names. By counsel not investigating, interviewing, or pursuing this witness to ascertain this information his only alternative was to subpoena this witness to discover why so he could implement strategy. But counsel should have compelled this witness's attendance to provide evidence that Appellant was not avoiding Philadelphia. Nonetheless, Jabbar-Mitchell was a necessary witness to Appellant's defense and counsel was ineffective for denying

Appellant the compulsory process to present this witness for his defense.

STEPHAN STUDIVENT

This witness was of paramount importance to the Appellant's defense. This witness would have testified to exculpatory evidence and directly contradicted testimony provided by the Commonwealth. Studivent is a necessity to the Appellant's case and counsel prejudiced Appellant by not using the compulsory process to compel this witness's attendance at trial. Studivent was willing and available to testify on the Appellant's behalf but counsel incompetently declined to subpoena this eyewitness who would have provided such evidence there would have been a reasonable probability the outcome of the proceeding would have been different. This witness was present and a witness to the crime. He was playing basketball that day and noticed two guys wearing hoodies over their heads concealing their faces walking down Sydenham St. He explained that the shooters hoodies were tied so their faces could not be seen and at no time did they have their hoodies off their faces. In his affidavit he states that Anthony Harris and Hassan Durant weren't just watching as the shooting took place and that everyone there ran once the shooting started. He also provides that Anthony Harris accused another person by the name of Malik Ware immediately after the shooting. This evidence was of the utmost importance because it negates everything in which Harris testified to concerning the identification of Appellant and if the jury heard this evidence they may have rendered a verdict of not guilty. Studivent also explained that the shooters were physically different that of the Appellant. Also providing his familiarity with the people involved in the case and explaining how those who were present at the school yard on the day of the crime were from the that neighborhood and knew it wasn't Appellant who did the shooting. Studivent explained in the affidavit that Appellant and victim never had any problems with each other, they were cool, Durant and Harris are very close friends, and Appellant is a humble and peaceful person in the community. Necessity is a understatement when it comes to Studivent and the need for his testimony at Appellant's trial. It is clearer then prescription glasses that counsel prejudiced Appellant by not compelling Studivent's presence and testimony at trial which may have rendered a verdict of not guilty.

DERRICK McMILLIAN AND STEPHANIE PIERRE

These witnesses were apart of the discovery and counsel never interviewed, investigated, or pursued them. These witnesses may have provided the Appellant's defense with beneficial evidence regarding this case. By counsel never pursuing these witnesses it precluded him from ascertaining their benefit. Counsel declined Appellant the compulsory process by not compelling their attendance at trial and discovering their potential benefit to this case. Counsel subpoenaed various other witnesses that he never interviewed or investigated for the purpose of presenting them if their

compelled their appearance at trial.

This case boiled down to the credibility of witnesses and the jury's determination of guilt was based upon this credibility and ultimately who's account of the incident they believed, the Commonwealth's witnesses or Appellant. In this case it is clearly shown that counsel offered no witnesses or evidence to directly negate and contradict the allegations testified to by the Commonwealth's witnesses, subjecting the jury to a one sided trial only hearing inculpatory evidence presented by the Commonwealth. How on earth could Appellant prevail over alleged eyewitnesses' testimony that directly implicates him as being a shooter without any direct evidence denying or negating those direct allegation? Most certainly not a generic stipulation of good character that was previously invalidated by counsel eliciting evidence that inferred Appellant engaged in other criminal activity. The only sufficient and highly effective form of evidence in a case such as this would be to offer testimony of eyewitnesses who would have provided exculpatory evidence and casting a shadow upon the Commonwealth's witnesses' truthfulness. Due to counsel's lack and ineffective use of the compulsory process he denied Appellant of the most effective means of defense that would have induced the proceeding to result in a different verdict. "The right to offer testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. The right is a fundamental element of due process of law." *Com. v. Terry*, 393 A.2d 490, 258 Pa. Super 540 (1978), quoting *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920 (1967).

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor...." This is nearly identical to that of Article 1, Section 9 of the Pennsylvania Constitution. The right to the compulsory process encompasses the right to meet the prosecution's case with the aid of witnesses, and the right to elicit the aid of the Commonwealth in securing those witnesses at trial, both of which are fundamental to a fair trial. *Com. v. Jackson*, 457 Pa. 237, 324 A.2d 350 (1974). Counsel ineffectively declined to use and inappropriately used the compulsory process to secure witnesses' attendance who were named in the discovery materials and witnesses known to counsel who would have provided extremely beneficial testimony negating Appellant's participation in the incident. "The constitutional right to compulsory process does not grant to a defendant the right to secure the

attendance and testimony of any and all witnesses: it guarantees him compulsory process for obtaining witnesses in his favor." *Com. v. Banks*, 946 A.2d 721, 2008 PA Super 57 (2008). The statements of the aforementioned witnesses and affidavit from Studivent clearly reveals the beneficial and material information possessed by those witnesses that was essential to the Appellant's defense. Majority of these witnesses were in the discovery materials and counsel knew of them since his assignment to this case and witnesses such as Tyrone Lewis and Shawn Lowry he waited until the conclusion of trial to attempt to subpoena them which is unacceptable. Nevertheless, because counsel precluded Appellant from securing vital witnesses Appellant was unable to present his version of the case to the jury, rendering the trial one sided. It is unquestioned that our Federal Constitution assures the right of an accused to be provided with adequate opportunity to present his version of the incident to the trier of fact. see *Com. v. Digiacom*, 463 Pa. 449, 345 A.2d 605 (1975). Counsel denying Appellant of the compulsory process prejudiced Appellant by hendering the jury from appraising all the necessary evidence in this case. This error so undermined the truth determining process no reliable adjudication of guilt or innocence could have taken place. Counsel had no reasonable basis to advance Appellant's interest by not securing witnesses who would have provided essential testimony to the defense. "In a case where virtually the only issue is the credibility of the Commonwealth's witness versus that of the defendant, failure to explore all alternatives available to assure that the jury heard the testimony of a known witness who might be capable of casting a shadow upon the Commonwealth's witness's truthfulness is ineffective assistance of counsel." *Com. v. White* 450 A.2d 63, 303 Pa. Super 550 (1982). "[T]o deny a criminal defendant the opportunity to present relevant and competent evidence in his defense would constitute a violation of his fundamental constitutional rights to compulsory process for obtaining witnesses in his favor and to a fair trial." *Com. v. Robertson*, 874 A.2d 1200, 2005 Pa. Super 152 (2005). Counsel prejudiced Appellant in this regard denying him effective assistance and a fair trial.

TRIAL COUNSEL VIOLATED APPELLANT'S CONSTITUTION AMENDMENT 6, EFFECTIVE ASSISTANCE OF COUNSEL, BY NOT INFORMING APPELLANT OF HIS RIGHT TO TAKE THE STAND, GIVING UNREASONABLE ADVICE NOT TO TESTIFY, AND NOT FULLY CONSULTING APPELLANT ABOUT TESTIFYING

Trial counsel was ineffective for not informing Appellant of his right to take the stand and was ineffective for giving Appellant specific unreasonable advice not to take the stand. Counsel never informed Appellant of his right to take the stand and never informed Appellant that ultimately it was his decision to take stand if he chose to do so. Appellant's ability to knowingly and intelligently decide to testify was impaired by counsel's unreasonable advice which prevented Appellant from testifying. The Appellant's decision wasn't knowing and intelligent. This can be attributed

to counsel not fully consulting with Appellant about taking the stand. "The decision whether to testify in one's own behalf is ultimately to be made by the accused after full consultation with counsel." *Com. v. Neal*, 618 A.2d 438, 421 Pa. Super 478 (1992) citing *Com. v. Bazabe*, 404 Pa. Super 408, 590 A.2d 1298 (1991). Being that counsel did not fully consult with Appellant it can not be said Appellant knowingly and intelligently declined testifying, for it was a result of a improper consultation. In order to support a claim that counsel was ineffective for failing to call the appellant to the stand, [appellant] must demonstrate either that (1) counsel interfered with his client's freedom to testify, or (2) counsel gave specific advice so unreasonable as to vitiate a knowing and intelligent decision by client not to testify in his own behalf. *Com. v. Martin*, 499 A.2d 344, 346 Pa. Super 129 (1985). Prejudice is the result of the aforementioned circumstances and due to essentiality and overwhelming need for Appellant to testify for his defense. The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that "are essential to due process of law in a fair adversary process." The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony:... *Com. v. Baldwin*, 8 A.3d 901, 2010 Pa. Super 201 (2010). Counsel's unreasonable stewardship and advice in this matter renders him ineffective.

In the colloquy of Appellant's decision whether or not he chose to take the stand, there is substantial dialogue that reveals that counsel was ineffective in regards to Appellant taking the stand (N.T. 2/4/09, at 35-39). This dialogue between Appellant and trial court also will enlighten Appellant's ignorance and lack of consultation in regard to this matter. Trial court asks Appellant if he discussed the pros and cons of whether he should take the stand with counsel and Appellant answered, no (N.T. 2/4/09, at 35). Then trial court asked Appellant has he thought about it and if he and counsel talked about whether or not he would take the stand and again Appellant answered, no (N.T. 2/4/09, at 35-36). Afterwards Appellant states: "We talked about it, but that was a very long time ago. We never talked about, you know, the pros and cons of me getting on the stand. We never-- we talked-- what I'm saying is we talked about it, but we never got into depth." (N.T. 2/4/09, at 37). One of the most important statements made by Appellant is admitting to never discussing the pros and cons of taking the stand with counsel. This shows that Appellant never fully consulted with counsel about taking the stand which interferes with Appellant's decision of taking the stand. Without discussing with client the benefits and disadvantages of taking the stand counsel cannot be said to have fully consulted with Appellant. The decision is fully up to the accused but there is no consultation about, the quote, unquote, pros and cons of that decision, as is the case here.

The origin of counsel's ineffectiveness begins with the conversation with Appellant about taking the stand prior to trial. In the dialogue of Appellant to trial court he indeed states that he and counsel never discussed the pros and cons but states that they talked about it a very long time ago. In this conversation between he and counsel "talking about it", Appellant is referring to counsel bringing up taking the stand generally. This is not confused with a proper consultation because it was far from it. When counsel brought up taking the stand to Appellant it was in the beginnings of their attorney-client relationship. Counsel was discussing with Appellant possible defenses. In the mist of this conversation of various possible defenses counsel vaguely mentions taking the stand but immediately dismisses this possible defense because he states that he wouldn't call Appellant to the stand and because he was in pursuit of ascertaining other information from Appellant. That was the extent of the conversation about taking the stand and what was meant by Appellant when he informed trial court that he and counsel never got into depth about it. Counsel did not inform Appellant that he had a right to testify and that ultimately it was Appellant's decision whether or not he was going to testify. Appellant wasn't aware of these circumstances until they were asserted by trial court at trial. Appellant was under the belief that these decisions were to be made by trial counsel. Trial court asked Appellant had he thought about taking the stand in this case and he answered, no (N.T. 2/4/09, at 35). This is because Appellant was not aware that taking the stand was his decision to make and counsel already informed him that he would not call him to testify. Therefore, Appellant had no reason to put any thought into testifying.

In the Appellant's colloquy trial court directs Appellant several times to speak with counsel. Although Appellant spoke with counsel inbetween conversations with trial court these conversations with counsel were far from full consultation. Besides the fact that these conversations were very brief, inside the time frame of 90 seconds, at most, the substance of the discussions were not suffice to be deemed a full consultation. The first instance where trial court directed Appellant to speak with counsel was immediately interrupted by trial court asking Appellant additional questions (N.T. 2/4/09, at 35). The second instance of Appellant and counsel's discussion the substance of that conversation was about counsel's concern with Appellant informing trial court that they haven't fully consulted about Appellant taking the stand. During this discussion counsel tries to convince Appellant that they have discussed Appellant taking the stand. Appellant then informs counsel that they have not fully discussed him taking the stand but he does remember when counsel mentioned it. This is when counsel informs trial court that Appellant wants to correct the record (N.T. 2/4/09, at 37). Appellant then informs trial court that they talked about taking the stand a long time ago but not in depth also informing trial court that they have not talked about the pros and cons of taking the stand. Trial court

then directs them to speak again (N.T. 2/4/09, at 38-39). This last brief discussion only consisted of Appellant informing counsel that he did indeed want to testify and then counsel informed Appellant of his disapproval of Appellant taking the stand. Stating to Appellant that it is his advice for him not to do so because it runs the risk of the jury finding out about the Appellant's prior juvenile convictions. These discussions can not be said to have constituted a full consultation of this matter because Appellant is yet to have received a overall understanding about him taking the stand. Appellant did not fully comprehend what was being stated to him by counsel and did not have time to properly discuss, digest and question counsel about his advice on this matter. Appellant was not afforded a reasonable amount of time to properly discuss this matter with counsel due to counsel's failure to fully consult with Appellant prior, waiting until the 25th hour in attempt to do so, which he still failed to fully consult him. Appellant did not receive a full consultation as a result of these discussions and did not knowingly and intelligently appraise or weigh the decision to testify without discussing the reasoning behind why counsel did not want the jury to learn of these prior convictions. Counsel never informed Appellant of the negative characteristics of that evidence if heard by jury. Generally, such evidence is perceived negatively by the jury for it exhibits propensity to commit crime charged with evidence of another crime and blackening character of the accused. But when counsel elicited that drugs were found in the motel room where the Appellant was arrested in (N.T. 2/3/09, at 107) the jury reasonably inferred that Appellant engaged in other criminal activity involving drugs. see Appellant's prior issue: TRIAL COUNSEL VIOLATED APPELLANT'S CONSTITUTION AMENDMENT 6, EFFECTIVE ASSISTANCE OF COUNSEL, BY REVEALING OTHER CRIMINAL ACTIVITY TO THE JURY. Therefore, the negative characteristics associated with the jury learning of Appellant's convictions was already present in the minds of the jury. The jury's minds were already predisposed that because Appellant engaged in other criminal activity he is more likely to commit crime charged and that his character was blackened. Due to counsel not fully consulting Appellant he did not understand that the ramifications of the jury learning of his prior juvenile convictions were the same as the jury hearing that Appellant engaging in other criminal activity. Counsel did not fully consult and discuss with Appellant about counsel's reasoning for why he feared the jury learning of Appellant's priors nor did he fully consult or discuss what counsel didn't want the priors to accomplish was already accomplished when the jury heard that drugs were found in the motel room where Appellant was arrested and was reasonably inferred engaged in this other criminal activity involving drugs. If Appellant was fully consulted, especially on these circumstances he would have opted to testify. Also, a full consultation is not limited to or subjected to counsel only advising client on the disadvantages of taking the stand because client needs the opportunity to properly appraise and weigh

both the benefits and disadvantages to intelligently make a decision on whether he should take the stand or not, especially in these circumstances. see *Com. v. Shultz*, 707 A.2d 513 (1997). Nevertheless, it can not be pronounced that Appellant knowingly and intelligently concluded not to take the stand based on a overall incomplete advisement to do so.

Consequently, Appellant's decision to forego testifying on his own behalf was not an informed decision reached after full consultation with counsel. Appellant's decision was the result of a spur of the moment decision which induced him to rely on advice of counsel. The record reveals that Appellant never discussed the pros and cons with counsel, never thought about taking the stand, and didn't speak on the proposition of taking the stand until the "last minute" with counsel. An attorney undoubtedly has the duty to consult with client regarding important decisions, including questions of overarching defense strategy. *Strickland v. Washington*, 104 S.Ct. 2052, 466 U.S. 668 (1984). Due to counsel not fully consulting with Appellant prior to trial and at trial it induced Appellant to rely solely on counsel's incompetent judgment. Appellant's decision was not knowing and intelligent or was based after evaluation of properly appraising one alternative against the other it was due to counsel's unreasonable advise not to do so. Counsel's advice to forego testifying was caused by his fear of the jury learning of Appellant's prior juvenile convictions and obviously believed this outweighed Appellant's overwhelming need to testify, which was erroneously concluded. This expressed fear of the jury learning of the Appellant's led Appellant to decline testifying. Appellant took this advice from counsel blindly and depended on it being in his best interest. But certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate. *Com. v. Brown*, 2011 WL 806188 (2011). Furthermore, Appellant was also persuaded not to take the stand from the advice given from trial court (N.T. 2/4/09, at 37-38). Trial court informed Appellant that it was extremely rare for a defense lawyer to advise someone to take the stand, that trial counsel has worked to keep things out of the record, things that jury have no right to know which could be interpreted very negatively. Trial court shared with Appellant that she would be shocked if counsel recommended that Appellant take the stand. Especially because Appellant's defense was not self-defense. The advice or vantage point from trial court helped usher Appellant's decision not to testify. When Appellant heard trial court's advice on Appellant taking the stand, considering the prestige of it's position and being the ultimate authority figure, ultimately became one of the primary factors of him declining taking the stand because Appellant concluded that if the Judge is advising me not to take the stand then obviously I shouldn't. Coupling trial court's advice with counsel's, reasoning that both were seasoned professionals at their respective positions, along with a incomplete

and was overall the basis of Appellant's decision.

Incumbently, we must look to the unreasonableness of the advice given by counsel. Firstly, as was previously stated, counsel's advice why Appellant shouldn't testify involving running the risk that the jury would learn of Appellant's prior juvenile convictions was unreasonable. Counsel had already elicited evidence of drugs being found in the motel room where Appellant was arrested which was reasonable inferred by jury Appellant engaged in drug activity. The negative characteristics associated with the elicited evidence and evidence of Appellant's prior juvenile convictions are the same, having the same effect. What counsel didn't want to be accomplished was already accomplished by his own actions. Counsel prejudiced Appellant in advance due to jury presuming because Appellant engaged in this other criminal activity he is more likely to commit present charge, wherefore it effectually stripped him of his presumption of innocence. At the same time jury concluded Appellant was of bad character because of this. Therefore, the damage was done rendering counsel's advice unreasonable. It cannot be said that prejudice would be suffered from the admission of Appellant's prior drug arrest since there was already evidence that Appellant engaged in drug activity. see *Com. v. Nieves*, 746 A.2d 1102, 560 Pa. 529 (2000).

Simultaneously, the Commonwealth would have not been permitted to extract this evidence during cross examination or would Appellant be required to answer questions regarding his prior juvenile convictions. Appellant's prior juvenile convictions were for drugs and not crimes of dishonesty, false statement, and is not considered crimine falsi. Accordingly, "it is well establish that evidence of prior convictions can only be introduced for the purpose of impeaching credibility of a witness if the convictions was for an offense involving dishonesty or false statement." *Com. v. Nieves* citing *Com. v. Randall*, 515 Pa. 410, 528 A.2d 1326 (1987). It can properly be concluded that prosecution couldn't have used this evidence for that purpose. Also prosecution couldn't have used Appellant's priors to show that Appellant was of bad character. On the record it is duly noted noted that the Commonwealth had stipulated with defense that Appellant is of good character (N.T. 2/4/09, at 34-35, 45-46). This stipulation displays that Commonwealth is in agreement that Appellant was of good character and a attempt from them to show Appellant's prior would be nullifying, contradicting, and destroying the stipulation between the two parties because it is showing that Appellant is of bad character, defeating the whole purpose. Under 42 Pa.C.S.A. § 5918 Appellant is not required to answer questions regarding his prior convictions because, although Appellant gave evidence tending to establish his good character it was so stipulated by the Commonwealth. Under Pennsylvania's and Federal rules of evidence 403 and 404 this evidence is inadmissible to be presented by Commonwealth for the probative value is substantially outweighed by prejudice.

Even when counsel elicited evidence that drugs were found in the motel room where Appellant was arrested trial court didn't allow Commonwealth to question Officer Casey about the drugs which were found (N.T. 2/3/09, at 74-77) and this is evident because prosecutor did not exploit it or question Officer Casey regarding those drugs. By prosecutor extracting Appellant's prior juvenile convictions on cross examination would only be used to merely prejudice Appellant by showing him to be a person of bad character, showing propensity to commit the crime charged with evidence of others. And it is unconstitutional to prejudice the accused simply for the sake of prejudicing him so that the Commonwealth may win it's case. The probative value of that evidence doesn't justify its admission especially when that evidence creates bias and jury may base its decision on improper basis. Under Pa.R.E. 404 (b)(2) states: Evidence of other crimes, wrongs, or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Appellant's prior convictions does not fit the criteria to be admitted under these exceptions. The prosecutor would have not been able to use Appellant's priors under these exceptions because in no way do they parallel the case he is being tried. There is no permitted purpose for the prosecutor to extract this evidence due to its stipulation to Appellant's good character and the highly prejudicial nature of that evidence. Questioning Appellant about prior juvenile record clearly gives the perception in the minds of the jury that Appellant is of bad character wherefore the perception the stipulation to good character creates immediately vanishes, which is unacceptable because stipulation becomes frivolous. The prosecutor doesn't have a purpose to extract prior criminal activity rendering counsel's advice unreasonable. Moreover, under F.R.E. 609 juvenile adjudications are inadmissible when used against the accused. But, again, as was previously stated, if prosecutor somehow was permitted to extract Appellant's prior juvenile convictions on cross examination the damage of that evidence was already done by counsel eliciting drugs being found in the motel room where Appellant was arrested that jury inferred Appellant engaged in other criminal activity involving drugs still making counsel's advice unreasonable.

There was a overwhelming need for the Appellant to testify because of the circumstances of the case. Counsel's overall lack of defense compels Appellant's testimony. Counsel presented no evidence to contradict the Commonwealth's theory of the case. In a case where the credibility of witnesses was the jury's primary fact when determining innocence or guilt, counsel presented no witnesses to challenge or contradict the witnesses presented by the Commonwealth. The only evidence linking Appellant to this case was the testimony of Anthony Harris, Hassan Durant, and Rachel Marcelis. And their testimonies was what persuaded the jury to render their verdict because there was no evidence to contradict their testimony or attack their credibility.

Counsel presented no evidence to attack their truthfulness. Also counsel didn't present any evidence tending to establish the Commonwealth's witnesses bias. There was no evidence presented by counsel to defend Appellant on the aspect of motive or flight and concealment. No evidence presented on the whereabouts of the Appellant to negate his participation in the incident. Counsel also never presented any evidence to tending to prove anything that he insisted the evidence would prove which he spoke of in his opening arguments to the jury. Counsel presented no evidence to establish a viable defense. The only form of evidence presented by was the generic stipulation to Appellant's character for peacefulness and nonviolence, which was a pitiful parody of a defense in light of the circumstances of this case. Especially in the face of incriminating testimony of the Commonwealth's witnesses, whose testimonies were uncontradicted and credibility were attacked insignificantly and unsuccessfully during cross examination. More importantly, this generic stipulation was directly negated by Appellant's counsel when he elicited that drugs were found in the motel room where Appellant was arrested. When the jury heard about these drugs being found they reasonably inferred that Appellant engaged in other criminal activity. This stripped Appellant of his presumption of innocence because it predisposed the minds of the jury to believe Appellant guilty with evidence of another crime, giving the inference that because he committed another crime he is more likely to commit this crime. At the same time unjustifiably blackening his character. Accordingly, by counsel eliciting those drugs it negates the Appellant's good character evidence leaving Appellant defenseless against the charges he faces.

Nevertheless, due to the overall circumstances of the defense presented by counsel it would only be in the Appellant's best interest to testify in his own behalf. Cross examination by counsel could not sufficiently bring to light and flesh out a defense to the crimes asserted. Rather, the testimony that Appellant would have given was the sole opportunity to rebut the prosecution's incriminating testimony. It is well established that "an accused may not be able to produce any other evidence to exculpate himself from the charges he faces except his own oath and evidence of good character." see *Com. v. Glover*, 619 A.2d 1357, 422 Pa. Super 543 (1993). As is the case here. Since counsel totally invalidated Appellant's evidence of good character the only other alternative left is the testimony of Appellant. Counsel ineffectively was unable to produce witnesses. No evidence was presented by counsel to defend Appellant but this frivolous generic stipulation. Consequently, this stipulation was made void by counsel's incompetency. Therefore, it must be recognized and made crystal clear that Appellant was defenseless against the charges against him. Appellant's case rested squarely on his good character and this good character presented was compromised prior to it being presented and meaningless to a jury who already concluded Appellant to be of bad character because of it reasonably inferring Appellant engaged in other criminal activities. Unfortunately Appellant was totally defenseless against

taking the stand was the Appellant's only salvation. "In fact, the most important witness for the defense in many criminal cases is the defendant himself." quoting *Rock v. Arkansas*, 107 S.Ct. 2704, 483 U.S. 44 (1987). As is the case here. "In sum, decades ago the considered consensus of the English speaking world came to be that there was no rationale justification for prohibiting the sworn testimony of the accused, who above all others may be in a position to meet the prosecution's case." *Ferguson v. Georgia*, 365 U.S. 570, 81 S.Ct. 756 (1961). By counsel not being in possession of witnesses to directly contradict the Commonwealth's incriminating testimony or evidence tending to establish a viable defense the jury was subjected to a one sided trial in favor of the prosecution. This only leaves the alternative of presenting Appellant's testimony, who above all others was the most qualified to directly deny the charges brought against him and to offer such relevant evidence to rebut every aspect of the Commonwealth's case as a whole. "[T]he conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court...." *Rosen v. United States*, 245 U.S. 467, 38 S.Ct. 148 (1918). Counsel's advice to Appellant was unreasonable and prejudiced him because counsel's incompetency in this matter left Appellant defenseless. Counsel's errors so undermined the truth determining process that no reliable adjudication of guilt or innocence took place.

Appellant would have and was prepared to testify to the following: Appellant would have directly denied the incriminating testimony of the Commonwealth's witnesses. Appellant would have denied being involved in is crime, being present at the scene of the crime, being in Rachel Marcelis' car, and being drove to Wilks-Barre by Marcelis. Appellant would have testified to his whereabouts when the incident occurred. His testimony would have consisted of informing the jury of the very close relationship Harris and Durant have with each other. Explaining how they were bestfriends with each other and they hang out with each other everyday, for the purpose of showing and creating the inference that they have conspired to resemble one another's testimony to secure Appellant's conviction and that they have spoken to each other about this case. Appellant would have gave testimony showing Harris and Durant's bias towards Appellant being caused by words on the street. Appellant would have testified that Harris had bias because of their families history including lots of arguments between the two. Explaining how Harris had arguments with Appellant's mother and how Appellant and brother used to fight with his son. Also how Harris used to call police on Appellant, brother, and people they hanged out with for being loud at night, being that they live on the same block. And explaining to the jury how Harris also didn't like Appellant because of the people he hanged out with. Appellant also could have

shown Marcelis' bias because Marcelis felt as though Appellant and friends used her for her car and money. Furthermore, Appellant would have explained how Marcelis felt betrayed and resented that Appellant didn't tell her that her boyfriend (Cordell Young, a friend of Appellant) was cheating on her when they were together, and that her bias and ill will towards Appellant fueled her reasoning to falsely implicate him in this crime. Appellant would've testified to the hatred Marcelis had towards Young because of their break up and how the break up changed the way she acted and felt towards Appellant. Also testifying to the quantity of drugs Marcelis used on a daily basis and the state she would be in under the influence of the types of drugs she used. Additionally, his testimony would have informed the jury that Harris and Durant are drinking buddies and they too have drug problems. Appellant would have explained Harris' crack addiction who is known in the community to be such, and also lies and steals, even from his family, to obtain drugs. And how Durant being known in the community to sell drugs and uses marijuana, pills and is addicted to cough syrup. Appellant would have testified that all of these witnesses have a reputation in the community to be untruthful as well. His testimony would have informed the jury that he and the victim were actually friends and never had any problems with each other, explaining their relationship between each other. Informing the jury that Appellant knew victim since he was young and that the victim watched him grow up. Appellant would have denied the alleged motive to the shooting, explaining how he never believed that the victim shot D-Nyce (Derrick McMillan). Appellant would have testified to living in Wilks-Barre and that he wasn't in Wilks-Barre to avoid being apprehended. And that he returned to Philadelphia on various occasions after the incident occurred to rebut the prosecution's assertion that Appellant never returned to Philadelphia after the incident. Also Appellant would have testified the reason why he gave false names to police when he was arrested. Appellant's testimony would have provided the jury with a intimate understanding of the type of witnesses the Commonwealth presented and inform them of the things that were not presented by counsel. It would have directly denied the charges brought against Appellant, attacked the credibility of each of the Commonwealth's witnesses, revealed each of their bias, provided rebuttal to every aspect of the Commonwealth's case, and presented his perceptions of the case. Had counsel called Appellant to testify there is a reasonable probability that the outcome of the case would have been different.

Counsel surely prejudiced Appellant for not providing Appellant with effective assistance in regards to taking the stand. Counsel did not inform Appellant of his right to take the stand, he did not fully consult with Appellant, he gave unreasonable advice not to take the stand, and left Appellant defenseless against the charges brought against him. There was a overwhelming need for Appellant's testimony so he could defend himself against the incriminating evidence presented by the

testimony was heard by the jury there would have been a reasonable probability that the outcome of the case would have been different. Counsel interfered with the Appellant's right to take the stand and gave unreasonable advice vitiating a knowing and intelligent decision to testify. Appellant wanted to testify but due to counsel's actions he prejudiced Appellant and deprived him of the sole alternative to present substantial and exculpatory evidence. Counsel's decision cannot be said to have been reasonably designed to effectuate his client's interest, thus, denying Appellant effective assistance.

TRIAL COUNSEL VIOLATED APPELLANT'S CONSTITUTION AMENDMENT 6, EFFECTIVE ASSISTANCE OF COUNSEL, FOR FAILING TO INFORM APPELLANT OF THE IMPORTANCE OF CHARACTER EVIDENCE, RIGHT TO CALL CHARACTER WITNESSES, FAILURE TO PURSUE A CHARACTER DEFENSE PRIOR TO TRIAL, BEING UNPREPARED TO PRESENT A CHARACTER DEFENSE, FAILURE TO CONDUCT PRE-TRIAL INVESTIGATION ON CHARACTER WITNESSES, FAILING TO INTERVIEW POTENTIAL CHARACTER WITNESSES, AND FAILING TO PRESENT CHARACTER TESTIMONY

The foundation of counsel's ineffectiveness concerning the Appellant's character defense is that he failed to fully advise Appellant regarding the importance of obtaining witnesses and his right to call such witnesses. Prior to trial counsel had no desire to pursue this line of defense. Counsel never once mentioned to Appellant anything pertaining to character evidence prior to trial. As a result the Appellant did not provide counsel with potential character witnesses' information so that interviews may be conducted to ascertain the value these witnesses would provide the defense. A trial counsel can not fault his client for failing to provide names of character witnesses, if witnesses were available, when trial counsel has been derelict in not adequately discussing with his client the importance of such a defense. *Com. v. Dupert*, 725 A.2d 750, 555 Pa. 547 (1999).

There is no record whatsoever regarding counsel conducting a pre-trial investigation of character witnesses. Hence, counsel was unprepared to adequately present a character defense at the commencement of the Appellant's trial. This plainly signifies that counsel was unprepared for trial. "[W]here counsel has entered an appearance and accepted the responsibility for the representation of the client, it is an essential part of that obligation to appear, prepared to proceed in all proceedings related to the matter, for which he has received adequate notice." *Com. v. Marcone*, 410 A.2d 759, 487 Pa. 572 (1980). What constitutes counsel's ineffectiveness, other than not pursuing a character defense prior to trial, is that he was totally unprepared to present any defense on the behalf of the Appellant as the trial began. "[A]n accused may not be able to produce any other evidence to exculpate himself from the charges he faces except his own oath and evidence of good character. *Com. v. Glover* 619 A.2d 1357, 422 Pa. Super 543 (1993). Prior to trial there is no record of affidavits from witnesses or any other form of evidence obtained by counsel to present a viable defense for the Appellant.

any other evidence to present a viable defense and it is recognized later in the trial that the defendant taking the stand was unrecommended by counsel, character evidence was the only form of defense that was available to exculpate Appellant, in which counsel refrained from pursuing prior to trial.

This case boiled down to the credibility of witnesses and the determination of the jury of whose story they deemed to believe. It is immaterial that Appellant chose not to testify because the jury's decision to acquit or convict still rested primarily on whether they believed the story of the Commonwealth's witnesses or the Appellant. So pursuing a character defense of Appellant's good character and/ or the Commonwealth's witnesses' bad character would've only advanced and benefited the Appellant's defense. There is no reasonable strategic decision for counsel to forego pursuing a character defense prior to trial when character evidence would only effectuate his client's interest. Being as though counsel was totally unprepared to present a character defense it is clear that counsel never intended to present such defense. Nevertheless, it is clear from a record of review his decision was not based upon a careful selection between available alternatives, consideration of the relative value of presenting character testimony through ascertained potential witnesses as opposed to the absence of such testimony- but was essentially grounded upon the fact that, prior to trial, he had failed to identify, interview, select and prepare any potential character witnesses, ultimately, failing to inform Appellant of his right and the importance of obtaining character witnesses.

in the Judge's robing room counsel has a discussion with the Judge, in which he mentioned that he broached the topic of character testimony for peacefulness with Appellant "last week" and asked the Judge to determine the admissibility of a DVD which the Commonwealth planned to impeach the defense's character witnesses with (N.T. 2/3/09, at 12-13). There are two aspects of this discussion that needs to be addressed. The first involved counsel stating that he broached the topic of character testimony with Appellant. Counsel states that he "broached" the topic "last week". The week prior, trial was in process, meaning that he broached this topic during the course of trial and admits to not bring this up to Appellant prior to trial. However, counsel did not inform Appellant of the importance of character witnesses or his right to call character witnesses during this discussion. Counsel merely informed Appellant that Commonwealth was in possession of a DVD that the Appellant was rapping in that the jury may perceive negatively because the rap consisted of violence and profanity. Counsel informed Appellant that the prosecutor planned on showing it to the jury to impeach character witnesses if any were presented. Counsel explained to Appellant that as long as he didn't present character testimony the DVD would not be shown to the jury and being that he didn't intend on presenting character testimony the Appellant shouldn't be concerned. Counsel didn't discuss the importance or right of

this DVD the prosecutor was in possession of, which was the basis of the conversation.

The second aspect of the discussion between counsel and trial court that needs to be addressed is counsel asking trial court to look at the DVD to determine if the Commonwealth would be able to impeach character witnesses with it. Counsel's basis for asking trial court to evaluate the admissibility of the DVD was because, in general, he did not want the jury to see it. It is unknown to the Appellant how long counsel was aware of the existence of this DVD. It may have been counsel's reasoning for not conducting a pre-trial investigation on character witnesses as well as character testimony altogether, up until that point in the proceedings. Obviously, counsel was willing to forego presenting character testimony to avoid the Commonwealth presenting the DVD to impeach character witnesses. Although counsel concluded that potential harm could come from the showing of this DVD, it is no excuse for counsel not to pursue a meritorious defense and inform his client of the merits thereof. Counsel never requested that the Appellant provide a list of names of potential character witnesses prior to trial or at trial and, therefore, counsel made no effort to interview any such potential witnesses so as to prepare such testimony for presentation at the trial in the event that such strategy might seem prudent. It is of no matter that the Commonwealth was in possession of evidence that may have been used to rebut character testimony, it is the duty of an attorney to be prepared and investigate and interview witnesses, in pursuit of a viable defense. Particularly when character testimony is consistent with what is sought to be achieved in the overall defense.

The relevant inquiry in cases such as this is whether counsel's failure to pursue a particular defense was reasonable. Apparently, counsel's failure to investigate a potentially meritorious defense is ineffective assistance of counsel. Especially where counsel has failed to obtain any evidence to present any defense on the behalf of his client. "[I]neffectiveness is generally clear in the context of complete failure because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made." *McGahee v. U.S.*, 570 F.Supp. 2d. 723 (2008). Additionally, counsel concluded that he would forego presenting character testimony if the Commonwealth was allowed to present this DVD to impeach character witnesses because the DVD would produce more harm to the Appellant's defense than the benefit of character testimony. Yet, when balancing the benefits of character testimony against the showing of the DVD, even if it were admitted, reveals that, under all of the circumstances of this case, the benefit far outweighs any harm. "To be sure, it [character evidence] is to be considered with all the other evidence. But it is not to be measured with all the other evidence. It's probative value, power of persuasion, does not depend upon, and it is not measured by, or appraised according

to, the might or infirmity in the Commonwealth's case. Eventhough, under all the other evidence a jury could reach a conclusion of guilt, still if the character evidence creates a reasonable doubt or establishes innocence a verdict of acquittal must be rendered." *Com. v. Neely*, 539 A.2d 1317, 372 Pa. Super 519 (1988). There is no reasonable strategic decision for why counsel wasn't prepared to present, didn't pursue, didn't inform Appellant of the importance and right to character testimony, prior to trial and at that point of trial.

During the course of the day when counsel asked trial court to determine if the Commonwealth would be allowed to impeach character witnesses with the DVD, trial court had a opportunity to view the DVD and gave her response (N.T. 4/3/09, at 68-73). She explained how there wasn't anything relevant in the DVD to undermine the Appellant's character. Trial court states that the Appellant uses horrific language, talks of criminal activity but it has no bearing on his character because its simply wordsmithing. Trial court goes further by comparing Appellant to Jay-Z, stating that Jay-Z raps about negative things but, concluding that, it doesn't necessarily tell its their character or personality. As a result the Commonwealth was denied the use of the DVD to undermine character evidence. The relevance of trial court's decision is it provided counsel with the opportunity to present character evidence without the danger of the jury being exposed to the DVD. This afforded the defense an advantage and this is when counsel decides to pursue character testimony.

At the preliminary charge conference in the Judge's robing room, counsel informs trial court that gave people a list, for those who were willing to be character witnesses in behalf of the Appellant (N.T. 2/3/09, at 155-156). This unorthodox way of obtaining character witnesses, in itself, displays counsel's unprepared for trial, failure to pursue a meritorious defense prior to trial and failing to ask client to provide him with potential character witnesses. Although, counsel decided that character testimony would be beneficial to the Appellant's defense, he failed to consult with Appellant on his decision to pursue character testimony, hence, counsel's reasoning for giving a list to Appellant's family to acquire character witnesses. "Counsel need not discuss all strategic options with his or her client. However, if that option is fundamental to the client defense and requires consultation with input from the client in order to define and implement the strategy, then we will require counsel to inform the client accordingly." *Com. v. Glover* 619 A.2d 1357, 422 Pa. Super 543 (1993). "Counsel should inform a defendant of the right to present character witnesses and should discuss with the client whether such witnesses would be advisable under the circumstances of the evidence and defenses available. A criminal defendant cannot be expected to offer counsel potential character witnesses if counsel has not discussed with him the possible uses of such evidence." *Com. v. Carter*, 597 A.2d 1156, 409 Pa. Super 184 (1991). Since counsel did not discuss with Appellant the possible

uses of such evidence and decides to give family and friends of Appellant a list for the purpose of finding character witnesses, it clearly establishes counsel's belated, desperate attempt to conceal his sloth, negligence, ignorance, and unpreparedness to present character testimony.

Not only did counsel decide to hand out a list to those who were present in the behalf of Appellant, counsel did not personally acquire the names of potential witnesses through his own efforts. He instructed Appellant's sister, Bianca Baxter, to ask those who were present in behalf of Appellant if they would be willing to be a character witness for Appellant. The fact that the Appellant's sister obtained the names of three potential character witnesses, counsel did not meet or interview those witnesses. Bianca Baxter gave counsel the list of names but counsel failed to contact, investigate and interview them to ascertain their value to the defense. These witnesses consisted of Andrea Steward, Tonia Underwood, and Gerald Newman. Counsel placed the burden on Appellant's family to find potential character witnesses, which is not their duty to do so. Simultaneously, placing this burden on Appellant's family to find those witnesses does not constitute a reasonable attempt to interview them. "Counsel's duty of effective representation, of course, also indicates a duty to familiarize himself with the witnesses counsel intends to call to testify at trial." *Com. v. Johnson*, 966 A.2d 523, 600 Pa. 329 (2009).

Nonetheless, the only form of defense counsel offered was a generic stipulation to Appellant's character for being peaceful and non-violent (N.T. 2/4/09, at 45-46). "The question here is the decision not to interview [the witnesses], not the decision to refrain from calling them at trial.... (emphasis added). [T]he value of the interview is to inform counsel of the facts of the case so that he may formulate strategy.... [N]o... claim of strategy can be attached to a decision not to interview or attempt to interview [witnesses] prior to trial. Therefore, no reasonable basis designed to effectuate [the defendant's] interest can be attributed to counsel's to question... witnesses or at least make a reasonable attempt to do so." *Com. v. Luther*, 463 A.2d 1073, 317 Pa. Super 41 (1983). There is no reasonable basis for counsel not to interview these witnesses other than his negligence and sloth.

Being that counsel failed to meet with or interview the potential character witnesses he didn't inform them when they were needed to appear for trial. Character witnesses were absent when counsel was to present his defense because he failed to inform them when they were needed. This is another aspect of counsel's ineffectiveness. Also counsel failed to subpoena these witnesses to compel their presence for trial. The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right... to have compulsory process for obtaining witnesses in his favor." [T]he right to compulsory process encompasses the right to meet the prosecution's case with the aid of witnesses, and the right to elicit the aid of the Commonwealth in securing those witnesses.

fundamental to a fair trial." *Com. v. Jackson*, 457 Pa. 237, 324 A.2d 350 (1974). If however, counsel's failure to seek compulsory process to obtain (the witness') testimony... was the result of sloth or lack of awareness of the available alternatives, then his assistance was ineffective. *Com. v. Abney*, 350 A.2d 407, 465 Pa. 304 (1976).

Another example of counsel's ineffectiveness for failing to meet with or interview potential character witnesses is displayed when he reveals to trial court the names of character witnesses and their relationship to Appellant (N.T. 2/4/09, at 26). Here counsel provides trial court with one of three character witnesses, Andrea Steward, in which he informs the court that Steward is a friend of Appellant's family. However, Steward isn't a friend of the family, he is indeed the Appellant's cousin. Clearly counsel failed to familiarize himself with potential witnesses he intends to call. Ultimately, he was prepared to call witnesses to testify that he failed to interview, which is, by all means, ineffective assistance.

In this instance of counsel failing to inform Appellant of the importance of character witnesses is exhibited when Appellant asked trial court why a continuance wasn't granted for the defense to secure the presence of eyewitnesses, disregarding character. Appellant states: "I do not wish to testify. But I have a question for Your Honor. Why aren't-- not character witnesses, but why aren't, to be exact, Kyle Carter, Gregory Blackman, witnesses like that, that were actually able to see, they were at the scene (N.T. 2/4/09, at 39). (There is additional dialogue between Appellant and trial court which is relevant to this circumstance. N.T. 2/4/09, at 39-41). This dialogue between Appellant and trial court divulges that Appellant obviously is unaware of the importance of character witnesses. The Appellant's only concern is for material witnesses and it is shown when he completely ignores the absence of character witnesses, inquiring only about witnesses he deemed to believe to be present when this incident occurred. It is apparent that counsel failed to discuss the importance obtaining character witnesses with his client due to Appellant's ignorance in the absence of character witnesses. It should also be known that Appellant was unaware that counsel obtained names of potential character witnesses until that particular day of 2/4/09. Counsel did not ask Appellant for names of character witnesses, he took it upon himself to give Appellant's family and friends this list in hopes to acquire character witnesses, rendering Appellant ignorant to the importance of character testimony.

In addition, counsel's generic stipulation to Appellant's good character prejudiced Appellant. Due to negligence and sloth counsel did not present character witnesses to testify to Appellant's character. This generic stipulation of character took away the thunder, power of persuasion, and believability of the Appellant's good character, opposed to the jury hearing from individual witnesses testifying about their personal knowledge of this good character. It divulges to the jury that in Appellant's most time of need he cannot even produce anyone to testify and vouch for

his peacefulness and non-violence. And to conclude otherwise would be underestimating the intelligence of a jury. "[O]f what avail is good character, which a man may have been a lifetime in acquiring, if it is to benefit him nothing in his hour of peril." *Com. v. Glover*. This case boiled down to the credibility of witnesses and if the jury heard the testimony of witnesses who are familiar with the Appellant's good character, it would've benefited the Appellant's defense, offering a potential for success substantially greater than the tactics utilized.

Furthermore, counsel declined to call Appellant's family to testify on the defense's behalf involving Appellant's character. Trial court afforded counsel with the option of calling Appellant's parent to testify and counsel stated that he didn't want to call family (N.T. 2/4/09, at 26-27). Counsel also stated that he didn't see Appellant's mom present when asked by court. However, it is clear the Appellant's mother was present that day, as well as everyday of the trial when trial court informs the victim's mother and both defendant's mothers, including Debra McBride, that it would wait for them when the verdict is reached (N.T. 2/4/09, at 184-185). The option of presenting familial character witnesses was available to counsel because of the Appellant's family support during the trial. There was also another witness present nonfamilial, Debra McBride, who would have testified to Appellant's good character but counsel failed to interview and ascertain the value of this witness even though he subpoenaed this witness. But trial counsel's failure to use Appellant's numerous relatives as character witnesses was based upon his perception of familial character evidence. Counsel's preconceived notions about familial character evidence led to his failure to even interview Appellant's relatives, and precluded him assessing their credibility. "Although familial character witnesses generally lack credibility of unbiased nonfamilial witnesses, an attitude that they are per se worthless, is sufficient evidence of counsel's incompetency." *Com. v. Weiss* 606 A.2d 439, 530 Pa. 1 (1992). In the light of overwhelming need for character testimony in a case such as this, counsel's limited investigation into the quality and/or quantity of potential character witnesses on behalf of Appellant, and counsel's prejudice towards familial witnesses, there is no reasonable basis to support trial counsel's decision not to call any character witnesses. Considering credibility of witnesses was of paramount importance, and counsel's error not to employ character witnesses, familial or otherwise, undermined Appellant's chances of instilling reasonable doubt in the minds of the jury and resulted in prejudice to Appellant.

Moreover, counsel prejudiced Appellant by failing to fully advise and inform Appellant on the importance of obtaining character witnesses and the possible uses of such evidence. Resulting in Appellant failing to provide counsel with potential character witnesses. If counsel would've informed his client of the possible uses of such evidence Appellant would've provided counsel with potential character witnesses

who would've testified not only to Appellant's good character, but testified to the Commonwealth's witnesses' bad character.

Pa.R.E. 608(a) states that the credibility of a witness may be attacked or supported by evidence in the form of reputation as to character; The evidence may refer only to character for truthfulness or untruthfulness. Every witness, even a criminal defendant, who testifies puts his or her character for truthfulness in issue. One way to impeach the witness is attacking that aspect his or her character. Thus, evidence of a witnesses bad reputation for truth and veracity is always admissible. Therefore, Appellant could have provided counsel with potential witnesses who could have testified to the prosecution's witnesses untruthfulness if informed by counsel.

This case boiled down to the credibility of witnesses and their credibility was the central issue at trial. Where intent and credibility are decisive factors leading to either acquittal or conviction, reputation is of paramount importance. Reputation evidence is not to be used merely to tip the balance where the Commonwealth's case is weak, but may raise doubt even when the case against the defendant is strong. Character evidence is crucial to the jury's determination of credibility. In this case, reputation evidence took on a significance beyond that which a jury might accord it in ordinary criminal trial. Accordingly, character testimony regarding the Commonwealth's witnesses' reputation for truthfulness was relevant, as it concerns credibility. Especially when their testimonies were inconsistent. The stories of the Commonwealth's witnesses conflicted and there was evidence that their stories may have been influenced by factors other than the oath to tell the truth. "In a case where virtually the only issue is the credibility of the witness for the Commonwealth versus that of the defendant, failure to explore all alternatives to assures that the jury heard the testimony of a known witness who might be capable of casting doubt upon the Commonwealth's witness is ineffective assistance of counsel." *Com. v. Luther*. Pa.R.E. 607 governs the impeachment of witnesses. It states that the credibility of any witness may be impeached by any evidence relevant to that issue. Impeachment evidence is offered for the purpose of attacking a witness's credibility, which includes attacking the character of witnesses truthfulness. The goal of impeachment is to lead the fact finder to discredit all or part of the witness's testimony. The finder of fact may reject part or all of the witness's testimony even though it is uncontradicted. In this instance there is a overwhelming need to attack the credibility of the Commonwealth's witnesses, whereupon it would've benefited and effectuated the interest of the Appellant's defense. Giving insight on the Commonwealth's witnesses' reputation for untruthfulness in the community, blacking their credibility in the minds of the jury.

Appellant was prejudiced by counsel's failure to fully advise Appellant of, and investigating a potentially meritorious defense, wherewith, counsel had no

reasonable basis to fail to pursue. Attacking credibility of the Commonwealth's witnesses was consistent with the overall defense. Counsel's failure to inform Appellant of that option deprived Appellant of a available defense having potential for success substantially greater than the tactics utilized. Counsel breached his duty to fully advise, and discuss the right to character witness with Appellant. "Thus, counsel has a duty to consider possible defense strategies and to discuss with client options which are available." *Com. v. Carter*. "The onus, is not upon a criminal defendant to identify what types of evidence may be relevant and require development and pursuit. Counsel's duty is to discover such evidence through his own efforts, including pointed questioning of his client." *Com. v. Gorby*, 909 A.2d 775, 589 Pa. 364 (2006). Character evidence is vital to the jury's determination of credibility and if counsel would've pursued and presented witnesses to attack this credibility, it would've created reasonable doubt. It cannot be said that trial counsel's ineffectiveness for failing to pursue character witnesses that would attack the Commonwealth's witnesses, did not contribute to the verdict. The only direct evidence against Appellant was the testimony of Commonwealth's witnesses, which was denied by Appellant. Therefore, the issue of credibility was crucial. If counsel pursued, and presented witnesses to attack this credibility, it may have been sufficient to create a reasonable doubt in the minds of the fact finder. The exclusion of attacking credibility resulted in the denial of a fair trial to Appellant. The absence of evidence concerning impeaching Commonwealth's witnesses affected the outcome of the trial. There is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

TRIAL COUNSEL VIOLATED APPELLANT'S CONSTITUTION AMENDMENT 6, EFFECTIVE ASSISTANCE OF COUNSEL, FOR FAILING TO INTERVIEW, INVESTIGATE, LOCATE, CALL, AND PRODUCE ESSENTIAL WITNESSES AT TRIAL

STEPHAN STUDIVENT

Stephan Studivent was present and a witness to the shooting of Demond Brown at the Kenderton school yard on April 21, 2007. Counsel was aware of this witness's existence. Studivent should've been presented to the jury by counsel because of this witness's benefit to the defense. Studivent's testimony would've directly contradicted the Commonwealth's version of the facts and because this was so essential to the defense counsel was ineffective for not producing this witness at trial.

The strength of the Commonwealth's case relied on the identification of the Appellant by Anthony Harris and Hassan Durant. Both of which allegedly positively identified the Appellant as the shooter and stated that the shooters wore hooded sweat shirts. Studivent was essential to the defense because he states that Appellant was not one of the shooters who participated in the shooting death of Demond Brown. He

shooters, concealing their faces. This directly contradicts the testimony of Durant when he states that the hoodies worn by the shooters weren't covering their faces and the hoodies were worn just past their ears (N.T. 1/29/09, at 76-77). Also Studivent contradicts Harris testimony about the hoodies of the shooters never covered their faces at all (N.T. 1/30/09, at 15-16). In addition Studivent states that he observed before they entered the school yard and that their hoodies were concealing their faces before they entered. This contradicts Harris' testimony about the shooters not having the hoodies on when he first noticed them (N.T. 1/30/09, at 10) before they entered the gates of the school yard. Studivent's testimony was necessary because he would've contradicted the Commonwealth's version of the case dealing with the identification of the Appellant.

Studivent has known the Appellant and Durant all of his life. He has resided in this neighborhood all of his life on the 3400 block of 16th Street, which is directly around the corner from Baxter's and Harris' residences. He has known Harris and the deceased since he was nine years old and also lives around the corner from the deceased. This indicates that he is very familiar with the individuals affiliated with the case. The relevance of this fact is that if the Appellant was indeed one of the shooters Studivent would've surely recognized him. Studivent has known the Appellant all of his life approximately the same time frame in which Harris has. He also could've gave the jury insight on Harris and Durant's relationship and closeness to each other, providing to the jury that they are very close friends who are usually together on a daily basis. Simultaneously, he could've made the jury aware that all the people present that day were from the neighborhood and was familiar with each other as well as the Appellant, indicating that if the Appellant was involved in the shooting everyone would've been able to identify him as the shooter. These circumstances would've benefited the defense and should've been displayed to the jury.

In counsel's opening statement he talks of chaos and confusion that broke out when the shooting occurred (N.T. 1/29/09, at 41) but present no evidence that would've benefited this aspect of the defense. Durant testified that when the shooting occurred he froze because he didn't know what to do (N.T. 1/29/09, at 122). Both of these witnesses, including Harris, state they stood still and watched as the shooting transpired. This evidence presented by the Commonwealth was uncontradicted although Studivent could've testified otherwise. According to Studivent, Durant and Harris weren't just standing around while the shooting occurred. He states that they too did indeed run when the shooting occurred, along with everyone present at the school yard. Studivent stated that he witnessed everyone run during the shooting. This would've benefited the defense because counsel asked the jury to consider the confusion, chaos, people running around when the gunshots rang out and whether or not an accurate identification could've been made given the circumstances. More importantly this

testimony from Studivent directly contradicts what was testified to by Harris and Durant involving them witnessing the whole shooting standing just watching, also attacking, challenging their credibility as well as their truth and veracity of these witnesses.

One of the most important observations, if not the most important observation made by Studivent is when he witnessed Harris accuse Malik Ware of committing this crime immediately after the shooting. He is one of a few people who witnessed Harris accuse Ware of being one of the shooters. This observation was made after the shooting on 15th Street. Studivent states that Harris proceeded to tell police about Ware being a shooter but then was confronted by Ware. This is a forward indication that Harris did not know who did the shooting. In Harris testimony he states that he was positive that Appellant was one of the shooters but immediately after the shooting takes place Studivent and others witnessed Harris accuse Ware of being a shooter. Harris testified to knowing Appellant all of his life and that he lives three doors away from him (N.T. 1/30/09, at 7-8) showing that he knows the Appellant very well. Harris also testifies how the shooters didn't have hoods on before they entered the school yard and describes how the hoodies were worn that made it possible for him to see the shooter's faces (N.T. 1/30/09, at 10, 15-16), trying to give the jury the impression that it was no mistake of his identification of the Appellant. Then he explains how his mother-in-law used to baby sit Appellant and how he was certain that he was one of the shooters (N.T. 1/30/09, at 65-66). But immediately after the shooting Studivent see Harris accusing someone who looks nothing like Appellant, or his codefendant for that matter, of committing this crime. Studivent's testimony on this circumstances concludes that Harris didn't know who the shooters were. This testimony was of paramount importance because it would've changed the whole complexion of the trial leaving a reasonable probability that the outcome would've been different.

Harris' accusation of Ware plays a key role in the blueprint of the defense. In counsel's arguments to the jury he speaks of the amount of time that passed after the shooting up until Harris decides to inform authorities about what he allegedly witnessed and how all types of information been obtained inbetween that time (N.T. 2/4/09, at 91-92). P/O Stellfox was the first officer to respond and arrive on the crime scene (N.T. 2/3/09, at 26). The relevance of how quickly police responded to the incident is to display how Harris along with Duarnt was immediately in the police's presence and didn't tell them about the events he allegedly witnessed. It is not until 2:26 p.m., where it is recorded in P/O Brian Graves' 75-48 report that Anthony Harris is transported to Homicide to be interviewed. This is approximately a hour and twenty minutes after the shooting occurred when Harris finally decides to inform police of his allegations. In between this time Harris never tol authorities about his alleged

positive identification of the shooters or his presence at the incident. Because of this unaccounted for time period counsel argues information could've been obtained by Harris.

Counsel asked Officer Graves if 2:26 p.m. was the first time he came in contact with Harris and he answered yes (N.T. 2/3/09, at 22-23). But on redirect the prosecution led Graves into testifying that he meet Harris at 1:15 p.m. (N.T. 2/3/09, at 24-25), which is untrue. In the crime scene log that is apart of the discovery, it is recorded that Officer Graves arrived on the crime scene at 1:28 p.m. When asked about how Graves came in contact with Harris he answered, he went to Temple Hospital where he seen Harris, talked to him, placed Harris into the vehicle and took him down to homicide detectives (N.T. 2/3/09, at 18). Harris was asked by prosecution if anywhere, did you go, after you told Graves what you had seen, he answered, "He bought me straight down homicide." (N.T. 1/30/09, at 22). This information concludes that Graves couldn't possibly have first came in contact with Harris at 1:15 p.m. and that the 1:15 p.m. that was referenced on the 75-48 was merely a approximate time of when the shooting occurred. Harris and Graves both testified that immediately after Harris relayed information to Graves about being a witness to this incident, Graves took Harris directly to Homicide. The recorded time of 1:28 p.m. of Graves entering the crime scene proves that he met Harris after 1:15 p.m. and as recorded they met at approximately 2:26 p.m. There is no possible way Graves met Harris at 1:15 p.m. if he first arrived at the crime scene at 1:28 p.m. and as testified by both Harris and Graves immediately after Harris told Graves of his presence at this incident Graves took him straight to Homicide. This indicates that it was indeed approximately a hour and twenty minutes that passed before Harris went to police about being a witness to the incident. Studivent's testimony on Harris accused Ware of being the shooter advances counsel's argument that in this unaccounted for time period Harris received rumored information about the shooting because Harris didn't know who committed the shooting. And once Harris heard that it was Appellant who supposedly did the shooting is why Harris implicated him in the shooting.

In relation to the argument by counsel that information could've been obtained by Harris in the time period in which it took him to come forward about being a witness, Harris' statement advances this conclusion. Harris states in his statement to police, when asked did he know why the accused would want to hurt the victim, he answers, "They say" that Derrick tried to rob Maurice but Maurice shot Derrick putting him in the hospital. Now these guys are shooting people that were friends of Maurice.. The key words in that statement is "They say". This indicates that someone or others told him about this alleged motive. At trial he constantly exclaimed that he never talked to anyone about this case (N.T. 1/30/09, at 59-61). It is evident that Harris clearly spoken to others about this case, acquiring information from whoever "they" might be "they say"

it took him to inform police of his alleged accusations is suspect. Harris even testified to the jury that he received information he heard from the neighborhood but counsel's inattention to this testimony prejudiced Appellant. When asked about additional information he gave detective about the Appellant's affiliation with Rachel Marcelis he admits that he heard in the neighborhood they were seen in a white jeep with her (N.T. 1/30/09, at 28). Harris doesn't know Marcelis or has seen the Appellant with her. He had no reason to be aware of her existence until this incident occurred and it was told to him by unidentified sources. Continuously he says he never talked to anyone about this case but there is evidence that proves he's lying. Counsel has neglected to pay attention to detail to the evidence and overall merits to the case. Studivent's observation of Harris accusing someone other than the Appellant strengthens the argument made by counsel about information that could've been obtained by Harris inside this unaccounted for time period. Stephan Studivent testimony to prove this was of paramount importance. The Appellant was prejudiced by counsel's failure to present this witness to the jury and as a result of this Appellant was subjected to a unfair, one sided trial.

The circumstances of Harris' unaccounted for time period until he came forward with his allegations, information he could've obtained inbetween that time, what Harris stated in his statement about the Appellant's alleged motive to hurt the victim and Harris admitting to receiving information in the neighborhood about the Appellant being seen in a white jeep are intertwined in the motive Harris has to testify falsely against the Appellant which displays his bias. Bias, interest, and corruption is usually established by demonstrating circumstances that might naturally lead a witness to favor or disfavor one party in a proceeding. Any evidence that supports an inference of bias, interest, or corruption is relevant impeachment evidence. The commonly accepted types of proof relevant to show bias, interest, or corruption include: family relationship or other personal connection suggesting favor or hostility, an employment relationship, status as a party in this case, and the possibility of financial gain or loss from the outcome of the case. West's Pennsylvania Practice, Evidence § 607-3 (3rd ed.). Once a witness testifies, evidence of bias, interest, or corrupt motive is relevant impeachment. A witness may be discredited by demonstrating that he or she has a reason to testify falsely.

it is obvious that Harris' relation to the victim effected him emotionally. Officer Graves was asked, what was Harris' demeanor at the time he saw him and Graves answered, "Very upset, crying, emotional with other members of his family out there in the parking lot. Hysterical. Just very, very emotional." (N.T. 2/3/09, at 18-19). It is natural for anyone to feel emotional in the mist of the loss of a loved one. But this same emotion can fuel and did fuel Harris motive to testify falsely against the Appellant. As stated previously, although police arrived on the scene immediately after the shooting Harris didn't inform them of his

incident. Harris gives his reasoning for not immediately informing police or others that Appellant participated in the shooting, testifying that his concern was for the victim (N.T. 1/30/09, at 59). This is Harris rationale he gives the jury as to why he didn't immediately inform police. Studivent's importance on this specific situation is that he witnessed Harris proceeding to inform police that it was Malik Ware who committed this crime. This is a indication that Harris doesn't know who the shooters are and that's why he didn't inform police until some time later of his allegations, not because he was concerned for the victim. Showing that Harris' emotional state compelled him to try and find out who may have done this to his cousin and whoever he concluded to have participated in this incident he was going to make sure they paid for what happened to his cousin. This furthers counsel's argument that Harris received information about this case inbetween this unaccounted for time period and because he received information that Appellant was involved created Harris bias towards Appellant. And this bias is why Appellant was implicated by Harris. Studivent presence was necessary in order to manifest this evidence to the jury.

Complimenting the fact that information was received by Harris is recorded at the preliminary hearing of this case. Harris testified to information that was told to him which indicates that this information was received after he gave his statement to police. When Harris was asked by the preliminary court Judge why did this happen, Harris provided new information that wasn't previously known & stated by Harris. Harris stated: "I don't know. These defendants was apparently suppose to have been looking for him for three days, coming asking where he is at but never using his name. This is what is going on around the way. This is all suppose to be steaming over another shooting around the way. It's crazy." (P.T. 10/30/07, at 9). This clearly shows that Harris has received additional information other then his own perceptions which possibly came after he gave his statement. This advances the inference of Harris' motive to testify falsey against the Appellant. This is another aspect of the evidence counsel declined to use in support of his argument and Studivent's testimony would've validated.

Studivent could have bridged Harris' prior bias that he possessed for the Appellant prior to the incident. At the preliminary hearing transcripts it displays Harris' obvious dislike for the Appellant when he says, "It is sickening and enough is enough. Now I mean, they walking around like they God gift to the world... You sitting down here like you own the world. Nobody owns this world. Enough is enough with these young men. They need to get jobs, straighten their lives out. Running around with guns and them selling drugs, get a job." (P.T. 10/31/07, at 9). Harris already had preconceived notions and a negative perception of the Appellant prior to this incident shown by his outburst towards the Appellant. Harris expresses how he feels

that Appellant walks around like he's God's gift to the world, owning the world and how nobody owns this world. Also affiliating Appellant with selling drugs, needing to straighten out his life and needing to get a job. This could have been excluded from the record when proving Harris' prior bias against Appellant. Nonetheless, he states it's sickening and enough is enough, indicating that he is fed up with Appellant. These are opinions of the Appellant Harris had before this incident ever took place, which demonstrates bias and hostility. All of the aforementioned factors are the ingredients to the recipe of the motive Harris has to testify falsely against the Appellant. The credibility of a witness may be impeached by evidence which tends to show that the witness had a interest in the outcome of the trial, or that the witness's testimony may be untruthful, or that the witness may possess a bias which colors his testimony. *Com. v. Butler*, 601 A.2d 268, 529 Pa. 7 (1991). Our law clearly establishes that any witness may be impeached by showing his bias or hostility, by proving facts which would make such feelings probable. *Com. v. Collins*, 545 A.2d 882, 519 Pa. 58 (1988). The mere fact that Studivent witnessed Harris attempting to inform police that Ware was a shooter shows the jury that Harris' main intention was to inform police of who he thought was responsible for the shooting of his cousin. But doesn't while at the scene because he clearly didn't know. This contradicts what Harris stated in his testimony about not informing police immediately because his only concern was for the victim. His statement, testimonies, and Studivent's testimony exhibits that he obviously received information other than his own perceptions about this incident. The time in which it took Harris to come forward with his allegations clearly afforded him the opportunity to receive information and was seeking information because he wanted to know who could have done this to his cousin. Furthermore, his emotional state was the most contributing factor to his motive. Being a relative of the victim filled Harris with vengeance and when he was told that Appellant was supposedly the shooter is why he implicated him for revenge for his cousin. Additionally, Harris already had bias towards Appellant prior to this incident occurring. Incorporating these circumstances together would show Harris' motive to testify falsely. Bias, interest, opportunity, emotions, and the record reveals his corrupt motive. Stephen Studivent's testimony is the missing link that connects these aspects of the case together and without him this information could not be effectively and collectively presented to the jury.

Simultaneously, Harris' bias, interest, and corrupt motive is directly connected to Hassan Durant's. Just as Harris does, Durant has a very close relationship to the victim and testified to being the victim's best friend (N.T. 1/29/09, at 63). This personal relationship effected Durant emotionally similar to Harris. Durant testifies to going a little crazy and being very upset by the victim being shot (N.T. 1/29/09, at 126). Naturally one's emotions can produce hostility and is in this instant

Durant have a close personal relationship with the victim, he has a close personal relationship with Harris. Studivent's testimony was obligatory to reveal Harris and Durant's close relationship to each other. The relevance of Harris and Durant's personal relationship to each other as well as the victim is to exhibit their common scheme, goal, bias, interest, and motive. At trial they both portray that they've had no communication about the case or been in each other's presence since the incident other than the victim's funeral. Durant testified that he never spoke to Harris about the case and never attended any memorials or remeberances for the victim where he seen Harris (N.T. 1/29/09, at 109-110). Harris also testified to never talking to Durant, not seeing him after the funeral, and never attending any memorials or remeberances for the victim (N.T. 1/30/09, at 61). It is not until co-defendant's counsel questioned Durant about his October 31, 2007 preliminary testimony when Durant finally admits to seeing Harris a good three times at these mentioned memorials and remeberances (N.T. 1/29/09, at 136-137). The fact these witnesses were falsely testifying about being present at these events together casts a shadow on their truthfulness about not talking about this case because they've both tried to conceal being in each other's presence. This raises suspicion and advances counsel's argument of Duarnt receiving information from sources other than his own perceptions (N.T. 1/29/09, at 41-42). This would explain why there are various altered circumstances Durant testifies to which are similar to Harris' testimony, that are different from his statement and preliminary testimony. It discloses to the jury that they conspired to resemble each other's testimony, all to give their testimonies more believability.

Durant's motive to testify falsely against the Appellant also incudes hearing of the Appellant being involved in the shooting, same as Harris. Durant doesn't come forward with his allegations until approximately two weeks after the incident. This gives Durant more than enough opportunity to receive information. Durant was in the presence of police at the scene as well as when he went to the hospital and still didn't inform police of his allegations about Appellant (N.T. 1/29/09, at 110-112). Durant's reluctance of informing police of his allegations was because he didn't know who committed this crime. It is not until he heard what the "word on the street" is when he decides to implicate Appellant for revenge for his best friend and this is where his bias for Appellant forms. When asked about the conversation he had with the victim's girlfriend he testifies, "I told them I was going down there and testify because it ain't right what happened and everybody else scared to step up to the plate." (N.T. 1/29/09, at 106). The significance of this statement made by Durant is it gives insight of his thought process at the same time giving details about him actually speaking about this case and receiving information about this case before he came forward with his allegations. The most important part of what he stated is when he said, "everybody else scared to step up to the plate." This statement was of paramount importance. According to Durant he said this while attending the funeral of the victim.

number so he could come forward with his accusations. Durant testified that he never spoke to anyone about this case until May 2, 2007 when he gave his statement to the police (N.T. 1/29/09, at 108-109). He strongly stood by exclaiming that he never spoke to family members, the victims, family members, Anthony Harris, or anyone about this case during his testimony. Yet, he was aware that everybody else was scared to step up to the plate. This signifies that he was in possession of information about this incident that people were not going to police with incriminating information. At that particular time the only person who came to police with incriminating information was Harris and the police were unable to charge anyone regarding this crime. This is the main person who was in direct contact with the police and the closest person in the victim's family to Durant. This presents the reasonable inference that Durant received information that everyone was scared to step up to the plate from Harris as well as other information. There is no way of getting around the fact that Durant had to be having conversations with Harris, other people who knew that information when he hadn't interacted with police who would be the only other source of that information. His aforementioned testimony in this regard clearly exhibits that he has spoken to others about this case. This testimony also hints at Durant knowing that this case needed one more witness to charge the Appellant and he was going to be the witness that would assure the charges would be brought against Appellant. He was asked what did he say to Detective Hagan when he called? He answered, "I told him, Detective Hagan, I know I could be an available witness because they needed another one. I said I would be that witness to the case because I was there." (N.T. 1/29/09, at 107). He then tried to rehabilitate what he just testified to by saying that Detective Hagan told him that they needed one more witness, when he just testified that he told Hagan he knew they needed another witness and he would be that witness. It would be natural for the jury to find this suspect and connect Durant knowing that police needing another witness with the evidence of him speaking about this case with Harris and unidentified sources, obtaining information knowing that everybody was scared to step up to the plate. All of these circumstances binded together constitutes Durant's corrupt motive to testify falsely against Appellant. Studivent was necessary to fill in the blanks for the jury of the very close relationship Harris and Durant have, creating the more then reasonable inference that they spoke about this case and testimonies, spoke to others about this case, receiving rumored information about Appellant's involvment, and having a common corrupt motive and interest regarding this case. Without Studivent the connection of this evidence did not come full circle at trial.

Counsel was ineffective for not impeaching Harris and Durant with all these circumstances that prove they both had a common scheme, bias, interest, and motive to testify falsely against Appellant. Also that they were involved in a conspiracy to do what ever it took to punish Appellant, including testifying against the

Studivent's testimony was necessary to link these witnesses, casting doubt on their testimonies and illuminating their similar interest in the outcome of the trial and common corrupt motive. Due to the fact that counsel didn't secure Studivent's testimony the jury was oblivious of how close Durant and Harris are to each other. Their connection is the glue which unites their common interest and goal, revenge. Without Studivent's testimony there is no evidence of the closeness of their relationship. Counsel denied Appellant of his right of confrontation by not introducing the theory of motive and cross examining these witnesses regarding that motive. Defendant's right of confrontation includes the right to cross examine about possible motives to testify. U.S.C.A. Const. Amend. 6. The Supreme Court states: [One] attack on the witness' credibility is effected by means of cross examination directed towards revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony. We have recognized that exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross examination. *David v. Alaska*, 94 S.Ct. 1105, 415v U.S. 308 (1974). The Appellant was entitled to present his theory of revenge concerning the motivation of these witnesses. This interest gave these witnesses a motive to testify falsely and Appellant had a right to explore this. Appellant had a right to confront these witnesses with these allegations in order to prove their bias and motive to lie about Appellant. Counsel had no reasonable strategic decision for not pursuing this tactic and presenting Studivent's testimony that gives weight to their motive. Counsel's decision was not reasonably based and was the result of ignorance, sloth and lack of concern of the available alternatives. Being that counsel failed to present Studivent's testimony it hindered him from proving the aforementioned elements that the circumstances exhibit.

Counsel was ineffective for not interviewing, locating, conducting a diligent investigation, and producing Studivent at trial. Counsel initially sent a private investigator to the residence provided by Appellant but no one answered the door at the time of his arrival. The investigator then left a envelope at that address requesting Studivent to telephone him but he was unresponsive. Counsel then sent the investigator to Studivent's provided residence on another occasion but was directed to go across the street to 3444 N. 16th Street where the door was answered by a black female identifying herself as the grandmother of Studivent. She provided the investigator with information regarding Studivent's whereabouts, when she informed him that he was away at college at Lincoln University in Oxford, Pa. This is where counsel's investigation on Studivent ends and he doesn't pursue him any further. Studivent states that he has no knowlegde of any letters or visits from the private investigator. Also he states that he never received

his presence was required for trial.

Here the Appellant was convicted on the strength of testimony of the Commonwealth's witnesses. In a case such as this, where there is only a few direct witnesses involved, credibility of the witness is of paramount importance. This case boiled down to the credibility of witnesses. It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. *Rompilla v. Beard*, 125 S.Ct. 2456, 545 U.S. 374 (2005). Counsel did not conduct a reasonable investigation of Studivent. Counsel was provided with Studivent's whereabouts from the grandmother of this witness but declined not to further the investigation. Counsel had knowledge that Studivent was away at college attending Lincoln University in Oxford, Pa. but declined to accomplish his goal of conducting an interview to ascertain the value this witness would've contributed to the defense. There is no reasonable explanation or strategic professional judgment that advances the Appellant's interest by not pursuing this investigation. No significant effort was made to produce this eyewitness to challenge the Commonwealth's witness' credibility and version of the facts. Particularly in a case built all but exclusively on three eyewitnesses identification of Appellant as the perpetrator, it is all but per se ineffective for trial counsel not to inform himself of, and duly investigate, all other eyewitnesses to the crime. *Com. v. Dennis*, 950 A.2d 945, 597 Pa. 159 (2008). see *Com. v. Mabie*, 359 A.2d 369, 467 Pa. 464 (1976).

There is no reasonable professional judgment that supports counsel's limitations on the investigation of Studivent. As of the time in which counsel received the information regarding Studivent's whereabouts he had no evidence that puts in question the credibility of the Commonwealth's witnesses or evidence that contradicts the theory in which the Commonwealth depended. Simultaneously, counsel had no evidence that supported any arguments he made at trial. Therefore, he ignored admissible evidence tending to establish a viable defense. At trial the only form of defense that was offered by counsel was a generic stipulation of character that Appellant was a peaceful and nonviolent citizen (N.T. 2/4/09, at 45-46) that was invalidated by counsel's own actions. Studivent's testimony absolutely essential to the defense. Studivent's testimony negated the theory upon which the Commonwealth relied. His testimony was damaging to the Commonwealth's case and should have been presented to the jury. Since this exculpatory evidence was not presented at trial, Appellant's right to a fair and reliable trial was severely hampered. Without Studivent no reliable adjudication was made at trial. Counsel had the option to continue the investigation but chose not to due to his negligence and sloth. The alternative not chosen by counsel, to continue to pursue Studivent, offered a potential for success substantially greater than the tactics utilized and as a result the Appellant was prejudiced. In a case where virtually the only issue is the credibility of the Commonwealth's witness versus

that of the defendant, failure to explore all alternatives available to assure the jury heard the testimony of a known witness who might be capable of casting a shadow upon the Commonwealth's witness truthfulness is ineffectiveness of counsel. *Com. v. Abney*, 350 A.2d 407, 465 Pa. 304 (1976). Cases such as this arguably stand for the proposition that, at least where there is limited amount of evidence of guilt, it is per se unreasonable not to attempt to investigate and interview known eyewitnesses in connection with defenses that hinge on the credibility of other witnesses. see *Com. v. Johnson*, 966 A.2d 523, 600 Pa. 329 (2009).

The Sixth Amendment, however, guarantees more than the appointment of competent counsel. By its terms, one has the right of assistance of counsel for his defense. Assistance begins with the appointment of counsel it does not end there. In some cases the performance of counsel may be so inadequate that in effect, no assistance of counsel is provided. Clearly, in such cases, the defendant's Sixth Amendment right to have assistance of counsel is denied. *U.S. v. Decoster*, 624 F.2d 196 (1976). As is the case here. It would have only been in the Appellant's interest and defense to continue to pursue Studivent. With Studivent's testimony would've been enough to persuade the jury to render a different verdict. Studivent was also available and willing to testify for the Appellant. Counsel's diligence in this regard would've been substantially greater than the tactics utilized. For counsel not to present any witnesses, let alone Studivent, denied Appellant of a viable defense sufficient to alter the outcome in the verdict.

The Appellant was also denied his right to the use of the compulsory process concerning this witness. It is the right of the accused in criminal prosecutions to use compulsory process. U.S.C.A. Const. Amend. 6. Counsel did not issue any subpoenas to compel this witness to appear in court. If however, counsel failure to seek compulsory process to obtain (the witness') testimony.... was the result of the sloth or lack of awareness of the available alternative, then his assistance was ineffective. *Com. v. Abney*.

It was imperative that Studivent was presented at trial. It was imperative for counsel to locate Studivent. There is no excuse for counsel to decline to pursue Studivent any further than he did. The value Studivent had to the Appellant case was paramount. The value of Studivent being interviewed would've informed counsel of the facts of the case so that he may formulate strategy. In the light of the circumstances, no competent lawyer would've chose not to continue to pursue Studivent. Counsel did not interview, nor took reasonable steps to interview the witness and consequently his lack of diligence prejudiced the Appellant. Counsel's decision not to investigate can not be said to have been reasonably designed to effectuate his client's interest. Studivent had the potential to single handedly change the outcome of the verdict and counsel incompetently denied Appellant the single most beneficial form of evidence that could've been presented in this case. the testi...

who would've contradicted the Commonwealth's theory of the case chopping the pillars from under the testimony in which the Commonwealth's case stood. Clearly, the Appellant was denied his Sixth Amendment guarantee of effective assistance of counsel. Here the testimony of the Commonwealth's witnesses ultimately contributed to the conviction of the Appellant. Therefore, the credibility of these witnesses was of paramount importance. Counsel knew of Studivent's potential benefit to the overall defense and he failed to explore every alternative available to assure the jury heard his testimony which would've severely injured the Commonwealth's case. The Appellant was prejudiced because there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceedings would've been different. [Please reference Exhibit A and apply].

GREGORY BLACKMON

Gregory was a known eyewitness to this shooting. He gave a statement on behalf of Appellant's co-defendant, Jeffrey McBride. Although he gave a statement in his behalf there is exculpatory evidence that applies to the Appellant. He states that he saw who shot the victim, Demond Brown but could not see the two shooters faces because they had hoodies on. He also gave a description of the shooters explaining that the height of the shooters were approximately 6'1" and 6'2" and slim. This does not fit the description of the Appellant because Appellant is approximately 5'6". More importantly, it is stated in his statement that he heard someone screaming "Malik" did it, referring to Malik Ware. Although it doesn't detail who this person is who screamed this accusation it furthers the Appellant's case and further investigation may reveal who Blackmon witnessed scream this allegation. Blackmon's testimony would've been very beneficial to the defense. [Please reference Exhibit B to see the contents of Blackmon's statement].

It is well recorded throughout the record that Blackmon was present through the days of Appellant's trial (N.T. 2/4/09, at 23). And although Blackmon appeared for trial it was no thanks to trial counsel. He did attempt to interview this witness by sending out his private investigator but his attempts were unsuccessful. If it wasn't for Blackmon's willingness to testify he would not have been present. Counsel even neglected to send Blackmon subpoenas prior to trial to compel his attendance. Yet, Blackmon was present. Counsel was overall ineffective in Blackmon's regard but what is more substantial is this witness was told that he would not be needed to testify. [see Exhibit C]. This witness was of the utmost importance to the Appellant's case and should've been heard by the jury. It needs to be discovered who told Blackmon that he would not be needed to testify because this deprived Appellant of a fair trial. Counsel was ineffective in this regard because he did not present this witness's testimony at trial. Appellant requests a private investigator to ascertain who told Blackmon that he wasn't needed to testify, if he even was interviewed by Appellant's trial counsel.

was he willing to testify in the Appellant's behalf as well, and what other information could he have provided the defense.

KYLE CARTER

Kyle Carter was a eyewitness to the shooting of Demond Brown. It is also well recorded on the record that he was present at Appellant's trial. Like all the other witnesses in this case counsel did not conduct a diligent investigation on Carter. Carter's presence was due to his willingness to testify. Nonetheless, he was present for trial but just like Blackmon, he was told that he was not needed to testify. [see Exhibit D]. Counsel was ineffective in this regard because he failed to present Carter's testimony at trial. Because of counsel's ineffectiveness and someone telling this crucial witness that he was not needed denied Appellant of a fair trial. Appellant requests a private investigator to ascertain who told Carter that he was not needed to testify, if he was even interviewed by Appellant's trial counsel, and what information does he possess that would be beneficial to the Appellant's case.

TYRONE LEWIS

Tyrone Lewis was a eyewitness to the shooting of Demond Brown. Lewis gave a statement to police on April 22, 2007 in regards to this incident. Within that statement there is extremely beneficial evidence that would've undermined the Commonwealth's theory of the case. Please see Appellant's prior issue: TRIAL COUNSEL VIOLATED APPELLANT'S AMENDMENT 6, EFFECTIVE ASSISTANCE OF COUNSEL AND COMPULSORY PROCESS, BY NOT SECURING THE ATTENDANCE OF ESSENTIAL WITNESSES, to see the benefits of this witness. Counsel was ineffective for not interviewing, investigating, locating, and producing Lewis' testimony. Counsel never attempted to investigate this eyewitness at all. He made no attempts to interview this witness to ascertain the value of this witness so that he may formulate strategy. Obviously counsel inattention to the discovery materials is the reasoning for his lack of pursuit of this witness because this witness's statement displays his apparent benefit to the defense. It is no matter if this is the case or not because it still renders counsel ineffective. Counsel subpoenaed this witness at the conclusion of trial pursuant to Appellant's request (N.T. 2/3/09, at 13-14). If it wasn't for the Appellant insisting that counsel subpoena this witness counsel would not have done so. This attempted was unsuccessfully served. This was unacceptable to subpoena a essential witness in the middle of trial. Appellant was prejudiced by counsel ineffectiveness by not interviewing and investigating this witness prior to trial. Appellant request a private investigator to interview Lewis as to his willingness to testify on Appellant's behalf and what other information he may possess in reference to this incident.

SHAWN LOWRY

Shawn Lowry was a eyewitness to this incident and gave a statement to police regarding this incident on April 21, 2007. Certain observations made by Lowry stated by him in his statement would be

see Appellant's prior issue: TRIAL COUNSEL VIOLATED APPELLANT'S AMENDMENT 6, EFFECTIVE ASSISTANCE OF COUNSEL AND COMPULSORY PROCESS, BY NOT SECURING THE ATTENDANCE OF ESSENTIAL WITNESSES, to see the benefits of this witness. Counsel was ineffective for not interviewing, investigating, locating, and producing Lowry's testimony. Counsel never attempted to interview or investigated this witness prior to trial. Like Tyrone Lewis, Lowry was subpoenaed pursuant to the request from Appellant (N.T. 2/3/09, at 13-14). Counsel's persuaded attempt to subpoena Lowry so late at trial displays his obvious incompetency because no competent lawyer would have done so. It was unreasonable for counsel to wait to the conclusion of trial, relying on the judgment of Appellant and not his own to subpoena a essential eyewitness to the crime who would have provided beneficial testimony. Counsel should have properly reviewed discovery materials, learned of the benefits as well as the potential benefits of this witness, pursued this witness prior to trial, and exercised the compulsory process prior to trial. Appellant was prejudiced by counsel's lack of diligence in this regard. Appellant requests a private investigator to interview Lowry as to his willingness to testify on the Appellant's behalf and what other information he may possess in reference to this incident.

MALIK WOODEN

Counsel was totally ineffective regarding Wooden because a attempt to interview, locate, call, subpoena, and investigate this witness is nonexistent. Wooden was a eyewitness to this incident who gave police a statement which possesses exculpatory, valuable evidence. Please see Appellant's prior issue: TRIAL COUNSEL VIOLATED APPELLANT'S AMENDMENT 6, EFFECTIVE ASSISTANCE OF COUNSEL AND COMPULSORY PROCESS, BY NOT SECURING THE ATTENDANCE OF ESSENTIAL WITNESSES, to see the benefits of this witness. Counsel never pursued this witness eventhough this witness possessed beneficial evidence that if heard by the jury there would be a reasonable probability the outcome of the proceeding would've been different. Counsel prejudiced Appellant by not producing Wooden's testimony at trial because of the exculpatory nature of Wooden's testimony. Appellant requests a private investigator to interview Wooden to discover Wooden's willingness to testify on Appellant's behalf and what other information he possesses regarding this case.

MCCOY MATTHEWS

McCoy Matthews was not interviewed, located, called, subpoenaed, or investigated by counsel. Counsel never pursued this witness whatsoever. Counsel's lack of investigation prejudiced Appellant because this witness possessed vital information to the defense and counsel failed to produce this witness at trial. Matthews was a eyewitness to this incident and gave a statement to police, which contained beneficial evidence. Please see Appellant's prior issue: TRIAL COUNSEL VIOLATED APPELLANT'S AMENDMENT 6, EFFECTIVE ASSISTANCE OF COUNSEL AND COMPULSORY PROCESS, BY NOT SECURING THE ATTENDANCE OF ESSENTIAL WITNESSES, to see the benefits

of this witness. Unfortunately Appellant was denied effective assistance of counsel by counsel failing to present this witness at trial. Appellant requests a private investigator to interview McCoy Matthews as to his willingness to testify for Appellant and what other information he knows regarding this case.

THERESA BROWN

Theresa Brown was a eyewitness to the shooting of Demond Brown and was interviewed by Philadelphia police Detectives. In this interview she provided police with exculpatory evidence and additional evidence that would've benefited the defense. Please see Appellant's prior issue: TRIAL COUNSEL VIOLATED APPELLANT'S AMENDMENT 6, EFFECTIVE ASSISTANCE OF COUNSEL AND COMPULSORY PROCESS, BY NOT SECURING THE ATTENDANCE OF ESSENTIAL WITNESSES, to see the benefits of this witness. Despite the exculpatory nature of the interview counsel ineffectively failed to present, investigate, interview, locate, call, and subpoena this witness. This prejudiced Appellant due to the overwhelming need for exculpatory testimony. Appellant requests a private investigator to ascertain her willingness to testify on the Appellant's behalf and what additional beneficial information she possesses.

SHARIAH JABBAR-MITCHELL

This witness was interviewed by Wilks-Barre police when Appellant was arrested. During this interview Jabbar-Mitchell gave evidence relevant to this case that was beneficial to Appellant that would've defended Appellant against various aspects of the case and arguments made by prosecutor. Please see Appellant's prior issue: TRIAL COUNSEL VIOLATED APPELLANT'S AMENDMENT 6, EFFECTIVE ASSISTANCE OF COUNSEL AND COMPULSORY PROCESS, BY NOT SECURING THE ATTENDANCE OF ESSENTIAL WITNESSES, to see the benefits of this witness. Although this interview was apart of the discovery and known by counsel, he ineffectively declined pursuit of this beneficial witness, prejudicing Appellant. No interview, investigation, or subpoenas were attempted on this witness. Appellant request a private investigator to interview this witness to discover the willingness to testify on Appellant's behalf and what other vital information the witness may have in regards to this case.

DARYL MACK

Daryl Mack was a witness in this case who was mentioned by the Commonwealth's witness Rachel Marcelis in her statement she gave police. Counsel attempted to interview by way of sending his private investigator to do so but the private investigator could not confirm a address for Mack because of the limited time frame allotted. Counsel only attempted this interview because Appellant insisted that he do so. This displays counsel's ineffectiveness. Nevertheless, Mack was found through the efforts of Appellant's co-defendant's counsel, Michael Wallace (N.T. 2/3/09, at 153). Wallace said that he didn't want to use Mack because he felt as though he was detrimental to his defense and had no intention on using him (N.T. 2/4/09, at 23-24). Although this was the opinion of Wallace it has no bearing on the defendant's case.

counsel. There is nothing recorded on the record that counsel has interviewed this witness to determine his evaluation of this witness's value when this witness was present for trial. Mack was potentially a crucial witness and should have been interviewed by counsel. It is counsel's duty to investigate potential witnesses to ascertain the value of that witness to inform him of the facts of the case so he may formulate strategy. Counsel was ineffective in this regard because he declined to interview this witness who may have provided beneficial evidence. Appellant requests a private investigator to interview this witness about information about this case he is aware of and his willingness to testify on the Appellant's behalf.

DEBRA McBRIDE, ZANEIA JONES, IKENA HARRIS, YOLONDA KOSH-JONES, DERRICK McMILLAN, STEPHANIE PIERRE, MALIK WARE, TONIA UNDERWOOD, GERALD NEWMAN, ANDRE STEWARD

These additional witnesses were known to counsel one way or the other. Some were provided by Appellant, mentioned in the discovery, and some were provided by Appellant's family. Yet, counsel was ineffective in regards to these witnesses. Debra McBride was not interviewed or investigated prior to trial. Although D. McBride was subpoenaed and present for trial counsel failed to interview her to ascertain the value of this witness, before trial or at trial. Counsel didn't even know what he subpoenaed this witness for in the first place because he only subpoenaed this witness because Appellant insisted him to do so. This goes for Jones, I. Harris, and Kosh-Jones. Counsel prejudiced Appellant by not interviewing this witness when she was readily available to be interviewed, testify, and because this witness may have provided beneficial evidence. When it comes to Underwood, Newman, Steward they were to be presented as character witnesses for Appellant. Counsel failed to produce these witnesses, interview and subpoena them for trial. McMillan and Pierre were never pursued by counsel although they were witnesses that were apart of the discovery materials, mentioned in very crucial circumstances. This hindered Appellant from discovery the benefits of these witnesses may possess. Counsel was overall ineffective regarding all of these witnesses and if it wasn't for counsel's unprofessional errors there is a reasonable probability that the outcome of the proceeding would've been different. It is counsel's duty to interview witnesses to obtain the facts of the case so that he may formulate strategy and because he didn't conduct interviews on these witnesses he was unable to formulate a viable strategy of defense, prejudicing Appellant. Appellant request a private investigator to interview these witnesses to ascertain the benefit these witnesses would've provided the defense and if such benefit is discovered, also question these witnesses on their willingness to testify in the Appellant's behalf. Appellant also request private investigator to conduct interviews on any witness that was not named in this memorandum that has relevance to the case and was negligently not interviewed.

TRIAL COUNSEL VIOLATED APPELLANT'S CONSTITUTION AMENDMENT 6, EFFECTIVE ASSISTANCE OF COUNSEL, FOR BEING UNPREPARED TO REPRESENT APPELLANT AT TRIAL

Counsel's overall unpreparedness for trial prejudiced the Appellant. There are a overabundance of instances of counsel's unpreparedness that contributed to the verdict rendered. This court has repeatedly held that "no number of failed [ineffectiveness] claims may collectively warrants relief if they fail to do so individually." see *Com. v. Johnson*, 966 A.2d 523, 600 Pa. 329 (2009). Collectively throughout this memorandum it displays counsel's ineffectiveness individually with every ineffective assistance issue, compiling counsel's unpreparedness in each issue. Where counsel has entered an appearance and accepted the responsibility for the representation of the client, it is an essential part of that obligation to appear, prepared to proceed in all proceedings related to the matter, for which he has received adequate notice. *Com. v. Marcone*, 410 A.2d 759, 487 Pa. 572 (1980). In *Commonwealth v. Zacher*, 455 Pa.Super 594, 689 A.2d 267 (1997), as the Commonwealth argues on the behalf of the trial judge, permitting counsel to appear in court without any preparation turns his "compliance" with the court's order into a "meaningless charade." Which is the case here due to counsel's stewardship at trial and throughout his representation of Appellant, which displays his obvious unpreparedness. The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have assistance of counsel for his defense." *Com. v. Grant*, 992 A.2d 152, 2010 Pa.Super 45 (2010). When reviewing the record it is apparent that counsel wasn't adequately prepared to defend Appellant against the propositions and aspects of guilt presented by the prosecutor as well as presenting a viable defense to defend Appellant against the charges against him. Counsel's unpreparedness was unacceptable and had a adverse effect on the outcome of the trial.

Firstly, counsel never conducted any interviews on any of the witnesses named in the discovery materials or witnesses that were provided by Appellant. There were various witnesses who gave the police statements that were provided in the discovery who gave exculpatory and beneficial information to police and counsel never interviewed or investigated them. Prior to trial there is no evidence of interviews for essential witnesses, known eyewitnesses, to this case that counsel attempted. Although counsel sent private investigator to attempt to interview certain witnesses provided by the Appellant those attempts were unsuccessful and these attempts made were not diligent. For example, the attempts to interview Stephan Studivent weren't diligent because at the time Studivent was attending Lincoln University in Oxford, Pa. and counsel was aware of this and still didn't pursue this witness. Even the attempts to interview Gregory Blackmon and Kyle Carter weren't diligent. Despite the unsuccessful

attempts to interview these witness but not limited to those witnesses, they still were present for trial and counsel still didn't interview these witnesses at trial to ascertain the value of these witnesses to inform himself of the facts of this case. Counsel never interviewed any witness that appeared for trial which clearly exhibits his unpreparedness for trial because this case boiled down to the credibility of witnesses. Because counsel failed to present any witnesses on the behalf of the Appellant also exhibits his unpreparedness for trial. Counsel not interviewing, investigating, and locating witnesses hindered counsel from presenting a viable defense at trial, constituting unpreparedness. Also counsel was ineffective in regards to subpoenaing witnesses which is a accumulative effect of his unpreparedness. Counsel hardly subpoenaed any witness, and those he did subpoena were subpoenaed at the request of Appellant. Most of which wouldn't have been subpoenaed altogether if it wasn't for Appellant. Counsel last minute subpoenaing of witness prejudiced Appellant due to nearly all of them being unsuccessful. Those who did show for trial honoring the subpoenas weren't interviewed by counsel. Like Debra McBride who wasn't interviewed by counsel and counsel had no idea of the reason why he subpoenaed this witness in the first place because he only subpoenaed the witness only because Appellant insisted him to do so. He never ascertained the value of the witness to inform himself of the facts of the case, making a strategic decision if he would present this witness or not. Counsel wasn't prepared for trial in this regard because he didn't present readily available witnesses, eyewitnesses, and didn't conduct interviews or investigations on witnesses in this case to properly develop a viable defense.

Counsel also never spoke to Appellant about important aspects of defense which include informing and speaking with Appellant about taking the stand and presenting character witnesses and or character evidence. These are fundamental conversations in which is counsel's duty to consult his client. Counsel failed to consult Appellant about these vital forms of defense being as though they were the Appellant's only other alternatives to defend himself against the charges against him and counsel ineffectively was unable to present witnesses in his behalf. By not consulting with Appellant, counsel was not prepared to present either defense. Counsel didn't even plan on presenting character evidence because he feared that the prosecutor would've been able to present a DVD of Appellant rapping about violence and etc. It wasn't until the middle of trial when counsel decided, without consulting with Appellant, that he was going to present character evidence because trial court informed counsel that the DVD was inadmissible to rebut character evidence. Counsel displayed his unpreparedness regarding character evidence when he directed Appellant's sister to pass a list around to those who were present in support of the Appellant, willing to testify to Appellant's good character the day before counsel was to present the defense (N.T. 2/3/09, at 155-156). This clearly exhibits that counsel did not speak with Appellant because he resorts to passing a list to Appellant's support.

attempt to obtain character witnesses. Additionally it is previously stated in this memorandum that counsel never intended on calling Appellant to the stand, never consulted Appellant about it, and also gave unreasonable advice to Appellant regarding taking the stand. Which also exhibits counsel's unpreparedness.

Futhermore, counsel makes various arguments in his closing arguments that he wasn't prepared to establish and didn't establish. Counsel indulged in this fantasy that just because he has argued his point to the jury that they were going to believe it, without evidence to prove it, when the actual evidence presented at trial exhibited the opposite. This fact was evident when one of counsel's arguments in particular was not supported by evidence presented at trial. Counsel argued that Anthony Harris waited approximately a hour and a half before he decided to inform authorities that he was a witness to this incident and inbetween that time Harris could have received all types of information, thus being the reason he implicates Appellant (N.T. 2/4/09, at 91-92). In order to solidify this inference it must be proven that Harris actually waited this hour and a half before he decided to inform police and counsel was unprepared to prove it to the jury. It is recorded on Police Officer Brian Graves' 75-48 incident report that he transported Harris to homicide to be interviewed. Counsel asked Officer Graves if 2:26 p.m., as recorded on his 75-48 report, when he first came in contact with Anthony Harris and Graves answered yes (N.T. 2/3/09, at 22-23). But on redirect examination the prosecution led Officer Graves into testifying that he met Harris at 1:15 p.m. (N.T. 2/3/09, at 24-25). Without this rehabilitation of this testimony from the prosecutor, counsel would've established this hour and a half unaccounted for time period in which it took Harris to come forward. Since the prosecution rehabilitated Graves testimony the evidence clearly exhibits that Graves came in contact with Harris at 1:15 p.m. Counsel's unpreparedness in this regard prejudiced Appellant because there was available evidence that proved this to be untrue.

In the crime scene log which was apart of the discovery it was recorded that Officer Graves was present at the crime scene at 1:28 p.m. The importance of this evidence is Graves came in contact with Harris at Temple Hospital and couldn't possibly have came in contact Harris at 1:15 p.m. Graves was asked about how he came in contact with Harris on direct examination and he answered, he saw Harris at Temple Hospital, talked to him and took him down to homicide (N.T. 2/3/09, at 18). Harris was asked by the prosecutor, if anywhere, did you go after you told Graves what you had seen. Harris answered, "He bought me straight down homicide." (N.T. 1/30/09, at 22). By presenting the crime scene log to the jury would've proved that Graves didn't met Harris at 1:15 p.m. and did indeed met him at 2:26 p.m. as Graves initially testified. Because if Graves was on the crime scene at 1:28 p.m. he would've had to come in contact with Harris after that because both witnesses testified that after they spoke about what Harris seen they went straight to homicide. They didn't meet at 1:15 p.m. because they went straight to homicide.

then to homicide. There was also other evidence that counsel was unprepared to present that would've corroborated this truth. Malik Wooden stated in his statement that he was speaking with Harris approximately at 1:15 p.m. at the Kenderton school yard because approximately 10 minutes after the shooting stopped Wooden states he walked back to the scene where he and Harris told him the victim got shot. This is approximately 1:15 p.m. because the shooting happened at approximately 1:06 p.m. and 10 minutes after the shooting stopped is when Wooden states he walked back to the scene and was speaking with Harris. Consequently, counsel was unprepared to establish this truth with available evidence. Counsel prejudiced Appellant because by not establishing Harris' unaccounted for time period it precluded the jury from reasonably inferring that Harris received information rumoring Appellant to be a shooter, which was Appellant's primary defense against why Harris would implicate him.

Counsel was also unprepared to defend Appellant against the testimony of Rachel Marceils. Counsel failed to interview and investigate Rachel Marcelis to discover she gave a prior inconsistent testimony, was given immunity, that she had an expectation of leniency from the prosecutor with favorable testimony, and that her testimony given at Appellant's trial was known to be perjured by the prosecutor. If counsel was equipped with such information at trial there is a reasonable probability that the outcome would have been different. Counsel was totally unprepared to defend Appellant against Marcelis' testimony, which prejudices Appellant.

In defense of Appellant against consciousness of guilt, avoiding Philadelphia and the prosecution's theory of motive, counsel was unprepared. Involving consciousness of guilt of why Appellant gave false names counsel displays his unpreparedness when he prejudiced Appellant by eliciting that drugs were found in the motel room where Appellant was arrested. This was a desperate attempt to offer evidence of why Appellant gave false names but at the same time it prejudiced Appellant. Instead of investigating another alternative that doesn't involve prejudicing his client he chose this poisonous method. Counsel also didn't offer any evidence to rebut against prosecution's proposition that Appellant fled to Wilks-Barre and never returned to Philadelphia to avoid being arrested for this crime. Counsel was unprepared to defend Appellant on this aspect when there was available evidence to defend Appellant. Shariah Jabbar-Mitchell gave a statement to Wilks-Barre police where she stated that her and Appellant made plans to come to Wilks-Barre from Philadelphia. Also counsel was unprepared to defend this theory of motive. Counsel offered no evidence to defend this theory of motive. This unpreparedness by counsel had an adverse effect on the outcome of the trial.

Overall it is evident that counsel was unprepared to represent Appellant at trial. Nothing about counsel performance at trial gives the inference that he was prepared for trial. There are many instances which exhibit counsel's unpreparedness.

but the aforementioned instances are the most obvious. It is displayed throughout every issue in this memorandum regarding counsel's ineffectiveness which unravels his unpreparedness. Nevertheless, the most evident of counsel's unpreparedness is the pitiful parody of defense offered by counsel. Counsel offered a generic stipulation of Appellant's good character. This generic stipulation was the sole defense against the charges against Appellant although there was readily available evidence that counsel declined to pursue. Therefore Appellant was relying on his evidence of good character to prevail against him. By merely considering that this is counsel's only evidence presented speaks volumes to his ineffectiveness and unpreparedness. Although counsel presented this defense it was made void by counsel eliciting that drugs were found in the motel room where Appellant was arrested. Because counsel elicited that drugs were found it displays propensity to commit the crime charged to the jury being evidence of other criminal activity and it ultimately blackened the character of Appellant. So the elicited evidence that drugs were found when Appellant was arrested invalidated the sole form of defense presented, leaving Appellant defenseless. Due to counsel's failure to prepare to defend Appellant against consciousness of guilt evidence presented by prosecutor and counsel's failure to be prepared to adequately present a defense other than this frivolous generic stipulation to character prejudiced Appellant because Appellant was clearly defenseless against the charges brought against him.

There is a reasonable probability that counsel's failure to interview known eyewitnesses as well as beneficial witnesses, failure to investigate eyewitnesses as well as additional witnesses named in the discovery, failure to investigate aspects of the case in defense to evidence of guilt presented by prosecutor, failure to consult Appellant about taking the stand, failure to consult Appellant about character defense, gross inattention to the capital nature of client's plight, failure to present willing and available witnesses, and presentation of such a pitiful parody of a defense which was undermined by counsel's own actions, in combination, affected the outcome of the trial and divulges his unpreparedness. It therefore seems quite clear that the result of the trial might different were it not for counsel's errors.

According to the United States Supreme Court, the Sixth Amendment provides the accused with the right to effective assistance of counsel at all critical stages of a criminal proceeding, including the pre-trial stages, trial, and sentencing. see *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Counsel's assistance fell far beneath effective in the pre-trial stages of this case due to his failure to conduct prompt adequate pre-trial investigation on witnesses and evidence establishing innocence against evidence tending to show Appellant's guilt as well as pre-trial consultations with Appellant about taking the stand and character evidence. This lack of pre-trial preparation naturally reflected on counsel's performance at trial which resulted in a meaningless defense and a guilty verdict.

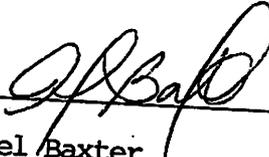
Appellant adequately at trial. Counsel was even unprepared to conduct meaningful cross examination on the Commonwealth's witnesses due to his lack of pre-trial investigations and interviews to ascertain vital information enabling him to do so. For example, counsel was totally unaware of the immunity agreement and prior inconsistent testimony of Rachel Marcelis, as well as evidence directed to Marcelis' expectation of leniency. This is just one example of how counsel failed to fully inform himself of the facts of this case. Assistance of counsel is mandated by the Sixth Amendment because lawyers "are the means through which the rights of the person on trial are secured," and through which the prosecution's case is subjected to "meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039 (1984). In this case counsel's knowledge of the case was so incomplete nothing about the prosecution's case was meaningfully adversarial tested by counsel. Accordingly, "it is not possible to provide a reasonable justification for [defending a case] without thorough preparation." see *Com. v. Brooks*, 839 A.2d 245, 576 Pa. 332 (2003). These allegations of ineffectiveness, fitting broadly under the rubric of failure to prepare for trial, are not even arguably reasonable tactics serving some broad strategic plan for the defense. Failure to prepare is not an example of foregoing one possible avenue to pursue another approach; it is simply an abdication of the minimum performance required of defense counsel. see *Com. v. Perry*, 644 A.2d 705, 537 Pa. 385 (1994). There is no excuse or reasonable basis for counsel not to adequately prepare for trial. It was nothing holding counsel back from being prepared to defend Appellant but his own sloth and neglect. Unfortunately, it is reality that court appointed counsel for indigent defendants, more often than not, don't perform at the criteria guaranteed by the Sixth Amendment. In this instance, this reality is true and is clearly recognizable through counsel's sloth, negligence, lack of concern, inattention, and unpreparedness for trial. It would be shocking to the sense of fairness to allow one who has requested the assistance of counsel to receive ineffective representation merely because his indigency prevented him from obtaining competent counsel through his own means. *Com. v. Saxton*, 532 A.2d 352, 516 Pa. 196 (1987). This is present in many cases but rarely wants to be acknowledged by the courts because a defense counsel's seasoned deceptive ways makes it appear that he has done all he can for his client, when in all actually has done nothing. In this case counsel tried to decorate his unpreparedness but you don't need X-ray vision to see right through it. It must also be emphasized that the *Washington v. Maroney*, 235 A.2d 349, 427 Pa. 599 (1967) standard does not mandate the highest quality of advocacy available, but does insist that there be at least a certain minimum level of competency. When the minimum level has not been provided there results a prejudice which can not be ignored, regardless of how impressive the prosecution's evidence might appear to a reviewing court reading the cold record. Indeed, it may well be that counsel's ineffectiveness substantially contributed to apparent invincibility of the prosecutions case. quoting *Com. v. Saxton*. Counsel denied Appellant

to a fair trial and effective assistance of counsel. Prejudice is present because counsel's errors so undermined the truth determining process that no reliable adjudication of guilt or innocence took place.

CONCLUSION

Wherefore, for the reasons contained herein and such additional reasons as may become apparent after an evidentiary hearing, petitioner request this Court to grant P.C.R.A. relief and set the matter for a new trial.

Respectfully Submitted,



Armel Baxter
HX-3302
SCI Coal Township
1 Kelley Drive
Coal Township, Pa. 17866
Pro se Petitioner

*Petitioner wishes to supplement the record of this Memorandum once all information regarding this matter is in his possession and once additional information becomes available.

PAA Ex. 5

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY, CRIMINAL DIVISION

DOCKET

No. CP-51-CR-0013121-2007

COMMONWEALTH OF PENNSYLVANIA

v.

ARMEL BAXTER
Petitioner

SUPPLEMENTAL POST CONVICTION PETITION
WITH
CONSOLIDATED MEMORANDUM OF LAW

The Petitioner, Armel Baxter, comes before this Court and supplements the previously filed post conviction petition seeking post conviction collateral relief by submitting the instant Supplemental Memorandum of Law in support of his petition.

Armel Baxter
HX-3302
SCI Coal Township
1 Kelly Drive
Coal Township, Pa. 17866
Petitioner

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STATEMENT OF QUESTION INVOLVED

Did trial counsel provide Appellant with a wholesale denial of counsel when he directed substitute counsel to defer to whatever codefendant's counsel agreed to at a critical stage of trial, supplemental jury instructions?

ASSERTED MATTER FOR ARGUMENT

Trial counsel violated Appellant's constitution Amendment 6, right to counsel, by completely denying Appellant counsel during a critical stage of trial.

SUMMARY OF THE ARGUMENT

Trial counsel violated Appellant's Sixth Amendment right to counsel due to him being absent and not exercising independent professional Judgment at a critical stage of trial, supplemental jury instructions. Trial counsel instructed substitute counsel, by phone, to defer to whatever codefendant counsel agreed to which was during supplemental jury instructions. As a result it deprived Appellant of counsel which is a constitutional guarantee that warrants relief. According to the Supreme Court of the United States when the accused is denied counsel at a critical stage, such as supplemental jury instructions, prejudice is presumed and a new trial should be granted.

ARGUMENT

TRIAL COUNSEL VIOLATED APPELLANT'S CONSTITUTION AMENDMENT 6, RIGHT TO COUNSEL, BY COMPLETELY DENYING APPELLANT COUNSEL DURING A CRITICAL STAGE OF TRIAL

Trial counsel violated Appellant's essential Constitution Amendment 6, right to counsel, by completely denying Appellant counsel during a critical stage of trial, supplemental jury instructions. Counsel was totally absent during this critical stage, physically as well as responsibly, due to him not employing independent professional judgments or decisions. As a result of counsel's actions it provided Appellant with a wholesale denial of counsel. In general, a person accused of a crime and the subject of a criminal prosecution has a constitutional right to counsel pursuant to the Sixth Amendment of the United States Constitution and Article 1, § 9 of the Pennsylvania Constitution. see *Com. v. Arroyo*, 555 Pa. 125, 723 A.2d 162 (1999). An accused right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities, not luxuries." Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a fair trial would be "of little avail," as the Supreme Court of the United States has recognized repeatedly. More importantly, which is precedent and illustrated in *United States v. Cronin*, "[t]he presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." *United States v. Cronin*, 104 S.Ct. 2039, 466 U.S. 648 (1984). Because Appellant was denied counsel at a critical stage prejudice is presumed. In *Cronin* the Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding. Clearly, this constitutional error warrants relief.

On February 5, 2009 during jury deliberation the Trial Court divulged pertinent information on the record concerning Appellant's counsel, Mark Greenberg's, conduct and absence during supplemental jury instructions. The record reveals:

(Whereupon, the following took place in the Judge's robing room:

THE COURT: The record should reflect that yesterday Mark Greenberg advised me that his mother was in the hospital in Baltimore, Maryland, and he requested permission to leave court at 4:30. I explained to him in detail that once the jury began to deliberate, that I did not control the timing of anything the jury would do. And I requested that he make arrangements to have present an attorney in the event of a question or a verdict. He gave me his word that he would do such. And then proceeded to leave the courthouse at four o'clock.

The jury recessed at five o'clock. There was no issue. There were no questions. This morning — and Mr. Greenberg further assured me that he would return to Philadelphia this morning no matter what.

This morning I found out that Mr. Greenberg never intended to return to Philadelphia and so advised my staff of that yesterday. He did make arrangements to have an attorney cover him. It is an attorney with three years experience, all civil. No criminal experience whatsoever. Mr. Michael Doyle is the attorney that Mr. Greenberg chose to stand in for him. Mr. Doyle spoke to Mr. Greenberg to advise him of questions from the jury and to advise him of everything that occurred in the robing room and afforded him the opportunity, that being Mr. Greenberg, to go on speaker so that he could participate in the dialogue back here in the robing room. Mr. Greenberg chose not to do that. Mr. Greenberg advised Mr. Doyle to defer to whatever Mr. Wallace agreed to. (N.T. 2/5/09, at 15-16).

It is apparent from a review of the record that counsel didn't provide assistance and execute his duties to the Appellant at this critical stage; but, first let us take into consideration the surrounding circumstances that will solidify this constitutional error.

First and foremost it must be made crystal that counsel denied Appellant counsel at a critical stage. At the commencement of trial on February 5, 2009 Trial Court informed the respective parties that the jury presented it with three questions (N.T. 2/5/09, at 2-3). This is unmistakably during jury deliberations because as a matter of fact these deliberations begun on February 4, 2009 at approximately 3:21 p.m. (N.T. 2/4/09, at 183). Two of three questions the jury asked pertained to charges that Trial Court gave in its initial instructions, in which they were unclear. Accordingly, the critical stages of jury deliberation as explained in *Com. v. Feliciano* 884 A.2d 901, 2005 Pa. Super 331 (2005), however, are those occasions when communications between the trial court and the jury during its deliberation become necessary, including instances in which the jury has questions, request, or considers itself deadlocked. Nonetheless, this appropriately justified supplemental instructions. "In Pennsylvania, trial courts have broad discretion in phrasing their charges,; during this stage, counsel may object to the instructions or suggest an alternative wording. As such, jury instructions are a 'critical stage' in a criminal trial." *Com. v. Johnson* 574 Pa. 5, 828 A.2d 1009 (2002), see *Rogers v. United States*, 422 U.S. 35, 95 S.Ct. 2091 (1975). "A critical stage in a criminal proceeding has been defined to include every stage where the substantive rights of the accused may be lost if not exercised at that stage. According to the Pennsylvania Supreme Court, a 'critical stage' in a criminal proceeding is characterized by an opportunity for the exercise of judicial discretion or when certain legal rights may be lost if not exercised at that stage." *Com. v. Williams*, 959 A.2d 1272, 2008 Pa. Super 257 (2008). In the present instance counsel's omission was undoubtedly at a critical stage of the proceedings.

As is expressed prior by Trial Court in the excerpt explaining what occurred during supplemental jury instructions, Mark Greenberg arranged for Michael Doyle to stand stand in for him as substitute counsel. The focal issue of Doyle is that he was not competent to represent Appellant at this critical stage. Trial Court gave

emphasis to substitute counsel's three year experience of only consisting of civil and no criminal experience, by deliberately asserting such on the record. This, in at the least, puts substitute counsel's competence in question. His inexperience speaks volumes to his inability to competently represent Appellant. However, it is of no matter if Doyle would have been in possession of the proper credentials and experience to competently represent Appellant at trial, under the circumstances of this case he still would have been incompetent to represent Appellant at this critical stage. There is no evidence on the record that exhibits or even insinuates that substitute counsel was either familiar or had any knowledge about this case. In order to be fully capable of competently representing Appellant at this stage substitute counsel would have had to witness the trial, as he did not. Even if he was familiar with the case, such as discovery material evidence, it would not constitute competency in this regard because evidence displayed at trial is the only evidence that determines the direction of the charges given to the jury. Substitute counsel had no way of fully understanding the case, its temperature or complexion as a whole, to properly determine what instructions were justified. Simultaneously, substitute counsel did not understand if the manner in which those supplemental instructions were given were appropriate and protecting Appellant's interest or if alternative wording or if alternative instructions were needed. Importantly, Trial Court previously informed Greenberg to have someone cover for him in case he was absent but to make himself available by telephone because whomever covered for him would not be allowed to answer questions due to it not being their case (N.T. 2/4/09, at 30-31). No matter who was selected to cover for Greenberg Trial Court repeatedly stated they can't answer questions.

Mr. Doyle wasn't selected to substitute for Mr. Greenberg due to his suffice knowledge of the law and this case. He was selected as a result of Greenberg's "last minute" convenience. Doyle presence was solely physical for he was only there to be seen. And this was to instill some false sense of comfort to the Court and Appellant, in attempt to create the illusion that Appellant was being afforded his right to counsel. An evident example of this proposition is apparent when Trial Court directed codefendant's counsel, Michael Wallace, to assist her when Appellant wanted to address the Court with questions (N.T. 2/5/09, at 14-15). Although inaudible and not portrayed on the record, Appellant diligently raised his hand and kept his hand raised until he got the attention of Trial Court due to various concerns, dissatisfaction, and questions he had for Trial Court. When Trial Court noticed Appellant's hand raised she stated: "Tell Mr. Doyle first, then you can tell me. You need to tell Mr. Doyle first." Despite Trial Court's insistence that he should address substitute counsel first, Appellant firmly kept his hand raised expressing his dissatisfaction with substitute counsel and displaying to the Court that substitute counsel could not provide him assistance. Trial Court desperately said: "You can tell Mr. Wallace.

Mr. Wallace, can you help me out?" Mr. Wallace answered, "Certainly." He then walked to Appellant's side of the defense table and spoke to Appellant. Also, Wallace intervened on another occasion to speak with Appellant in attempt to provide assistance (N.T. 2/5/09, at 27-28). Plainly substitute counsel failed to advise, employ advocacy, and provide assistance in Appellant's behalf. Doyle's incompetence was narrated by the actions of Appellant, Wallace, Trial Court, as well as Doyle himself. Doyle never introduced himself to Appellant, spoke to Appellant, or even disputed the fact that Trial Court directed Mr. Wallace to assist and advise Appellant, which is a magnified indicator that Doyle was aware of his own incompetence and lack of familiarity of the case to even begin to try to assist and advise Appellant about this case. Ultimately, it is clear from a review of the record that substitute counsel was not competent to represent Appellant at this critical stage.

A major concern of substitute counsel's incompetence and Mr. Greenberg's absence appears when Trial Court directed the court reporter to go off record while Trial Court gave the respective attorneys responses to the jury's questions (N.T. 2/5/09, at 3). This imperative omitted dialogue is an issue within itself, but, sufficiently raises suspicion of what was actually said and if Appellant's rights were protested. In the simplest form of logic it tells us something transpired that was wrong morally, principlly, or error and improper on the behalf of Trial Judge. The record reflects: "THE COURT: I needed to clean up the record because we were in the process of working for what was an appropriate response to the jury's question." This statement made by Trial Court was a baseless rationale for why she omitted essential dialogue from the record. There is no justification for the Court to omit dialogue from the record as it is improper. "The preservation and accuracy of trial transcripts are constitutionally mandated only to the extent that they are necessary to provide an adequate and effective record for appellate review." Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585 (1956). This impropriety is amplified by the reality hadn't Trial Court took it upon herself to place on the record the information that Greenberg instructed Doyle to defer to whatever Wallace agreed to at this critical stage it would be unknown and a miscarriage of justice because she extracted essential dialogue from the record. So who knows what other errors and violations that transpired at this off the record dialogue without a verbatim record. Trial Court may very well have revealed the details of this circumstance but kept other undisclosed to cater to her convenience. Canon 2 of the Code of Judicial Conduct provides that a judge "should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of judiciary," and the commentary to that canon states that he "must avoid all impropriety and the appearance of impropriety." see also Gay v. United States, 411 U.S. 974, 93 S.Ct. 2152 (1973). Accordingly, impropriety is associated with the omitted dialogue because there is no proper justification to omit

dialogue. With all this impropriety staring Doyle in the face it is displayed he wasn't protecting Appellant's interest because he allowed Trial Court to omit essential dialogue without disputing such conduct or objecting to it. It is a mystery as to the violations that occurred due to a incomplete record but one thing is for certain. Appellant was not afforded counsel to protect his interest at this off the record dialogue and Appellant was not afforded counsel at this critical stage.

Substitute counsel's primary purpose, which clearly exhibits that trial counsel, Greenberg, was very much aware that Doyle was incompetent to represent Appellant at this critical stage, was to contact Greenberg in the event that the jury presented questions, receive instructions from Greenberg, and execute them. In addition to this fact it was told to him prior by Trial Court. In the same moment Greenberg was well aware and alert to the fact that substitute counsel was not competent to represent Appellant at this stage because of the preparations made in case of any important legal issue arose. Moreover, counsel at minimum must take sufficient precautions to protect the defendant's interest in his or absence. see Siverson v. O'Leary, 764 F.2d 1208 (7th Cir 1985). In Siverson v. O'Leary it is proclaimed that precautions generally must insure that the attorney will at least be available to assist defendant during any reasonable foreseeable contingency that might arise in the attorney's absence. Here, it is obvious that trial counsel made the necessary precautions through his availability for consultation by telephone. Yet, even if Appellant's counsel was available by telephone, this alone was not sufficient to render his absence professionally reasonable.

As previously stated, Trial Court explained that Doyle contacted Greenberg to inform him of the jury's questions so that he may participate in the supplemental jury instruction conference held in the Judge's robing room. The record reflects:
(Statement of Trial Court)

"Mr. Doyle spoke to Mr. Greenberg to advise him of questions from the jury and to advise him of everything that occurred in the robing room and afforded him the opportunity, that being Mr. Greenberg, to go on speaker so that he could participate in the dialogue back here in the robing room. Mr. Greenberg chose not to do that. Mr. Greenberg advised Mr. Doyle to defer to whatever Mr. Wallace agreed to."

Clearly, counsel declined to take part in the dialogue in the Judge's robing room. This reveals that counsel was not cognizant about Trial Court's responses to the jury's questions regarding instructions. Trial Court declined participation in the dialogue which means he declined hearing Trial Court's responses presented by the jury. The mere record establishes this fact as well as there being no reason for counsel to direct substitute counsel to defer to Wallace when he is fully conscious of the questions and responses enabling him to make appropriate independent professional judgments. The underlining issue is that Greenberg did not make an independent

professional judgment and relayed his professional obligation and responsibility to Wallace by instructing substitute counsel to defer to whatever Wallace agreed to. By trial counsel's course of action in this regard he undeniably instructed substitute counsel not to make an independent professional judgment as well. Although it wasn't substitute counsel's purpose or responsibility to make an independent professional judgment the fact still remains neither counsel provided such, resulting in a wholesale denial of counsel to Appellant. Simultaneously, because substitute counsel was incompetent, unfamiliar with the case, and under instruction to defer to whatever Wallace agreed to and Greenberg not being aware of Trial Court's responses, or of everything that happened during the supplemental jury instruction conference, Appellant wasn't provided assistance of counsel, not only concerning Trial Court's responses but wasn't provided assistance of counsel at the off the record dialogue. Substitute counsel was blindly following the lead of an attorney who's allegiance, loyalty, and responsibility to protect his client's interest belonged to codefendant, Jeffrey McBride. Therefore, whatever transpired at the off the record dialogue no one there protecting Appellant's interest. In an adversary setting, counsel must be present to represent the accused's interest, protect his constitutional rights, and ensure he receives a fair trial. None of these were achieved during the off the record dialogue. Also there is nothing indicating that trial counsel was even aware that Trial Court conducted this conference off the record, for there is obvious error in such a act, and counsel's dormancy in this regard concludes his lack of knowledge. Consequently, even though Greenberg took precautions to be available by telephone during his absence it was not professionally reasonable because he completely denied Appellant counsel. Furthermore, Appellant was completely denied counsel when Trial Court was giving the actual supplemental jury instructions to the jury due to substitute counsel completely following the lead of Wallace. Regardless of whether the instructions were initial, supplemental, or reiterative, the deliberate exclusion of counsel when the jury is being instructed on the law of the case impugns and impartially of the trial itself. *Com. v. Johnson*, 574 Pa. 5, 828 A.2d 1009 (2002).

It was not the responsibility of Wallace to make any decision whatsoever in the behalf of a client that was not his own. Nor was any decision or assistance made in the behalf of a client that was not his own valid. In the same instance the record is unclear if Wallace was even aware that he was making decisions in behalf of Appellant at the supplemental jury instructions. Nonetheless, any such decision would be invalid. The phrase "duty of loyalty" appears in the context of examining counsel's primary obligation to his own individual client. *Com. v. Washington*, 880 A.2d 536, 583 Pa. 566 (2003). ABA Model Code of Professional Responsibility EC 5-1 states: "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences

and loyalties." Wallace represented Appellant's codefendant, Jeffrey McBride, and this is where his obligation, allegiance, responsibility, and loyalty lies. Foremost, any decision made by Wallace would be tailored to catered to McBride for his representation was exclusively to McBride. If Wallace did make a decision in behalf of Appellant, by his representation of McBride it would compromise his ability to advise Appellant disinterestedly. Such decision made in behalf of Appellant may very well have been tainted by Wallace's obligation and desire to obtain the best treatment possible for his client. It is in this instance legally impossible for Wallace to have given Appellant undivided loyalty. An accused is entitled to representation free of any conflict. see *Com. v. Breaker*, 456 Pa. 341, 318 A.2d 354 (1973). It is clear that Appellant's and McBride's interest were not in unison. Furthermore, section 5-16 of the Code provides that "before a lawyer may represent multiple clients, he should fully explain to each client the implication of the common representation and should accept or continue employment only if the client consents." ABA Model Code of Professional Responsibility EC 5-16. see also *Com. v. Brown*, 972 A.2d 529, 2009 Pa. Super 69 (2009). It also states "it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires." Here, it is certain that Appellant had no say in the selection of an attorney, nor did Wallace explain the implications of the common representation, or did Appellant have the opportunity to evaluate for himself whether Wallace would represent him with undivided loyalty. Consistently, this violated the consent requirement and disclosure provision of Mode Code of Professional Responsibility which extends to DR 5-101(c). Appellant was not even aware that Wallace was making any such decisions on his behalf. Regardless, any decision Wallace made on the behalf of Appellant is void. Even despite Trial Court's belief that Wallace felt comfortable he could protect the interest of both defendants displayed in N.T. 2/5/09, at 17. Wallace was not Appellant's attorney. Appellant did not waive his right to counsel or waive the representation of Greenberg as his attorney to give Wallace authorization to fulfill the duty of counsel. Nor was Wallace's representation authorized judicially. No conduct such as this is permissible in the administration of justice, whereupon as a result Appellant was denied counsel.

The ABA Model Code of Professional Responsibility Canon 5 is titled: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client". Previously referenced EC 5-1 of that canon applies to Greenberg as well, due to the obligations of counsel placing him and Wallace on the proverbial two way street. Greenberg had a obligation to Appellant to exercise independent professional judgment at this critical stage of supplemental jury instructions. Being that he didn't, he denied Appellant counsel at this critical stage. Counsel's decision not to exercise independent judgment was a decision to abandon his client, as it resulted in Appellant

being unaware that he had no counsel in this regard and left him to stand alone at a critical stage. It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. *United States v. Gouveia*, 467 U.S. 180, 104 S.Ct. 2292 (1984). Through the precaution counsel took to make himself available for consultation by telephone demonstrates that he was conscious of his duties, but to the contrary, conscientiously declined to discharge those duties. It is clear from the reflection of the record that Greenberg's absence was due to his mother being hospitalized in Baltimore, Maryland. It must be realized that this event holds paramount significance because with his departure from trial he also decided to depart with his responsibility to Appellant. As his obvious concern for his mother needs no emphasis, it is equally obvious that at the time his concern was solely for his mother and no longer for his client. Sympathy is appropriate, as no one can blame counsel for running to the aid of his mother, but, it is no excuse for him to abandon his client, who faced most serious charges, first degree murder, alone at a critical stage of trial. A lawyer is under an ethical obligation to exercise independent professional judgment on behalf of his client; he must not allow his own interest, financial or otherwise, to influence his professional advice. *Evans v. Jeff D.*, 475 U.S. 717, 106 S.Ct. 1531 (1986). A criminal defendant "requires the guiding hand of counsel at every step in the proceeding against him." quoting *Powell v. Alabama* 287 U.S. 45, 53 S.Ct. 55 (1932). This right of counsel's presence is required at every stage of a criminal proceeding where substantive rights of the accused may be affected. see *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254 (1967). Intertwined with the aforementioned, counsel's absence coupled with his decision not to exercise independent professional judgment interfered and violated Appellant's right under Pa.R.Crim.P. rule 602. see *Shields v. United States*, 273 U.S. 583, 47 S.Ct. 478 (1927) (accused had right under "rule of orderly conduct of jury trial" to be present for supplemental jury instructions.) The Supreme Court stated: "[w]e entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purposes to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict." *Fillippon v. Albion Vein State Co.*, 39 S.Ct. 435, 250 U.S. 76 (1919).

Moreover, it is definite that Doyle was following the lead of codefendant's counsel, Wallace, by him being under instruction to do so from Greenberg. Nowhere is this fact more apparent than when he immediately informed Trial Court that he had no objections to its responses to the jury's questions concerning instructions

instantaneously after Wallace expressed no objections (N.T. 2/5/09, at 3-4). As explained in a case that closely resembles and parallels this instant case, "the strategy instructing substitute counsel to follow the lead of codefendant's counsel was tantamount to providing defendant no counsel at all." quoting *Com. v. Jones*, 2005 Pa. Super 115, 871 A.2d 1258 (2005). Unfortunately, no claim of strategy can be asserted where counsel completely fails to exercise independent professional judgment. Therefore, counsel's decision wasn't "based on strategy" but was instead "grounded in negligence." Independent professional judgment is paramount to a lawyer's conduct and without it a accused Sixth Amendment, right to counsel, turns into a meaningless charade. "In representing a client, a lawyer should exercise independent professional judgment and render candid advise." Rules of Professional Conduct rule 2.1. It is apodictic that the right to counsel is not honored for its own sake, but rather because it ensures the accused a fair trial. The *Cronic* Court reaffirmed this aphorism, but recognized that, because of the presumption that counsel's assistance is essential, the denial of counsel at a critical stage renders an otherwise acceptable trial unfair. *Curtis v. Duval*, 124 F.3d 1 (1st Cir 1997).

Accordingly, the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice. Stated another way, denial of counsel is considered a "structural error," which entitles a defendant to a new trial without showing prejudice under *Strickland's* second prong -- prejudice is presumed because the error makes the adversary process itself presumptively unreliable. *Valentine v. United States*, 488 F.3d 325 (6th Cir. 2006). In effect it is said there are circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified, most obvious, of course, is the complete denial of counsel. In *Cronic* the United States Supreme Court ruled that in some circumstances, a deprivation of the right to counsel as guaranteed by the Sixth Amendment is so fundamental that a violation can never be considered harmless error. The [Supreme] Court has reiterated that the harmless error analysis does not apply to Sixth Amendment claims involving the absence of counsel at a critical stage by stating that the right to counsel is so basic to a fair trial that its infraction can never be treated as harmless error. *French v. Jones*, 332 F.3d 430 (6th Cir. 2003). In *French v. Jones* it states in depth about this application of law:

"The United States Supreme Court has defined the type of ineffective - assistance claims that fit within the second exception to the *Strickland* rule. Under the *Strickland* rule, petitioners alleging a deprivation of their right to counsel must show (1) that counsel's performance fell below an objective standard of reasonableness; and (2) that a reasonable probability exist that, but for counsel's substandard performance, the outcome would have been different. The Court has held that the petitioner need not prove actual prejudice in the following three categories of circumstances:

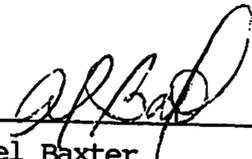
(1) when the petitioner was denied counsel at a critical stage of the proceedings; (2) when the petitioner's counsel failed to subject the prosecution's case to a meaningful adversarial testing; and (3) when the circumstances of the trial prevent counsel from affording effective representation."

It can properly be pronounced that Appellant's claim fits within the category of being denied counsel at a critical stage of the proceedings. Hence, harmless error doctrine is inapplicable and prejudice is present.

Appellant was denied counsel at a critical stage of his trial which was revealed by Trial Court in her statement she inserted into the record. This violated Appellant's Constitution Amendment 6, right to counsel. The presumption of prejudice described in *Cronic* is "reserved for situations in which counsel has entirely failed to function as the client's advocate." *Com. v. Williams*, 9 A.3d 613 (2009); quoting *Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551 (2004). This is true in the present matter where counsel was absent, instructed substitute counsel to follow the lead of codefendant's counsel, failing to assist Appellant at a critical stage, and ultimately providing a wholesale denial of counsel. Compellingly, the *Cronic* decision applies. "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law." *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963). The product of this violation warrants relief.

Wherefore, for the reasons contained herein Petitioner requests this Court to grant P.C.R.A. relief and set this matter for a new trial.

Respectfully Submitted,



Armel Baxter
HX-3302
SCI Coal Township
1 Kelley Drive
Coal Township, Pa. 17866
Pro se Petitioner

PAA Ex. G

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY, CRIMINAL DIVISION

DOCKET

No. CP-51-CR-0013121-2007

ARMEL BAXTER
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

POST CONVICTION PETITION
MEMORANDUM OF LAW
ADDENDUM

The Petitioner, Armel Baxter, comes before this Court and supplements the previously filed post conviction petition seeking post conviction collateral relief by submitting the instant Memorandum of law Addendum in support of his petition.

Armel Baxter
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SCI Coal Township
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STATEMENT OF QUESTION INVOLVED

Did trial court demonstrate bias, and favor of the prosecution and opinion of Rachel Marcelis, a abuse of discretion, when improperly questioning Marcelis and limiting counsel's questioning of this witness?

ASSERTED MATTER FOR ARGUMENT

Trial court violated Appellant's Constitution Amendment 14, due process, by abusing its discretion for improperly questioning Rachel Marcelis and limiting counsel's cross examination of Rachel MARcelis, in which both indicated trial court's bias and favor of the prosecution to the jury.

TRIAL COURT VIOLATED APPELLANT'S CONSTITUTION AMENDMENT 14, DUE PROCESS, BY ABUSING ITS DISCRETION FOR IMPROPERLY QUESTIONING RACHEL MARCELIS AND LIMITING COUNSEL'S CROSS EXAMINATION OF RACHEL MARCELIS, IN WHICH BOTH INDICATED TRIAL COURT'S BIAS AND FAVOR OF THE PROSECUTION TO THE JURY

Trial court abused its discretion by improperly questioning Rachel Marcelis and limiting counsel's crossexamination of Rachel Marcelis. Due to trial court's conduct in both regards concerning the testimony of Marcelis as well as indicating that the court was leaning towards the side of the prosecution to the jury. This prejudiced the Appellant because the jury was influenced by trial court's conduct, depriving a fair and impartial trial. "If the court has so far injected itself into the trial as to give the jurors the impression that it favors the prosecution, court may thereby be depriving the defendant of a fair trial." U.S. v. Jhonson, N.D., Iowa 2005 403 F. Supp. 2d. 721. As the ultimate authority figure trial court occupies an exalted and dignified position, as the person whom the jury looks for guidance, therefore its favor may lead the jury to conclude it should follow the judge's opinion. As a result it polluted the fundamental fairness of the ultimate verdict.

There were various instances of trial court limiting trial counsel's questioning of Marcelis when counsel was well within the appropriate latitude of questioning, attempting to bring the witness to the mark. This was a clear indicator of bias to the jury. In essence this was a violation of the Appellant's confrontation clause as well. Also there is an instance where trial court questioned Marcelis which expressed her opinion of Marcelis' testimony, rehabilitating the testimony in favor of the prosecution, which impressed the jury. Together these instances of partiality from trial court during the testimony of this witness constitutes a abuse of discretion. "An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will, as shown by the evidence or the record, discretion is abused." quoting Paden v. Baker Concrete Construction, Inc., 540 A.2d 341 (1995); Com v. Kimbell, 563 Pa. 256, 759 A.2d 1273 (2000). Trial court's abuse of discretion exist in her judgment being unreasonable as a result of partiality. The jury recognized this partiality as it was obvious and was influenced by such.

The sequence of events establishes trial court's abuse. Accordingly, it must be viewed in the same light it was displayed to the jury. Firstly, it must be recognized that during Marcelis direct examination she testified favorable to the prosecution. Although it was never flushed out on the record Marcelis testified favorably for the Commonwealth because she possessed a expectation of leniency. Due to her own implications and involvement she alleged, when testified to could've resulted in criminal charges. This gave Marcelis a interest to testify in favor of

the Commonwealth. On direct examination Marcelis testified completely consistent to her statement. Her goal was to ensure the Commonwealth was completely satisfied with her testimony. Simultaneously, her direct examination and cross examination were to serve two different purposes. Marcelis' cross examination was to serve the intended purpose of discrediting herself. On cross examination she gave various purposeful inconsistencies completely contrary to that of her direct examination testimony but none was more indicative of her intention on discrediting herself than her admitting to her over excessive drug use. Marcelis used this as a tool to impeach herself, explaining to the jury how those drugs had a effect on her ability to observe. She was not even questioned by counsel referring to the use of drugs when she voluntarily divulged she did a lot of drugs at the time of the incident (N.T. 1/30/09, at 153). Trial court recognizes that Marcelis had two different agendas. On a subsequent day of trial the court's statement recognizes this fact. "Rachel didn't go sufficiently south for Jimmy [prosecutor] to have Crone read the statement." (N.T. 2/5/09, at 2). This was stated at supplemental jury instructions. Therefore, this is undeniable proof in the record that trial court was totally aware that Marcelis was making a effort to go "south", also trial court's actions in this regard was proof of this fact. Nonetheless, this prompted the court's conduct as it exhibited favor of the prosecution and dislike for Marcelis' sudden change of heart. Regardless if the jury was aware of Marcelis expectation of leniency or not it still recognized she had a dual agenda and recognized trial court's reaction regarding that agenda.

The first occurrence which exposed trial court's favor of the prosecution is revealed when the prosecution objected to trial counsel's question regarding Marcelis' state of mind caused by her drug use. "BY MR. GREENBERG: Q. So, I mean, as a practical matter, your whole reality was fried because of this drug use?" (N.T. 1/30/09, at 158). This question was objected to by the prosecution and sustained by the court. (The record is incomplete of the basis of the objection or trial court's basis to sustain it). In spite of counsel's question being within the realm of relevance as well as propriety the court sustained the objection. It is stated, "[t]he scope of cross examination lies largely within the discretion of the trial court, whose ruling will not be reversed absent a abuse of discretion or error of law." *Com. v. Karenbauer*, 552 Pa. 420, 715 A.2d 1086 (1998). Abuse of discretion is present in this regard because counsel's question is legitimate dealing with the mind state of the witness. In *Karenbauer* it states, "[r]elevant evidence may nevertheless be excluded if its probative value is outweighed by the unfair prejudice that would result from its admission." In the present matter the probative value of counsel's question is paramount. Counsel's question was asked in attempt to impeach Marcelis' observation and recollection of alleged testimony prior. Because counsel was precluded from a full and fair cross examination of the said witness it intruded on Appellant's right

to confront the witness. There was no reason justifiable to preclude the defense from bringing Marcelis to the mark. As a result counsel was forced to alter his line of questioning.

The denial of questioning induced the following:

"BY MR. GREENBERG:

Q: Whatever you claim that you heard inside the truck, it could have been based upon something that was going on in your own head from fantasizing or from going through a drug stupor; isn't that right?" (N.T. 1/30/09, at 158-159)

This question caused trial court to question Marcelis indicating its opinion and favor of the prosecution. This is the central and focal instance of trial court's partiality because it was the most visible indication to the jury of the court's opinion and bias. The present question was immediately objected to by the prosecution but was allowed to be answered by the court. Marcelis answered: "Yeah, the drugs I was taking could cause you - -" Marcelis was instantaneously cut off and interrupted by trial court and the following occurred:

"THE COURT: Don't tell me what could. Did you hear - -

THE WITNESS: I don't understand.

THE COURT: Did you hear what they said or not?

THE WITNESS: Yes, I heard the question. I don't understand - -

THE COURT: No. I asked you, did you hear what Fra and Snubbs said in the car?

THE WITNESS: Yes.

THE COURT: Next question." (N.T. 1/30/09, at 159)

This dialogue illustrated to the jury that trial court favored the prosecution. The jury was well aware that Marcelis' testimony had a dual purpose regarding direct examination and cross examination by this point of the trial. By trial court intervening it indicated its opinion of Marcelis' credibility due to it rehabilitating Marcelis' testimony in favor of the prosecution. In other words, representing the position that the court did not believe that Marcelis was being truthful when attempting to discredit her observation of what transpired in the truck. This unduly influenced the jury. Marcelis was in stride of discrediting herself during Mr. Greenberg's cross examination and it was solely for the jury to deem what they believed, direct examination or cross examination. Trial court's interjection impressed the jury. "Determination of a witness' credibility is solely in the province of the jury. The court must not influence the jury in the exercise of the discretion which is lodged solely in them." see *Com. v. Bibbs*, 970 A.2d 440 (Pa. Super. 2009). "Where the judge oversteps the bounds of propriety in examining witnesses the jury must be deemed to be inordinarily impressed by this evidence of the judge's opinion such that the defendant is deprived of a fair and impartial trial. The trial becomes not one of trial by jury, but of trial by jury impressed by the judge." see *Com. v. Hammer*, 494

A.2d 1034, 508 Pa. 88 (1985).

There was no reasonable judgment for trial court to question Marcelis pertaining to what she heard the defendant's say in the car or to intervene in the cross examination at this moment. As stated prior, the prosecution objected to the question that was asked of Marcelis and trial court distinctly overruled the objection. Trial court stated, "She can answer." (N.T. 1/30/09, at 159). The essence of the question asked, of the things Marcelis claim she heard in the truck, "it could have" been based upon what was going on in Marcelis' head, fantasizing, or going through a drug stupor? Marcelis appropriately answered the question presented consistently to the merits of the question but at the same time Marcelis wasn't given the opportunity to finish giving her answer to the question which trial court had no crystal ball to see the fruits of the witness' response in totality. "Yeah, the drugs I was taking could cause you - -". Nevertheless, the witness' answer was within the boundaries of relevance which neither mislead or confused the jury. The origin of the question was "could have" and trial court told Marcelis not to tell her "what could", negating the whole question in which she allowed. Intervention is unjustified when the question presented was allowed by trial court itself and the answer in response is completely consistent to the question. Marcelis was caught off guard and confused by trial court intervening during cross examination. Marcelis herself was aware that her response was in harmony with the question and that trial court allowed and authorized the question to be asked. She informed the court that she heard the question but did not understand what the court wanted from her. When questioned about what was said in the car it was interpreted by Marcelis as well as the jury that trial court was assuming the role of prosecutor. As a result Marcelis answered compatibly with her testimony during direct examination to satisfy the side of the prosecution in order to maintain leniency she expected. So not only did trial court abuse its discretion by intervening but it took it a step further and abused its discretion by questioning Marcelis about what was said by the defendants, which had no bearing on the intended purpose of the question asked by counsel. Trial court totally disregarded what was sought by counsel and ran to the aid of the prosecution and rehabilitated Marcelis' testimony in the middle of cross examination. The jury was conscious of these circumstances that exhibited favor, bias, and opinion of Marcelis.

Furthermore, trial court had no viable reason to question Marcelis in reference to what she allegedly heard in the car, simultaneously, this too exhibited bias to the jury. "A major reason for the restrictions on a trial judge's questioning is the concern that his conduct may lead the jury to conclude that the court has made up its mind on the question of the defendant's guilt, and that the jury should follow the judge's opinion." *Com. v. Seabrook*, 475 Pa. 38, 379 A. 2d 564 (1977). The unavoidable constant throughout the aforementioned dialogue between trial court and

Marcelis was that Marcelis had already previously testified to what she allegedly heard in the car between the defendants on direct examination (N.T. 1/30/09, at 123, 129-131). Not only did she testify to what she heard, she testified to it in depth. The prosecution went as far as showing Marcelis her statement in order to refresh her recollection and she testified consistent to the substance of that statement (N.T. 1/30/09, at 129-131). Trial court also moderated the objections during this specific line of questioning during direct examination. Hence, the unreasonableness of trial court questioning Marcelis in this regard.

"It is well established, however, that a trial judge has a right and sometimes the duty to interrogate witnesses... when important facts is indefinite or a disputed point needs to be clarified, the court may see that it is done by taking part in the examination... In exercising this prerogative, the court can not unduly protract testimony or show bias." *Carney v. Otis Elevator Co.*, 370 Pa. Super. 394, 536 A.2d 804 (1987). Trial court's questioning of Marcelis concerning what was said by the defendants was unreasonable because this important fact was neither indefinite or needed to be clarified. It was testified to in length on direct examination just prior to trial court's questioning. "A trial judge has the right if not the duty to interrogate witnesses in order to clarify a disputed issue or vague evidence. Unless the complaining party can establish the judge's questioning has constituted an abuse of discretion, resulting in discernible prejudice, capricious disbelief, or prejudgment, a new trial will not be granted." *Jordan v. Jackson*, 200 Pa. Super. 208, 876 A.2d 443 (2005). Again, what Marcelis alleged she heard in the car did not need to be clarified, nor was it vague as to what Marcelis claim she heard. Defense counsel's purpose of his question was not if Marcelis thought, stated, or believed what was said in the car by the defendants it was to induce Marcelis to acknowledge that there is the possibility that it could have been from her imagination because of her over excessive drug use. Marcelis testified to it prior so rightfully she may have very well believed it happened, but counsel's purpose was to illuminate the fact that there is a very strong possibility that the effects of the drugs caused hallucinations and the most effective way to portray that was to get Marcelis to admit that possibility by the way the drugs effected her personally. The abuse of discretion is a result of discernible prejudice which the jury recognized due to trial court changing the whole direction of the question and rehabilitating Marcelis' testimony in behalf of the prosecution. "[I]t is established that it is proper for the court to intervene to ask questions on facts which did not appear from either counsel's examination and which had a tendency to enlighten the jury." see *Com. v. Myma*, 278 Pa. 505, 123 A. 486 (1924). It is clear that the court's question appeared in direct examination and in no way enlighten the jury due to the question being previously asked and answered. In *Com. v. Conde*, 2003 Pa. Super. 144, 822 A.2d 45 (2003) it is stated "trial court

is entitled to limit scope of cross examination to prevent cumulative testimony." Here, there was no need for trial court to requestion the witness because it was only cumulative and furthers the unreasonableness of the court's actions. "Indeed, while [i]t is always the right and sometimes the duty of a trial judge to interrogate witnesses, ... questioning from the bench should not show bias or feeling nor be unduly protracted." *Com. v. Watts*, 358 Pa. 92, 56 A.2d 81 (1948). The court's question showed bias, feeling, and opinion on the matter and improperly prejudiced the Appellant.

The purpose of counsel's questioning Marcelis in reference to the things Marcelis claim she heard in the truck, possibly being from fantasizing or going through a drug stupor, was to create a reasonable doubt in the minds of the jury. It was instill in the jury that there is a very significant possibility that Marcelis' massive drug use may have caused her to be delusional, have hallucinations, and imagine what she thought she heard. Marcelis' testimony of the types and quantity of drugs she used on the day in question side effects are consistent with having hallucinations and counsel wanted the witness to acknowledge that what she thought she heard was a result of the side effects the drugs caused. The probative value of such evidence was of the utmost importance because the potential existed for the jury to find everything Marcelis testified untruthful. Therefore, this reasonable doubt counsel attempted to create was imperative. Trial court stopped Marcelis in mid sentence of answering a question that trial court allowed to ask her a question that was already asked, that Marcelis already answered, and that trial court and the jury already knew the answer to, which constitutes rehabilitation. This destroyed the reasonable doubt that counsel's question tried to create. The rehabilitation displayed to all parties including the jury that the court believed that Marcelis heard what she said she allegedly heard in the truck regardless of what drugs Marcelis had taken, indicating opinion of Appellant's guilt. "An expression indicative of favor or condemnation is quickly reflected in the jury box and at counsel table. To depart from the clear line of duty through questions, expressions or conduct, contravenes the orderly administration of justice. It has a tendency to take from one of the parties the right to a fair and impartial trial, as guaranteed under our system of jurisprudence. [From *Com. v. Myma*] Judges should refrain from extended examination of witnesses; they should not, during the trial, indicate an opinion on the merits, a doubt as to the witnesses' credibility, or do anything to indicate a leaning to one side or the other..." *Com. v. Hammer*, 494 A.2d 1054, 508 Pa. 88 (1985). Yes counsel tried to salvage this reasonable doubt by asking additional questions in the same relevance afterwards but the damage was already done. The court showed its favor and once a bell is rung you can not unring it.

This rehabilitation of Marcelis in favor of the prosecution is where the roles of the prosecution and trial court are blurred. Under our system trial judge

is properly presented to the jury as the ultimate authority figure for this reason juries are traditionally highly sensitive to every utterance of the trial judge. see *Bursten v. U.S.*, 393 F.2d 976 (5th Cir. 1968). Naturally, when the court interrupted the defense's questioning to requestion the witness in a rehabilitative manner the court's role was no longer defined as neutral by the jury. "Our adversary system of criminal justice demands that our perspective roles of prosecution and defense, and neutral role of the court be kept separate and distinct in a criminal trial." *Brown v. Lynaugh*, 843 F.2d 849 (5th Cir. 1988). Such a function as rehabilitation is reserved for the prosecution on redirect, trial court unreasonably participated in this function, as a result the court's role and prosecution's role were intertwined. That prejudice was too great for the Appellant to overcome.

Although, all of the aforementioned instances regarding trial court's questioning of Marcelis are suffice to deem this trial unfair there are more occurrences that furthers trial court's bias. By the jury being fully alert of trial court's bias in favor of the prosecution it too recognized the bias that immediately followed. Counsel shortly after, questioned Marcelis about the responses she initially gave Detective Crone when being interrogated. It was recognized prior that her initial responses when being questioned by detectives were that she "didn't know" anything in reference to this case. Counsel asked Marcelis, "What was the question he asked you that caused you that response, I don't know?" (N.T. 1/30/09, at 160). Immediately the court told Marcelis not to answer that question. "MR. GREENBERG: Why not? THE COURT: Don't answer that question. Thank you." This prompted counsel to abort this line of questioning and denied the defense the opportunity to attack the witness' credibility dealing with the specific questions Detective Crone asked that she initially denied having any knowledge about. This line of questioning was essential to the defense and probative value was not disturbed by any prejudice. Counsel was so surprised by trial court's exclusion of the question he was compelled to ask "why not", in which no explanation was given. "As bearing on his credibility, a witness may be cross examined as to inconsistent acts or omissions on his part which tends to discredit him." quoting *Kaplan v. Loev*, 327 Pa. 465, 194 A. 653 (1937), *Com. v. Green*, 525 Pa. 424, 581 A.2d 544 (1990). Counsel was in the confines of propriety and trial court's impartiality fueled this exclusion and abuse of discretion. Counsel cross examination regarding Detective Crone's specific questions and Marcelis' responses of "I don't know" would've created the inference that Marcelis may have not known what she claims, enlightened the jury to the specific occurrences during the interrogation, and brought out testimony in reference to suspicions of coercion due to Marcelis acknowledging prior that she had to consent to being video taped, and sign a statement to be given her car, not having to come to court, and her parents wouldn't find out about this incident. Counsel's line of questioning in this regard

paramount. It is certainly true that cross examination is a vital and fundamental part of a fair trial. Full cross examination of a witness upon the substance of his direct testimony is an absolute right, the denial of which is error of constitutional dimensions. see *Pointer v. Texas*, 380 U.S. 400 (1965) and *Alford v. United States*, 282 U.S. 687 (1931). Moreover, the right of cross examination extends beyond the subject testified to in direct testimony and includes the right to examine in any facts tending to refute inferences or deductions arising from matters testified to on direct. *Com. v. Lopinson*, 427 Pa. 284, 234 A.2d 552 (1967).

Consequently, soon after trial court excluded counsel's question dealing with the specifics of Detective Crone's interrogation, trial court again excluded another question in regards to Detective Crone's questioning of Marcelis. Counsel asked Marcelis that eventually in her mind when she gave Detective Crone the answers she thought he wanted to hear the questioning proceeded because initially her answers were she didn't know (N.T. 1/30/09, at 161). The prosecution objected to counsel's question on the basis to what she thought Detective Crone wanted to hear, trial court directed counsel to rephrase the question (N.T. 1/30/09, at 161-162). Clearly, counsel's question was legitimate. His question merely asked Marcelis about in her own mind she gave Detective Crone the answers she thought he wanted to hear. In no way does it infer about the thoughts that were actually in Detective Crone's mind, only about what Marcelis thought. Which is unquestionably appropriate and needed not to be rephrased whatsoever. Trial court's impartiality was recognized by the jury due to trial court denial and limitations placed on counsel's questioning of Marcelis concerning Detective Crone's interrogation, rendering it impossible for counsel to have any effective cross examination on the matter. As a general rule, it is elementary that a party is entitled on cross examination to bring out every circumstance relating to a fact which an adverse witness is called to prove. *Peters v. Shear*, 351 Pa. 521, 41 A.2d 556 (1945); *Com. v. Green*.

Again, trial court prevented counsel from probing Marcelis about material circumstances and putting her credibility to the test. On recross examination trial court totally cut off counsel's question to Marcelis and dismissed the witness from the witness stand (N.T. 1/30/09, at 168). The irony of this occurrence is trial court allowed prosecution two opportunities of redirect examinations. This constituted two occasions of rehabilitation. When counsel attempted to question Marcelis about the fruits in which the prosecution's second redirect examination produced he was completely denied. The importance of this denial is the prosecution asked Marcelis did she imagine the things she heard and what happened that day, and she answered, "No, I don't believe I imagined anything." (N.T. 1/30/09, at 167-168). This prompted counsel to attempt to question Marcelis because of this new assertion of uncertainty. Previously, counsel's question of the things Marcelis claimed she heard in the truck

could have been from hallucinations was for the purpose of undermining this belief and just like now as it was then, trial court made it impossible for counsel to put the weight of her prior testimony to the test. Counsel should have been able to question Marcelis about what she believed. This denial, like the ones before, leaves a void of the information that could've been produced which is an intrusion of the Appellant's right to confront the witness. "It is the essence of a fair trial that reasonable latitude be given the cross examiner, even though he is unable to state to the court what facts a reasonable cross examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his or her testimony and credibility to a test, without which the jury can not fairly appraise them.... To say that prejudice can be established only by showing that the cross examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantive right and withdraw one of the safeguards to a fair trial." *Com. v. Ritchie*, 502 A.2d 148, 509 Pa. 357 (1985).

In the face of all this prejudice to the Appellant conveyed by trial court, counsel's reluctance to at least object was due to it being of no avail, therefore it had to be endured. The notion that the judge is the foremost regulator of his own conduct is amply recognized by the Code of Judicial Conduct, adopted by this court in 1973, effective January 1, 1984: "A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved." Code of Judicial Conduct, Canon 1. Similarly, recognized in *Com. v. Hammer* any objections on the matter would've only irritate the court. "The efficacy of counsel in assuring impartiality of the judge is negated by this self-regulatory function and the authority of the bench, for a judge who poses a question or comment during the trial is predisposed to believe that question or comment is proper, lest it not be spoken. Given the predisposition, the likelihood that the judge will be well-cautioned by counsel's objection is negligible. In that context, the rationale underlying the waiver doctrine, that timely objection gives the court the opportunity to cure the error, becomes a relatively empty one. Indeed the possibility exist that counsel's objection will be viewed as a source of annoyance and may well aggravate the situation."

In conclusion, trial court improperly limiting the defense's cross examination and improper questioning of Rachel Marcelis undermining the defense's case and bolstered the Commonwealth's witness' testimony and credibility and strengthened the prosecution's case. The court exhibited bias, partiality, and favor of the prosecution's position of its witness. The jury was impressed and influenced by judge's opinion and favor on the matter of Marcelis and denied Appellant a fair trial. Prejudice was the result of the court's abuse of discretion for residing on

the side of the prosecution, a act that was too great for the Appellant to overcome.

Wherefore, for the reasons contained herein Petitioner requests this Court to grant P.C.R.A. relief and set this matter for a new trial.

Respectfully Submitted,



Arnel Baxter
HX-3302
SCI Coal Township
1 Kelley Drive
Coal Township, Pa. 17866
Petitioner

PAA
Ex. 7

FILED

SEP 24 2010

Post Trial Unit

GARY S. SERVER, ESQUIRE
I.D. 52866
52103 DELAIRE LANDING
PHILADELPHIA, PA 19114
(215) 632 - 3546

ATTORNEY FOR PETITIONER

COMMONWEALTH OF PENNSYLVANIA : COURT OF COMMON PLEAS
VS. : PHILADELPHIA COUNTY
: CRIMINAL DIVISION
: CP-51-CR-0013121-2007
ARMEL BAXTER :

CP-51-CR-0013121-2007 Comm. v. Baxter, Armel J.
Amended Post-Conviction Relief Act Petition Filed



AMENDED PETITION UNDER THE POST CONVICTION RELIEF ACT

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

The Petitioner, ARMEL BAXTER, by and through his attorney, Gary S. Server, Esquire, files this petition in conformity with the requirements of the Post Conviction Relief Act, and in support thereof avers the following:

1. Petitioner was found guilty of Murder in the First Degree and related offenses after a jury trial.
2. On 2/5/09, the Petitioner was sentenced by The Honorable Renee Cardwell Hughes to the mandatory life sentence without parole.
3. Petitioner has taken the following actions to secure relief from conviction and sentencing, to wit:
 - (a) Direct appeal to Superior Court where judgment of sentence was affirmed on 3/3/10;
 - (b) Petition for Allowance of Appeal to the Supreme Court of Pennsylvania which was denied on 2/23/11;
 - (c) The within timely Petition under the PCRA which was filed on 9/23/11.
4. Petitioner is presently incarcerated at SCI Coal Township under DOC number HX 3302.
5. Petitioner alleges the following general grounds for relief:
 - (a) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place.

(b) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place.

6. Specifically, petitioner alleges the following:

The Petitioner's Sixth Amendment constitutional right to counsel was denied where his trial counsel failed to appear or to meaningfully participate telephonically in a discussion about how to answer a jury question. Counsel sent a civil attorney who had no experience in a criminal jury trial to represent the Petitioner during the critical stage of the trial where a jury question had to be answered. And trial counsel when consulted indicated that the civil attorney was to defer to the decision of the co-defendant's counsel.

The Petitioner's Fourteenth Amendment constitutional right to due process was denied where the Commonwealth failed to disclose that Rachel Marcelis had been given immunity for her testimony which she disclosed at a prior trial for the co-defendant.

Trial counsel was ineffective when he unreasonably introduced evidence of the Petitioner's drug related activity in order to rebut the inference of flight and concealment where such evidence directly contradicted the defense that the Petitioner was a person of good character unlikely to commit a crime.

7. Petitioner reserves the right to supplement this petition upon production of the notes of testimony or the discovery of additional evidence prior to the next scheduled date of the hearing.

WHEREFORE, your Petitioner prays that the Honorable Court grant leave for the presentation of testimony in this matter and grant the Petitioner relief in accordance with the Post Conviction Relief Act, to wit: grant a nunc pro tunc appeal.

RESPECTFULLY SUBMITTED BY:

GABY S. SERVER, ESQUIRE

MEMORANDUM

Section 9545 of the Post Conviction Relief Act requires that a PCRA Petition be filed within one year of the date the judgment becomes final; 42 Pa.C.S. Section 9545(b)(1). In the instant case, the judgment became final on or about 3/25/11, 30 days after the Supreme Court denied the Petitioner's Allocator Petition. This Petition was filed on 9/29/11, well within the one year limitation period. Therefore because this Petition is timely this Court has jurisdiction to consider his claims.

In order to establish an ineffective assistance of counsel claim the Petitioner must prove by a preponderance of the evidence that the underlying claim has arguable merit, that counsel's performance had no reasonable basis and that the Petitioner was prejudiced. Once these three prongs have been proven the Petitioner must also demonstrate that the ineffective assistance of counsel so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place; COMMONWEALTH V. LACAVA, 542 PA. 160, 666 A.2D 221 (1995).

The Sixth Amendment to the U.S. Constitution requires that in all criminal prosecutions an accused must have the assistance of counsel. The parallel provision of the Pennsylvania Constitution is Article 1, Section 9. An accused person's right to be represented by counsel is a fundamental component of the criminal justice system; COMMONWEALTH VS. ARROYO, 555 PA. 125, 723 A.2D 162 (1999). In U.S. vs. CRONIC, 104 S.CT. 2039, 466 U.S. 648 (1984) the U.S. Supreme Court held that a denial of counsel at a critical stage of his trial violates an accused person's constitutional rights. The denial of counsel at a critical stage presumes the existence of prejudice. In CRONIC the Court found that there was constitutional error without any showing of prejudice where counsel was either totally absent or prevented from assisting the accused during a critical state of the trial.

The Fourteenth Amendment to the U.S. Constitution constrains any state from depriving any person of life, liberty or property without due process of law.

In the instant case the Petitioner's Sixth Amendment right to counsel was denied where his trial counsel failed to appear or to meaningfully participate in a discussion about how to answer a jury question. Instead of fulfilling his obligation under the constitution counsel sent a civil attorney who had no experience in a criminal jury trial to represent the Petitioner during a critical state of the trial where a jury question had to be answered. Instead of considering the question and proposing an answer that was tailored to effectuate his client's interest counsel indicated that the inexperienced civil attorney should defer to the decision of co-defendant's counsel.

The Petitioner's Fourteenth Amendment right to due process was denied where the Commonwealth failed to disclose that Rachel Marcellis had been given

immunity for her testimony which the Petitioner learned that she disclosed at a prior trial for a co-defendant. The Commonwealth has still not tendered that evidence to the Petitioner.

Counsel was ineffective when he unreasonably introduced evidence of the Petitioner's drug related activity in order to rebut the inference of flight and concealment where such evidence directly contradicted the defense that the Petitioner was a person of good character unlikely to commit a crime. This strategy was not reasonable and did not effectuate the best interests of the Petitioner.

WHEREFORE, the Petitioner respectfully requests that the Court grant such relief as it may deem appropriate: to wit a new trial.

RESPECTFULLY SUBMITTED BY:

GARY S. SERVER, ESQUIRE

PAA
Ex. 8

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
CRIMINAL DIVISION

CP-51-CR-0013121-2007 Comm. v. Baxter, Arnel J.
Motion to Proceed Pro Se

Arnel Baxter
Petitioner

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NOV 13 2013



v.

APPEALS/POST TRIAL

Docket #:
CP-51-CR-0013121-2007

Commonwealth of Pennsylvania

PETITION TO PROCEED PRO SE

To the presiding Judge of the Court in this instant matter: P.C.R.A.

Your Petitioner, Arnel Baxter, by his own accord, moves this Court to grant Petitioner guaranteed right to proceed pro se, guaranteed by the Sixth Amendment, in support thereof represents the following:

1. A defendant.... has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so, and such right of self-representation is supported by the structure of the Sixth Amendment, which necessarily implies a right of self-representation, and by the English and colonial jurisprudence from which the Sixth Amendment emerged. see *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975). A criminal defendant or appellant has the right to proceed pro se at trial and through appellate proceedings. see *Commonwealth v. Grazier*, 552 Pa. 9, 713 A.2d 81 (1998).
2. Irreconcilable differences on the direction of PCRA and a complete breakdown of communication which resulted in a denial of defendant's right to competent representation.
3. PCRA counsel refuses to argue meritorious issues within Petitioner's established PCRA petition / memorandum of law, when issues clearly exhibits constitutional error and merit. PCRA counsel doesn't forego Petitioner's issues due to lack of merit, they are foregone due to his sloth and neglect.
4. PCRA counsel refuses to pursue witnesses who are in possession of exculpatory information and relevant to this case. Simultaneously, PCRA counsel refuses to hire private investigator to pursue witnesses to conduct interviews and acquire necessary affidavits when resources and information is readily available to him.

5. PCRA counsel refuses to forward vital documents that are essential to PCRA. They consist of: Bill of Particulars, Information and / or Indictment, Criminal Complaint, Judgment of Sentence Order, and Affidavit of Probable Cause. Without said documents no meaningful appeal can be made.
6. Petitioner is forced to proceed pro se because PCRA counsel refuses to protect and preserve the interest of his client. Petitioner explicitly is left with no choice other than to exercise his right to be heard on his right to proceed pro se induced by PCRA counsel's lack of concern for a court appointed client.

Upon conclusion of proceeding Petitioner asks this Court to order the following:

- A. A continuance so that Petitioner can execute and prepare for amended PCRA petition.
- B. Appointment of private investigator.
- C. Bill of Particulars, Information and / or Indictment, Criminal Complaint, Judgment of Sentence Order, and Affidavit of Probable Cause be forwarded to the Petitioner immediately. (True and Correct Certified copies)
- D. Rachel Marcelis' immunity agreement with the Commonwealth be forwarded to the Petitioner.
- E. Trial counsel's and prosecution's witness lists be forwarded to Petitioner.
- F. Investigation into omitted dialogue caused by trial court, Renee Cardwell Hughes, which happened in trial transcripts.
- G. Appointment of standby counsel.
- H. The Grazier hearing be transcribed and everything within be preserved for the record. Also Petitioner be forwarded everything that was preserved at Grazier hearing.

Relief Petitioner seeks: (one of the following 7 through 8)

7. Appoint new counsel; remove current counsel from case
8. This Court orders that PCRA counsel argues issues Petitioner asserts as well as executes problem areas displayed within this Petition
9. Petitioner represents himself pro se; with standby counsel

Commonwealth of Pennsylvania
Municipal Court
County of Philadelphia
1st Judicial District



Order Granting / Denying Motion

PAA
Ex.9

Commonwealth of Pennsylvania
v.
Armel J. Baxter

Philadelphia County Clerk of Quarter Sessions
1301 Filbert Street
TD1101
Philadelphia, PA 19107
PH: 215-683-7290

Docket No: CP-51-CR-0013121-2007

ORDER GRANTED

AND NOW, this 9th day of June, 2014, after consideration of the FOR GRAZIER HEARING TO PERMIT DEFENDANT TO PROCEED PRO SE by the Defendant it is ORDERED that the FOR GRAZIER HEARING TO PERMIT DEFENDANT TO PROCEED PRO SE is GRANTED.

GRAZIER HEARING WAS HELD.
DEFENDANT IS PERMITTED TO PROCEED PRO SE.
ATTORNEY GARY S. SERVER HAS BEEN PERMITTED TO WITHDRAW.
Judge Barbara A. McDermott, ADA Dan Blanchard, Atty. Gary S. Server, Steno Janine Doyle, Court Clerk Erin Waters

6/9/14

Date

BY THE COURT:

Barbara McDermott

Judge Barbara A. McDermott



[Handwritten signature]

CP-51-CR-0013121-2007 Comm. v. Baxter, Armel J.
Grazier Hearing Held - Defendant Permitted to Proceed Pro Se



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Ex 10

Received
SEP 8 2014

Clerk of Court

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

ARMEL BAXTER,
Petitioner

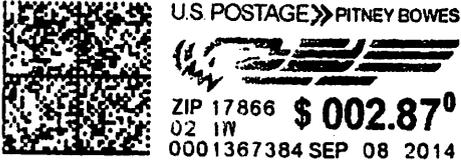
HX 3302
SCI COAC
TOWNSHIP

v.

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY - PENNSYLVANIA

CP-51-CR-0013121-2007

PCRA PETITION - PRO SE



CP-51-CR-0013121-2007 Comm. v. Baxter, Armel J.
Post-Conviction Relief Act Petition Filed



7198105331

DEFENDANT'S "UNCOUNSELED" PRO SE SUPPLEMENTAL PE
AND CONSOLIDATED MEMORANDUM OF LAW UNDER
THE POST CONVICTION COLLATERAL RELIEF ACT

TO THE HONORABLE BARBARA McDERMOTT, JUDGE OF THE SAID COURT:

AND NOW COMES, Armel Baxter, pro se, in absence of a attorney of law, and /
or without the benefit of paralegal assistance, submits this uncounseled Pro se
Petition under the Post Conviction Relief Act (P.C.R.A.), in accord and pursuant to
42 Pa. C. S. § 9541 - 9545 et seq. - of the Post Conviction Relief Act.

Procedural History

1. Petitioner was found guilty of Murder in the First Degree and related offenses after a jury trial.
2. On 2/5/09, the Petitioner was sentence by the Honorable Renee Cardwell Hughes to life without the possibility of parole.
3. Petitioner has taken the following actions to secure relief from conviction and sentence, to wit:
 - Direct appeal to Superior Court where judgment of sentence was affirmed on 3/3/10; Petition for Allowance of Appeal to Supreme Court, which was denied on 2/23/11; Timely PCRA Petition which was filed on 9/23/11.

Petitioner is Entitled to an Evidentiary Hearing

Without your Honorable Court granting an Evidentiary Hearing on the merits of Petitioner's PCRA claims, Your Honorable Court cannot determine from the record whether Petitioner's ineffectiveness claims are of merit or in lack thereof, a full and fair open Evidentiary Hearing is the only available proceeding to resolve Petitioner's allegations and PCRA claims, whereas, the Evidentiary Hearing process is the only and appropriate arena to resolve factual issues. Too many facts remain uncertain and will surely undermine Petitioner's PCRA claims, absent an Evidentiary Hearing, in the manner as is outlined therein Petitioner's PCRA petitions, which factual basis supporting grounds for PCRA relief are evident.

Petitioner is entitled to relief on record based claims where there are absolutely no dispute with respect to material facts. Pa.R.Crim.P., Rule 907 (2) requires such relief wherein the pleadings raise material issues of facts; and Evidentiary hearing is required. Pa.R.Crim.P., Rule 908 (A)(2); contra *Comm. v. Williams*, 732 A.2d 1167, 1189-90 (Pa. 1999). ("Clearly, a material factual controversy exists...; therefore, we hold that the PCRA court erred in dismissing [the] ground for relief without conducting a factual hearing.")

A Evidentiary Hearing cannot be denied unless your Honorable Court is certain of the total lack of merit of the petition. see *Comm. v. Bennett*, 462 A.2d 772, 773 (1983) [quoting *Comm. v. Rhodes*, 416 A.2d 1031, 1035-36 (1979)]; accord *Comm. v. Korb*, 617 A.2d 715, 716 (1992) [remanding for evidentiary hearing where it appears that appellant has presented a claim of ineffective assistance of counsel which contains at least arguable merit] (citing *Comm. v. Copeland*, 554 A.2d 54, 60-61 (1988)). Even in borderline cases petitioners are to be given every conceivable legitimate benefit in the disposition of their claims for an evidentiary hearing. see also *Comm. v. Pulling*, 470 A.2d 170, 173 (1983); *Comm. v. McGill*, 832 A.2d 1014, 1022 (2003) ["only where the record clearly establishes that the action or omission of [trial counsel] was without a reasonable basis should the court resolve the reasonable basis prong absent a remand for an evidentiary hearing as to strategy of counsel".]

The claims Petitioner has pled in this case - including the claims of ineffective assistance of counsel - are not frivolous; nor is this a borderline petition. On the contrary, the petition sets forth material facts that, if uncontested by the Commonwealth or proven at an Evidentiary Hearing setting, entitle Petitioner to relief. Unless Commonwealth concedes the facts and Petitioner's entitlement to relief, an Evidentiary Hearing is required. *Comm. v. Sherard*, 394 A.2d 971 (1978); *Comm. v. Pulling*, 470 A.2d 170 (1983).

The governing statutory provision, 42 Pa.C.S. § 9545 (d)(1), does not require affidavits from proposed witnesses to be submitted by the PCRA Petitioner prior to ordering an evidentiary hearing. A principal architect of the 1995 Legislative Amendments to the PCRA, Senator Stewart Greenleaf, spoke on the matter: "[t]his amendment allows a defendant to merely present a summary of the statement so we know generally what that witness is going to say and merely sign a certification. Either the witness, his attorney, the defendant's attorney, or the Petitioner himself, the defendant himself can sign a certification saying to his best knowledge that this was an accurate statement of what the witness would testify to. So I think it is an effort, again, not to take anyone's rights away from him but also to help that defendant in the processing of his appeal and hopefully to make it easier for him to obtain a hearing, which we want him to obtain." see *Comm. v. Brown*, 767 A.2d 576, 2001 Pa. Super 18 (2001). Here, Petitioner has satisfied this requirement with his presentation of Certification of testimony of relevant witnesses, thus, Evidentiary Hearing is required.

Should this Court find this or any amended or supplemental Petition defective in some respect, the Rule of Criminal Procedure requires that this Court notify Petitioner of the nature of any such defects and afford Petitioner the opportunity to comply and conform his petition. see Pa.R.Crim.P. 905 (B).

ARGUMENTS

TRIAL COUNSEL VIOLATED CONSTITUTION AMENDMENT 6, EFFECTIVE ASSISTANCE OF COUNSEL AND RIGHT TO CONFRONTATION, BY FAILING TO CROSS EXAMINE, CONFRONT AND IMPEACH RACHEL MARCELIS' TESTIMONY REGARDING IMMUNITY GIVEN BY THE COMMONWEALTH AND PRIOR INCONSISTENT STATEMENT

Trial counsel, Mark Greenberg, violated the Sixth Amendment of the Constitution regarding Appellant's right to effective assistance of counsel and right to confrontation by failing to cross examine, confront, and impeach Rachel Marcelis with the immunity petition given to her by the Commonwealth and her prior inconsistent statement. Counsel's decision to forgo cross examining her about her immunity and prior statement was unreasonable as it infringed upon Appellant's right to confrontation and the jury's duty to properly assess and appraise the witness's credibility and testimony. Both the United States and Pennsylvania Constitutions guarantee the right of the accused to confront witnesses against him. U.S.Const.Amend. VI; Pa.Const.Art.1, §9. The right of confrontation entitles a criminal defendant to physically face and cross examine those who testify against him at trial. *Comm. v. Crosland*, 397 Pa. Super. 622, 580 A.2d 804 (1990). The purpose behind the rule is to ensure the integrity of the fact finding process. *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531 (1980). Cross examination offers a defendant a tool to sift the conscience of the witness and test the accuracy of his recollection. *Mattox v. United States*, 156 U.S. 237, 242-243, 15 S.Ct. 377 (1895). These basic components of Appellant's right to confrontation were not achieved due to trial counsel denying Appellant the opportunity to put the weight of Marcelis' testimony and her credibility to the test. Appellant was denied a substantial right and one of the safeguards essential to a fair trial.

On or about January 16, 2009 the District Attorney's Office petitioned the Court in this case to grant Rachel Marcelis immunity in this matter. Her immunity regarding this case was premised upon her involvement in this case as helping the defendants flee the scene of the murder and driving defendants to Wilks Barre, Pa., which was alleged in her statement to Philadelphia homicide detectives. Subsequently, on or about January 21, 2009 it was ordered by the Court to grant Rachel Marcelis immunity. Counsel's ineffectiveness is tied to his failure to impeach and attack Marcelis' credibility with the existence of the aforementioned immunity agreement. This impeachment evidence was relevant and an important aspect of Appellant's right to confront Marcelis with evidence of bias, interest, and corrupt motive.

"It is 'hornbook' law that a witness's motivation or inducement to testify is properly within the scope of cross examination." see *Comm. v. Baston*, 242 Pa. Super. 98, 363 A2d 1178 (1976); *Alford v. United States*, 282 U.S. 687, 51 S.Ct. 218 (1931). Bias, interest, or corruption is established by demonstrating circumstances that might naturally lead a witness to favor or disfavor one party in a proceeding. Any evidence that supports an inference of bias, interest, or corruption is relevant impeachment evidence. Rightfully, a witness testifying under a grant of immunity may be impeached thereby. Appellant was entitled to establish Marcelis' immunity demonstrates interest and bias by means of cross examination. The partiality of Marcelis was a paramount subject of exploration at trial, and was relevant to discrediting this witness and affecting the weight of her testimony. The Supreme Court of the United States has recognized that the exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross examination. see *David v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105 (1974).

"We cannot over emphasize the importance of allowing full and fair cross-examination of government witness whose testimony is important to the outcome of the case. Out of necessity, the government frequently relies on witnesses who have themselves engaged in criminal activity and whose record for truthfulness is far from exemplary. These witnesses often have a major personal stake in their credibility contest with the defendant. Full disclosure of all relevant information concerning their past record and activities through cross-examination and otherwise is undisputably in the interest of justice." *United States v. Brooke*, 4 F.3d 1480, 1489 (9th Cir. 1993). In this instance, the jury was not cognizant about Marcelis' immunity, favorable treatment, and motivation to testify against Appellant because of counsel's failure to cross examine Marcelis accordingly and as a result counsel's errors so undermined the truth determining process no reliable adjudication of guilt or innocence took place.

Nowhere in the record is it presented by any party that Rachel Marcelis has been given immunity. Neither on direct or cross examination is Marcelis' immunity even alluded to. Although it is customary for the prosecution to show interest, bias, or favorable treatment of its witnesses in anticipation of an attack by the opposing party there is no mention of immunity given to Ms. Marcelis. Nevertheless, the onus is vested in trial counsel to identify what types of evidence may be relevant and require development and pursuit. see *Comm. v. Gorby*, 909 A.2d 775, 589 Pa. 364 (2003). Thus, it was counsel's duty to present to the jury the existence of the immunity and attack the witness's credibility through cross examination by a showing of motive, bias, and interest which colored Marcelis testimony.

Counsel's decision not to impeach Marcelis with evidence of her bias and interest has no reasonable basis. It cannot be said that it was counsel's strategic decision to forgo cross examining this witness about her immunity to pursue some other alternative. Counsel's decision wasn't based on strategy, it was based on neglect, sloth, lack of concern, and inattention. It was counsel's overall strategy to convince the jury that the Commonwealth's witnesses were not credible. More specifically, it was trial counsel's strategy to convince they jury that Rachel Marcelis was not credible and she would say anything to please her particular audience (N.T. 1/29/09, at 42); also (N.T. 2/4/09, at 98). In addition to this fact counsel also references Marcelis' conduct and alleges her criminal participation in this incident in his closing arguments (N.T. 2/4/09, at 98-99). However, it was already established by trial court's instructions that closing statements are not to be considered evidence (N.T. 2/4/09, at 47) which renders his attempt to make the jury aware of bias, interest, and corrupt motive to testify obsolete and stale. Thus, counsel's own words now testify against him and reveals his overall trial strategy, which necessitated attacking Marcelis' credibility through cross examination with the existence of immunity. Not only would the proper introduction of Marcelis' immunity through cross examination alert the jury to the fact that she was deemed a accessory, it was also consistent to counsel's overall strategy of convincing the jury Marcelis was not credible and had a motive to tailor her testimony to the Commonwealth's satisfaction. Counsel's decision was not reasonably designed to effectuate Appellant's interest as it was so unreasonable no competent lawyer would have chosen it.

Regarding Marcelis' prior inconsistent statement, previous to Appellant's trial Marcelis testify at Cordell Young's trial (CP-51-CR-0013578-2007) on June 10, 2008. The relationship between Cordell Young's trial and Appellant's trial is the statement given to Philadelphia detectives from Marcelis which contains her statement regarding both incidents. At Young's trial the record reflects Marcelis' testimony to be contrary to her testimony at Appellant's trial, which constitutes a prior inconsistent statement. "It is long settled that a prior inconsistent statement may be used to impeach a witness."Comm. v. Hensley, 295 Pa. Super. 225, 441 A.2d 431 (1982). Now, although prior inconsistent statements are generally admissible for the limited purpose of impeaching witnesses they also may properly be admitted as substantive evidence. see Comm. v. Brady, 510 Pa. 123, 507 A.2d 66 (1986). A prior inconsistent statement may be used as substantive evidence only when the statement is given under oath at a formal legal proceeding; or the statement had been reduced to a writing signed and adopted by the witness; or a statement that is a contemporaneous verbatim recording of the witness's statement. Comm. v. Lively, 610

A.2d 7, 530 Pa. 464 (1992). In the present matter this prior inconsistent statement could have indeed been used as impeachment evidence as well as substantive evidence. Marcelis prior inconsistent statement was made under oath at a prior legal proceeding and counsel was aware of this evidence. Had counsel attacked Marcelis' credibility with this evidence, casting doubt on this witness's truth and veracity, the outcome of the proceeding would have surely been different.

At Appellant's trial it is portrayed by Marcelis that when it came to her statement and her testimony that she was not being untruthful (N.T. 1/30/09, at 167-168). It was also portrayed by the prosecution that Marcelis was being totally honest and truthful with her testimony during closing arguments (N.T. 2/4/09, at 122-124). Marcelis also testified that when it came to being video taped during the video portion of her statement that she consented because she did not want her parents to find out she hung out in North Philly, police said they would give her car back, she wouldn't have to come to court, and her life would go back to normal (N.T. 1/30/09, at 142-145). Marcelis also admits that she consented to being video taped because she had final exams at school she wanted to take and states that if she consented to being video taped all the aforementioned incentives would be provided by police detectives (N.T. 1/30/09, at 166-167). The importance of these circumstances Marcelis portrayed and testified to are the fact they are totally inconsistent to her testimony at Cordell Young's trial.

It is preserved on the record at Cordell Young's trial that not only does Marcelis testify that her statement was untruthful but she was forced to give police the statement how they wanted, as it was not true. Marcelis testified that police informed her she was a prisoner and she was not allowed to leave, they took her car with her school work and she wasn't going to leave without giving them the statement the way they wanted it (Young's N.T. 6/10/08, at 208-209). Marcelis stated that the detective would come in and ask her a question and if it wasn't the answer he wanted he would leave as to punish her (Young's N.T. 6/10/08, at 211). She also states that the police weren't accepting what she believed to be the truth (Young's N.T. 6/10/08, at 221). In addition she testified that the only way she was allowed to leave to make it back to school for finals if she consented to be video taped, did what they wanted her to do and told them what they wanted her to (Young's N.T. 6/10/08, at 194); also stating police told her that she was going to give police what they wanted and not what she originally stated to them (Young's N.T. 6/10/08, at 199). Marcelis further testified that police omitted things from the video consent tape where she states that it was two days from hell, they forced her to tell them what they wanted and how horrible it was for her giving the statement (Young's N.T. 6/10/08, at 199-200).

Marcelis testified that she expressed all of these things to her lawyers, that she was kidnapped by Philadelphia police detectives and they refused to let her leave unless she agreed to sign a statement that wasn't true and agreed to be video taped saying things that weren't true (Young's N.T. 6/10/08, at 195). Ultimately, Marcelis testified that her whole statement is not accurate (Young's N.T. 6/10/08, at 204). Furthermore, there is an abundance of testimony which shows Marcelis was being untruthful, possessed bias, interest, and corrupt motive to give a false statement because of her hatred for Cordell Young due to a bad break up (Young's N.T. 6/10/08, at 162, 219, 220, 221-222). It was counsel's duty to impeach and attack this witness's credibility with her prior inconsistent testimony.

Counsel had no reasonable basis for not cross examining this witness in reference to her prior inconsistent statement, where such omitted evidence would not have been merely a general assault on the veracity of the witness, but it would have directly contradicted her version of the facts. Counsel's decision was not based on strategy or to pursue some other alternative because evidence of Marcelis' prior inconsistent testimony would have served the purpose of benefiting the defense. The record reflects that trial counsel admits that this case boiled down to the credibility of the Commonwealth's witnesses (N.T. 2/4/09, at 88) and the jury's determination of whether or not they're being truthful in their testimony and whether or not they're being accurate in their testimony. He also directs the jury's attention on the witnesses statements and how they were obtained (N.T. 2/4/09, at 92). Strategically counsel emphasizes that Marcelis is capable of saying anything and asks the jury to review her statement and testimony with the utmost caution (N.T. 1/29/09, at 42) due to how her statement was obtained. He attempts to persuade the jury that Marcelis eventually tells detective Crone what he wants her to hear after being interrogated vigorously for a long period of time (N.T. 2/4/09, at 98) during closing arguments to the jury but produces no evidence to provide merit to his assertions. It is apparant that cross examining Marcelis concerning her prior testimony at Young's trial would have been consistent to counsel's overall defense. Trial court rightfully acknowledges at a motion hearing that Marcelis is clearly a "critical witness" in this matter (Motion Hearing N.T. 1/23/09, at 12); And informs the defense and prosecution that, "there is plenty in the statement (Marcelis' testimony at Young's trial) that lets you both do what you need to do without creating this unduly prejudicial environment of talking about Ms. Whitfield's death." (Motion Hearing N.T. 1/23/09, at 13). No reasonable basis exist for counsel's decision to forgo confronting this witness with her prior inconsistent statement and because he didn't confront this witness with this readily available impeachment and substantive evidence it prejudiced Appellant.

Prejudice is present due to counsel's failure to cross examine and impeach Marcelis' credibility, creating a reasonable probability that the outcome of the proceeding would have been different but for counsel's ineffectiveness. Rachel Marcelis was the Commonwealth's most crucial and essential witness. Marcelis was presented to corroborate Anthony Harris and Hassan Durant's testimony as well as provide additional evidence of guilt. Marcelis testified to driving Appellant and codefendant (Jeffrey McBride) around the scene of the incident and also dropping them off in the vicinity. Shortly after dropping them off she testifies to seeing them running amongst a crowd of people coming from the direction of the incident. She states Appellant and codefendant got back into the car and overheard either of them say, "I got him". After, she testifies that codefendant admits that the person who was shot at the incident (Demond Brown) as being the person who shot Appellant's and codefendant's friend D-Nyce (Derrick McMillian). This gave the Commonwealth a motive for the shooting. Marcelis also testified to driving Appellant to Wilks Barre shortly thereafter the shooting. Her testimony was in essence the solid link between Appellant and crimes charged. This testimony provided inculpatory evidence, a motive, evidence of flight and concealment, and corroborated the testimony of the two other Commonwealth witnesses. Additionally, Marcelis testimony gave an intimate account of the incident more insightful than any other witness presented by the Commonwealth. It strengthened her believability because she was testifying against those she befriended and had a personal relationship with. Therefore, casting a doubt on Marcelis' credibility was essential to Appellant's defense.

The Court commented that "[a] successful showing of bias ... would have a tendency to make the facts to which [the witness] testified less probable in the eyes of the jury than it would be without such testimony." United States v. Abel, 469 U.S. 45, 105 S.Ct. 465 (1984). Marcelis' immunity obviously demonstrates bias but when coupled with her prior inconsistent statement it furthers the assertion of bias and untruthfulness because her testimony at Young's trial was not blanketed with immunity where a presumption from Marcelis to give allegiance to the Commonwealth does not exist, as it does here. This gives her prior inconsistent statement superior indicia of reliability than her statement does at Appellant's trial. Because counsel failed to cross examine Marcelis in reference to her immunity and prior inconsistent statement the jury was erroneously led to believe that she possessed no bias, interest, corrupt motive, or reason to be untruthful. Her testimony went virtually unchallenged and uncontradicted which gave the jury the impression that there weren't any blemishes on her credibility. There was no evidence presented to contradict Marcelis' testimony so it was free from conflict, with nothing to overshadow or directly challenge what

she testified to. This gave her the greatest reliability of all the Commonwealth's witnesses. Counsel's decision only worked to advance the Commonwealth's case and as a result they hanged their hat on the fact that there was no evidence presented to negate her not having any motive to lie or be untruthful. So the Commonwealth freely portrayed Marcelis as absolutely not having any motive to lie (N.T. 2/4/09, at 121). In the eyes of the jury this witness was merely testifying so that the truth be told, prejudicing Appellant.

"The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness testifying falsely that a defendant's life and liberty may depend." *Napue v. Illinois*, 79 S.Ct. 495, 360 U.S. 264 (1959). Here, the jury's determination of Appellant's innocence or guilt in this case was based on the credibility of witnesses, giving these determinations paramount importance, hence, giving Rachel Marcelis' credibility paramount importance. Furthermore, impeachment evidence was critical to the jury's determination of credibility. Had counsel exhibited evidence of immunity and impeached Marcelis with her prior inconsistent statement, simultaneously, using the prior statement as substantive evidence it would have changed the whole complexion of Appellant's trial. Simply, both instances of impeachment evidence and substantive evidence creates a reasonable doubt that did not otherwise exist. see *Comm. v. Moose*, 529 Pa. 218, 602 A.2d 1265 (1992).

It is essential for trial counsel to confront and discredit Marcelis with evidence of immunity because it would have induced the jury to focus it's attention on Anthony Harris' and Hassan Durant's testimony. These Commonwealth witnesses were the only other witnesses who implicated Appellant in this matter and by discrediting Marcelis it would have given Harris and Durant's testimony greater importance. And as such it would've given the circumstances in which the jury could have deemed their testimony untruthful greater importance. The weight given to these witnesses by the jury still depended on credibility and regarding Harris and Durant the record is saturated with a long list of inconsistencies compared to their respective statements and against either's testimony.

In furtherance of the aforementioned there is evidence of their bias, interest, and corrupt motive. Both Durant and Harris testified to having a very close relationship with the victim, being Harris the cousin and Durant being the best friend. Because of these relationships between these individuals compounded with the emotional effect it had, which was testified by both witnesses, gave the jury a reasonable inference of bias to testify falsely and interest on the outcome of the trial,

simultaneously, where the jury can naturally infer they possess animosity for Appellant. Also there is evidence that Harris and Durant may have conspired to testify falsely against Appellant and that they received information other than their own perceptions from people in the neighborhood. There was evidence on the record that Harris and Durant was untruthful about seeing each other after the shooting where counsel tried to illustrate that may have talked to one another about this case (N.T. 1/29/09, at 136-137) and (N.T. 1/30/09, at 61). This is of great significance because it exhibits to the jury that they are trying to hide the fact that they have seen each other, raising suspicion of the jury that they have talked about this case and conspired to resemble each other's testimony in attempt to give them more believability. Also there is evidence that Harris did receive information about this case other than his own observations from those in the neighborhood when he admitted it when he told police Appellant had been seen frequently in a white truck, where he called police and attempting to give them a tag number of the vehicle (N.T. 1/30/09, at 28). Thus, discrediting Marcelis would have put this case in a different light, creating a reasonable probability that the outcome would have been different had counsel done so.

Appellant need not show that the outcome would have been different or even that it more likely than not would have been different. *Strickland v. Washington*, 104 S.Ct. 2052, 466 U.S. 668 (1984). All he must show to prevail on the prejudice prong of either of his ineffectiveness claims is that the verdict does not carry the requisite confidence because of counsel's ineffectiveness or that absent his errors, there is a reasonable probability that the fact finder would have had a reasonable doubt as to his guilt. *Strickland* at 693, 694 (1984). The operative term is "reasonable probability". Case law makes it clear that this "reasonable probability" is not one which is more likely than not. It is just what it says it is - a reasonable - and a reasonable probability is a good chance - not a better than 50/50 chance, but a good chance that the fact finder would have had a reasonable doubt as to the charges on which it convicted. see also *Woodford v. Visciotti*, 537 U.S. 19, 22 (2002). A reasonable probability exists in this present matter creating a reasonable doubt that did not otherwise exist.

"The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *Unites States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090 (1974). This is the case in the present matter because counsel ignored readily available evidence that puts in question the credibility of a crucial Commonwealth witness. Evidence that only would have bolstered the defense. Counsel's failure to confront and impeach unfairly bolstered the credibility of the

witnesses whose testimonies were crucial to the success of the prosecution, resulting in prejudice. Counsel's unprofessional errors denied Appellant the opportunity to attack Marcelis' credibility and at least raise doubt in the minds of the jury about this witness's bias and untruthfulness. The jury was not able to factor in the grant of immunity and prior inconsistent statement in it's credibility assessment, a credibility assessment which was of paramount importance due to credibility being virtually the only issue in determining innocence or guilt. Counsel denied Appellant his guaranteed right to confrontation protected by both the Unites States and Pennsylvania Constitutions as it denied him a fair trial. It cannot be said that counsel's actions did not have an adverse effect on the outcome of the proceeding and it cannot be said that a reliable determination of guilt or innocence was made at trial. Counsel's actions prejudiced Appellant, hence warranting a new trial.

TRIAL COUNSEL VIOLATED CONSTITUTION AMENDMENT 6, EFFECTIVE ASSISTANCE OF COUNSEL, FOR FAILING TO INTERVIEW, INVESTIGATE, LOCATE, CALL, AND PRODUCE ESSENTIAL WITNESSES AT TRIAL

Gregory Blackmon was an eyewitness to the shooting which occurred on April 21, 2007. Gregory Blackmon would've testified that Appellant was not one of the shooters who comitted this crime. In his statement he gives a description of the shooters as being 6'1'' and 6'2'' in height and this differs from Appellant's description. He would testify the faces of the shooters were unable to be seen due to their faces being covered with hoodies. He would've explained that when the shooting occurred that everyone in the playground started running. Blackmon provides that he witnessed Commonwealth witness, Anthony Harris, accuse a person by the name of Malik Ware of comitting this crime. Mr. Blackmon states that he appeared for court everyday of the Appellant's trial and if he were called by counsel he would've been willing and available to testify.

Stefon Studivant was present at the Kenderton School yard where the shooting death of Demond Brown occurred. Studivant would have testified on April 21, 2007 he went to the Kenderton playground to play basketball and he witnessed two men wearing hoodies start shooting. He states he was unable to see the faces of the shooters because they were wearing hoodies tied up around their faces. He will testify that Appellant was not one of the shooters he witnessed shooting. He states that the shooters were physically different from Appellant in weight and size. Studivant explains in his affidavit that Anthony Harris nor Hassan Durant were just standing around watching as the shooting occurred as everyone in the school yard ran once the

shooting started. It is expressed by Studivant that he witnessed Anthony Harris accuse Malik Ware of Shooting Demond Brown. This witnesses also states that Harris and Durant are close friends who hangout and play basketball with one another. He will testify that he never received any subpoenas from Appellant's attorney to appear for court and around the time of the trial he was attending Lincoln University and if he was called to testify he would have been willing and available to testify.

Kyle Carter was a witness to the shooting which occurred at the Kenderton School on April 21, 2007. In Carter's statement he states when the shooting started he ran but was unable to see the faces of the shooters because he was scared and because they wore hoodies. He would've testified that when the shooting did occur everyone ran that present in the school yard. He also would've testified that he did not see the Appellant during the shooting. Regarding Anthony Harris, Carter observed Harris state that it was Malik who shot the victim. Carter states he was also present for everyday of the trial and missed school because of it. He also states he never spoke to Appellant's attorney while present at trial.

Darryl Mack was mentioned by Rachel Marcelis as being present in her vehicle when the incident occurred of the shooting of Demond Brown. Darryl Mack states in his statement that Marcelis drove to Broad and Allegheny before the shooting. He would testify that he drove Marcelis around as she did narcotics and eventually she was incoherent. Mack will testify that during the time of the incident he was with Marcelis and Appellant was not in the vehicle with them. Mack states in his statement that it would be impossible for Marcelis to be in two places at once when she was with him in the passenger seat, while comatose from drugs. He also states that he was served a subpoena from his Probation Officer and someone from Jeffrey McBride's (codefendant) attorney's (Michael Wallace) office. He will testify that he spoke briefly with McBride's attorney about this case and as a result the attorney told him he would only be hindering them. He continues to state in his statement that McBride's attorney told him that he did not want the prosecution to ask him questions, then asked him to leave while ushering him out the building. Mack acknowledges that he was willing and available to testify at Appellant's trial.

Derrick McMillian was mentioned by Rachel Marcelis in her statement to police as well as her testimony at Appellant's trial as being the alleged motive to this shooting. Marcelis states that she asked codefendant, Jeffrey McBride, if the person who was shot (Demond Brown) had shot D-Nyce (Derrick McMillian), and she testified that McBride answered, "yea". This provided a motive to the shooting as being revenge because McMillian was stated to be friends with Appellant and codefendant. McMillian

would've testified that he was indeed shot but was able to get a good enough look at the perpetrators in his shooting and states that Demond Brown was not involved and was not one of the shooters who shot him. This testimony would have directly negated the Commonwealth's theory of motive. He would also testify that Appellant and himself knew the victim all their lives as he watched them grow up. McMillian also provides character evidence for peacefulness and non-violence regarding Appellant.

Deborah McBride was also mentioned by Rachel Marcelis as being the mother of Cordell Young and Jeffrey McBride. Marcelis testimony exhibits that she frequented Mrs. McBride's home and before she gave a statement to police she visited Mrs. McBride's home. Deborah McBride would testify that Marcelis was in a relationship with her son Cordell Young. She will explain that Marcelis and Young broke up due to Young just wanting to be friends and because Young simply had a lot of girlfriends. Mrs. McBride would've informed the jury that Marcelis was in love with Young and that she made up and implicated Appellant and codefendant in this incident to get back at Young. The record is clear that Mrs. McBride was present everyday of the trial and there is no record that counsel interviewed this witness although she was subpoenaed by counsel.

All of the aforementioned witnesses are essential to the Appellant's defense. These witnesses would have provided beneficial and exculpatory information in reference to this case. These testimonies would've negated each of the Commonwealth witnesses' version of the facts. Also putting in question the truthfulness, veracity, and credibility of the Commonwealth witnesses upon which their case relied. It is evident that from the beginning to the end of Appellant's wrongful conviction and sentence and from the foregoing that Appellant's right to a fair trial was surely inherently undermined by trial counsel who negligently refrained from diligently investigating, interviewing, locating, calling, and producing witnesses, ultimately prejudicing Appellant severely. "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore 'all' avenues leading to facts relevant to guilt, innocence, and degree of guilt or penalty." see *Comm. v. Bailey*, 480 Pa. 239, 336, 390 A.2d 166-170 (Pa. 1978). It is no secret that this case boiled down to the credibility of witnesses. And for this reason is why these beneficial and exculpatory witnesses are of paramount importance. For it cannot be second guessed that had counsel presented these witnesses' testimony to the jury a reasonable probability exist that the outcome of the proceeding would have been different. A criminal attorney who fails to adequately investigate and introduce evidence that demonstrates his client's factual innocence, or evidence that lacks defendant's involvement or participation of the alleged crime, or raises sufficient doubt as to

undermine the confidence in the verdict, renders deficient performance. see *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999); *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003); *Williams v. Taylor*, 529 U.S. 362, 405, 120 S.Ct. 1495.

The Commonwealth presented testimony from Anthony Harris and Hassan Durant, eyewitnesses who allege Appellant's involvement. They testified to positively identifying and witnessing Appellant commit the crimes charged. More specifically their testimony consisted of the attire of the alleged shooters, as wearing hoodies, and how the hoodies were worn by the shooters they were able to identify Appellant. Also both stated that they both stood still while observing the incident as the shooting occurred. These accounts of the incident were the Commonwealth's strength and because trial counsel presented no exculpatory witnesses it was viewed by the jury as gospel.

Gregory Blackmon, Kyle Carter, and Stefon Studivant were necessary to Appellant's defense to provide exculpatory evidence and negate the Commonwealth's theory of the case. These witnesses would have testified that Appellant was not present at the incident. They explain that the fashion in which the shooters wore the hoodies that no reliable identification could be made. Each explain that when the shooting started everyone present at the school yard ran to safety and that no one was just standing around watching.

Moreover, these witnesses observed Harris accuse another of committing this crime immediately after the shooting. This observation made by these witnesses is of colossal significance. Not only does it display that Harris did not know the identity of the shooters and he is being untruthful by implicating Appellant, it supports trial counsel's overall defense. It supports the defense and counsel's argument to the jury that Harris and Durant has received information other than their own perceptions and is why they're testifying falsely against Appellant. Counsel speaks to the jury about all the time that passed after the shooting up until Harris, which was an hour and a half, and Durant, which was approximately 11 days, when they decide to inform authorities what allegedly happened (N.T. 2/4/09, at 90-92) and how all types of information could have been obtained, referencing "word on the street". Because these witnesses witnessed Harris accuse Malik Ware of committing this murder it gives Harris justifiable reasoning to seek out the word on the street because it exhibits to the jury he doesn't know who the shooters were. And this unaccounted for time in which they delay information regarding this incident provides opportunity to receive what the word on the street was.

Further evidence that Harris did receive information was when he admitted that he heard in the neighborhood Appellant was seen in a white jeep in which he informed police detectives (N.T. 1/30/09, at 28). Durant also alerts the jury that

he may have received information is when he testified to speaking with victim's girlfriend, he states, "I told them I was going down there and testify because it ain't right what happened and everybody else scared to step up to the plate." (N.T. 1/29/09, at 106). This signifies that he had to have received information about this case before he came forward with his allegations, also revealing to the jury that he was aware that police didn't possess the requisite evidence to charge Appellant with this crime. The aforementioned exculpatory witnesses were imperative to give such evidence weight and substance to create a reasonable doubt that did not otherwise exist.

What intertwines Harris and Durant is their close relationship to the victim. Harris testifies that he is the cousin of the victim and Durant testifies that he is the bestfriend. Stefon Studivant would have shown the jury through his testimony that Harris and Durant too were close friends. This is for the purpose of showing bias, interest, and corrupt motive. The commonly accepted types of proof relevant to show bias, interest, or corruption include: family relationship or other personal connection suggesting favor or hostility. see *Comm. v. Collins*, 519 Pa. 58, 545 A.2d 882 (1988). Harris and Durant's bias can be shown through their relationships to the victim but Studivant's testimony necessary to show that these witnesses were close friends as well. Studivant's testimony would have bolstered evidence that Harris and Durant had a motive of revenge to falsely testify against Appellant for revenge, because it was word on the street Appellant was responsible. Evidence from the trial shows that Harris and Durant denied seeing each other after the shooting which is untruthful. Harris denied ever seeing Durant after the shooting (N.T. 1/30/09, at 61) and never talked about this case with him. Durant also denied seeing Harris after the shooting (N.T. 1/29/09, at 109-110) but it is not until Durant is questioned about his testimony at preliminary hearing does he admit to seeing Harris a good three times (N.T. 1/29/09, at 136-137), yet Harris still denied. This evidence exhibits to the jury that they were intentionally trying to conceal the fact that they have seen each other which raises suspicion of the jury and giving a reasonable inference that they have spoken about this case and have a common corrupt goal, motive, and bias concerning this case, giving strength to evidence that they conspired to testify falsely against Appellant.

Appellant claims that the testimony of Darryl Mack, Derrick McMillian, and Deborah McBride are relevant to Rachel Marcelis. Marcelis provided testimony of inculpatory evidence, motive, evidence of flight and concealment, and corroborated the testimony of Harris and Durant. Darryl Macks importance is that he would negate the events in which Marcelis testified regarding the day in question. He would have

testified that she was under the influence of drugs in a comatose state being driven around by Mack. Derrick McMillian's importance is that he negates Marcelis theory of motive by testifying that the victim in this case had nothing to do with him being shot. Deborah McBride's importance is she will disclose the relationship Marcelis had with her son Cordell Young being a bad break up and because of her hurtful feelings towards Young, Appellant's friend, she falsely implicated Appellant. Deborah McBride's testimony provides evidence of Marcelis' bias, interest, and corrupt motive.

All of the aforementioned witnesses counsel failed to produce at trial existed as they have all given statements in this regard. They were all available to testify for the defense as it is exhibited in their statements. Counsel should have known of these witnesses and did know of these witnesses because of the defense's witness list presented to trial court, conversations with Appellant, notes of testimony displays his knowledge, and discovery materials. The prejudice Appellant suffered is illustrated herein.

It is clear from the record in this case that trial counsel rendered ineffective assistance for failing to investigate, interview, locate, call, and produce the aforementioned witnesses. In a case where virtually the only issue is credibility of the Commonwealth's witness versus that of a defendant, failure to explore all alternatives available to assure that the jury heard the testimony of a known witness who might be capable of casting a shadow upon the Commonwealth's witness's truthfulness is ineffective assistance of counsel. *Comm. v. White*, 450 A.2d 63, 303 Pa. Super. 550 (1982).

These witnesses had relevant, exculpatory evidence which would have significantly aided Appellant's defense, but they were never diligently investigated, interviewed, or produced at trial. As stated in Justice Black's dissent in *Betts v. Brady*, 316 U.S. 455, 476, 62 S.Ct. 1252 (1942), whether a man is innocent can not be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree or certainty that the defendant's case was adequately presented. It can not be overlook that had counsel diligently investigated, interviewed, located, called, and produced these witnesses for trial there would be a reasonable probability that the outcome of the proceeding would have been different.

TRIAL COUNSEL VIOLATED CONSTITUTION AMENDMENT 6, EFFECTIVE ASSISTANCE OF COUNSEL, FOR FAILING TO INFORM APPELLANT OF THE IMPORTANCE OF CHARACTER TESTIMONY AND RIGHT TO CALL CHARACTER WITNESSES, FAILURE TO INVESTIGATE A CHARACTER DEFENSE PRIOR TO TRIAL, FAILURE TO CONDUCT A PRETRIAL INVESTIGATION OF CHARACTER WITNESSES, FAILURE TO INTERVIEW POTENTIAL CHARACTER WITNESSES, FAILURE TO PRESENT CHARACTER TESTIMONY, RENDERING TRIAL COUNSEL UNPREPARED TO PRESENT A CHARACTER DEFENSE

Andre Stewart was a potential character witness for Appellant involving this matter. Stewart was present at Appellant's trial to give support to Appellant and is a relative to Appellant, his cousin. While present at trial it is stated that he was merely asked by trial counsel would he be willing to be a character witness in Appellant's behalf. Stewart answered in the affirmative. He states a piece of paper was passed around for those willing to be character witnesses to place their names and addresses on this peice of paper. Stewart continues stating that he never heard from anyone and it was never mentioned again during the duration of trial. He adds that he was never subpoenaed for court.

Gerald Newman is a cousin of the Appellant who was willing and available to be a character witness in Appellant's behalf. Newman states that Appellant's counsel came over to him and passed out a paper asking who wanted to be a character witness with no criminal background. Newman heard trial counsel say to Bianca Baxter, Appellant's sister, to take everyone's name and return it to him. He additionally adds in his statement that he never got a subpoena or phone call from counsel or anyone else to come to court.

Bianca Baxter is the sister of Appellant and was present during Appellant's trial. Bianca states that trial counsel asked her to provide names, addresses, and phone numbers of potential character witnesses. She claims that she gave this list to counsel of the potential character witnesses.

Appellant present to this Court that, yes, Andre Stewart, and Gerald Newman were willing and available to testify and present evidence of Appellant's good character for peacefulness and non-violence in the community but the substance of Andre Stewart, Gerald Newman, and Bianca Baxter's statements are for the additional purpose of illustrating counsel's ineffectiveness for failing to investigate a character defense prior to trial, failing to conduct a pretrial investigation of character witnesses, failing to interview potential character witnesses, failing to present character testimony, failing to inform Appellant of the importance of character evidence and right to call character witnesses, rendering trial counsel, ultimately, unprepared to present a character defense.

The foundation of counsel's ineffectiveness concerning Appellant's character defense is that he failed to fully advise Appellant regarding the importance of obtaining character witnesses and his right to call such witnesses. Prior to trial counsel had no desire to pursue this line of defense. Counsel never once mentioned to Appellant anything pertaining to character evidence prior to trial. As a result Appellant didn't provide counsel with potential character witnesses so that interviews could be conducted to ascertain the value these witnesses would provide the defense. A trial counsel can not fault his client for failing to provide names of character witnesses, if witnesses were available, when trial counsel has been derelict in not adequately discussing with his client the importance of such evidence. *Comm. v. Dupert*, 725 A.2d 750, 555 Pa. 547 (1999).

There is no record whatsoever regarding counsel conducting a pretrial investigation of character witnesses. Hence, counsel was unprepared to adequately present a character defense at the commencement of trial. "[W]here counsel has entered an appearance and accepted the responsibility for the representation of the client, it is an essential part of that obligation to appear, prepare to proceed in all proceedings related to the matter, for which he has received adequate notice." *Comm. v. Marcone*, 410 A.2d 759, 487 Pa. 572 (1980). The rationale for the admission of character testimony is that the accused may not be able to produce any other evidence to exculpate himself from the charges he faces except his own oath and evidence of good character. *Comm. v. Castellana*, 277 Pa. 117, 121 A. 50 (1923). Prior to trial there is no evidence that counsel possessed any evidence to present a viable defense on behalf of Appellant. Since counsel failed to acquire any other evidence to present a viable defense and it is recognized later in the trial that defendant taking the stand was unrecommended by counsel, character testimony was the only form of defense available to exculpate Appellant, in which counsel refrained from pursuing prior to trial.

Character testimony would've only advanced and benefited the defense. There is no reasonable strategic decision for counsel to forgo pursuing a character defense prior to trial when this evidence would only effectuate his client's interest. Nevertheless, it is clear from a record of review his decision was not based upon a careful selection between available alternatives, considering the relative value of presenting character testimony through ascertained potential witnesses as opposed to the absence of such testimony - but was essentially grounded upon the fact that, prior to trial, he failed to identify, interview, select and prepare any potential character witnesses, ultimately, failing to inform Appellant of his right and importance of obtaining character witnesses.

In the Judge's robing room counsel had a discussion with the Judge, in which he mentioned that he broached the topic of character testimony for peacefulness with Appellant "last week" and asked the Judge to determine the admissibility of a rap DVD which the Commonwealth planned to impeach the defense's character witnesses with (N.T 2/3/09, at 12-13). There are two aspects of this discussion that needs to be addressed. The first involved counsel stating that he broached the topic of character testimony with Appellant. Counsel states he "broached" the topic "last week". The week prior, trial was in process, meaning that he did so during the course of trial. This proves that he never discussed such with Appellant prior to trial. However, counsel did not inform Appellant of the importance of character witnesses or his right to call such during this discussion. Counsel merely informed Appellant that the Commonwealth was in possession of a rap DVD that Appellant was rapping in that the jury may perceive negatively because the rap consisted of violence and profanity. Counsel informed Appellant that the prosecutor planned on showing it to the jury to impeach character testimony if any were presented but since he didn't intend on using character testimony Appellant should'nt be concerned. Therefore, this discussion was only for the purpose of informing Appellant of the existence of the rap DVD.

The second aspect of the discussion between counsel and trial court that needs to be addressed is counsel asking trial court to look at the rap DVD to determine if the Commonwealth could impeach character witnesses with it. Obviously counsel's reasoning for the Courts determination of admissibility was because he did not want the jury to see it. It may have been counsel's reaoning for why he didn't conduct a pretrial investigation of character witnesses. It is apparent that counsel was willing to forgo presenting character testimony to avoidthe presentation of this evidence. But, although, counsel concluded that potential harm would come from the showing of this DVD, it is no excuse not to pursue a meritorious defense and inform his client of the merits thereof. It is no excuse to prepare such testimony for the presentation at trial in the event that such strategy might seem prudent. It is of no matter if the Commonwealth was allowed the use of the DVD or not, it is the duty of counsel to be prepared, investigate and interview witnesses, in pursuit of a viable defense, particularly when character testimony is consistent with what is sought to be achieved in the overall defense.

The relevant inquiry in cases such as this is whether counsel's failure to pursue a particular defense was reasonable. Apparently, counsel's failure to investigate a meritorious defense is ineffective assistance of counsel. Especially where counsel has failed to obtain any evidence to present any defense on the behalf of his client. "[I]neffeciveness is generally clear in the context of complete failure because counsel can hardly be said to have a strategic choice against pursuing a

certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made." *McGahee v. United States*, 570 F.Supp. 2d. 723 (2008). Clearly counsel was under a false conclusion that this rap DVD would produce more harm to Appellant's defense than the benefit of character testimony. Yet, when balancing the benefits of character testimony against the showing of the DVD, even if it were admitted, reveals that, under all of the circumstances of this case, the benefit far outweighs any harm. "To be sure, it [character evidence] is to be considered with all the other evidence. But it is not to be measured with all the other evidence. It's probative value, power of persuasion, does not depend upon, and it is not measure by, or appraised according to, the might or infirmity in the Commonwealth's case. Eventhough, under all the other evidence a jury could reach a conclusion of guilt, still character evidence creates a reasonable doubt or establishes innocence a verdict of acquittal must be rendered." *Comm. v. Neely*, 539 A.2d 1317, 372 Pa. Super. 519 (1988).

During the course of the day when counsel asked trial court to determine the admissibility of the rap DVD, trial court had an opportunity to view it and gave her response (N.T. 2/3/09, at 68-73). She explained how there wasn't anything present relevant in the DVD to undermine Appellant's character. Trial court states Appellant uses horrific language, talks of criminal activity but it has no bearing on his character because its simply wordsmithing. Trial court goes further by comparing Appellant to Jay-Z, stating that Jay-Z raps about negative things but, concluding that, it doesn't necessarily tell its their character or personality. As a result the Commonwealth was denied the use of the DVD to impeach character witnesses. The relevance of this decision is it provided counsel with the opportunity to present character testimony without the danger of the jury being exposed to the DVD. This afforded the defense an advantage and this is when counsel decides to pursue character testimony. Nonetheless, it must be emphasized that counsel's decision to finally pursue character testimony was the day before the prosecution rested, and the defense was to be presented.

At the preliminary charge conference in the Judge's robing room, counsel informs trial court that he gave people a list, for those who were willing to be character witnesses in behalf of Appellant (N.T. 2/3/09, at 155-156). This unorthodox way of obtaining character witnesses, in itself, displays counsel's unprepared for trial, failure to pursue a meritorious defense prior to trial and failing to ask client to provide him with potential character witnesses. Although, counsel decided that character testimony would be beneficial to Appellant's defense, he failed to consult with Appellant on his decision to pursue character testimony, hence, counsel's reasoning for giving a list to Appellant's family to acquire character witnesses.

"Counsel need not discuss all strategic options with his or her client. However, if that option is fundamental to the client's defense and requires consultation with input from the client in order to define and implement the strategy, then we will require counsel to inform the client accordingly." *Comm. v. Glover*, 619 A.2d 1357, 422 Pa. Super. 543 (1993). "Counsel should inform a defendant of the right to present character witnesses and should discuss with the client whether such witnesses would be advisable under the circumstances of the evidence available. A criminal defendant cannot be expected to offer counsel potential character witnesses if counsel has not discussed with him the possible uses of such evidence." *Comm. v. Carter*, 597 A.2d 1156, 409 Pa. Super. 184 (1991). Because counsel didn't consult with his client such evidence of character witnesses were not provided, then he unprofessionally decides to give a list to Appellant's family in order to acquire potential witnesses, clearly establishes counsel's belated, desperate attempt to conceal his sloth, neglect, ignorance, and unpreparedness to present character testimony.

Not only did counsel decide to hand out a list to those who were present in Appellant's behalf he asked Appellant's sister to acquire the names of potential character witnesses. It is stated in *Andre Stewart, Gerald Newman, and Bianca Baxter's* statements that Bianca Baxter obtained potential character witnesses names, addresses, and phone numbers. Bianca Baxter gave counsel the list of names but counsel failed to contact, investigate, and interview them to ascertain their value to the defense. *Andrea Stewart and Gerald Newman* states that after they gave their information they heard nothing else from counsel where no interviews were conducted. Counsel's duty of effective representation, of course, also indicates a duty to familiarize himself with the witness counsel intends to call to testify at trial. *Comm. v. Johnson*, 966 A.2d 523, 600 Pa. 329 (2009). Although counsel was provided a list of potential character witnesses from Appellant's sister it does not constitute a reasonable attempt to interview them.

"The question here is the decision not to interview [the witnesses], not the decision to refrain calling them at trial.... (emphasis added). [T]he value of the interview is to inform counsel of the facts of the case so that he may formulate strategy... [N]o... claim of strategy can be attached to a decision not to interview or attempt to interview [witnesses] prior to trial. Therefore, no reasonable basis designed to effuate [the defendant's] interest can be attributed to counsel ... not to question... witnesses or at least make a reasonable attempt to do so." *Comm. v. Luther*, 463 A.2d 1073, 317 Pa. Super. 41 (1983).

Andre Stewart and Gerald Newman's statements displays further that counsel never subpoenaed these witnesses. The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right... to have compulsory process for obtaining witnesses in his favor." [T]he right to compulsory process encompasses the right to meet the prosecution's case with the aid of witnesses, and the right to elicit the aid of the Commonwealth in securing those witnesses at trial, both of which are fundamental to a fair trial. *Comm. v. Jackson*, 457 Pa. 237, 324 A.2d 350 (1974). If however, counsel's failure to seek compulsory process to obtain (witnesses') testimony... was the result of sloth and lack of awareness of the available alternatives, the his assistance was ineffective. *Comm. v. Abney*, 350 A.2d 407, 465 Pa. 304 (1976).

Furthermore, counsel declined to call Appellant's family to testify on the defense's behalf involving Appellant's character. Trial court afforded counsel with the option of calling Appellant's parent to testify and counsel stated that he didn't want to call family (N.T. 2/4/09, at 26-27). Counsel also stated that he didn't see Appellant's mom present when asked by trial court. However it is clear on the record that Appellant's mother was present that day as well as every other day of trial when trial court informed Appellant's mother as well as the victim's mother and codefendant mother it would wait for them when the verdict is reached (N.T. 2/4/09, at 184-185). Counsel was ineffective in this regard because he again failed to interview Appellant's mother to ascertain the value of this witness. Regardless, counsel's failure to use Appellant's numerous relatives as character witnesses was based upon his perception of familial character testimony. Counsel's preconceived notions about familial character evidence precluded him from interviewing and investigating and presenting their testimony. "Although familial character witnesses generally lack credibility of unbiased nonfamilial witnesses, an attitude that they are per se worthless, is sufficient evidence of incompetency." *Comm. v. Weiss*, 606 A.2d 439, 530 Pa. 1 (1992). In light of the overwhelming need for character testimony in a case such as this, counsel's limited investigation into the quality and/or quantity of potential character witnesses on behalf of Appellant, and counsel's prejudice towards familial witnesses, there is no reasonable basis to support counsel's decision not to call any character witnesses. Considering credibility of the witnesses was of paramount importance, and counsel's error not to employ character witnesses, familial or otherwise, undermined Appellant's chances of instilling reasonable doubt in the minds of the jury and resulted in prejudice.

Nonetheless, the only form of defense counsel offered was a generic stipulation to Appellant's character for peacefulness and non-violence in the community (N.T. 2/4/09, at 45-46). What **MUST** be understood is that this defense offered by

counsel is a sham, make believe, and a illusion of Appellant being afforded effective assistance of counsel guaranteed by the Sixth Amendment of the Constitution. This defense was not a product of counsel's thorough, complete pretrial investigation, nor was it a product of counsel's effective trial strategy. This defense was a product of counsel's sloth and neglect and trial court basically bailing trial counsel out, by relieving him of his duty to investigate a meritorious defense and being prepared to present a meritorious defense. A violation of this magnitude cannot be glossed over. As previously stated counsel had no evidence suggesting a viable defense on behalf of Appellant when the prosecution rested, counsel was totally unprepared to present any defense. This is when trial court improperly made the prosecution stipulate to Appellant's good character in order to rescue counsel from the fact he had no defense because of his ineffectiveness. The record reveals:

THE COURT: Mr. Berardinelli — because you have legal character, Mr. Berardinelli will stip to character. Because you don't have the names and dates of birth of the people you desire, he can agree to a generic stipulation to character. You do, in fact, have legal character, and there is no point having either of you burdened with the fact that you didn't put character in when there is no reason for the Commonwealth not to stipulate. I know you don't want to because you hate the video. (N.T. 2/4/09, at 22)

This record reflects that trial court didn't even ask the prosecution if it wished to stipulate to such evidence, the prosecution was told to stipulate, and then trial court acknowledges that the prosecution didn't want to because of the DVD. This was all done for the purpose of lifting the "burden", which is attached to counsel, to in at the least meet the minimum performance standard required of defense counsel. If violations such as this are allowed, it would crumble the pillars in which the justice system and Sixth Amendment were built. This Court must find prejudice in the instant matter, for if not, it would set the precedence that as long as a defendant has legal character, in resemblance to this matter, all the Commonwealth would have to do is stipulate to that defendant's character and it rightfully relieves and removes the duty of counsel to pursue, investigate, and prepare a meritorious defense of character witnesses, rewarding counsel's ineffectiveness not to do so, rendering counsel effective regarding character evidence simply because the Commonwealth stipulated to it.

The aspects of the Sixth Amendment right to counsel do not allow such egregious notions. Counsel's actions in this regard provided Appellant with a denial of counsel for he was unprepared to present any defense on behalf of Appellant and as a result trial court intervened and ordered the prosecution to stipulate to good character in order to create the facade counsel provided effective assistance.

If no actual assistance for the accused defense is provided, then the constitutional guarantee has been violated. To hold otherwise could convert the appointment of counsel into a sham and nothing more than a formal compliance with the constitution's requirement that the accused be given assistance of counsel. The constitution's guarantee of assistance of counsel can not be satisfied by mere formal appointment. *United States v. Cronin*, 104 S.Ct. 2039, 466 U.S. 648 (1984). As Judge Wyzanski has written: "while a criminal trial is not a game in which participants are expected to enter the ring with a near match in skill, neither is it a sacrifice of unarmed prisoners to gladiators." *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (1975). Here, counsel failed to subject the prosecution's case to meaningful adversarial testing due to him being totally unprepared to present any defense, and because so, under *Cronin* prejudice exists.

Even if counsel's errors are to be considered under *Strickland*, counsel has also prejudiced Appellant with all of his actions in this regard, resulting in a generic stipulation of character evidence, prejudicing Appellant because the jury was fully aware that this stipulation was exactly what it is - generic. This was a pitiful parody of a defense and offered Appellant no chance for success. It was a joke. The stipulation took away the thunder, power of persuasion and believability of the Appellant's good character, opposed to the jury hearing from individuals testifying about their personal knowledge of this good character. It divulges to the jury that in Appellant's most time of need he cannot even produce anyone to testify and vouch for his peacefulness and non-violence. And to conclude otherwise would be underestimating the intelligence of a jury. "[O]f what avail is good character, which a man may have been a lifetime in acquiring, if it is to benefit him nothing in his hour of peril." *Comm. v. Glover*, *supra*. Appellant's defense needed the jury to hear testimony of witnesses who were familiar with his good character, as it would offer a potential for success substantially greater than the tactic utilized and creating the reasonable probability necessary the outcome would have been different.

As a threshold, this Honorable Court must determine whether counsel's total unpreparedness for trial and all counsel's shortcomings involving character evidence constitutes bad lawyering or no lawyering. Where in both cases, Appellant was denied his Sixth Amendment right to effective assistance of counsel because there exists compelling and serious doubt as to the reliability of his conviction and sentence. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, (1984) and *United States v. Cronin*, *supra*.

PROSECUTION COMMITTED BRADY VIOLATION, VIOLATING CONSTITUTION AMENDMENT 14, DUE PROCESS, AND CONSTITUTION AMENDMENT 6, RIGHT TO CONFRONTATION, BY WITHHOLDING EVIDENCE OF RACHEL MARCELIS' IMMUNITY

The prosecution violated Constitution 14 and 6, by withholding material evidence of Rachel Marcelis' immunity agreement given in approximately 2008, which constitutes a Brady Violation and a violation of the confrontation clause. "A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused." *Youngblood v. West Virginia*, 126 S.Ct. 2188, 547 U.S. 867 (2006). This evidence wasn't disclosed to the defense at Appellant's trial, prejudicing Appellant. This case boiled down to the credibility of witnesses and Marcelis' testimony went unchallenged and uncontradicted. If this evidence was presented at trial it would've put the case in such a different light creating a reasonable probability the result of the proceeding would have been different.

It is recognized on the record of Cordell Young's trial (*Commonwealth v. Cordell Young CP-51-CR-0013578-2007*) that Rachel Marcelis was given immunity in reference to the present case (Young's N.T. 6/10/08, at 164). In young's trial it was explained that although Marcelis was given immunity it was geared towards the second incident, indicating Appellant's case. What is compelling is that Marcelis was never given immunity in Young's trial, it still and was exclusively for the sole purpose of Appellant's trial. This is apparent when question by ADA Brian Zarallo, Marcelis recognizes that the subject of the immunity petition was in reference to Appellant's case (Young's N.T. 6/10/08, at 171). At Appellant's trial it was never revealed by the prosecutor that she was under any type of agreement with the Commonwealth. This evidence was relevant to Marcelis' credibility, reliability and the jury's determination of guilt. This impeachment evidence would have been of high probative value for it shows bias, interest, and corrupt motive, demonstrating Marcelis had a reason to testify falsely. Appellant was prejudiced because he could not impeach this crucial witness with this evidence because it was suppressed by the prosecution, giving way to unfairness of the ultimate verdict and undermining the truth determining process.

There was no evidence presented which indicated to the jury that Marcelis had an interest on the outcome of this trial. Since there was no indication of immunity she was viewed by the jury not to possess a motive to cooperate with the Commonwealth. And because this interest existed the jury had a right to know about it. "[W]henver a prosecution witness may be bias in favor of the prosecution because of outstanding criminal charges or because of any non-final criminal disposition against him within

the same jurisdiction, that possible bias, in fairness, must be made known to the jury. Even if the prosecutor has made no promises, either on the present case or on other pending criminal matters, the witness may hope for favorable treatment from the prosecutor if the witness presently testifies in a way that is helpful to the prosecution. And if that possibility exist, the jury should know about it.

Marcelis' testimony at Appellant's trial provided inculpatory evidence, motive, evidence of flight and concealment, and corroborated the testimony of the two other Commonwealth witnesses, Anthony Harris and Hassan Durant. Compounded with the testimony Marcelis offered, the jury was erroneously led to believe that Marcelis had no personal stake, bias, interest, corrupt motive, or reason to be untruthful when implicating Appellant in the murder. Again, there was no evidence presented to contradict Marcelis' testimony so it was free from conflict, with nothing to overshadow or directly challenge what she testified to. This gave her the greatest reliability of all the Commonwealth witnesses. The prosecution portrayed her not to have any motive to lie. On the record there is no indication of a relationship with the victim or any other Commonwealth witness but there was with Appellant and codefendant. This strengthened her believability because she was testifying against those she befriended. She was also portrayed to be tearing up on the stand, not lying and putting the defendants in a murder over her finals or anything, and saying she wouldn't do that (N.T. 2/4/09, at 121). The prosecution talks about her demeanor at the end of the video consent tape as giggling and laughing, and not being treated badly while giving her statement. He also speaks on the fact that Marcelis didn't get up on the stand and say that the statement was a bunch of bunk in his closing arguments (N.T. 2/4/09, at 123). Prosecutor goes further and improperly vouches for the credibility of the witness (N.T. 2/4/09, at 122-124) which is a separate issue, but displays the prosecution may have additional evidence that supports her truthfulness and is the prosecution's personal belief, placing the prestige of the Commonwealth behind Marcelis. Ultimately, in the eyes of the jury Marcelis was deemed credible and reliable because of her affiliation with Appellant, testifying consistent to her statement, being perceived not having a reason to lie, and simply because there was no evidence to contradict her testimony. Whereas her immunity agreement divulges everything to the contrary. These circumstances cannot be overlooked because it obviously prejudiced Appellant by nondisclosure.

Nevertheless, "[i]t is well-settled that Commonwealth has a duty not to conceal the existence of a promise or of an agreement to recommend a specific sentence or leniency for a crucial prosecution witness". *Comm. v. Hartey*, 621 A.2d 1023, 424 Pa. Super. 29 (1993). Evidence of nondisclosure are relevant to affecting credibility.

The jury's determination of Appellant's innocence or guilt in this case was based on the credibility of witnesses, giving these determinations paramount importance, hence, giving Rachel Marcelis' credibility paramount importance. Any implication, promise or understanding that the government would extend leniency in exchange for a witness's testimony is relevant to the witness's credibility. *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763 (1972) The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life and liberty may depend. *Napue v. Illinois*, 79 S.Ct. 1173, 360 264 (1959). This is true in the present case and Appellant was prejudiced due to the nondisclosure, in the jury's eyes the witness possessed no interest in the outcome of the case and had no reason to testify falsely, testifying favorably for the prosecution. Marcelis' testimony was not looked upon as being colored with bias and having a personal stake against Appellant. Had the defense been armed with full disclosure of the immunity agreement with Commonwealth it would change the whole complexion of the trial. Appellant was denied a fair trial where prejudice was a product of the prosecution's nondisclosure, concealing an agreement that should have been made to the jury in the interest of justice.

The Supreme Court extended its holding in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), to include evidence which bears materially on credibility of a key prosecution witness. The Court observed "[w]hen the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule". *Comm. v. Santiago*, 654 A.2d 1062, 439 Pa. Super. 447 (1994). Not only does Marcelis' immunity provide impeachment evidence it also provides exculpatory evidence. Exculpatory evidence includes evidence affecting witness credibility, where the witness reliability is likely determinative of guilt or innocence. see *United States v. Ruiz*, 122 S.Ct. 2450, 536 U.S. 622 (2002). It is apparent that this undisclosed evidence bears materiality because it discredits Marcelis and undermines the confidence in the outcome of the trial. Also evidence is material if the undisclosed information could have substantially affected the efforts of defense counsel to impeach the witness, thereby calling in to question the fairness of the ultimate verdict. see *United States v. Cuffie*, 80 F.3d 514 (1996). Under these circumstances Marcelis' immunity was essential to the defense.

By the prosecution withholding evidence, Appellant was deprived of the right to confront Marcelis with this evidence. Prejudice ensued because the jury did not hear the withheld evidence, which hindered them from appraising it, along with cross examination about the withheld evidence, which revealed her bias, interest, corrupt

motive, and reason to testify falsely against the Appellant.

In furtherance, it was most recently order by Judge McDermott during a video conference hearing on March 31, 2014 that the prosecution must forward Appellant this immunity agreement that was mentioned at Cordell Young's trial, yet, the prosecution fails to comply with a court order. They have been very evasive with this particular immunity agreement but credit the record in Young's trial because due to it we know it exists. And as it has now, the prosecution had then, been withholding this vital evidence from the defense. Whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and such it is the spokesmen for the government. see. *Comm. v. Strong*, 761 A.2d 1167, 563 Pa. 455 (2000). The staff of the prosecution is a unit and each member must be presumed to know the commitments made by any other member. If responsibility could be evaded that way, the prosecution would have designed another deceptive contrivance akin to those condemned in *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340 (1935) and *Napue v. Illinois*, supra; *Santobello v. New York*, 92 S.Ct. 495, 404 U.S. 257 (1971). The prosecution knows and knew of the existence of this evidence and because of prosecution's failure to disclose Appellant was prejudiced.

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION, FOR COUNSEL'S FAILURE TO CONDUCT A THOROUGH AND COMPLETE PRETRIAL INVESTIGATION THAT WOULD HAVE ALLOWED COUNSEL TO ADEQUATELY PREPARE AND PRESENT AN EFFECTIVE TRIAL STRATEGY, WHICH REQUIRED EXPERT TESTIMONY

Appellant claims he was denied his right to effective assistance of counsel under both Federal and State constitutions for trial counsel's failure to conduct a thorough and complete pretrial investigation when he failed to interview and investigate Commonwealth witness Rachel Marcelis. In the case at bar, trial counsel failed to interview Rachel Marcelis to ascertain what vital information this witness possessed that could have been crucial in establishing and developing a viable defense and trial strategy based on her drug use. Had counsel done so, his interview would have produced vital information used to raise an effective trial strategy, warranting testimony of an expert witness to assist the trier of fact. see *Comm. v. Delbridge*, 578 Pa. 641, 855 A.2d 27 (2003).

In trial counsel's opening arguments to the jury he speaks about Rachel Marcelis as being a drug user and abuser (N.T. 1/29/09, at 42). This is in accord with trial counsel's overall trial strategy of attacking witnesses' credibility. Counsel's knowledge of his assertion clearly is generated from his review of discovery

materials of Marcelis' statement where she states on the prior night of this incident that, "[w]e partied all night long, drinking smoking weed, until the morning." Also counsel was exposed to Marcelis' prior testimony in Cordell Young's trial (Commonwealth v. Cordell Young CP-51-CR-0013578-2007) where she admits to drug use on that particular night into the next day (Young's N.T. 6/10/08, at 168-169, 184). What is compelling is that these are the only instances of evidence of drug use counsel exposed himself to. Counsel's knowledge about Marcelis' drug use began and ended with information provided in discovery that she smoked weed and drank when Appellant's trial commenced, and this is where counsel's ineffectiveness on the matter is born because he solely relied on that information.

Counsel had a duty to investigate and should not have relied solely on the information provided to him by the Commonwealth. The court has stated that... the constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be. Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provisions. see *Comm. v. Johnson*, 966 A2d 523 (2009).

Accordingly, upon cross examination of Rachel Marcelis by trial counsel it is ascertained that Marcelis indulged in a enormous amount of drugs which consist of 45 xanax, 10 jars of wet (embalming fluid), a ounce of marijuana, 40 ounces of beer, vodka, and tequila (N.T. 1/30/09, at 153-157) with no sleep since the day before until the day of the present incident. It is imperative that this court know that trial counsel was oblivious to the extreme amounts of drugs Marcelis consumed and it wasn't until he cross examined her in reference to her drug use where he found out. Had counsel interviewed and investigated Rachel Marcelis concerning the specific types of drugs and quantity of drugs she consumed it would have informed counsel of the facts of this case enabling him to formulate and prepare an effective trial strategy.

Trial counsel has a general duty to undertake reasonable investigations or make reasonable decision that render particular investigation unnecessary. *Comm. v. Basemore*, 560 Pa. 258, 744 A.2d 717 (2007). Trial counsel's unreasonable failure to prepare for trial is an abdication of the minimum performance required of defense counsel. *Comm. v. Perry*, 573 Pa. 385, 644 A.2d 705 (1994). The duty to investigate, of course, may include a duty to interview certain potential witnesses; and a prejudicial failure to fulfill this duty, unless pursuant to a reasonable strategy or decision, may lead to a finding of ineffective assistance of counsel.

In *Commonwealth v. Dennis*, 597 Pa. 159, 950 A.2d 945 (2007), our Supreme Court summarized:

"[T]hese arguably stand for the proposition that, at least where there is a limited amount of evidence of guilt, it is per se unreasonable not to attempt to investigate and interview known eyewitnesses in connection with defenses that hinge of the credibility of other witnesses..."

"It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction..." *Rompilla v. Beard*, 125 S.Ct. 2456 (2005). "[I]neffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made. *McGahee v. United States*, 570 F.Supp. 2d 723 (3rd Cir. 2008). Counsel did not interview, nor took reasonable steps to interview the witness and consequently he was unable to make an informed, independent decision on the value of her testimony. Counsel's decision not to investigate can not be said to have been reasonably designed to effectuate Appellant's interest.

During the cross examination of Marcelis counsel attempted to attack this witness's credibility by asking if those drugs effected her ability to perceive. When he questioned her about if her reality was fried, trial court sustained objection by prosecutor, and when questioned about fantasizing or going through a drug stupor, trial court improperly intervened and questioned the witness about whether she heard what either defendant said in her vehicle regarding if the victim was shot, and Marcelis answered in the affirmative (N.T. 1/30/09, at 158-159). Further, counsel attempted to question this witness about if she heard voices due to drugs she used and Marcelis continued to be evasive by testifying what side effects these drugs had in general. But when questioned by the prosecution on redirect examination about if she imagined all the things she heard and happened that day, she states she didn't believe she imagined anything (N.T. 1/30/09, at 167-168). Marcelis' testimony in this regard went uncontradicted and unchallenged and although it was established she was under the influence of drugs the jury still deemed her testimony credible, which necessitated a expert witness's testimony to aid the jury by testifying to the effects of the accumulation of these drugs beyond that possessed by a lay person.

An expert's testimony was essential in this regard to assist the jury to understand the evidence or to determine the facts with specialized knowledge beyond that possessed by a lay person. A individual such as Marcelis, with the height of five-ten and the weight of approximately 125 lbs., consuming the quantity of drugs and the types of the aforementioned drugs is consistent to an individual being in

a drug induced psychosis, where expert testimony was necessary to illustrate. The expert would have been able to explain the side effects of each drug individually as well as the side effects they have when used together when one mixes them. Expert testimony would have informed the jury on the witness's ability to perceive, observe, narrate, and account while under the influence of these types and quantity of drugs while being in a drug induced psychosis. Had counsel conducted a thorough and complete pretrial investigation it would have informed him of the need of an expert witness's testimony. Because he did not it foreclosed the option of counsel to adequately prepare an effective trial strategy, prejudicing Appellant. Such ineffectiveness where a reasonable probability exist that the outcome would have been different and no reliable adjudication of innocence or guilt have taken place warrants a new trial.

Wherefore, for the reasons contained herein Petitioner requests this Court to grant P.C.R.A. relief and set this matter for an Evidentiary Hearing and a new trial.

* (Also, when referring to witnesses named herein please reference each witnesses relative statement as well as statements attached, thank you.)

Respectfully Submitted,



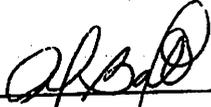
Armel Baxter
Pro se Petitioner
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Coal Township, Pa. 17866

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Respectfully Submitted,



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Pro se Petitioner
HX-3302
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1 Kelley Drive
Coal Township, Pa. 17866



DOB
1/11/1989

STATEMENT OF Gregory Blackmon
TAKEN BY: Sharon Williams
RE: Armel Batten
DATE 7/22/14 PAGE 1 OF 3

STATEMENT

Q) Did you go to court to testify on behalf of Armel?

A) Yes, I came to court but I was not called to testify.

Q) Did any attorney speak with you?

A) Yes, I don't remember his name but he told me he would ^{call} me when it was my turn to get on the stand. I was never called to testify. I showed up for court every day as long as the trial lasted.

Q) Will you be willing and available to testify for an upcoming evidentiary hearing or any other legal hearing?

A) Yes.

Witness: Sharon Williams

Signature: Gregory Blackmon



Sister's International

Private Investigative Services
Philadelphia, PA 19149
215-831-1640

DOB
1/11/1984

STATEMENT OF Gregory Blackmon
TAKEN BY: Sharon Williams
RE: Armel Baxter
DATE: 7/22/14 PAGE 1 OF 1

STATEMENT

Q) WHAT IS YOUR NAME AND YOUR RELATIONSHIP
TO ARMEL BAXTER

A) MY NAME IS GREGORY BLACKMON AND I AM A FRIEND
TO ARMEL BAXTER

Q) HOW LONG HAVE KNOWN ARMEL BAXTER

A) TEN YEARS OR MORE WE ARE FROM THE SAME
NEIGHBORHOOD TIOGA AREA.

Q) WHAT HAPPEN ON APRIL 21, 2007?

A) I WAS PLAYING BASKET BALL AT KENDERTON SCHOOL
OUTSIDE IN SCHOOL YARD WHEN TWO UNKNOWN MALES
WITH HOODIES ON CAME INSIDE THE YARD AND STARTED
SHOOTING.

Q) DID YOU KNOW THESE MALES?

Witness:

Sharon Williams

Signature:

Gregory Blackmon



Sister's International
Private Investigative Services
Philadelphia, PA 19149
215-831-1640

DOB
4/11/1984

STATEMENT OF Gregory Blackmon
TAKEN BY: Sharon Williams
RE: Armel Batten
DATE: 7/22/14 PAGE 1 OF 2

STATEMENT

A) NO I COULDN'T SEE THEIR FACES. IF ARMEL WAS ONE OF THE SHOOTERS I WOULD HAVE KNOWN BECAUSE I KNOW HIS MANNERISM. IT WAS NOT ARMEL BATTEN OR JEFFERY McBRIDE.

Q) WHEN THE SHOOTING STARTED WHAT DID YOU DO?

A) I RAN OUTSIDE OF THE SCHOOL YARD.

Q) HOW MANY PEOPLE WERE IN THE SCHOOL YARD

A) ABOUT 30 PEOPLE

Q) AT ANY TIME DID YOU SEE ARMEL BATTEN IN THE SCHOOL YARD OR OUTSIDE THE YARD?

A) I DIDN'T SEE ARMEL IN THE SCHOOL YARD OR OUTSIDE THE SCHOOL YARD

Witness: Sharon Williams

Signature: Gregory Blackmon



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DOB

4/1/1990

STATEMENT OF STEFON STUJIVANT

TAKEN BY: SHARON WILLIAMS

RE: ARMEL BATEA

DATE: 7/22/14 PAGE 1 OF 1

STATEMENT

Q) WHAT IS YOUR NAME AND YOUR RELATIONSHIP TO ARMEL BATEA?

A) MY NAME IS STEFON STUJIVANT AND I KNOW ARMEL BATEA FROM THE NEIGHBORHOOD 3600 SYDENHAM ST.

Q) STEFON HOW LONG HAVE YOU KNOWN ARMEL?

A) ALL MY LIFE.

Q) ON THE DATE OF APRIL 21, 2007 AT APPROXIMATELY 12:15 PM WHERE WERE YOU?

A) I WAS AT KENDERTON SCHOOL LOCATED AT 15TH & ONTARIO ST, PLAYING BASKETBALL. 1 HR LATER I SAW TWO UNKNOWN MALES ENTER THE SCHOOL YARD AND STARTED SHOOTING.

Q) STEFON DID YOU SEE THE FACES OF THESE MALES?

Witness: Sharon Williams

Signature: [Handwritten Signature]



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DOB
 4/1/1990

STATEMENT OF Stephon STUDIVANT
 TAKEN BY: Sharon Williams
 RE: ARMEL BAYTER
 DATE 2/27/14 PAGE 1 OF 2

STATEMENT

Q) No.

Q) How many people were in the school yard with you?

A) ABOUT 20 plus people.

Q) Did you ^{see} ARMEL BAYTER in the school yard?

A) NO. I never saw ARMEL BAYTER AT THE school yard NOR DID I see ^{him} THE WHOLE DAY.

Q) When the shooting started what did you do?

A) I RAN OUT OF THE school yard.

Q) Stephon, were you ~~able~~ able to come to court?

Witness: Sharon Williams

Signature: [Handwritten Signature]



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DOB
4/1/1990

STATEMENT OF Stefon Student
TAKEN BY: Sharon Williams
RE: ALMEL BAITER
DATE: 7/22/14 PAGE 1 OF 3

STATEMENT

A) Yes, I was sitting outside waiting to be called.

Q) What happen that you were not called to testify?

A) I am not sure?

Q) Did anyone talk to you?

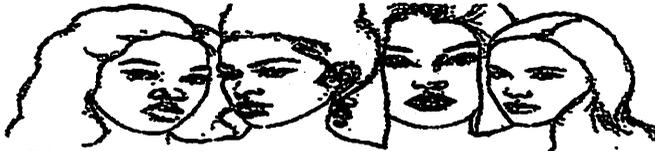
A) No.

Q) Stefon will you be able to come to court to testify at an upcoming evidentiary hearing or any other proceeding involving this case?

A) Yes.

Witness: Sharon Williams

Signature: [Handwritten Signature]



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DJB
6/18/1987

STATEMENT OF Derrick McMillian
TAKEN BY: Sharon Williams
RE: AMEL BAYTER
DATE: 7/20/14 PAGE 1 OF 1

STATEMENT

Q) WHAT IS YOUR NAME AND RELATIONSHIP TO AMEL BAYTER?

A) My NAME IS DERRICK McMILLIAN AND I AM A FRIEND TO BOTH AMEL BAYTER AND JEFFERY McBRIDE.

Q) HOW LONG HAVE YOU KNOWN AMEL?

A) I'VE KNOWN AMEL (AKA) JJ ALL OF MY LIFE.

Q) DERRICK HOW ARE YOU CONNECTED TO THE INCIDENT IN THE SHOOTING DEATH OF DAMON BROWN?

A) IT'S ALLEGED THAT THE REASON I GOT SHOT 11 TIMES WAS BECAUSE DAMON BROWN ^{WAS SUPPOSED TO HAVE SHOT ME} ~~SHOT ME~~ DUE TO ME BEING FRIENDS WITH AMEL AND JEFFERY. THE TRUTH IS THAT DAMON BROWN DIDN'T SHOOT ME AND AMEL AND JEFFERY KNEW NOTHING ABOUT ME BEING SHOT THEY FOUND OUT LATER.

Witness: Sharon Williams

Signature: Derrick McMillian



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DOB
7/18/1987

STATEMENT OF Derrick McMillan
TAKEN BY: Sharon Williams
RE: Armed Battering
DATE: 7/20/14 PAGE 1 OF 2

STATEMENT

Q) Derrick Do you know who shot Damon Brown?

A) I WAS IN THE HOSPITAL WHEN DAMON BROWN WAS SHOT AND KILLED. I WAS NOT INVOLVED IN HIS DEATH NOR DO I KNOW WHO SHOT DAMON.

Witness: Sharon Williams

Signature: Derrick McMillan



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DUIB
 3/28/1984

STATEMENT OF Kyle Carter
 TAKEN BY: Sharon Williams
 RE: ARMEL BAXTER
 DATE: 7/20/14 PAGE 1 OF 1

STATEMENT

My name is Sharon Williams and I am an
 Licensed ~~PA~~ Investigator. I am working the case
 of ARMEL BAXTER:

Q) WHAT IS YOUR NAME AND YOUR RELATIONSHIP
 TO ARMEL BAXTER?

A) My name is Kyle Carter and I am a friend
 to ARMEL BAXTER.

Q) How long have you known ARMEL BAXTER?

A) I've known ARMEL for 2-3 years.

Q) On the date of April 21, 2007, around 2pm
 in the afternoon, where were you?

A) I was at KENDERTON SCHOOL 15th & OUNTERID ST
 waiting to play ~~BASKET~~ BASKET BALL. When two
 unknown ~~males~~ males appeared. Cont'd

Witness: Sharon Williams

Signature: X Kyle Carter



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DOB
3/28/1989

STATEMENT OF Kyle Carter
TAKEN BY: Sharon Williams
RE: Adriel Batten
DATE: 7/20/14 PAGE 1 OF 2

STATEMENT

AND STARTED SHOOTING. I RAN AROUND
A CAR AND HID. I DIDN'T SEE THE FACES
OF THESE MALES. ALL I SAW WAS FIRE ARMS
AND THAT WAS ENOUGH FOR ME TO GET OUT THE WAY.

Q) KYLE DID ANYONE TAKE YOUR STATEMENT MEANING
DETECTIVES FROM HOMICIDE?

A) NO.

Q) WERE YOU ASK TO COME TO COURT TO TESTIFY
AS TO WHAT YOU SAW?

A) YES, BUT I NEVER GOT TO GO INTO THE COURTROOM.

Q) WHAT HAPPEN IF YOU KNOW WHY YOU WERE NOT
CALLED TO TESTIFY?

A) I DON'T KNOW. I WAS DOWN IN COURT FOR
4 DAYS AND WAS NEVER CALLED.

Witness:

Sharon Williams

Signature:

Kyle Carter



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DAB
2/17/1984

STATEMENT OF Darryl Mack
TAKEN BY: Sharon Williams
RE: Armel Baxter
DATE: 7/24/14 PAGE 1 OF 1

STATEMENT

Q) What is your name and your relationship to Armel Baxter

A) My name is Darryl Mack and I know Armel from the neighborhood. We played games, music, rode bikes and went swimming. Armel + Jeffrey were good law abiding young men.

Q) On the day + date of April 21, 2007, where were you.

A) I was with Rachel Marcelis driving around the city of Phila. Rachel pulled up on me driving a white truck. She was smoking WET/PCP she then asked me if I had some weed.

Q) Darryl did you and Rachel ever discuss the shooting incident on April 21, 2007 when Devon Brown was shot and killed?

A) NO.

Witness:

Sharon Williams

Signature:

Darryl Mack

Cont:



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DOB
2/17/1984

STATEMENT OF Darryl Mack
TAKEN BY: Sharon Williams
RE: ARMEL BAWTER
DATE 7/20/14 PAGE 1 OF 2

STATEMENT

A) When I got back to the neighborhood someone told me what ^{happened} Rachel was still ⁱⁿ the car high sleep Rachel had been smoking weed and Durag pills and doing PCP/Wet. All day.

Q) Darryl Did ARMEL BAWTER AND J. ~~McBRIDE~~ McBRIDE ever get in the car with you + Rachel?

A) No, I never saw ARMEL OR Jeffrey I gave Rachel gas money to go home Rachel left and I had not seen her since.

Q) Darryl Where you subpoenaed to court to testify as to what you know about you being ~~with~~ alone with Rachel?

A) Yes, I got a subpoena and did go to court to testify. As a matter of fact my PO gave me the subpoena, and some investigator gave me a subpoena to BUT I never was called to testify.

Witness: Sharon Williams

Signature: X Darryl Mack



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DOB
2/17/1984

STATEMENT OF Darryl L. Mack
TAKEN BY: Sharon Williams
RE: ARIEL BAXTER
DATE: 7/20/14 PAGE 1 OF 3

STATEMENT

Q) WHAT HAPPENS THAT YOU DIDN'T TESTIFY IN COURT?

A) WHILE IN COURT JEFFERY McBRIDE'S ATTORNEY TOLD ME THAT IF I WANTED TO HELP JEFFERY + ARIEL "I NEED YOU TO GET OUT OF THE COURT HOUSE BEFORE THE DA SEE'S YOU." THE ATTORNEY THEN TOLD ME THAT MY TESTIMONY WOULD ONLY HURT THEM. I LEFT THE COURT THINKING THAT WAS DOING THE RIGHT THING.

Q) DARRYL WILL YOU BE AVAILABLE TO COME TO COURT FOR AN UPCOMING EVIDENTIARY HEARING OR ANY OTHER HEARING INVOLVING THIS CASE?

A) YES.

Witness: Sharon Williams

Signature: Darryl Mack



DOB
9/24/1963

STATEMENT OF Deborah McBride
TAKEN BY: Sharon Williams
RE: Armet Baxter
DATE 7/22/14 PAGE 1 OF 1

STATEMENT

Q) WHAT IS YOUR NAME AND WHAT IS RELATIONSHIP TO ARMET BAXTER?

A) I AM ARMET BAXTER PLAY AUNT MY NAME IS DEBORAH McBRIDE.

Q) HOW LONG HAD YOU KNOWN ARMET?

A) I KNOWN ARMET FOR 11 YEARS.

Q) MS. McBRIDE WHAT CAN YOU TELL ME ABOUT MARCELLIS?

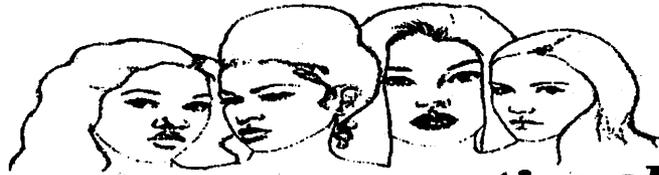
A) RACHAL MARCELLIS WAS DATING MY SON ~~Jeff~~ CORDELL YOUNG. CORDELL HAD A LOT OF GIRL FRIENDS AND HE TOLD RACHAL THAT THEY WERE JUST FRIENDS.

Q) WHY DID RACHAL MARCELLIS GET INVOLVE WITH ARMET BAXTERS + JEFFREY McBRIDE CASE?

A) ARMET + JEFFREY WERE FRIENDS. RACHAL ~~was~~

Witness: Sharon Williams

Signature: Deborah McBride



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215-831-1640

DOB
9/24/1963

STATEMENT OF Deborah McBride
TAKEN BY: Sharon Williams
RE: ALMAY BARTON
DATE 7/27/14 PAGE 1 OF 2

STATEMENT

WANTED TO GET BACK AT CONDELL YOUNG. JEFFERY
MCBRIDE OLDER BROTHER ~~THAT~~ SHE MADE UP THIS STORY
THAT ARMEL & JEFFERY WAS IN THE CAR WITH HER
RACHELL WAS IN LOVE WITH CONDELL SHE WOULD
DO ANYTHING TO GET BACK AT CONDELL YOUNG.

Q) MRS. MCBRIDE IS THERE ANYTHING ELSE YOU
CAN ADD TO THIS STATEMENT?

A) NO

Witness: Sharon Williams

Signature: X Deborah McBride



DOB
6/13/1985

STATEMENT OF Andre Stewart
TAKEN BY: Sharon Williams
RE: Armel Baxter
DATE: 8/6/14 PAGE 1 OF 1

STATEMENT

Q) WHAT IS YOUR NAME, DOB AND ADDRESS?

A) MY NAME IS ANDRE STEWART MY DOB 6/13/1985
AND MY ADDRESS 5106 CHESTER AVE, PHILA PA 19143

Q) ANDRE DID YOU ATTEND ARMEL'S TRIAL AND
WERE YOU ASKED BY ANYONE TO BE A CHARACTER
WITNESS FOR ARMEL BAXTER?

A) YES, I DID ATTEND ARMEL'S TRIAL AND I
WAS ASKED BY ARMEL'S ATTORNEY WHOSE NAME
I DIDN'T KNOW TO BE A CHARACTER WITNESS FOR
ARMEL.

Q) WHO DID YOU GIVE YOUR NAME TOO?

A) THE ATTORNEY PASSED AROUND A PIECE OF
PAPER ASKING THAT WE PUT OUR NAMES + ADDRESSES
ON IT, AND THAT HE WOULD CALL US LATER TO BE
A CHARACTER WITNESS FOR ARMEL.

Witness: Sharon Williams
INVESTIGATOR # 308

Signature: Andre L. Stewart
5106 CHESTER AVE
PHILA., PA 19143



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Private Investigative Services
Philadelphia, PA 19149
215-831-1640

DOB
6/13/1985

STATEMENT OF ANDIE STEWART
TAKEN BY: SHARON WILLIAMS
RE: ARMEL BAXTER
DATE: 8/6/14 PAGE 1 OF 2

STATEMENT

A) I GAVE MY NAME AND ADDRESS TO THE ATTORNEY AND TO ARMEL'S SISTER BIANCA.

Q) ANDIE DID ANYONE EVER CALL YOU TO COME TO COURT AND TESTIFY ON BEHALF OF ARMEL BAXTER'S CHARACTER?

A) I NEVER HEARD FROM ANYONE AND IT WAS NEVER MENTIONED AGAIN DURING THE DURATION OF THE TRIAL. PLUS I NEVER GOT A SUBPOENA TO COME TO COURT.

Q) ANDIE WILL YOU BE AVAILABLE TO COME TO A UPCOMING EVIDENTIARY HEARING OR ANY OTHER PROCEEDING INVOLVING THIS CASE?

A) YES.

Witness: Sharon Williams
INVESTIGATOR # 308

Signature: Andie R. Stewart
5106 Chester Ave
Phila, Pa, 19143



Sister's International
Private Investigative Services
Philadelphia, PA 19149
215-831-1640

DOB
1/12/1983

STATEMENT OF GERALD Newman
TAKEN BY: Sharon Williams
RE: ARMEL Baxter
DATE: 8/6/17 PAGE 1 OF 1

STATEMENT

Q) My name is Sharon Williams and I am a
Private Investigator working on ARMEL BAXTER PERA case

Q) What is your name and birth date and address

A) My name is GERALD Newman, DOB 1-12-1983
I am 31 years old. I lived at 1037 N. 67th St
Phila Pa 19151

Q) What was your involvement in ARMEL BAXTER
case?

A) ARMEL is a family member of mine and I
wanted to be there for support and to be a character
witness.

Q) Gerald did you attend ARMEL's trial and were
you asked to be a character witness?

A) I was at trial for 4 days and while at trial

Witness: Sharon Williams
Investigator # 308

Signature: Gerald Newman
1037 N 67 St
Phila Pa 19151



Sister's International

Private Investigative Services

Philadelphia, PA 19149

215-831-1640

STATEMENT OF GERALD NEWMAN
TAKEN BY: SHARON WILLIAMS
RE: ARMEL BAXTER
DATE: 8/6/14 PAGE 1 OF 2

STATEMENT

ARMEL'S ATTORNEYS CAME OVER TO ME AND PASSED OUT A PAPER ASKING WHO WANTED TO ^{BE} A CHARACTER WITNESS WITH NO CRIMINAL BACKGROUND.

Q) GERALD WHO DID YOU GIVE YOUR NAME AND ADDRESS TO?

A) I HEARD THE ATTORNEY FOR ARMEL SAY TO BIANCA BAXTER, ARMEL SISTER TO TAKE EVERYONE'S NAME AND RETURN IT TO HIM.

Q) DID YOU GET A SUBPOENA TO COME TO COURT?

A) NO, I NEVER GOT A SUBPOENA OR A PHONE CALL FROM ARMEL ATTORNEY OR ANYONE ELSE TO COME TO COURT. I WAS WILLING AND AVAILABLE TO COME TO COURT.

Q) GERALD WILL YOU BE AVAILABLE TO COME TO AN UPCOMING EVIDENTIARY HEARING OR ANY OTHER PROCEEDING

Witness: Sharon Williams
INVESTIGATOR #308

Signature: X. Gerald Newman
1037 N 67 ST
PHILA PA 19151



DJB
1/17/1983

STATEMENT OF GERALD NEWMAN
TAKEN BY: SHARON WILLIAMS
RE: ARMEL BAYLER
DATE: 8/6/14 PAGE 1 OF 3

STATEMENT

Involving This Case?

A) Yes..

Witness: Sharon Williams
Investigator #308

Signature: Gerald Newman
1037 N. 67 St
Phila PA 19151



Sister's International

Private Investigative Services
Philadelphia, PA 19149
215-831-1640

JOB
5/18/1988

STATEMENT OF Bianca Baxter
TAKEN BY: Sharon Williams
RE: ARMEL BAXTER
DATE: 7/22/14 PAGE 1 OF 1

STATEMENT

Q) What is your name and your relationship to Armel Baxter?

A) I am Armel's little sister Bianca Baxter

Q) Bianca Did anyone ask you to provide names and addresses of character witnesses for your brother Armel?

A) Yes. An attorney whose name I don't remember asked me to provide with names, addresses and phone numbers of character witnesses?

Q) What happen to that list of names for the character witnesses

A) I gave this attorney the list of names and he told me he was going to give it to the judge. He also stated that he would add the names in closing statement to the jury.

Witness: Sharon Williams

Signature: Bianca Baxter
3517 N Sydenham
Phila Pa 19141



Sister's International
 Private Investigative Services
 Philadelphia, PA 19149
 215-831-1640

DOB:
 5/18/1988

STATEMENT OF Bianca Batton
 TAKEN BY: Sharon Williams
 RE: Armel Baxter
 DATE: 7/22/14 PAGE 1 OF 2

STATEMENT

Q) Bianca where you in the court room when the attorney read the names of the witnesses?

A) Yes, I was in the court room and this attorney never read any of the names from my list of character witnesses.

Q) Bianca did you leave the attorney with a copy of your list?

A) Yes.

Witness: Sharon Williams

Signature: X Bianca Batton
 3517 N Sycamore St.
 Phila Pa 19141

September 5, 2014

Arnel Baxter
HX-3302
SCI Coal Township
1 Kelley Drive
Coal Township, Pa. 17866

LEGAL CORRESPONDENCE

Office of Judicial Records
The Juanita Kidd Stout Center
for Criminal Justice
1301 Filbert Street
Philadelphia, Pa. 19107

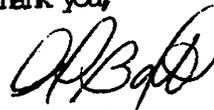
Re: Commonwealth v. Arnel Baxter CP-51-CR-0013121-2007

To whom it may concern,

Please note that the present Supplemental Petition and consolidated Memorandum of Law is being filed pursuant to Prison Mail Box Rule", also, Commonwealth v. Jones, 700 A.2d 423, 549 Pa. 58 (1997). This petition is being filed on September 5, 2014 and timely. Following this correspondence prison cash slip will follow to exhibit Petitioner has complied with this rule as it will exhibit date Petitioner placed this Petition in mailbox.

In advance, I thank you for both your time and assistance in the above referenced matter.

Thank you,



Arnel Baxter

CC: File

4. An effective trial attorney adequately investigates his client's case. Once completed, trial counsel must determine if his client has any defenses (*e.g.*, mistaken identification; alibi); if so, trial counsel must do everything in his power to develop the necessary facts to present a **complete defense**. *See Holmes v. South Carolina*, 547 U.S. 319, 324 (U.S. 2006). Trial counsel must not only review the pre-trial discovery and conduct a reasonable investigation to develop facts, *see Rompilla v. Beard*, 545 U.S. 374, 377, 383 (U.S. 2005), he must utilize the tools afforded to his client in the United States and Pennsylvania Constitutions when necessary (*e.g.*, compulsory process clause). For instance, to present a complete defense, **all** trial counsel's subpoenaed witnesses **must be at court**; if not, there may be a partial defense, but not a complete defense. In these circumstances, effective trial counsel will explain the materiality of each missing witness and ask the trial court to compel their immediate attendance by issuing a bench warrant. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). An effective trial attorney, more importantly, will make this request even if he knows the trial court will deny it because, as any effective trial attorney knows, trial errors occur, but the only way those errors can be reviewed and rectified by an appellate court is if the issue is presented to the trial court. As the U.S. Supreme Court emphasized: "Effective trial counsel preserves claims to be considered on appeal[.]" *Martinez v. Ryan*, 132 S.Ct. 1309, 1317 (U.S. 2012).
5. An effective trial attorney, moreover, utilizes evidence disclosed by the Commonwealth when that evidence impeaches one of its witnesses, especially a key witness whose police statement implicated his client. *See Giglio v. United States*, 405 U.S. 150, 154-155 (1972). This is so because, as any effective trial attorney knows, a "jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence." *Napue v. Illinois*, 360 U.S. 264, 269 (1959).
6. Here, while **Mark Greenburg** is by all means an experienced criminal defense attorney, his advocacy in Armel Baxter's case fell below an objective standard of reasonableness for several reasons. Moreover, the **cumulative impact** of Greenburg's numerous failings undermines all confidence in Armel Baxter's first-degree murder conviction warranting a new trial.
7. In short, while Mark Greenburg cross-examined the Commonwealth's witnesses, he **presented no defense whatsoever**, despite having a year to prep for trial. Indeed, Mark Greenburg **did not interview a single eyewitness** in the year he served as Baxter's trial attorney. Undersigned counsel (Cooley), on the other hand, agreed to represent Baxter in mid-November 2014, and by January 20, 2015, **he interviewed eight (fact and character) witnesses**. Counsel, moreover, does not live in Philadelphia like Mark Greenburg; instead, he lives in Toronto, Canada. Thus, despite living out of the country and only having two months to prep, counsel **made it a priority** to find and interview these witnesses face-to-face because he knew his client's life was at stake. If counsel found and interviewed these witnesses in such a short time period, Mark Greenburg surely could have done the same in the year he represented Baxter.

MARK GREENBURG'S INVESTIGATION (OR LACK THEREOF)

8. Despite the fact the Commonwealth did not formally seek the death penalty against Armel Baxter, in Pennsylvania a non-capital first-degree murder conviction automatically results in an LWOP sentence, which, as the U.S. Supreme Court recently noted, is equivalent to a death sentence:

As for the punishment, life without parole is 'the second most severe penalty permitted by law.' It is true that a death sentence is 'unique in its severity and irrevocability,'; yet life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but *the sentence alters the offender's life by a forfeiture that is irrevocable*. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence. As one court observed... this sentence 'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.

Graham v. Florida, 130 S.Ct. 2011, 2027 (2010) (emphasis added); *accord Miller v. Alabama*, 132 S.Ct. 2455, 2463 (2012) (“*Graham* further likened life without parole... to the death penalty itself[.]”).

9. Counsel cites *Graham* and *Miller* to put into perspective Mark Greenburg's investigation (or lack thereof). In other words, a reasonably competent trial attorney would have approached Armel Baxter's case as if it were a capital case because Baxter's life literally hung in the balance; unfortunately, based on the record evidence, Greenburg's investigation leaves much to be desired about. Moreover, Greenburg's lackluster investigative efforts was a significant reason why Greenburg presented no defense whatsoever at Baxter's trial.
10. According to the ABA Guidelines: “Defense counsel should conduct a **prompt** investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.” ABA Standard § 4-4.1 *Cf. Wiggins v. Smith*, 539 U.S. 510, 524 (U.S. 2003) (“[W]e long have referred [to the ABA Guidelines] as guides to determining what is reasonable.”) (quotations and citation omitted). Greenburg's pre-trial investigation fell below the ABA standard and was objectively unreasonable.

A. Darryl Mack

11. Based on Armel Baxter's Common Pleas Court Docket, Mark Greenburg was appointed as early as **March 6, 2008**.¹ On this date, there is a docket entry that reads: "Counsel attached for trial." Based on this entry, there is a strong argument Greenburg was appointed earlier than March 6, 2008. Thus, by March 6, 2008, it is safe to assume Greenburg had Rachel Marcelis's May 3, 2007 police statement where she implicated Armel Baxter and Jeffery McBride in Demond Brown's shooting.² Marcelis's also implicated Darryl Mack.
12. Despite having Marcelis's statement as early as March of 2008 (if not earlier), Greenburg never asked his investigator, **Mark Shaffer**, to locate and interview Mack to determine the validity of Marcelis's allegations. Counsel makes this conclusion based on the following correspondences between Greenburg and Shaffer:
 - Mark Greenburg's September 3, 2008 letters to Kyle Carter, Stefon Studivent, Gregory Blackmon, and Malik Ware.³
 - Mark Greenburg's October 6, 2008 letter to Mark Shaffer.⁴
 - Mark Shaffer's December 2, 2008 letter to Mark Greenburg.⁵
 - Mark Shaffer's January 20, 2009 letter to Mark Greenburg.⁶
 - Mark Shaffer's January 27, 2009 letter to Mark Greenburg.⁷
13. Indeed, the first time Greenburg mentioned Darryl Mack was on January 26, 2009, when he asked Shaffer to serve subpoenas on five people, including Mack.⁸ In Shaffer's January 27, 2009 letter to Greenburg, he wrote the following:

Daryl [sic] Mack, house number unknown, residence on Carlisle Street, Philadelphia, PA 19140. We conducted some database research but within the limited time frame allotted we did not develop a confirmed address for me to attempt service upon him.⁹

¹ A copy of the docket is attached as Exhibit 1.

² A copy of Rachel Marcelis's May 3, 2007 statement is attached as Exhibit 2.

³ Copies of these letters are attached as Exhibit 3.

⁴ A copy of this letter is attached as Exhibit 4.

⁵ A copy of this letter is attached as Exhibit 5.

⁶ A copy of this letter is attached as Exhibit 6.

⁷ A copy of this letter is attached as Exhibit 7.

⁸ Ex. 7.

⁹ Ex. 7.

B. Kyle Carter, Stefon Studivent, and Gregory Blackmon

14. Despite being appointed in early 2008, Greenburg did not attempt to locate and interview Kyle Carter, Stefon Studivent, and Gregory Blackmon until **September 3, 2008**, when he sent each a letter asking to speak with them.¹⁰ In each letter, Greenburg wrote the following:

I represent Armel Baxter in a matter in which he has been charged with murder. The incident in question involves the shooting death of Demond Brown which allegedly took place on April 21, 2007 at the school yard located in the 3400 Block of North 15th Street. Mr. Baxter insists that he is innocent and advises that you may have some relevant information about the case. Please contact me at your earliest convenience so that we can talk about this case in greater detail.

15. More than a month later, after his letters went unanswered, Greenburg wrote Shaffer on **October 6, 2008**, asking him to locate and interview Kyle Carter, Stefon Studivent, and Gregory Blackmon.¹¹ Nearly two months later, on **December 2, 2008**, Shaffer wrote Greenburg and informed him he had been unable to locate and interview Carter, Studivent, and Blackmon.¹² Shaffer then described the extent of his investigation regarding each witness:

- Kyle Carter: Between October 6th and December 2nd, 2008, Shaffer visited Carter's Philadelphia address once. When no one answered, Shaffer left a sealed envelope with a message for Carter to call him.
- Stefon Studivent: Between October 6th and December 2nd, 2008, Shaffer visited Studivent's Philadelphia address once. When no one answered, Shaffer left a sealed envelope with a message for Studivent to call him.
- Gregory Blackmon: Kyle Carter: Between October 6th and December 2nd, 2008, Shaffer visited Blackmon's Philadelphia address once. Upon arrival, an African-American female answered the door, identified herself as Blackmon's cousin, and said Blackmon was not home. Shaffer left the woman a sealed envelope with a message for Blackmon to call him.

16. Nearly a month-and-a-half later, on **January 13, 2009**, and only two weeks before trial, Greenburg called Shaffer and asked him to renew his efforts to locate and interview Carter, Studivent, and Blackmon.¹³

¹⁰ Ex. 3.

¹¹ Ex. 4.

¹² Ex. 5.

¹³ Ex. 6.

17. A week later, on **January 20, 2009**, and only a week before trial, Shaffer wrote Greenburg with an update.¹⁴

- Kyle Carter: On **January 15, 2009**, Shaffer returned to Carter's Philadelphia address, but Carter was not home. Shaffer left another letter for Carter asking him to call.
- Stefon Studivent: On **January 15, 2009**, Shaffer returned to Studivent's Philadelphia address, and spoke with a woman who identified herself as Studivent's grandmother (Josephine), who informed him Studivent was not at home because he was a student at Lincoln University in Oxford, Pennsylvania. Shaffer wrote: "We gave Josephine the letter we had prepared in advance and related the urgency of Stefon telephoning us. She stated that she would only promise to pass the letter onto Stefon's mother."
- Gregory Blackmon: On **January 15, 2009**, Shaffer returned to Blackmon's Philadelphia address, but Blackmon was not home. Shaffer left another letter for Blackmon asking him to call.

18. In terms of Stefon Studivent, Greenburg never instructed Shaffer to locate and interview Studivent at Lincoln University.

19. Collectively, then, between early 2008 and (late) January 2009, Shaffer visited Kyle Carter's, Stefon Studivent's and Gregory Blackmon's Philadelphia residences only twice. Greenburg and Shaffer also sent or left three letters (collectively) to each witness. More remarkably, though, is the fact neither Greenburg nor Shaffer interviewed a single witness from March 2008 to January 2009. Undersigned counsel, though, somehow managed to interview eight witnesses from late November 2014 to January 20, 2015.

20. What is more disturbing about Greenburg's investigation (or lack thereof) is the fact Michael Wallace's investigator located and subpoenaed Gregory Blackmon and Kyle Carter; Greenburg knew this because Wallace informed him that his investigator located both, but he never followed-up with either before trial. At trial, Greenburg conceded he never attempted to interview Blackmon and Carter after Wallace's investigator located them:

The witnesses who Mr. Wallace identified, Mr. Blackman and Mr. Kyle Carter, as I said earlier, I made efforts to locate these people independently of Mr. Wallace. Mr. Wallace advised me that he located them and subpoenaed them. I took no more steps beyond that. I have nothing to add to what Mr. Wallace said.¹⁵

¹⁴ Ex. 6.

¹⁵ NT, Trial, 2/4/2009, at 27-28.

21. Mark Greenburg's pre-trial investigative efforts (or lack thereof) foreshadowed his investigative efforts during trial. Indeed, Darryl Mack, Kyle Carter, Gregory Blackmon, and Stefon Studivent each testified at the January 20, 2015 hearing that they attended Baxter's trial for at least one day. Mack and Studivent said they attended one day, while Carter and Blackmon attended multiple days, yet not once did Greenburg interview them while they were at court.

C. Stephanie Pierre

22. As Greenburg testified at the January 20, 2015 hearing, he recalled Stephanie Pierre's name, meaning Baxter provided Pierre's name to him and asked him to interview her so she could testify as an alibi witness.
23. Neither Greenburg nor Shaffer ever contacted Stephanie Pierre and there is no evidence Greenburg ever asked Shaffer to interview her in Wilkes-Barre, Pennsylvania.
24. An alibi witness speaks for itself. Greenburg should have made every effort to interview her to hear what she had to say, but he did not.
25. In short, the Court must keep in mind Mark Greenburg's investigative (or lack thereof) efforts when evaluating Baxter's ineffectiveness claims.

TRIAL COUNSEL INEFFECTIVENESS STANDARD

26. Baxter had a right to effective trial counsel. *See* U.S. Const. Amend. VI; *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). 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." *Id.* 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. Cronin*, 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. 668, 688 (1984). Consequently, unless a defendant receives effective representation, "a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan*, 446 U.S. 330, 343 (1980).
27. To prevail on an ineffectiveness claim, Baxter must demonstrate that counsel's performance was deficient and the deficient performance prejudiced him. *See 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 an IAC 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, in other words, “is a probability sufficient to undermine confidence in the outcome.” *Strickland v. Washington*, 466 U.S. at 694.

28. The Pennsylvania Supreme Court has interpreted *Strickland* and articulated its own three-factor test. To obtain IAC relief, the defendant must show: (1) the underlying legal claim is of arguable merit; (2) counsel’s action or inaction lacked any objectively reasonable basis designed to effectuate his client’s interest; and (3) prejudice, to the effect that there was a reasonable probability of a different outcome at trial if not for counsel’s error. See *Commonwealth v. Pierce*, 527 A.2d 973, 975–976 (Pa. 1987). 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 (Pa. 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).

Claim 1: Mark Greenburg’s Decision Not To Preserve the Compulsory Process Claim Before the Trial Court Was Objectively Unreasonable and Prejudiced Baxter Undermining Confidence in His Conviction and His Initial Appeal Before the Superior Court. U.S. Const. amends. V, VI, VIII, XIV; Pa. Const. art. §§ 8, 9, 23.

A. Compulsory Process and Right to Present a Complete Defense Case Law

29. The U.S. Constitution “guarantees criminal defendants a meaningful opportunity to present a complete defense.” *Holmes v. South Carolina*, 547 U.S. 319, 324 (U.S. 2006) (citation and quotations omitted). To meaningfully present a complete defense, however, requires the attendance of favorable defense witnesses. If favorable witnesses fail or refuse to appear to testify, especially when they have been subpoenaed, trial counsel must exercise the defendant’s right to compulsory process and demand the trial court’s assistance in compelling the favorable witnesses’ testimony.
30. The Sixth Amendment reads, in part: “In all criminal prosecutions, the accused shall enjoy the right... to have compulsory process for obtaining witnesses in his favor[.]” U.S. Const. amend. VI. The Pennsylvania Constitution reads, in part: “In all criminal prosecutions the accused hath a right... to have compulsory process for obtaining witnesses in his favor[.]” Pa. Const. art. 1, § 9. The U.S. Supreme Court’s compulsory process “cases establish, at a minimum, that criminal defendants have the right to the government’s assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt.” *Pennsylvania v. Ritchie*, 480 U.S. at 56. As the Court emphasized forty years ago:

The need to develop [and present] all relevant facts in the adversary system is both fundamental and comprehensive. *The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.* The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is *imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.*

United States v. Nixon, 418 U.S. 683, 709 (U.S. 1974) (emphasis added).

31. Stated differently, the “right to offer the testimony of witnesses, *and to compel their attendance, if necessary*, is in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.” *Washington v. Texas*, 388 U.S. 14, 19 (U.S. 1967) (emphasis added)
32. To compel a witness’s appearance, trial counsel must request the trial court to issue a bench warrant for the witness. Although “a decision to issue a bench warrant to compel the appearance of a witness lies within the trial judge’s discretion, that discretion is constrained by the defendant’s Sixth Amendment right to compulsory process.” *United States v. Simpson*, 992 F.2d 1224, 1230 (D.C. Cir. 1993). When “assessing a request for compulsory process, a trial judge may not invade the province of the jury and independently weigh the probativeness of relevant evidence.” *Id.* In other words, “[o]nce the defendant has *alleged facts* that, *if true*, demonstrate the necessity of the witness’ testimony, the court is obligated to lend its authority in compelling the sought-after witness’ appearance.” *Id.* (emphasis added); *accord Commonwealth v. Terry*, 393 A.2d 490, 493 (Pa. Super. 1978).

B. Issue Preservation and Waiver

33. As noted *supra*, “[e]ffective trial counsel preserves claims to be considered on appeal.” *Martinez v. Ryan*, 132 S.Ct. at 1317. The ABA Guidelines, for instance, makes clear that “[d]efense counsel should take whatever steps are necessary to protect the defendant’s rights of appeal.” ABA Standards § 4-8.2(b). In Pennsylvania, the need to preserve issues with a timely objection or request is paramount because “the failure to make a timely and specific objection before the trial court at the appropriate stage of the proceedings will result in waiver of the issue.” *Commonwealth v. Houck*, 102 A.3d 443, 451 (Pa. Super. 2014); *accord Pa.R.A.P. 302(a).*

C. Application of Law to Facts

1. Deficient Performance

34. Here, Michael Wallace subpoenaed Kyle Carter and Gregory Blackmon, and Mark Greenburg piggybacked off Wallace's subpoena.¹⁶ Thus, by subpoenaing them, Greenburg presumably knew Carter's and Blackmon's testimony would challenge and undermine Anthony Harris's and Hassan Durant's identification testimony. Blackmon and Carter were both at court multiple days waiting to testify on Baxter's behalf. Unfortunately, due to a significant snow storm in the early morning hours of February 4, 2009, Carter and Blackmon incorrectly assumed the courthouse was closed.

35. Wallace and Greenburg both knew the significance of Carter's and Blackmon's testimony, as both requested a continuance in order to contact them and have them come to court. Although both requested a **continuance**, neither ever made a proffer to the trial court explaining Carter's and Blackmon's proposed testimony. With no proffer, the trial court denied their continuance requests. At the January 20, 2015 hearing, moreover, both said they never requested bench warrants for Carter and Blackman because, if the trial court denied their continuance requests, it would have denied their bench warrant requests. Thus, neither ever attempted to vindicate Baxter's compulsory process rights.

36. Here, Greenburg's actions were objectively unreasonable. First, the fact Greenburg never made a proffer to the trial court of what he expected Carter and Blackmon to say on the stand was objectively unreasonable. Had he done so, he would have explained how Carter's and Blackmon's testimony would rebut and undermine Anthony Harris's and Hassan Durant's identification testimony. This, in turn, may have convinced the trial court to grant the continuance *and* bench warrant. Second, Greenburg's decision not to make an on-the-record bench warrant request was objectively unreasonable, even if it was an certain the trial court would have denied the request. By making an on-the-record request and a timely objection after the trial court denied the request, however, Greenburg would have **preserved the issue for appellate review**. By doing neither, though, Greenburg denied Baxter the opportunity to make a meritorious compulsory process argument on direct appeal.

2. Prejudice

37. In eyewitness cases, "the only duty" of the fact-finder "will often be to assess the reliability of [the eyewitness] evidence." *Watkins v. Sowders*, 449 U.S. 341, 347 (1981). Here, however, because Greenburg failed to make a proffer and request bench warrants, Baxter's jury was never presented with substantial testimony undermining Anthony Harris's and Hassan Durant's alleged identifications. The following chart demonstrates how Carter's and Blackmon's testimony would have significantly undermined Anthony Harris's and Hassan Durant's alleged identifications:

¹⁶ NT, Trial, 2/4/2009, at 20.

| Anthony Harris/Hassan Durant | Kyle Carter/Gregory Blackmon |
|---|--|
| 1. The two shooters had on hoods, but their hoods did not cover their faces and ears. | 1. The two shooters had on hoods, and the hoods were pulled tightly around their heads, making it impossible to see their faces. |
| 2. They (Harris and Durant) both stood, frozen, for at least five seconds as the two shooters fired 8 to 10 shots | 2. Everyone ran from the schoolyard when the two shooters began shooting; no one stood and watched the shooters. |
| 3. They (Harris and Durant) both immediately recognized Armel Baxter and Jeffery McBride as the shooters | 3. Both shooters looked to be 6' or taller, meaning both shooters were much taller than Armel Baxter |
| | 4. When they (Blackmon and Carter) returned to the schoolyard shortly after the shooting, they saw and heard Anthony Harris identify Malik Ware as one of the shooters |

38. These facts speak for themselves; had Greenburg informed the trial judge of these facts, there is a reasonable probability she would have issued bench warrants for Carter and Blackmon. **Indeed, after the Commonwealth explained to the trial court the importance of Hassan Durant's testimony, the trial court, on January 27, 2009, issued a bench warrant for Hassan Durant's appearance at trial.**¹⁷ Thus, the trial court was not adverse to issuing bench warrants when provided with sufficient facts demonstrating the witness's materiality to the proponent's case.

39. Had Carter and Blackmon testified, there is a reasonable probability the jury would have acquitted Armel Baxter of all charges. In other words, in the absence of Carter's and Blackmon's testimony, the Court can have no confidence in Baxter's first-degree murder conviction. Likewise, had Greenburg informed the trial court of these facts, yet it still denied his bench warrant requests, there is a reasonable probability the Superior Court would have found a compulsory process violation, reversed the trial court's denial, and ordered a new trial, assuming, of course, Greenburg timely objected to the denial of the bench warrants. *See e.g., United States v. Simpson*, 992 F.2d at 1230; *Commonwealth v. Terry*, 393 A.2d at 493.

¹⁷ Ex. 1.

40. The prejudice, however, runs deeper. Had Kyle Carter and Gregory Blackmon testified and significantly undermined Anthony Harris's and Hassan Durant's identifications, this would have significantly undermined Rachel Marcelis's trial testimony as well because, if Armel Baxter was too short to be one of the shooters, then her testimony must be false.¹⁸
41. Individually and collectively, Mark Greenburg's deficient performance relating to Kyle Carter and Gregory Blackmon prejudiced Armel Baxter warranting a new trial where Carter's and Blackmon's testimony can be presented to a jury.

Claim 2: Mark Greenburg Never Attempted to Locate Stephon Studivent at Lincoln University, Despite the Fact Studivent's Family Informed Mark Shaffer, Greenburg's Investigator, that Studivent Was Away at Lincoln University. Greenburg's Decision Was Objectively Unreasonable and Prejudiced Armel Baxter Because Studivent Was a Fact Witness Whose Testimony Would Have Significantly Undermined Anthony Harris's and Hassan Durant's Identifications. U.S. Const. amends. V, VI, VIII, XIV; Pa. Const. art. §§ 8, 9, 23.

A. Duty to Reasonably Investigate

42. Trial counsel has a duty to conduct a reasonable investigation. *See Wiggins v. Smith*, 539 U.S. at 521; *Strickland v. Washington*, 466 U.S. at 690-91. The duty to investigate, however, "does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla v. Beard*, 545 U.S. 374, 383 (2005); *Wiggins v. Smith*, 539 U.S. at 525; *Strickland v. Washington*, 466 U.S. at 699; *Burger v. Kemp*, 483 U.S. 776, 794 (1987).
43. Pre-trial and trial decisions "made after [a] thorough" factual investigation are considered "strategic" and are "virtually unchallengeable." *Strickland v. Washington*, 466 U.S. at 691; *Commonwealth v. Hughes*, 865 A.2d 761, 813 (Pa. 2004). Likewise, strategic choices "made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* In other words, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*
44. The duty to investigate, however, must be reevaluated based on each new fact developed during the investigation. Certain facts, for instance, will automatically compel an attorney to conduct further investigation—even if the initial fact is not what trial counsel needs or was looking for initially. *See Wiggins v. Smith*, 539 U.S. at 525 ("The scope of [trial counsel's] investigation was... unreasonable in light of what

¹⁸ This is where the immunity agreement and Rachel Marcelis's prior testimony at Cordell Young's trial would have truly gutted Rachel Marcelis's testimony at Armel Baxter's trial. *See infra*, ¶¶ 81-86 (cumulative impact claim).

counsel actually discovered in the DSS records.”); *Rompilla v. Beard*, 545 U.S. at 383-385. In other words, while certain facts may not be the ultimate prize, they may contain sufficient information to demand additional investigation. Thus, counsel cannot terminate his investigation of an issue or witness when the “rudimentary knowledge” he has uncovered would lead a reasonably competent attorney to conduct additional investigation based on this rudimentary information. *Wiggins v. Smith*, 539 U.S. at 524.

45. Thus, in analyzing a refusal or failure to investigate claim, the issue is not whether trial counsel should have conducted additional investigation, but whether the investigation supporting trial counsel’s decision not to further investigate was itself reasonable. See *Wiggins v. Smith*, 539 U.S. at 523.

B. Application of Law to Facts

1. Deficient Performance

46. Here, based on Mark Greenburg’s September 3, 2008 letter to Stefon Studivent,¹⁹ Greenburg knew Studivent likely had exculpatory information regarding Demond Brown’s shooting. After Greenburg’s initial letter and Mark Shaffer’s initial home visit produced no results, Greenburg asked Shaffer to re-up his efforts to locate and interview Studivent. As a result, on **January 15, 2009**, Shaffer returned to Studivent’s Philadelphia address, and spoke with a woman who identified herself as Studivent’s grandmother (Josephine), who informed him Studivent was not at home, but at Lincoln University in Oxford, Pennsylvania. In his January 20, 2009 report to Greenburg, Shaffer wrote: “We gave Josephine the letter we had prepared in advance and related the urgency of Stefon telephoning us. *She stated that she would only promise to pass the letter onto Stefon’s mother.*”²⁰
47. Based on Shaffer’s January 20th report, Greenburg knew Josephine had no intention of contacting Studivent at Lincoln University. Yet, despite this fact, Greenburg never requested Shaffer to try to locate Studivent at Lincoln University, which, mind you, is a small college just west of Philadelphia in Chester County.²¹ By not attempting to locate Studivent at Lincoln University, Greenburg never subpoenaed Studivent and he never testified on Baxter’s behalf.
48. Greenburg’s decision not to search for Studivent at Lincoln University after learning about Josephine’s statement to Shaffer was objectively unreasonable. Based on Studivent’s proposed trial testimony (*i.e.*, Baxter was not one of the shooters), a reasonably competent trial attorney would have searched for Studivent at Lincoln University.

¹⁹ Ex. 3.

²⁰ Ex. 4.

²¹ <http://www.lincoln.edu/about.html>.

2. Prejudice

49. In eyewitness cases, as mentioned, “the only duty” of the fact-finder “will often be to assess the reliability of [the eyewitness] evidence.” *Watkins v. Sowders*, 449 U.S. at 347. Here, however, because Greenburg failed to adequately investigate Studivent’s whereabouts, Baxter’s jury was never presented with significant facts undermining Anthony Harris’s and Hassan Durant’s alleged identifications. The following chart demonstrates how Stefon Studivent’s testimony would have significantly challenged and undermined Anthony Harris’s and Hassan Durant’s alleged identifications:

| Anthony Harris/Hassan Durant | Stefon Studivent |
|---|---|
| 1. The two shooters had on hoods, but their hoods did not cover the face and ears. | 1. The two shooters had on hoods, and the hoods were pulled tightly around their heads, making it impossible to see their faces. |
| 2. They (Harris and Durant) both stood, frozen, for at least five seconds as the two shooters fired 8 to 10 shots | 2. Everyone ran from the schoolyard when two shooters began shooting; no one stood and watched the shooters. |
| 3. They (Harris and Durant) both immediately recognized Armel Baxter and Jeffery McBride as the shooters | 3. Both shooters looked to be 6’ or taller, meaning both shooters were much taller than Armel Baxter |
| | 4. When he (Studivent) returned to the schoolyard shortly after the shooting, he saw and heard Anthony Harris identify Malik Ware as one of the shooters. |

49. Had Studivent testified, there is a reasonable probability the jury would have acquitted Armel Baxter of all charges. In other words, in the absence of Studivent’s testimony, the Court can have no confidence in Baxter’s first-degree murder conviction.

50. The prejudice, however, goes further. Had Studivent testified and significantly undermined Anthony Harris’s and Hassan Durant’s alleged identifications, this would have significantly undermined Rachel Marcelis’s trial testimony as well because, if Armel Baxter was too short to be one of the shooters, then her testimony must be false.

51. Individually and collectively, Mark Greenburg’s deficient performance relating to Stefon Studivent prejudiced Armel Baxter warranting a new trial where Studivent’s testimony can be presented to a jury.

Claim 3: Mark Greenburg's Decision Not To Present Darryl Mack To Undermine Rachel Marcelis's Testimony Was Objectively Reasonable and Prejudicial Warranting a New Trial. U.S. Const. amends. V, VI, VIII, XIV; Pa. Const. art. §§ 8, 9, 23.

A. Pre-Trial and Trial Facts

52. On May 3, 2007, after 36 hours of detention and questioning by Homicide detectives, Rachel Marcelis signed a statement typed by Homicide detectives.²² In the statement, Marcelis implicated Armel Baxter and Jeffery McBride in Demond Brown's shooting. She also implicated Darryl Mack by supposedly telling detectives Mack was with her, Baxter, and McBride in her white Ford Expedition before and after the shooting.

53. According to Marcelis's statement, she, Baxter, and McBride attended a party on the night of April 20, 2007. **Antonio Pemberton** threw the party at the (15th and Allegheny) apartment he had been squatting at for several weeks. In her statement, Marcelis supposedly provided the following sequence of events regarding April 20, 2007 and April 21, 2007:

- a. She, Baxter, and McBride spent the night at Pemberton's apartment; all three left together in the morning.
- b. About 10 to 15 minutes after they left Pemberton's apartment, **Cordell Young** (McBride's older brother) called McBride informing him that a woman named **Fatima Whitfield** had been shot and murdered that morning at Pemberton's apartment.
- c. She, Baxter, and McBride return to 15th and Allegheny where they picked up Cordell Young; once in her Ford Expedition, Young supposedly confessed to shooting Fatima Whitfield.
- d. After they picked up Young, they (Marcelis, Baxter, McBride, and Young) drove to Young's (and **Debra McBride's**) house. Debra McBride is Young's and McBride's biological mother. Marcelis, Baxter, and McBride went inside and made small talk with Debra McBride, while Young stayed outside and smoked a cigarette.
- e. At this point, Marcelis, Baxter, and McBride decided to leave Debra McBride's house to get some dutches. As Marcelis, Baxter, and McBride walked out of the house toward Marcelis's Expedition, they saw **Darryl Mack** and invited him to get dutches with them. Mack agreed, got into Marcelis's Expedition, and the four (Marcelis, Baxter, McBride, and Mack) drove off. Marcelis drove, Mack sat in the front passenger's seat, while Baxter and McBride are in the back seat.
- f. Shortly after leaving Debra McBride's house, Marcelis said she drove past Kenderton Elementary School, and when she did, Baxter or McBride made a

²² Ex. 2.

comment to the effect of, “Look who’s in the playground.” Baxter then instructed Marcelis to drive around the block, which she did, before stopping on Sydenham Street and allowing Baxter and McBride to exit her Expedition.

- g. Marcelis then drove north on Sydenham Street, made an immediate right (going east) on Tioga Street, and another immediate right (going south) on 15th Street. Once she crossed over Ontario Street (going south) and neared Westmoreland Street, Mack said he heard gun shots. This prompted Marcelis to check her rearview mirror; when she did, she saw Baxter and McBride running south on 15th Street with a large group of people. As Baxter and McBride neared her Expedition, she opened her doors, let them in, and drove off—in front of numerous witnesses.²³
- h. When Mack asked Baxter and McBride what happened, either Baxter or McBride said something to the effect of, “We go him.” Baxter and McBride then talked about how McBride’s gun jammed during the shooting.
- i. Marcelis then drove to Mack’s aunt’s house, where McBride made more incriminating statements.

54. After reading Marcelis’s statement, a reasonably competent trial attorney would have immediately located and interviewed Darryl Mack to determine the validity of Marcelis’s narrative. Mark Greenburg, though, never attempted to interview Mack, and the correspondences between him and Mark Shaffer plainly prove this point.²⁴ On January 27, 2009, however, only days before Baxter’s trial was scheduled to commence, Greenburg requested Shaffer to serve Mack with a subpoena.²⁵ In his January 27, 2009 report to Greenburg, Shaffer said he was unable to serve the subpoena that day (January 27th), but as Mack testified at the January 20, 2015 hearing, someone ultimately served him a subpoena on January 29, 2009 (the first day of trial) as he stood in line waiting to meet with his probation officer.

55. At the January 20, 2015 hearing, Mack also said he went to the courthouse immediately after meeting with his probation officer. Once at the courthouse, he said Michael Wallace pulled him aside, asked him for his side of the story, and after hearing what he (Mack) had to say, told him he should leave the courthouse because he was no help to anybody. Mack’s story is corroborated by the February 4, 2009 transcripts, where Wallace informed the trial court he thought Mack’s testimony “wasn’t helpful to anybody.”²⁶

²³ Not a single police report disclosed during pre-trial discovery mentioned the two perpetrators running south on 15th Street and getting into a white SUV. This is quite shocking considering Marcelis’s claim that a large group of people running from the playground ran past her SUV while Baxter and McBride got in. If such a report exists, however, counsel respectfully requests the Commonwealth to provide a copy of the report or reports to the Court and counsel.

²⁴ Exs. 3-7.

²⁵ Exs. 7-8.

²⁶ NT, Trial, 2/4/2009, at 24.

56. There is no record evidence, however, Greenburg spoke with or attempted to speak with Mack at the courthouse on January 29, 2009. Also, there is no evidence Greenburg was present or participated in the interview Wallace had with Mack. Indeed, at the January 20, 2015 hearing, Mack said he only spoke with Wallace before being instructed to leave the courthouse; Mack never mentioned speaking to Greenburg or Greenburg participating in the discussion he had with Wallace.

B. Facts Developed at January 20, 2015 Hearing

57. At the January 20, 2015 hearing, Mack said the following regarding his activities on April 20, 2007 and April 21, 2007:

- a. On the night of April 20, 2007, Mack attended a party at **Antonio Pemberton's** apartment. Mack drank that night and was inebriated, but he did not take or ingest any drugs.
- b. Mack saw Rachel Marcelis at the party. Marcelis, according to Mack, was both high and drunk because she smoked weed, took PCP, and drank alcohol.
- c. Mack did not spend the night at Pemberton's apartment; instead, he left sometime before midnight and walked back to his Carlisle Street apartment that he shared with his parents.
- d. On the morning of April 21, 2007, Mack was outside his Carlisle Street apartment when Rachel Marcelis pulled up alongside him in her Expedition. According to Mack, Marcelis still looked drunk and high, or at the very least hung over from the party at Pemberton's apartment.
- e. After making small talk with Marcelis, she agreed to drive him to his lady friend's house in northeast Philadelphia. Marcelis, though, told Mack to drive because she was in no condition to drive. Mack, consequently, got into the driver's seat and drove to his lady friend's house.
- f. By the time Mack arrived at his lady friend's house, Marcelis had passed out in the front passenger's seat. Mack left her sleeping, while he visited with his lady friend for an hour or so. When he returned to the Expedition, Marcelis was still sleeping.
- g. Mack woke Marcelis when he got back into the driver's seat and the two drove back towards his Carlisle Street apartment. As he drove, he received a call from his father informing him of Demond Brown's shooting. Mack's father and Demond Brown's father grew up together, so Mack's family knew Demond Brown's family.

- h. Despite Rachel Marcelis's statement to police implicating him in Demond Brown's murder, **not a single law enforcement officer ever detained and interrogated Mack regarding his role in Demond Brown's murder.** In other words, detectives never spoke with Mack to corroborate or validate Rachel Marcelis's May 3, 2007 statement.
- i. Had Greenburg asked Mack to testify at Baxter's trial, he would have told the jury what he told the Court at the January 20, 2015 hearing.

C. Deficient Performance and Prejudice

58. Greenburg relied on Michael Wallace's conversation with Mack to determine if Mack had relevant and favorable evidence to present on Baxter's behalf. Greenburg's decision to piggyback onto Wallace's decision to turn away Mack at the courthouse was objectively unreasonable. Greenburg never spoke with Mack before trial or when Mack appeared at court; instead, Wallace spoke with Mack. Greenburg's decision not to call Mack, therefore, cannot be a strategic decision because he, himself, did not question Mack and evaluate his statement and credibility. **Wallace's allegiance was to Jeffery McBride, not Armel Baxter.** Attorneys do not always see eye-to-eye regarding a witness and they do not question witnesses the same way either. As a result, it was incumbent on Greenburg to question Mack before trial or at the courthouse and to make his own independent judgment regarding Mack's credibility and believability.

59. Even if Greenburg could piggyback onto Wallace's decision to turn Mack away at the courthouse, the decision is still objectively unreasonable because Mack's proposed testimony would have obliterated Rachel Marcelis's testimony and credibility. Again, the prejudice speaks for itself; without Mack's testimony, all Greenburg could do was cross-examine Rachel Marcelis and get her to admit she occasionally heard voices when she did drugs. This admission, though, did little, if anything, to the Commonwealth's overall narrative and theory of guilt. She may have heard voices when drunk and high, but she was quite certain Baxter, McBride, and Mack were in her Expedition before and after Demond Brown's murder. Mack's testimony would have forcefully challenged and undermined her narrative.

60. Simply put, had Greenburg actually interviewed Mack before trial or at the courthouse, and conducted an adequate investigation surrounding Rachel Marcelis's statement, the objectively reasonable thing to do would have been to have Mack testify to discredit Marcelis's testimony. Had Mack testified, there is a reasonable probability of a different outcome. Stated differently, the Court can have no confidence in Baxter's convictions in the absence of Mack's testimony.

D. Commonwealth's Argument

1. Cordell Young's Trial

61. In its November 10, 2014 *Motion to Dismiss*, the Commonwealth argued that the absence of Darryl Mack's testimony was based on Mark Greenburg's strategic decision—which in turn was based on the testimony in Cordell Young's trial (CP-51-CR-0013587-2007).²⁷ According to the Commonwealth, the testimony at Cordell Young's trial belied Mack's narrative:

The testimony at Young's trial established that on the same day defendant and McBride murdered Demond Brown, they were at a party where Young committed this murder. Numerous witnesses testified at Young's trial that on the day of the incident, Mack, Rachel, [Baxter], and McBride all left a party together in North Philadelphia. In fact, other than Rachel Marcelis, at least one person, Antoine Pemberton, told police he saw Mack, [Baxter], and McBride with Rachel Marcelis, in her car, on the day of [Demond Brown's] murder.²⁸

62. The Commonwealth then *assumed*, because Michael Wallace represented Cordell Young, he must have told Mark Greenburg about these numerous statements: "Surely, ... [Baxter's] counsel and... McBride's counsel knew this fact. Indeed, McBride's counsel also represented Young at his murder trial."²⁹
63. The Commonwealth's argument is meritless for numerous reasons

2. Reasons Why Commonwealth's Argument is Meritless

64. **First**, the Commonwealth conveniently overlooks that, in order to characterize a decision as strategic, the decision must be based on a reasonable and thorough investigation. *See Strickland v. Washington*, 466 U.S. at 691; *Commonwealth v. Hughes*, 865 A.2d at 813. Here, there is no evidence Mark Greenburg even knew about the statements made in connection with Cordell Young's murder prosecution. If Greenburg was not aware of these statements or the trial testimony, his decision not to present Mack cannot possibly qualify as a strategic decision based on the Commonwealth's rationale. This conclusion is based on the following facts:

²⁷ *Comm. Mot. Dismiss*, at 12. The Commonwealth prosecuted Cordell Young in June 2008.

²⁸ *Id.*

²⁹ *Id.*

- a. There is no evidence Michael Wallace ever discussed the pre-trial statements and trial testimony in Cordell Young's case with Mark Greenburg. The Commonwealth merely assumes Wallace spoke to Greenburg *before* trial. This assumption, however, is belied by the fact Greenburg subpoenaed Mack to testify at Baxter's trial.³⁰ If Greenburg spoke to Wallace before trial, and Wallace abhorred Mack's proposed testimony *before* trial, then why on earth subpoena Mack in the first place? The answer is simply: Greenburg had no clue about the pre-trial statements and trial testimony relating to Cordell Young's murder prosecution.
- b. There is no evidence Michael Wallace ever gave Greenburg access to the pre-trial discovery in Cordell Young's case. Likewise, there is no evidence Greenburg ever requested Cordell Young pre-trial discovery from Wallace.
- c. There is no evidence Michael Wallace ever provided Greenburg a copy of the Cordell Young trial transcripts. Michael Wallace served as Cordell Young's appellate attorney as well (**2519 EDA 2008**), meaning he had access to the trial transcripts. Moreover, the court reporter filed the official transcripts with the Common Pleas Court on October 24, 2008— several months before Baxter's trial.³¹ There is no evidence Greenburg ever requested, obtained, and reviewed the trial transcripts from Wallace, the court reporter, or the Common Pleas Court.³²
- d. There is no evidence Greenburg was present when Michael Wallace spoke with Mack at the courthouse; likewise, there is no evidence Wallace consulted with Greenburg after he (Wallace) spoke with Mack. At the January 20, 2015 hearing, Greenburg had no recollection witnesses the Wallace-Mack discussion or speaking with Wallace after he met with Mack.
- e. Simply put, Greenburg's decision not to call Mack cannot possibly be called a strategic decision.

65. **Second**, the Commonwealth's characterization of the testimony at Cordell Young's trial is wrong, misleading, and incomplete.

- a. Antoine Pemberton: In its *Motion to Dismiss*, the Commonwealth cited to pages 31-32 of the Cordell Young trial transcripts on June 11, 2008.³³ The problem with this reference is that it does not reference Pemberton's trial testimony; instead, it references **Det. James Crone's testimony**; specifically, where he is

³⁰ Ex. 8.

³¹ Ex. 9.

³² As noted *infra*, this point is also reinforced by the fact Greenburg never impeached Rachel Marcellis with her trial testimony at Cordell Young's trial. See *infra*, ¶¶ 73-80

³³ *Comm. Mot. Dismiss*, at 12 ("Trial of Cordell Young, N.T. 6/11/08, 31-32").

reading into the record Pemberton's April 28, 2008 custodial statement.³⁴ In the portion of the statement referenced by the Commonwealth, Pemberton allegedly told police he saw Marcelis, Baxter, McBride, and Mack shortly after he left his apartment on the morning of April 21, 2007; Pemberton left his apartment because someone murdered Fatima Whitfield in his apartment only moments before.

b. The Commonwealth's other significant problem is it either did not read Pemberton's *entire* trial testimony,³⁵ or it did, but chose not to incorporate the following facts into its *Motion to Dismiss*:

i. When the prosecutor asked Pemberton if he made the statement regarding seeing Marcelis, Baxter, McBride, and Mack in Marcelis's Expedition on the morning of April 21, 2007, Pemberton repeatedly denied making the statement to Homicide detectives.³⁶

ii. When the prosecutor asked Pemberton if he told detectives that Marcelis, Baxter, McBride, and Mack were at his apartment before Fatima Whitfield's shooting, Pemberton denied making this statement as well.³⁷

iii. On cross-examination, Pemberton explained how Det. Crone and other detectives produced his April 28, 2008 statement:

- “[They] had me in a room and they were basically telling me that... Mr. Young was stating that I was the shooter and I was the killer, and basically giving other circumstances of what... happen[ed] basically.”³⁸
- “They were forcing me to answer [their questions]. I gave them answers that they already told me to say.”³⁹
- “They told me everybody... I don't know why they needed me.”⁴⁰
- Det. Crone showed Pemberton “a lot” and a “bunch of” other statements and Det. Crone went over each statement with him for an hour or so.⁴¹

³⁴ At Cordell Young's trial, Antoine Pemberton's April 28, 2008 statement was marked and entered into evidence as Commonwealth Exhibit 23 (C-23).

³⁵ Antoine Pemberton's entire trial testimony is attached as Exhibit 10.

³⁶ Ex. 10, at 115, 116,

³⁷ *Id.* at 119.

³⁸ *Id.* at 126.

³⁹ *Id.* at 127.

⁴⁰ *Id.* at 127.

⁴¹ *Id.* at 138, 139, 140, 142, 156.

- c. The Commonwealth also conveniently failed to mention:
- i. Throughout his interrogation, Homicide detectives repeatedly accused Pemberton of shooting Fatima Whitfield, not Cordell Young.⁴²
 - ii. Homicide detectives did not video or audiotape Pemberton's all-day interrogation.
 - iii. Det. Crone typed the statement for Pemberton; Pemberton did not hand write it himself.⁴³
 - iv. Knowing much of the statement was false, because he simply said what Det. Crone wanted him to say, and because he did not actually type the statement, Pemberton never actually read the statement before signing it.⁴⁴
- d. Wayne Ware: In its *Motion to Dismiss*, the Commonwealth cited Ware's testimony, particularly page 204 of the Cordell Young trial transcripts on June 11, 2008.⁴⁵ Again, the Commonwealth's reference is misplaced, misleading, and incomplete. **Indeed, Ware never saw Mack on April 21, 2007.**
- e. Wayne Ware gave a custodial statement to Homicide detectives on August 9, 2007.⁴⁶ Like Antoine Pemberton, on direct-examination, Ware denied making numerous statements contained in his statement. As a result, the prosecutor read his entire statement into the record as he questioned Ware.
- f. On page 204, the prosecutor read the following QUESTION from his statement: "Did you ever speak to [Baxter], [McBride] or Rachel that day [April 21, 2007]?" The ANSWER provided in the statement said Ware left Pemberton's apartment on the morning of April 21, 2007 because of Fatima Whitfield's murder and quickly went home.⁴⁷ Once home, Marcelis, Baxter, and McBride showed-up about twenty minutes later in Marcelis's Expedition. Marcelis drove, while McBride sat in the front passenger's seat, and Baxter sat in the back.⁴⁸
- g. Here, again, the Commonwealth either did not read Ware's *entire* testimony, or it did, but simply chose to disregard the following fact:

⁴² *Id.* at 155.

⁴³ *Id.* at 143, 144.

⁴⁴ *Id.* at 155.

⁴⁵ Wayne Ware's entire trial testimony is attached as Exhibit 11.

⁴⁶ At Cordell Young's trial, Wayne Ware's August 9, 2008 statement was marked and entered into evidence as Commonwealth Exhibit 29 (C-29).

⁴⁷ Ex. 11, at 204.

⁴⁸ *Id.* at 205.

- i. When the prosecutor asked Ware if he made the statement regarding seeing Marcelis, Baxter, and McBride in Marcelis's Expedition on the morning of April 21, 2007, Ware repeatedly *denied* making the statement.⁴⁹
 - ii. More importantly, before Homicide detectives began questioning Ware, they threatened him with conspiracy to murder charges,⁵⁰ fed him information from other statements,⁵¹ and told him who they believed was at Pemberton's apartment on the night April 20, 2007 and the early morning hours of April 21, 2007.⁵²
- h. The Commonwealth also failed to mention Homicide detectives did not video or audiotape Ware's lengthy interrogation and that Det. Crone typed the statement for Ware.

66. **Third**, the Commonwealth assumes, had Greenburg presented Mack to impeach Rachel Marcelis, it could have easily impeached Mack with Pemberton's and Ware's testimony. This assumption is false.

- a. To begin with, Pemberton's and Ware's testimony is hearsay, and the Commonwealth never identified what hearsay exception their testimony fell under because one does not apply.
- b. With no applicable hearsay exception, the only way the Commonwealth could have impeached Mack was to present Pemberton and Ware as witnesses at Baxter's trial. The Commonwealth not only did not present Pemberton and Ware as witnesses, it never even listed them as *potential* witnesses. Here, because Michael Wallace and Mark Greenburg both subpoenaed Mack, and because Rachel Marcelis's statement implicated Mack, the Commonwealth surely would have (and should have) expected Mack to testify. Despite this obvious expectation, and despite knowing about Pemberton's and Ware's (supposedly powerful impeachment) testimony at Cordell Young's trial, the Commonwealth never listed them as potential witnesses. Additionally, the Commonwealth did not disclose Pemberton's and Ware's statements to Mark Greenburg when it provided pre-trial discovery. The Commonwealth's refusal to list them as potential witnesses, speaks volumes as to how it viewed Pemberton's and Ware's credibility (or lack thereof). If Pemberton and Ware were such powerful impeachment witnesses, as the Commonwealth suggests in its *Motion to Dismiss*, the Commonwealth surely would have listed them as potential witnesses and had them testify if Mack testified.

⁴⁹ Ex. 11, at 205, 206

⁵⁰ *Id.* at 216.

⁵¹ *Id.* at 213-214, 216-217.

⁵² *Id.* at 227.

c. Even if the Commonwealth presented Pemberton and Ware as rebuttal witnesses to impeach Mack, Mark Greenburg could have easily impeached them both by introducing their testimony from Cordell Young's trial, where both state, *on-the-record*, their statements to Homicide detectives were false and that neither saw Mack, Marcelis, Baxter, and McBride on April 21, 2007.

67. **Fourth**, had Mark Greenburg obtained and reviewed Cordell Young's trial transcripts, he would have learned that Rachel Marcelis's, Antoine Pemberton's, and Wayne Ware's *custodial* statements did not correspond with one another. The chart below highlights these inconsistencies:

| First Time Seeing Darryl Mack on April 21, 2007 | |
|--|---|
| Rachel Marcelis | <p>Marcelis, Baxter, and McBride (but not Mack) spent the night at Pemberton's apartment; all three left together in the morning.</p> <p>About 10 to 15 minutes after they left Pemberton's apartment, Cordell Young called McBride informing him that Fatima Whitfield had been shot and murdered that morning in Pemberton's apartment.</p> <p>Marcelis, Baxter, and McBride return to 15th and Allegheny where they picked up Cordell Young; once in her Expedition, Cordell Young supposedly confessed to shooting Fatima Whitfield.</p> <p>After they picked up Young, they (Marcelis, Baxter, McBride, and Young) drove to Young's (and Debra McBride's) house. Marcelis, Baxter, and McBride went inside and made small talk with Debra, while Young stayed outside and smoked a cigarette.</p> <p>At this point, Marcelis, Baxter, and McBride decided to leave Debra's house in order to get some dutches. As Marcelis, Baxter, and McBride walked out of the house toward Marcelis's white Expedition, they saw Darryl Mack and invited him to go get dutches with them.⁵³</p> |
| Antoine Pemberton | <p>Marcelis, Baxter, McBride, and Mack were at Pemberton's apartment on the morning of April 21, 2007, but they left around 6 a.m. before Fatima Whitfield's shooting.</p> <p>Immediately after Whitfield's murder, Pemberton left his apartment and walked to the corner of 15th Street where he saw Cordell Young on the phone with Marcelis, asking her to come back and pick him up.</p> <p>Pemberton and Young then walked to Broad and Allegheny where Marcelis picked up Young with her Expedition. When Marcelis pulled up, Darryl Mack rolled down the window and asked Pemberton what happened.⁵⁴</p> |

⁵³ Ex. 2.

⁵⁴ Ex. 10, at 116-119.

| | |
|---------------|---|
| Wayne Ware | <p>Ware woke up on the morning of April 21, 2007 when Fatima Whitfield's dead body dropped against his in Pemberton's apartment.</p> <p>When he woke and checked the apartment, Ware did not see Marcelis, Baxter, McBride, or Darryl Mack.</p> <p>Immediately after Whitfield's murder, Ware walked quickly home. Twenty minutes later, Marcelis arrived at his house in her Expedition and came inside. When Ware looked outside into the Expedition he saw Baxter in the back seat and McBride in the front passenger's seat. Ware did not see Mack in the Expedition.</p> <p>Ware did not see Mack at all on April 21, 2007.⁵⁵</p> |
|---------------|---|

E. Summary

68. Individually and collectively, the Commonwealth's claim that Mark Greenburg made a strategic decision not to present Darryl Mack is meritless.

69. Moreover, based on the above facts (which were easily discoverable before trial), Mark Greenburg had every reason in the world to present Darryl Mack's testimony; not doing so was not only objectively unreasonable, it prejudiced Baxter. Individually, had the jury known about Mack's accounting of events on April 21, 2007, there is a reasonable probability the outcome of Baxter's trial would have been different. The same can be said about the collective impact of all of Greenburg's objectively unreasonable decisions. *See infra*, ¶¶ 81-86.

70. Baxter is entitled to a new trial.

Claim 4: Mark Greenburg Act Objectively Unreasonable By Not Impeaching Rachel Marcelis With Easily Obtainable and Impactful Impeachment Evidence. His Failure to Obtain and Utilize this Impactful Impeachment Evidence Prejudiced Arnel Baxter Warranting a New Trial. U.S. Const. amends. V, VI, VIII, XIV; Pa. Const. art. §§ 8, 9, 23.

71. At trial, a reasonably objective defense attorney would have realized how damaging Rachel Marcelis's testimony was for Arnel Baxter. Thus, a reasonably competent defense attorney would have used all forms of impeachment evidence in his quiver to discredit Marcelis's character and the narrative she provided to Homicide detectives on May 3, 2007 and the jury.

⁵⁵ Ex. 11, at 205-206.

72. Here, Mark Greenburg failed to impeach Rachel Marcelis with her immunity agreement and prior testimony at Cordell Young's June 2008 trial. Greenburg knew of and had the immunity agreement, but chose not to impeach Marcelis with it. Greenburg, though, did not have her prior testimony at Cordell Young's trial because he never obtained and read her testimony. Not to impeach Marcelis with these two powerful forms of impeachment evidence was inexcusable and prejudicial warranting a new trial.

A. Immunity Agreement

73. Before trial, the Commonwealth informed Greenburg of its immunity agreement with Rachel Marcelis.⁵⁶ On January 23, 2009, a week before trial, the Commonwealth faxed the immunity agreement to Greenburg.⁵⁷ During his cross-examination of Marcelis, Greenburg did not mention the immunity agreement. This was inexcusable, as there was no strategic reason not to further impeach Marcelis's testimony with the immunity agreement.
74. At the January 20, 2015 hearing, Greenburg attempted in vain to justify his decision, but none of his claimed strategic reasons make sense. At the hearing, Greenburg hammered home the fact he was able to get Marcelis to admit she occasionally heard voices when she got high and drunk.⁵⁸ This may be true, but the questions that need to be asked are: Why stop impeaching her at this point? Why not impeach her further with her immunity agreement? Would it have really harmed Greenburg's (lackluster) defense by introducing the immunity agreement? There was no legitimate reason to stop impeaching Marcelis once she admitted to hearing voices occasionally. Also, introducing the immunity agreement would not have harmed Greenburg's defense—because he presented no defense (outside cross-examining the Commonwealth's witnesses).
75. Counsel will not rehash the arguments he made during the January 20, 2015 hearing regarding the immunity agreement; he will simply say this: there is a reasonable probability the jury would have viewed Marcelis's testimony with much greater skepticism had it known of the immunity agreement. Indeed, had Greenburg mentioned the immunity agreement, and the fact Marcelis was the *only* Commonwealth witness with an immunity agreement, which, by the way, forced her to testify to the so-called truth (*i.e.*, the Commonwealth's version of events), there is a reasonable probability the jury would have asked: Why does this witness need a legal agreement to testify truthfully under oath? Is she incapable of testifying truthfully without an immunity agreement? Again, these questions and concerns would have impacted the jury's assessment of Marcelis's credibility to the Commonwealth's detriment and Baxter's benefit.

⁵⁶ Ex. 13.

⁵⁷ Ex. 13.

⁵⁸ NT, Trial, 1/30/2009.

B. Rachel Marcelis's Testimony at Cordell Young's Trial

76. Mark Greenburg had Rachel Marcelis's May 3, 2007 statement. In her statement, she implicated Baxter and McBride in Demond Brown's murder, but she also implicated Cordell Young in Fatima Whitfield's April 21, 2007 murder.⁵⁹ Based on these facts, a reasonably competent defense attorney would have tracked Cordell Young's case to see when it went to trial because a reasonably competent attorney would expect Rachel Marcelis to testify for the Commonwealth.

77. On June 10, 2008, Marcelis testified at Cordell Young's trial. Michael Wallace, as mentioned, represented Cordell Young. On October 24, 2008, the court reporter from Young's trial filed the trial transcripts with the Common Pleas Court.⁶⁰ A reasonably competent defense attorney, that followed the Young prosecution and knew about the trial, would have obtained and reviewed the transcripts to determine whether Marcelis testified. Greenburg did not obtain and review the Cordell Young transcripts. Greenburg had no strategic reason for not obtaining and reviewing the transcripts. Had Greenburg obtained and reviewed the transcripts, he would have uncovered a treasure trove of impeachment evidence based on Marcelis's June 10, 2008 testimony:

- a. First, Marcelis's description of events of April 21, 2007 were inconsistent with her May 3, 2007 statement.⁶¹
- b. Second, Marcelis repeatedly said Det. Crone forced her to sign an untrue statement.⁶²
- c. Third, Marcelis admitted it was "wrong" to falsely accuse Cordell Young of murder.⁶³
- d. Fourth, Det. Crone forced her to tell him what he wanted to hear.⁶⁴
- e. Fifth, Marcelis did not want to testify for the Commonwealth because the Commonwealth wanted her to testify to what she said in her May 3, 2007 statement, but she knew the statement was untrue.⁶⁵
- f. Sixth, Homicide detectives detained Marcelis for 36 hours before they obtained her May 3, 2007 statement. She arrived at Homicide sometime between noon and 5 p.m. on May 2, 2007, but she did not sign her statement until 11:35 p.m. on May 3, 2007.⁶⁶

⁵⁹ Ex. 2.

⁶⁰ Ex. 9.

⁶¹ Ex. 12, at 165-171.

⁶² *Id.* at 194-196.

⁶³ *Id.* at 196.

⁶⁴ *Id.* at 199.

⁶⁵ *Id.* at 201.

⁶⁶ *Id.* at 207-208.

- g. Seventh, Marcelis had this dialogue with the prosecutor where she explained why she falsely implicated Cordell Young:

Prosecutor: So you were made at Cordell the day that this happened?

Marcelis: At the time, yes, I was.

Prosecutor: And you lied to get him in trouble.

Marcelis: They weren't accepting what I believed to be the truth. Which was I had originally said that my belief was that Antoine, per the phone conversation, was the one that committed the murder. They told me that they weren't hearing it. They knew that wasn't true and I did, too. And that I was going to tell them what they wanted. And I figured that would get me out. I didn't like him at the time. Why not."

Prosecutor: Well, when you said, "Kill two birds with one stone," that made it sound like there were two things you wanted to accomplish.

Marcelis: That I got to go home. That I got to go back to school. I got my car back and I could go back to my little life. Me and Corey didn't get along. That was kind of, You screwed me over, so now I'm going to screw you over. Who has the last laugh?

Prosecutor: Well, just so I'm clear, you told the detectives that [Pemberton] killed [Whitfield]?

Marcelis: Yes. That was my first statement when I went in. They told me if I told them, they would let me go home and give me my car and everything.

Prosecutor: You told the detectives that you were there and you saw [Whitfield] get shot?

Marcelis: No. I told them – they asked me if I knew anything about it. I said I heard through the grapevine that it was Tweez [Pemberton]. And he had called me and threatened me that if I cooperated, he was going to kill me with the same gun.

Prosecutor: So they didn't put the first part in but they gladly put the second part in?

Marcelis: The wouldn't take the first part at all.⁶⁷

⁶⁷ *Id.* at 221-222.

C. Impact of Impeachment Evidence

78. The impact of the immunity agreement and Marcelis's testimony at Cordell Young's trial speaks for itself. Indeed, if Homicide detectives coaxed Marcelis to falsely implicate Cordell Young in connection with Fatima Whitfield's murder, they surely could have coaxed her to implicate Armel Baxter and Jeffery McBride in Demond Brown's murder. Viewed from another angle, if Marcelis could so easily fabricate a narrative regarding Fatima Whitfield's homicide to protect her own interests, there is no doubt she could easily do (and did do) the same when it came to Demond Brown's homicide.
79. Introducing this evidence would not have harmed Baxter's defense because, to harm a defense, one must first present a defense, which is something Mark Greenburg did not do. Even if there was some sort of harm, the benefit from introducing this impeachment evidence far outweighed the harm. In short, Greenburg had no strategic reason not to introduce this evidence to impeach Marcelis's credibility.
80. The absence of this impeachment evidence, therefore, undermines all confidence in Armel Baxter's conviction warranting a new trial.

Claim 5: Mark Greenburg Failure to Investigate, Interview, and Present Stephanie Pierre as an Alibi Witness Prejudiced Armel Baxter Warranting a New Trial

81. As Greenburg testified at the January 20, 2015 hearing, he recalled Stephanie Pierre's name, meaning Baxter provided Pierre's name to him and asked him to interview her so she could testify as an alibi witness.
82. Neither Greenburg nor Shaffer ever contacted Stephanie Pierre and there is no evidence Greenburg ever asked Shaffer to interview her in Wilkes-Barre, Pennsylvania.
83. An alibi witness speaks for itself. Greenburg should have made every effort to interview her to hear what she had to say, but he did not.
84. At the January 20, 2015 hearing, Pierre said she lived with Baxter in Wilkes-Barre and Baxter was in Wilkes-Barre in the morning and early afternoon hours of April 21, 2007.
85. The prejudice here speaks for itself; Armel Baxter cannot be in two places at once.
86. Baxter is entitled to a new trial.

Claim 6: Mark Greenburg's Cumulative Errors Undermine All Confidence in Armel Baxter's Conviction Warranting a New Trial Where Armel Baxter Can Introduce the Substantial Exculpatory and Impeachment Evidence Not Presented By Mark Greenburg.

U.S. Const. amends. V, VI, VIII, XIV; Pa. Const. art. §§ 8, 9, 23.

87. Courts have long recognized that errors are to be considered individually and collectively, and that cumulative error or prejudice may provide a basis for relief whether or not the effects of individual errors warrant relief. *See Kyles v. Whitley*, 514 U.S. 419, 437-438 (1995) (cumulative discovery violations warranted a new trial); *Taylor v. Kentucky*, 436 U.S. 478, 487-488 & n.15 (1978) (cumulative effect of potentially damaging instructions and prosecution argument violated due process guarantee of fundamental fairness, necessitating relief); *Donnelly v. DeChristoforo*, 416 U.S. 637, 639 (1974) (considering totality of prosecutorial misconduct in context of entire trial to decide if misconduct was sufficiently prejudicial to violate defendant's due process rights).
88. Here, the cumulative impact of Mark Greenburg's numerous errors undermines all confidence in Armel Baxter's convictions warranting a new trial.
89. Gregory Blackmon's, Kyle Carter's, and Stefon Studivent's testimony would have significantly undermined not only Anthony Harris's and Hassan Durant's identifications, but Rachel Marcelis's testimony as well. This is so because, at trial, Harris's and Durant's identifications added substantial credibility to Marcelis's narrative, *i.e.*, if Harris and Durant identified Baxter and McBride, Marcelis's narrative must be true. Thus, had Greenburg presented substantial evidence calling into question the identification evidence, this would have also done significant damage to Marcelis's credibility. For instance, if the jury had significant doubts about the identification evidence, it would have been forced to ask the following question: If Anthony Harris and Hassan Durant misidentified Armel Baxter and Jeffery McBride, is Marcelis's narrative credible? Mark Greenburg could have answered this question by presenting Darryl Mack's testimony—which would have inflicted a near fatal blow to Marcelis's narrative and credibility. If, on the outside chance, Marcelis had any credibility remaining after Mack's testimony, introducing the immunity agreement and her testimony from Cordell Young's trial would have definitely killed her narrative and credibility.
90. Stephanie Pierre's alibi testimony would have simply represented the icing on the cake.
91. Consequently, there is a reasonable probability that, had Mark Greenburg not made the abovementioned errors, the outcome of Baxter's trial would have been different. Stated differently, the Court can have no confidence in Baxter's conviction in the absence of all the above-mentioned witnesses and evidence.
92. Baxter is entitled to a new trial.

Prayer for Relief

85. **WHEREFORE**, Baxter requests the following relief:

- a. A **new trial** where he can present the abovementioned exculpatory and impeachment evidence.

Respectfully submitted this the 5th day of February, 2015.

/s/Craig Cooley

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Certificate of Service

On **February 5, 2015**, counsel e-filed the following document. The Philadelphia District Attorney's Office was notified of the counsel's filing via the e-filing system.

/s/Craig M. Cooley

PAA
Ex. 12

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : CP-51-CR-0013121-2007

v.

ARMEL BAXTER

CP-51-CR-0013121-2007 Comm. v. Baxter, Armel J.
Opinion & Order



OPINION AND ORDER

McDermott, J.

FILED
MAR 04 2015
Post Trial Unit

March 4, 2015

Procedural History

On July 11, 2007, the petitioner was arrested and charged with Murder and related charges. On February 5, 2009, a jury found him guilty of Murder in the First Degree, Possession of an Instrument of Crime ("PIC"), and Conspiracy. That same day, the Honorable Renee Cardwell Hughes sentenced the petitioner to life imprisonment without the possibility of parole for Murder, with concurrent sentences of ten (10) to twenty (20) years of imprisonment for Conspiracy, and one (1) to two (2) years of imprisonment for PIC. At trial, the petitioner was represented by Mark Greenberg, Esquire.

Mark Greenberg continued to represent the petitioner on appeal. On March 3, 2010, Superior Court affirmed the judgment of sentence in an unpublished memorandum at 437 EDA 2009. On February 23, 2011, our Supreme Court denied the petitioner's allocatur petition at 129 EAL 2010.

On September 23, 2011, less than one year after his allocatur petition was denied, the petitioner filed a *pro se* PCRA and memorandum of law. On November 2, 2012, Gary Server,

Esquire was appointed to represent the petitioner. On September 24, 2013, Mr. Server filed an amended petition, raising various issues the petitioner identified in his *pro se* filings. On November 13, 2013, the petitioner filed a motion to proceed *pro se*. On June 9, 2014, after the petitioner declined to participate in a video conference, he was transported from SCI Coal Township for a *Grazier* hearing. At the conclusion of the hearing, this Court held that petitioner's waiver of counsel was knowing, intelligent, and voluntary, permitted petitioner to represent himself, and appointed an investigator to assist him. On October 27, 2014, Craig Cooley, Esquire entered his appearance as counsel for petitioner.

On January 20, 2015, this Court held an evidentiary hearing, receiving testimony from witnesses Darryl Mack, Stephan Studivant, Kyle Carter, Stephanie Pierre, and Gregory Blackmon, Michael Wallace, Esquire and Mark Greenberg, Esquire.

Facts

The following facts were set out by the trial court and adopted by the Superior Court on appeal:

On April 21, 2007, approximately twenty (20) to fifty (50) people were in the Kenderton Elementary playground. Demond Brown (decedent/victim, also identified on the record as "Demond") had recently finished a game of basketball and was standing on the sideline. The decedent's cousin, Anthony Harris (also identified on the record as "Tony"), and best friend, Hassan Durant, were standing on the basketball court.

Arnel Baxter and Jeffrey McBride¹ were in the backseat of their friend Rachel Marcelis' car, driving to their friend Daryl Mack's aunt's house. Either Baxter or McBride said they saw someone on the playground and told Rachel Marcelis to go back so they could be sure. Rachel Marcelis drove around the block, and Baxter and McBride exited the car.

Anthony Harris and Hassan Durant saw Baxter and McBride enter the playground with hoodies on. People on the playground noticed Baxter and McBride because both men were wearing hoodies on a very hot day. The decedent turned around, noticed

¹ Footnotes omitted.

Baxter and McBride, and began to run. Baxter and McBride began shooting, and continued to shoot as they walked together side by side. The decedent ran in a zigzag pattern toward the 15th Street exit. The decedent stumbled out of the playground and fell in the middle of the street.

Baxter and McBride ran out of the playground, and headed east on Ontario Street, then south on 15th Street. Rachel Marcelis saw Baxter and McBride running in her direction, and let them back in her car. While in the car, Rachel Marcelis heard Baxter and McBride talking about how McBride's gun did not work and he could "not get any rounds off." When they arrived at Daryl Mack's aunt's house, Rachel Marcelis asked McBride "if that was the person who shot De-Nyce." McBride answered "yes." After they left the house, Rachel Marcelis, Baxter and McBride drove to Wilkes-Barre for the weekend, but only Rachel Marcelis returned the following Monday.

An arrest warrant was issued for both Baxter and McBride on May 4, 2007. McBride was arrested in Wilkes-Barre on May 7, 2007, after police were informed of his outstanding warrant. Baxter was found at a motel in Wilkes-Barre on July 10, 2007, after the police received a call regarding domestic violence issue. Baxter was initially arrested for false identification, after he gave officers several false names.

Commonwealth v. Baxter, 437 EDA 2009 (Pa. Super. March 3, 2010).

Issues

Petitioner alleges that trial counsel was ineffective for failing to present the testimony of Darryl Mack, Stephan Studivant, Kyle Carter, Stephanie Pierre, and Gregory Blackmon and for failing to impeach Rachel Marcelis with her immunity agreement.

To warrant relief based on a claim of ineffective assistance of counsel, a petitioner must show that such ineffectiveness "in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." *Commonwealth v. Jones*, 912 A.2d 268, 278 (Pa. 2006); 42 Pa.C.S. § 9543(a)(2)(ii). Counsel is presumed to have rendered effective assistance. *Commonwealth v. Weiss*, 81 A.3d 767, 783 (Pa. 2013)(citing *Commonwealth v. Sepulveda*, 55 A.3d 1108, 1117 (Pa. 2012)).

To overcome the presumption, the petitioner has to satisfy the performance and prejudice test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The Supreme Court of Pennsylvania has applied the *Strickland* test by looking to three elements, whether: (1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's actions or failure to act; and (3) the petitioner has shown that he suffered prejudice as a result of counsel's lapse, *i.e.*, that there is a reasonable probability that the result of the proceeding would have been different. *Commonwealth v. Bennett*, 57 A.3d 1185, 1195-96 (Pa. 2012)(citing *Commonwealth v. Pierce*, 527 A.2d 973, 975 (Pa. 1987)). If a claim fails under any necessary element of the *Strickland* test, the court may proceed to that element first. *Bennett*, 57 A.3d at 1195-96. Counsel will not be deemed ineffective for failing to raise a meritless claim. *Jones*, 912 A.2d at 278 (citing *Commonwealth v. Darrick Hall*, 701 A.2d 190, 203 (Pa. 1997)).

In his first three claims of error, petitioner alleges that trial counsel was ineffective for failing to present testimony from Kyle Carter, Gregory Blackmon, and Stefon Studivant to contradict the Commonwealth's eyewitnesses' identification of petitioner. To prevail on a claim that trial counsel was ineffective for failing to present a witness, a defendant must demonstrate that: (1) the witness existed; (2) counsel was either aware of or should have been aware of the witness's existence; (3) the witness was willing and able to cooperate on behalf of the defendant; and, (4) the proposed testimony was necessary to avoid prejudice to the defendant. *Commonwealth v. Bryant*, 855 A.2d 726, 746 (Pa. 2004)(citing *Commonwealth v. Begley*, 780 A.2d 605, 630 (Pa. 2001)).

Carter, Blackmon, and Studivant all gave testimony that while they were present at the time of the shooting, they did not see either the actual shooting or the shooters' faces. All believed the petitioner was not one of the shooters based upon his height. N.T. January 20, 2015

at 73, 109-128, 161-185. Petitioner has failed to establish that the witnesses were willing and able to cooperate on behalf of petitioner and that the proposed testimony was necessary to avoid prejudice.

Blackmon testified that he was at the basketball game where the shooting occurred, and that prior to the shooting he saw two tall, slender men in hooded sweatshirts approach the game. He said that he could not see their faces because the hoods obscured them. N.T. January 20, 2015 at 161-185. Blackmon asserted that he would have testified to these facts and that he appeared at trial. However, when asked why he did not testify, he initially explained that one of the attorneys said that he did not need Blackmon to testify. *Id.* at 177, 179-180. Later, Blackmon contradicted this testimony by stating that he did not appear for court because of the weather.

Carter testified that he, too, was at the basketball game on the day of the shooting, and saw the hooded shooters but did not witness the actual shooting. Carter described the shooters as taller than himself but stated that he could not see their faces because of their hoods. N.T. January 20, 2015 at 108-128. Carter was inconsistent within his testimony regarding where he was located when the shooting began. During his testimony he stated he was in three different locations: just off the basketball court, sitting on a car, and running to get under a car. *Id.* at 112, 117, 121. He was impeached with his affidavit from October 14, 2013, in which he said he was running at the time of the shooting, which he admitted was wrong. *Id.* at 124. Carter was also inconsistent regarding the reason he did not testify at trial. Carter said that he was present at the trial but did not testify because “[m]y services weren’t needed.” *Id.* at 120-121. Carter did not mention anything regarding a snow storm or courts being closed until prompted by the District Attorney, after which he indicated he believed that court was cancelled. *Id.* at 123.

Studivant testified that he attended the same basketball game that was disrupted by the shooting. According to Studivant the shooters' hoods were pulled so tight around their faces that he could not tell their race. He could only tell that the shooters were taller than petitioner. N.T. January 20, 2015 at 70-73. According to Studivant, after the shooting, Anthony Harris accused Malik Ware of being the shooter. Studivant heard Ware, who was standing near Brown's body when the police arrived, say "[d]on't say I shot him." *Id.* at 80. This testimony is inconsistent with all the other witnesses who stated that the shooters immediately ran away after the murder. Studivant stated that he spoke with an investigator for the defense before trial and that he went to court but left because he "had word that we wasn't [sic] getting on the stand." *Id.* at 92-94, 102.

Petitioner has failed to establish that the witnesses were willing and able to cooperate on his behalf. Both Carter and Blackmon were subpoenaed for trial.² N.T. February 4, 2009 at 20; N.T. January 20, 2015 at 244. Studivant was not subpoenaed, however, according to a letter from Mark Shaffer dated December 2008, it is clear that trial counsel made multiple unsuccessful attempts to locate Studivant. Exhibit P-6. Additionally, Studivant testified that he was aware of petitioner's trial and the need for his testimony. Neither Carter, Blackmon, nor Studivant gave credible testimony regarding why they did not appear at trial. Both Carter and Blackmon vacillated between asserting that they were told not to testify and that there was a snowstorm. Studivant vaguely asserted that he left because other witnesses left. Their failure to appear at court on precisely the day they were to testify does not inspire confidence that they were willing to cooperate. None of these witnesses provided compelling testimony explaining their failure to appear even though they were aware of the trial. Blackmon's and Carter's flimsy explanations are undermined by the record from trial. At trial, after being given time to locate Blackmon and

² Carter and Blackmon were subpoenaed by McBride's attorney, Michael Wallace, Esquire. However, it is clear from the record at trial that there was communication and cooperation between Mr. Greenberg and Mr. Wallace with regards to locating witnesses. N.T. February 4, 2009 at 20, 27-28.

Carter, co-defendant's counsel, Michael Wallace, informed the Court that Blackmon's mother said he was in school and that Carter did not answer his phone. N.T. February 4, 2009 at 31. This Court notes that in spite of the inclement weather, all of the jurors and other essential parties managed to make it to court that day. Thus, petitioner has not established that Carter, Blackmon, and Studivant were willing and able to cooperate on his behalf.³

Petitioner has also failed to establish that the proposed testimony of Carter, Blackmon, and Studivant was necessary to avoid prejudice as the testimony does not discredit the persuasive testimony provided at trial by Anthony Harris and Hassan Durant. On the day of the shooting, Durant was at the park when he noticed petitioner and McBride. Durant immediately paid attention to petitioner and McBride when they arrived at the park because it was a hot day and Durant thought it was odd that they were wearing hoodies. N.T. January 29, 2009 at 75. Durant was about twenty feet from the shooters when they shot Brown and "[he] seen [sic] it perfect." *Id.* at 79-80. Durant identified petitioner and McBride at trial and indicated that had seen the petitioner around the neighborhood for about a year before the shooting. *Id.* at 65, 89. Durant explained that although the shooters had hoods on, he could see their faces. *Id.* at 76.

Harris was also present in the park for the shooting. Harris saw petitioner and McBride before they entered the park and they put their hoods up. N.T. January 30, 2009 at 6, 10. Harris saw petitioner pull out a gun and shoot Brown. *Id.* at 12. Harris identified petitioner as the shooter and explained that Harris had known petitioner for over twenty years as he lived three

³ This Court notes that petitioner's argument that trial counsel should have made a proffer to the trial court as to the testimony of Blackmon and Carter and pursued bench warrants was found to be meritless by Superior Court. On appeal, the petitioner argued that the court erred and abused its discretion in denying a continuance to the defense on February 4, 2009 for these witnesses. Although the Superior Court found that the claim was waived, it also found it to be meritless based on the fact that there were no guarantees that the witnesses would have shown up, should the trial have been continued. *See Memorandum, 437 EDA 2009 at 14-15.*

doors down from him. *Id.* at 7-8. Harris explained that even when petitioner and McBride had their hoods up, Harris could see their faces. *Id.* at 15-16.

Harris and Durant's testimony was credited by the jury, and is not rendered vulnerable by the after-the-fact testimony of Carter, Blackmon, and Studivant. Carter, Blackmon, and Studivant stated that they could not see the shooters' faces because of their hoods, a claim that was implausible. The shooting took place during the daytime in front of a crowd; in those conditions, it is not plausible that a hood would completely obscure a person's face. Further, neither Carter, Blackmon, nor Studivant knew petitioner prior to the shooting whereas both Harris and Durant were well acquainted with petitioner. Carter, Blackmon, and Studivant's incredible and vague assertion that the shooters were taller than petitioner, a man they did not know, would not have swayed the jury to discredit Harris and Durant's testimony that Durant saw his neighborhood acquaintance and Harris saw his neighbor of over twenty years shoot Brown in broad daylight. Petitioner's claim that trial counsel was ineffective for failing to present testimony from Carter, Blackmon, and Studivant is meritless.

Petitioner argues that trial counsel was ineffective for failing to present testimony from Darryl Mack. Mack testified that on the night before the shooting, he attended a party at the home of a man named Antoine. At that party, he saw Rachel Marcelis consume large amounts of alcohol, smoke PCP and marijuana, and take pills. He left the party, but saw Marcelis again the next morning; to him, she appeared to be inebriated. He asked for a ride, and she suggested that he drive her white truck while she rode along. He drove to the Frankford section of Philadelphia, in the northeast, in order to visit a woman he was seeing. He visited this woman for approximately two hours and fifteen minutes, and when he returned to Marcelis's truck, she was sleeping where he had left her in the passenger seat. N.T. January 20, 2015 at 16-50. Mack also

testified that he showed up to testify at the petitioner's trial, but was told by co-defendant's counsel that he should leave because his testimony would be unhelpful. *Id.* at 30.

At trial, Mr. Wallace, indicated that he decided not to call Mack as a witness as his testimony was not helpful. N.T. February 4, 2009 at 24. This Court cannot help but conclude that both Mr. Wallace and trial counsel exercised good judgment in refraining from offering Mack's testimony, which failed to contradict Marcelis's testimony and was redundant.⁴ Marcelis freely acknowledged at trial that she used Xanax, wet, marijuana, and alcohol on the night before the shooting, that she did so to an extreme degree, and that the substances were still affecting her on the day of the shooting. N.T. January 30, 2009 at 153-160. Mack's testimony regarding Marcelis's drug use was cumulative. Also, Mack's testimony did not undermine Marcelis's testimony that she was with petitioner and McBride during the shooting. Mack merely testified that he drove Marcelis's car to his girlfriend's house, left Marcelis in the car, and two hours later when he returned, she was in the car. N.T. January 20, 2015 at 22-28. Mack was driving Marcelis and her car back to Broad Street and Allegheny Avenue when a friend called Mack and informed him of Brown's murder. *Id.* at 27. Nothing in Mack's testimony precludes the possibility that Marcelis drove petitioner and McBride to the shooting. Additionally, to the extent that Mack denies being present in the car with Marcelis, McBride, and petitioner at the time of the shooting, this Court finds this testimony incredible. Trial counsel was not ineffective for failing to present testimony from Mack.

The petitioner argues that trial counsel was ineffective for failing to seek the testimony of Stephanie Pierre, an alleged alibi witness. At this Court's hearing, Pierre testified that in April of

⁴ Again, this Court notes that there was communication and cooperation between Mr. Greenberg and Mr. Wallace. N.T. February 4, 2009 at 20, 27-28. Although the record states that Mr. Wallace told Mack to leave, Mr. Wallace stated this fact in front of Mr. Greenberg and petitioner. It is clear that Mr. Greenberg was aware of the fact that Mack had been told to leave and agreed with this decision. N.T. February 4, 2009 at 24.

2007 she was living in Wilkes-Barre, Pennsylvania and petitioner was her roommate. On April 21, 2007, Pierre woke up at 11:00 a.m. and was home all day. Pierre testified that petitioner was present in the house in Wilkes-Barre that day and to her knowledge did not travel to Philadelphia. N.T. January 20, 2015 at 131-140. Like the rest of the petitioner's witnesses, Pierre did not give credible testimony. Pierre was inconsistent about who was living in the house: at one point she said that petitioner and McBride were her only roommates and at another point she said many people lived in the house but she did not know their names. *Id.* at 135, 140. Pierre was also incredible in her assertion that the reason she did not contact the police to inform them that petitioner was with her in Wilkes-Barre on the day of the murder was that she only heard about petitioner's arrest in the newspaper. *Id.* at 139, 145.

This Court finds that petitioner did not provide trial counsel with any basis on which he should have been aware of Pierre as a possible alibi witness. In a letter dated October 20, 2008, trial counsel requested that petitioner provide him with the names, addresses, and phone numbers of all alibi witnesses. Exhibit P-7. Trial counsel testified that this letter signified that petitioner was unable to provide the names of potential alibi witnesses when he had interviewed petitioner. N.T. January 20, 2015 at 240. Trial counsel asserted that if petitioner had provided him with the names of alibi witnesses he would have filed an Alibi Notice. *Id.* 5 at 222. Finally, Mr. Greenberg testified that he did not remember petitioner telling him about a Stephanie Pierre, although it was possible. *Id.* at 212-213, 237. This Court finds that even if Mr. Greenberg was vaguely aware of the existence of a possible alibi witness, he was not aware of Pierre's existence. The fact that petitioner never mentioned Pierre to trial counsel is supported by the record from trial. After the Court gave a brief break for the attorneys to attempt to locate their witnesses and denied their request for a continuance, the Court conducted a colloquy of petitioner. During that

colloquy petitioner indicated that he wanted his attorney to call the missing Carter and Blackmon, “witnesses like that, that were actually able to see, they were actually at the scene.” N.T. February 4, 2009 at 39. Petitioner made no mention of Pierre or any alibi witnesses. Trial counsel was not provided a name or address with which he could have found Pierre and produced her testimony. Trial counsel was not ineffective for failing to present testimony from Pierre.

Finally, petitioner argues that trial counsel was ineffective for failing to cross-examine Marcelis on the basis that she had entered into an immunity agreement with the Commonwealth in exchange for her testimony. At this Court’s hearing in this matter, Mr. Greenberg testified that he chose not to cross-examine Marcelis as to the immunity agreement because he felt that it might actually bolster her credibility with the jury, both by further establishing the likelihood that she had been the getaway driver in this shooting, and by allowing the Commonwealth to point out that the immunity agreement required that she tell the truth at trial, and exposed her to criminal liability if she failed to do so. N.T. January 20, 2015 at 216-219. Because he had already gotten Marcelis to acknowledge her significant drug use during the time period in question, he felt that he had already called her reliability as a witness into question, and thus using the agreement would not offer much and might, in fact, backfire. *Id.* at 227-233.

Mr. Greenburg expressed a reasonable trial strategy, with a sound basis designed to effectuate the petitioner’s interests at trial. “Generally, where matters of strategy and tactics are concerned, counsel’s assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis designed to effectuate his client’s interests.”

Commonwealth v. Puksar, 597 Pa. 240, 256-57, 951 A.2d 267, 277 (2008)(quoting *Commonwealth v. Miller*, 572 Pa. 623, 819 A.2d 504, 517 (2002)). “A chosen strategy will not

be found to have lacked a reasonable basis unless it is proven 'that an alternative not chosen offered a potential for success substantially greater than the course actually pursued.'"

Commonwealth v. Williams, 587 Pa. 304, 899 A.2d 1060, 1064 (2006)(quoting *Commonwealth v. Howard*, 553 Pa. 266, 719 A.2d 233, 237 (1998)). This Court agrees that cross-examining Marcelis as to the immunity agreement would have had, at best, greatly diminished returns given what had already been accomplished, and may have had the effect of bolstering her credibility to the petitioner's detriment. Further, this Court notes that the jury was aware that Marcelis was never charged with crimes resulting from the murder. N.T. January 30, 2009 at 147. Because trial counsel pursued a reasonable trial strategy, this claim must fail.

For the foregoing reasons, the petition for relief under the PCRA is hereby DISMISSED.

BY THE COURT,


Barbara A. McDermott, J.

Commonwealth v. Armel Baxter, CP-51-CR-0013121-2007

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing Court Order upon the person(s), and in the manner indicated below, which service satisfies the requirements of Pa. R. Crim. P. 114:

Philadelphia District Attorney's Office
Three South Penn Square
Philadelphia, PA 19107
Attn: Daniel Blanchard, ADA

Type of Service: First Class Mail

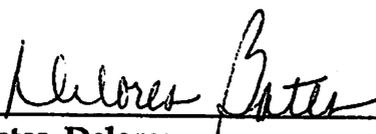
Craig Cooley, Esquire
1528 Walnut Street
Suite 1902
Philadelphia, PA 19102

Type of Service: First Class Mail

Armel Baxter, HX-3302
SCI Coal Township
1 Kelley Drive
Coal Township, PA 17866

Type of Service: Certified Mail

Dated: March 5, 2015



Bates, Delores
Administrative Assistant to the
Honorable Barbara A. McDermott

PAA
Ex. B

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
CRIMINAL DIVISION

| | |
|------------------------------|---|
| <hr/> | |
| COMMONWEALTH OF PENNSYLVANIA |) |
| |) |
| Respondent, |) |
| |) |
| v. |) |
| |) |
| ARMEL BAXTER |) |
| Defendant-Petitioner. |) |
| <hr/> | |

CP-51-CR-0013121-2007
Non-Capital PCRA: First-Degree Murder
PCRA Court: Barbara A. McDermott

Notice of Appeal

Notice is hereby given that Defendant-Petitioner, **Armel Baxter**, hereby appeals to the **Pennsylvania Superior Court** from an *Order* denying Baxter's PCRA petition entered on **March 4, 2015** by the **Honorable Barbara McDermott**. Judge McDermott's opinion/order is attached.

Pursuant to **Pa.R.Crim.P. 720(A)(2)(a)**, Baxter's *Notice of Appeal* is timely because it is filed within thirty-days (30) of entry of the *Order* denying his PCRA petition.

Respectfully submitted this the **30th day of March, 2015**.

/s/Craig M. Cooley
Cooley Law Office
1308 Plumdale Court
Pittsburgh, PA 15239
647-502-3401
Pa. Bar. No. 315673
craig.m.cooley@gmail.com
www.pa-criminal-appeals.com

Certificate of Service

On **March 30, 2015**, counsel e-filed this *Notice of Appeal*, meaning the Commonwealth received an e-copy of counsel's *Notice of Appeal*.

**Robin Godfrey, PCRA Unit
District Attorney's Office
Three South Penn Square
Philadelphia, PA 19107**

On **March 30, 2015**, counsel mailed a copy of the *Notice of Appeal* to Judge McDermott's chambers.

**The Honorable Barbara J. McDermott
1301 Filbert Street
CJC 1403
Philadelphia, PA 19107**

On **March 30, 2015**, counsel emailed court reporter, **Monique Valtri**, a copy of the *Notice of Appeal*. Ms. Valtri was the court reporter for Mr. Baxter's **January 20, 2015** PCRA hearing.

/s/Craig M. Cooley
Craig M. Cooley
Attorney for Armel Baxter

Date: March 30, 2015

| | | | | | | | |
|--|---------------|--|-------------------------------|----------------------------------|-----|-----|-----|
| INVESTIGATION INTERVIEW RECORD | | PHILADELPHIA | | CASE NO: M7-122 | | | |
| | | POLICE DEPARTMENT HOMICIDE DIVISION | | INTERVIEWER: Crone - Rossiter | | | |
| NAME | AGE | RACE | DOB | | | | |
| Rachel Lynn Macelis | 19 | W/M | [REDACTED] | | | | |
| ADDRESS | APARTMENT NO. | | PHONE NO. | | | | |
| [REDACTED] | [REDACTED] | | [REDACTED] | | | | |
| NAME OF EMPLOYMENT/SCHOOL | | | SOC. SEC. NO. | | | | |
| [REDACTED] | | | [REDACTED] | | | | |
| ADDRESS OF EMPLOYMENT/SCHOOL | DEPARTMENT | | PHONE NO. Cell: [REDACTED] | | | | |
| DATES OF PLANNED VACATIONS | | | | | | | |
| DATES OF PLANNED BUSINESS TRIPS | | | | | | | |
| NAME OF CLOSE RELATIVE | | | | | | | |
| [REDACTED] | | | | | | | |
| ADDRESS | | | | | | | |
| [REDACTED] | | | | | | | |
| PLACE OF INTERVIEW | | | DATE | TIME | | | |
| PAB 104 Homicide Division | | | 05/03/07 | 5:57PM | | | |
| BROUGHT IN BY | | | DATE | TIME | | | |
| Police | | | 05/02/07 | | | | |
| WE ARE QUESTIONING YOU CONCERNING | | | | | | | |
| The shooting death of Fatima Whitfield | | | | | | | |
| WARNINGS GIVEN BY | | | DATE | TIME | | | |
| N/A | | | | | | | |
| ANSWERS | (1) | (2) | (3) | (4) | (5) | (6) | (7) |

PAA
Ex. 14

Q.) Are you known by any other names?
A.) No.

Post Hrg. Brief
Ex. 2

Q.) Can you read and write English?
A.) Yes.

Q.) How far did you go in school?
A.) Attending West Chester University.

Q.) Can you tell me what you know in relation to the shooting death of Fatima Whitfield?
A.) I only know her as "fats". (Identifying PID #810526 assigned to Keeya Leary)

Q.) You are being shown a color photograph, is this the female you know as "fats"?
A.) Yes, that's fats.

Q.) Can you tell me what occurred in relation to her death.

Q.) I had just met her the day she was killed, she was killed on Saturday, April 21st. We were at "Tweezy's" apartment at 15th and Allegheny, I'm not exactly sure which apartment number it was, it was the last apartment down a long hallway, I know we walked up steps to get to it. I got there late, probably around 12 or 1 o'clock in the morning. I drove there from Uber and Westmorland. There were a lot of people in the car, I have an Expedition, there were at least 10 to 15 people in the car. There were already people inside the apartment. We partied all night long, drinking smoking weed, until the morning. Most of the people had left between 7 and 9AM. I left around 10 or 11 o'clock, I'm not exactly sure about the time. Before we left, we were all in the bedroom with the TV. There are three bedrooms altogether, we were in the one with the

Rachel Macelis

1. The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that this is crucial for the company's financial health and for providing reliable information to stakeholders.

2. The second part of the document outlines the specific procedures for recording transactions. It details the steps from identifying a transaction to entering it into the accounting system, ensuring that all necessary details are captured.

3. The third part of the document addresses the role of the accounting department in monitoring and controlling the company's resources. It discusses how accurate records enable the company to identify areas of inefficiency and to take corrective action.

4. The fourth part of the document discusses the importance of regular audits and reconciliations. It explains how these processes help to detect and correct errors, ensuring that the financial statements are accurate and reliable.

5. The fifth part of the document discusses the role of the accounting department in providing financial information to management. It explains how this information is used to make strategic decisions and to evaluate the company's performance.

6. The sixth part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that this is crucial for the company's financial health and for providing reliable information to stakeholders.

7. The seventh part of the document outlines the specific procedures for recording transactions. It details the steps from identifying a transaction to entering it into the accounting system, ensuring that all necessary details are captured.

8. The eighth part of the document addresses the role of the accounting department in monitoring and controlling the company's resources. It discusses how accurate records enable the company to identify areas of inefficiency and to take corrective action.

9. The ninth part of the document discusses the importance of regular audits and reconciliations. It explains how these processes help to detect and correct errors, ensuring that the financial statements are accurate and reliable.

10. The tenth part of the document discusses the role of the accounting department in providing financial information to management. It explains how this information is used to make strategic decisions and to evaluate the company's performance.

INVESTIGATION INTERVIEW RECORD

CITY OF PHILADELPHIA

CONTINUATION SHEET

POLICE DEPARTMENT

TV. There are two other bedrooms, but I never went into them or knew who was in them. When I was getting ready to leave, it was me, Fats, Tweezy, Fra, Snub, Corey and another girl that I didn't know.

Q.) Who's apartment is it?

A.) Tweezy. He was thrown out of his grandparent's house when he was young, he has been staying at different places and then he started staying in this apartment. He doesn't rent, he just squats there, with the exception of one apartment, the rest were empty on the floor, from what I was told and could see.

Q.) Did you see any person with a gun while inside Tweezy's apartment?

A.) Yes. There was a girl there, she was in the bedroom we were in, I heard her say something like don't I look cute and I turned around to look at her and she was posing with it. Someone told her to put it back and she put it on the windowsill and put a towel back over it. It was the windowsill right next to the couch.

Q.) You are being shown a color photograph, is this the male you know as Tweezy?

A.) Yes. His real name is Antoine Pemberton. (Identifying PID#980709 assigned to Antoine Pemberton)

Q.) What is your relationship with Tweezy?

A.) Tweezy was a friend of Fra, Cory, and Snub. I used to date him for a brief period, after Corey.

Q.) You are being shown a color photograph, is this the male you know as Snub?

A.) Yes. (Identifying PID#932835 assigned to Armel Baxter)

Q.) What is your relationship with Snub?

A.) I just knew him as being a friend of Corey's.

Q.) You are being shown a color photograph, is this the male you know as Fra?

A.) Yes. His real name is Jeffery McBride (Identifying PID# 1013234 assigned to Jeffry McBride)

Q.) What is your relationship with Fra?

A.) He is Corey's little brother. Out of everybody, I'm probably closest to him. He's is like my little brother.

Q.) You are being shown a color photograph, is this the male you know as Corey?

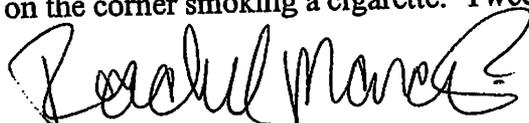
A.) Yes. (Identifying PID#10133903 assigned to Cordell Young).

Q.) What is your relationship with Corey?

A.) I used to date Corey. On and off for about a year. I stayed at his sister's house last summer, we had already broken up by this time. I was close to his family.

Q.) What happens when you leave the apartment?

A.) I left with Snub and Fra. Fats was on the bed, she was sleeping, Tweezy was in the room playing Playstation, it was a game system not exactly sure if it was playstation. Corey was walking around the house. We got into my car, I was driving, and we went to go get Dutches or something to eat. We had been out of the apartment for 10 to 15 minutes when Corey called Fra on his cell phone and Fra say something like "who the fuck", "what happened" and then he said we would be right there. Fra got off the phone and told me to go back down Allegheny. We started asking Fra what was going on. Fra said that Corey said that someone got shot in the apartment. All of us were kind of yelling in the car, because we didn't know who would have been shot, or who would have shot anyone. We got back down to Allegheny, we were right by Broad and Allegheny. Corey was on the corner smoking a cigarette. Tweezy was with him with a scared



THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

PHYSICS 311

LECTURE 1

MECHANICS

1.1 Kinematics

1.2 Dynamics

1.3 Energy

1.4 Momentum

1.5 Angular Momentum

1.6 Oscillations

1.7 Relativity

1.8 Quantum Mechanics

1.9 Statistical Mechanics

1.10 Electrodynamics

look on his face. Tweezy and Corey walked towards my car, Corey was getting in my back seat when Tweezy walked up to the passenger side of the car. I asked Tweezy what happened because we had just left. Tweezy was shaking his head saying "she's gone, she's gone". Corey got in the car and Fra turned around and asked what had happened. We pulled off and Corey had said "I shot her". Corey had this blank stare like he wasn't there. We kept asking who is shot. Corey said that it was fats. He said that he left his cell phone charger there or something stupid like that, like he wasn't thinking. We kept asking what happened, Corey said that Fats was gone, that she was dead. Corey said that he shot her twice in the head. Snubs started freaking out because fats was his nieces mom. Fra was yelling to him like what the fuck is wrong with you. Snubs was punching the chair and screaming at Corey. I kept asking him what happened. Corey said that he had giving fats 70 dollars but she wouldn't have sex with him and that she wouldn't give the money back. Corey said he kept telling fats to give it back but she wouldn't so he told everyone to get out and then he shot her. I didn't understand what Corey meant so I asked him if everyone left but Fats stayed behind? Corey said that Tweezy was there. I don't remember who asked him about the gun but Corey said that he left it. Later on we found out that Tweezy had it but that was a few days later.

Q.) Where do you drive after you pick up Corey?

A.) We were driving to Corey's house, Fra and Snubs were screaming at him and when we got to Corey's house, they told him to get the fuck out of the car. At that point, Corey was gone, it was like his brain shut off, like he was just there, just a body, nothing inside. I arrived at Fra's mother's house, Corey and Fra are brothers they live together on 1931 Westmorland. Me, Fra and Snub go inside, Corey was outside smoking a cigarette. We were talking to Fra and Corey's mother, we didn't tell her about the shooting. We left the house to go get the dutches, which was the reason we left the apartment in the first place. When I walked out of the house, Mack was outside, so he got into my car with us. We driving by the basketball courts at the schoolyard, I think it was around 15th and Sydenham St.

Q.) I am showing you a color photograph is this the male you refer to as Mack?

A.) Yes (identifying PID#962934 assigned to Daryl Mack)

Q.) Where is everyone in your car?

A.) I'm driving, Mack is in the front seat, Snub and Fra are in the back seat.

Q.) What happened when you got to the schoolyard?

A.) Snub had made a comment to Fra to the effect of, look who's in the playground, I looked but I didn't know who they were talking about. Snub told me to drive around the block again. I'm not exactly sure which streets are which, they are all one way streets there, but I think I drove up 15th St, around, and then down Sydenham. I drove past the playground on Sydenham St and they told me to stop the car halfway up the block on Sydenham St, not next to the playground, one block up. Snub and Fra got out of the back of my car and they started walking in the direction of the schoolyard and I drove off. I drove off and turned around and took a side street towards Allegheny. I'm not even sure what street it was, that's when I saw everybody running. In the rear view mirror I could see a large number of people running from the area of the schoolyard. Mack looked around and asked me if I heard anything, like shots, I said no I didn't hear anything. That's when we saw Fra and Snub running with the crowd towards the car. They jumped in the back seat and I drove off. They started talking about the shooting, Fra said that his gun had jammed up, he and Snub were talking about that. Mack turned around and asked what happened, I don't know which one was answering, Fra or Snub, but they said they got him. They were talking about the gun that Fra had had jammed and how many shot he did or didn't get off and that Snub's gun was the only one that worked. I started driving back towards Fra's mother house. Prior to this, we were supposed to go to Mack's Aunts

Rachel M...

The first part of the document discusses the general situation of the country and the role of the government. It mentions the need for a strong and stable government to ensure the development and progress of the nation. The text emphasizes the importance of maintaining law and order and promoting economic growth. It also touches upon the social and cultural aspects of the country, highlighting the need for a united and harmonious society. The document concludes with a call for the government to continue its efforts in building a better future for the people.

The second part of the document provides a detailed analysis of the current economic conditions. It discusses the challenges faced by the economy, such as inflation and unemployment, and offers suggestions for addressing these issues. The text mentions the need for a balanced budget and the implementation of sound financial policies. It also highlights the importance of investing in infrastructure and human resources to stimulate economic growth. The document concludes with a statement of confidence in the government's ability to overcome these challenges and achieve economic stability.

The third part of the document focuses on the social and cultural aspects of the country. It discusses the need for a strong sense of national identity and unity. The text mentions the importance of preserving the country's heritage and promoting social justice. It also touches upon the role of education in shaping the future of the nation. The document concludes with a call for the government to continue its efforts in promoting social and cultural development.

The fourth part of the document discusses the international relations of the country. It mentions the need for a peaceful and stable international environment. The text discusses the country's commitment to international law and cooperation. It also touches upon the role of the country in the global community. The document concludes with a statement of confidence in the country's ability to maintain its independence and sovereignty while contributing to the world's peace and stability.

INVESTIGATION INTERVIEW RECORD

CITY OF PHILADELPHIA

CONTINUATION SHEET

POLICE DEPARTMENT

house, they told me where to drive and I ended up at what was supposed to be Mack aunt's house. We went up Broad St, I'm not exactly sure where we were, there was a lot that I was thinking about and they were giving me directions. I don't know the name of the street, it was north on Broad and I made a left. It was supposed to be in the Nicetown area. We all got out of the car. Mack talked his aunt. I was standing around with Fra and Snub, I pulled Fra aside and I asked him who was the boy they shot, was he the boy that shot D-nice. Fra said yea. I didn't want to know any more. Too much had already happened that day.

Q.) Who is D-Nice?

A.) He is a friend of ours that was shot, he was shot 7 times, he almost died but he is in stable condition. He lost his eye. His real name is Derrick McMillan.

Q.) You are being shown a color photograph, is this the male you refer to as D-nice?

A.) Yes. (Identifying PID# 922024 assigned to Derrick McMillan)

Q.) Did you ever see the guns that Fra and Snub used?

A.) No. Not before the shooting and not at Macks' aunts house. When me and Fra were talking, I don't know if they got passed off, or put in the house, or what happened to them.

Q.) Who leaves with you from Mack's Aunts house?

A.) Everyone, we went back around to Corey's house. Mack went somewhere I don't know. I went into the house, Fra and Snubb were outside. When I came back down, they said c'mon lets go to Wilkes Barre. I said OK. They asked if I had to go to my mom's house, I told them that I didn't have to, that I didn't have any plans so we left. The three of us got into my car and left. This is around dinner time, 5:30PM or so. On the ride up, they fell asleep. It takes me about 2 hours to get there.

Q.) Where did you go in Wilkes Barre?

A.) We went to Sassy's house, her name is Stephanie, and we spent the night there. Fra and Snub only stayed the first night. After that we really just hung out, bowling and pool. I let them use my car when I was up there. Sometimes during the day, but mostly at night. I came home on Tuesday morning around 7:00AM by myself. They stayed up there. The only placed that I know them to stay are Sassy's house and Oni's grandmother house. She had moved, there was an old apartment and a new house. I went over to her house on that Monday, Oni was with us at the time. All four of us went in. I overheard a conversation about not being allowed to stay at the old apartment, it was the grandmother talking about them, referring to them as the boys, because of smoking weeds and trash inside the apartment, basically not following her rules.

Q.) I am showing you a black and white photograph, do you know this female?

A.) That is Sassy. (identifying PA BMV #29-158-038 & 29-158-038 duplicates)

Q.) Do you know where Sassy lives.

A.) It's on Sherman St. Near Sherman and Coal, it's a twin.

Q.) You said earlier in your statement that Tweezy had possession of the gun Corey used to kill fats, how did you find that out?

A.) I heard it on the street, that Tweezy grabbed the gun because Corey had left it. I guess Tweezy left after Corey and then there was a phone call where he threatened me.

Q.) Tell me about that phone call?

Toukil Manna

A.) I was back home from Wilkes Barre, this was last week. He was calling my cell phone from a private number. He had been calling repeatedly. Most of the phone calls were like I know where you are, and that he was going to get me, to kill me, that sort of thing. I basically told him that he wasn't scaring me, that's when he said something to the effect of, he was going to kill me with the same gun that blew the fat bitches head off.

Q.) Have you had any contact with Snub or Fra since the incident?

A.) One phone call from Fra. It was short. He asked what I was doing I told him that I was going to be busy. He said that he really didn't want to talk, he called me from a private number.

Q.) Can you give me the cell phone numbers of the persons you mention in your interview?

A.) Fra 267-701-8442 Snub 570-472-1523 Corey 267-997-8847 Fra mom 215-223-0963

Q.) What type of vehicle were you driving during the incidents you described?

A.) It's a white Ford Expedition, its' either a 1999 or a 2000. It's registered to my parents.

Q.) Do you have an easypass in that vehicle?

A.) I used to, but there isn't one in there now.

Q.) Prior to the incident, had you seen Fra, Snub, Corey or Tweezy with a gun?

A.) Yes. About four months ago I saw Snub with a gun on his hip, tucked in his pants, it was black, it was kind of square, we outside. He wasn't flashing it or anything, I just took notice to it. There was a time when we were at D-nice's house, on Sydenham St, I walked into the room they were like posing with it. Taking pictures with a cell phone.

Rachel Marcellis

PHILADELPHIA POLICE DEPARTMENT
HOMICIDE UNIT

CONSENT TO VIDEOTAPE STATEMENT

I, Rachel Mardis, do freely and voluntarily consent to
the videotape and audio cassette recording of an interview with DET. CLONE
DET. K. ROSSITER of the Philadelphia Police Department, Homicide
Unit on 5.3.07.

Rachel Mardis
(Signature of Consenting Party)

Date: 5/3/07
Time: 11:35 pm

PAA
Ex. 15

[1]
[2] **COURT OFFICER:** All parties please
[3] remain seated as the jurors leave the
[4] courtroom.
[5] (Jury is excused.)
[6] (Luncheon recess.)
[7] (Jury is present.)
[8] **THE COURT:** Good afternoon, Jurors.
[9] We are now ready to proceed with the
[10] testimony.
[11] Commonwealth, you may call your
[12] next witness.
[13] **MR. ZARALLO:** The Commonwealth
[14] calls Rachel Marcelis.
[15] **COURT OFFICER:** State your full
[16] name, spell your last name.
[17] **THE WITNESS:** Rachel Lynn
[18] Marcelis, M-A-R-C-E-L-I-S.
[19] ---
[20] RACHEL LYNN MARCELIS, after having
[21] been first duly sworn or affirmed, was
[22] examined and testified as follows:
[23] ---
[24] **THE COURT:** You may proceed,
[25] counsel.
WILLIAM GEFTMAN

[1]
[2] **MR. ZARALLO:** Thank you, your
[3] Honor.
[4] ---
[5] DIRECT EXAMINATION
[6] ---
[7] **BY MR. ZARALLO:**
[8] **Q.** How are you today, Ms. Marcelis?
[9] **A.** Fine.
[10] **Q.** Ms. Marcelis, I'm going to ask you a
[11] serious of questions referring back to late April
[12] of 2007.
[13] During that time period did you
[14] know the defendant?
[15] **A.** Yes.
[16] **Q.** How did you know him?
[17] **A.** He started off as a friend and we dated
[18] for quite some time.
[19] **Q.** For awhile?
[20] **A.** Yes.
[21] **Q.** After April 21st, 2007, were you still
[22] involved with him in a romantic sense or was it
[23] somebody --
[24] **A.** Oh, no. At that point a bad breakup and a
[25] lot of bad feelings in-between.
WILLIAM GEFTMAN

[1]
[2] **Q.** Now, on the morning of April 21st, 2007,
[3] what kind of car were you driving?
[4] **A.** A white Expedition.
[5] **Q.** Was that your Expedition?
[6] **A.** My parents'.
[7] **Q.** It was the car that you regularly drive?
[8] **A.** Yes.
[9] **MR. ZARALLO:** Your Honor, at this
[10] time if I may mark as Exhibit C-24?
[11] (The exhibit was marked for
[12] identification as C-24.)
[13] **COURT OFFICER:** C-24 has been
[14] marked, your Honor.
[15] **THE COURT:** Very well.
[16] **BY MR. ZARALLO:**
[17] **Q.** Ms. Marcelis, I'm going to ask you to take
[18] a look at this document.
[19] **A.** Okay.
[20] **Q.** Yesterday we spoke and informed you that
[21] you were given an immunity petition; is that
[22] correct?
[23] **A.** Correct.
[24] **Q.** And what's your understanding of what an
[25] immunity petition means?
WILLIAM GEFTMAN

[1]
[2] **A.** Anything that I were to testify with now
[3] could not be used against me.
[4] **Q.** And just so we're clear, at some point you
[5] told the police information; correct?
[6] **A.** Correct.
[7] **Q.** Information with respect to two separate
[8] incidents?
[9] **A.** Correct.
[10] **Q.** Both that occurred on the morning of
[11] April 21st, 2007?
[12] **A.** Correct.
[13] **Q.** And this immunity petition is really
[14] geared towards the second incident.
[15] **A.** Okay.
[16] **Q.** I'm asking you if you understand that.
[17] **A.** Yes, I understand.
[18] **Q.** Have you been arrested for anything?
[19] **A.** No.
[20] **Q.** Do you, in fact, have any arrests?
[21] **A.** No.
[22] **Q.** And just so we're clear, aside from the
[23] agreement that anything you testify to cannot be
[24] used against you, is there any other agreements
[25] that you have in place with the Commonwealth, with
WILLIAM GEFTMAN

[1]
[2] me or with another representative from the
[3] Commonwealth?
[4] **A.** No.
[5] **Q.** In other words, there's nothing written
[6] or even spoken that you're aware of that says your
[7] cooperation or noncooperation would result in
[8] something else happening at all?
[9] **A.** No.
[10] **Q.** Ms. Marcelis, on April 20th, Friday night,
[11] 2007, were you at a party?
[12] **A.** Yes.
[13] **Q.** Who was at that party?
[14] **A.** There was probably about 20 to 30 of us.
[15] Just friends from around that area, from the
[16] neighborhood.
[17] **Q.** Where was the party at?
[18] **A.** I don't remember exactly. I think it was
[19] about 15th and Allegheny.
[20] **Q.** Was it in a house or an apartment?
[21] **A.** An apartment.
[22] **Q.** Do you know whose apartment it was?
[23] **A.** Legally, no one's. It was an abandoned
[24] apartment.
[25] **Q.** Do you know who was staying there?
WILLIAM GEFTMAN

Page 167

[1]
[2] **Q.** Who is Fredo? Do you know who Fredo is?
[3] **A.** Cordell's brother.
[4] **Q.** The defendant's brother?
[5] **A.** Yeah.
[6] **Q.** What about Snub?
[7] **A.** Yeah.
[8] **Q.** Were Fredo and Snub at some point at this
[9] party?
[10] **A.** Yeah.
[11] **Q.** Do you know someone named Tyreek Mathis or
[12] Rico?
[13] **A.** Yes.
[14] **Q.** Was Rico there?
[15] **A.** Yes.
[16] **Q.** If you remember, what time did you get to
[17] the party if you could estimate for us?
[18] **A.** It was late. It was probably after 9:00,
[19] 10:00 a.m. -- or p.m.
[20] **Q.** So it would have been Friday night, late
[21] evening, Friday night?
[22] **A.** Yeah.
[23] **Q.** Just shortly before it was about to become
[24] Saturday morning?
[25] **A.** Yeah.
WILLIAM GEFTMAN

William Geftman, O.C.R

[1]
[2] **A.** A friend of ours. Someone who was around
[3] all the time. His name was -- I don't know the
[4] real name. Tweez.
[5] **Q.** Tweez?
[6] **A.** Yes.
[7] **Q.** Was Tweez there that night?
[8] **A.** Yes.
[9] **Q.** Was the defendant there?
[10] **A.** Yes.
[11] **Q.** Do you know anybody else, street names or
[12] real names, that were there at some point during
[13] the night?
[14] **A.** In and out. There was a lot of us.
[15] Offhand, just -- I'm trying to recall back. There
[16] were several girls I didn't know. A couple of our
[17] other friends. There was Tweez and another boy.
[18] Weez. They are street names. I don't know any
[19] real names.
[20] **Q.** Tweez is one person and Weez is another
[21] person?
[22] **A.** Yeah.
[23] **Q.** Just because they sound so similar.
[24] Did you ever hear the name Fredo?
[25] **A.** Yes.
WILLIAM GEFTMAN

Page 168

[1]
[2] **Q.** When you got to the party, what kind of
[3] things were going on at the party? What were
[4] people doing?
[5] **A.** Drinking, drugs and hanging out.
[6] **Q.** Did you meet a girl named Fatima Whitfield
[7] also known as Fats?
[8] **A.** Yes. Briefly.
[9] **Q.** Was that the first time you ever met her?
[10] **A.** Yes.
[11] **Q.** Did there come a time when you left the
[12] apartment?
[13] **A.** Yes.
[14] **Q.** What time did you leave?
[15] **A.** I left several times. We left at night.
[16] We were going to go out and get Dutches or get
[17] something to eat. And I left also twice in the
[18] morning again to go get breakfast. And I ran into
[19] the corner store, but I'm not exactly sure...
[20] **Q.** At some point the next morning while it
[21] was daylight out, early in the morning, you left?
[22] **A.** Yes.
[23] **Q.** Were you alone or were other people in
[24] your vehicle?
[25] **A.** I left with Fra and Snub.
WILLIAM GEFTMAN

Court Reporting System

(page 165 - 168)

[1]
[2] **Q.** Is Fra for Fredo?
[3] **A.** Yes.
[4] **Q.** That's the person you know as the
[5] defendant's brother?
[6] **A.** Yeah.
[7] **Q.** After you left did something cause you to
[8] go back to that location?
[9] **A.** We left the first time in the morning. We
[10] went back. At this point everybody was kind of
[11] disbursing and leaving. And at that time we were
[12] all going to go back to the defendant's brother's
[13] house. All being Snub, Fra, Cordell and myself.
[14] And I was going to go to the store and get Dutches.
[15] We had been up, mind you, all night drinking,
[16] doing drugs and whatever. So Cordell said he was
[17] walking home. We left. He left and walked towards
[18] his house, which would have been towards 20th and
[19] Allegheny. Where we were going up towards Broad
[20] and Allegheny. And after we got the Dutches, he
[21] called his brother and said, Hey, I don't feel like
[22] walking home. Could you come pick me up?
[23] **Q.** That's all he said?
[24] **A.** Yeah.
[25] **Q.** Where did you go when that call came in?
WILLIAM GEFTMAN

[1]
[2] **A.** We came and picked him up. And he was
[3] approximately I think like 18th and Allegheny
[4] walking towards where his mother lived. And we
[5] picked him up there and drove him to his mother's
[6] house.
[7] **Q.** And the defendant didn't say anything to
[8] you?
[9] **A.** Nothing other than normal conversation.
[10] **Q.** Did you drop the defendant off at that
[11] point?
[12] **A.** Yes. It was only about two to three
[13] blocks, his mother's house from where he were.
[14] **Q.** He walked three blocks and called you to
[15] drive him the rest of the two or three blocks?
[16] **A.** Yes.
[17] **Q.** How far away were you --
[18] **A.** We only went to Broad and Allegheny.
[19] There's a convenience store there and he had
[20] started walking. And then as we were coming back
[21] down, because the normal way I would go is back
[22] down Allegheny. He called and said, Hey, grab me
[23] on your way.
[24] **Q.** Who was with him?
[25] **A.** The defendant was by himself.
WILLIAM GEFTMAN

[1]
[2] **Q.** After you dropped the defendant off, did
[3] you and the remaining people in the car go
[4] someplace?
[5] **A.** Yes. We went --
[6] **Q.** Without getting into specifics.
[7] **A.** We went -- we were going actually away
[8] that weekend. The defendant's brother, myself and
[9] Snub were going to visit a friend that weekend. So
[10] we went to get clothes and stuff that we wanted to
[11] take with us.
[12] **Q.** Did an incident happen after that that the
[13] police asked you about at some point?
[14] **A.** Yes.
[15] **Q.** Is that the subject as far as you know of
[16] the immunity petition?
[17] **A.** Yes.
[18] **Q.** At some point did you learn that Fats,
[19] Fatima Whitfield, had been killed?
[20] **A.** Yes.
[21] **Q.** When did you learn that?
[22] **A.** This was later on that evening.
[23] **Q.** That evening?
[24] **A.** Yes.
[25] **Q.** A couple days later, I guess it would have
WILLIAM GEFTMAN

[1]
[2] been more than a week later, around May 2nd, 2007,
[3] were you stopped by the police?
[4] **A.** Yes.
[5] **Q.** What did the police ask you to do?
[6] **A.** They had told me that my car matched the
[7] description of a car that was used in an armed bank
[8] robbery. That they needed me to come in basically
[9] just to verify that it was not my vehicle. At that
[10] point I informed them that they could call my
[11] roommate from college -- I went to school in West
[12] Chester -- and find out exactly when I left there.
[13] I had only been in the city for maybe 15, 20
[14] minutes at the defendant's mother's house. And
[15] when I was leaving, that that was only where I
[16] went. I said, Call also the defendant's mom. She
[17] could tell you I was here. I wasn't involved in
[18] any robbery. And that was what they had informed
[19] me.
[20] **Q.** Did anyone inform you that you were wanted
[21] for questioning with regard to a homicide?
[22] **A.** After they brought me in to the
[23] roundhouse.
[24] **Q.** The roundhouse is at 8th and Race;
[25] correct?
WILLIAM GEFTMAN

[1]
[2] **A.** I have no -- I know I got there. That's
[3] where they told me I was.
[4] **Q.** You were transported to what you
[5] understand to be the Homicide Division?
[6] **A.** Yeah. And at that point I was still under
[7] the impression that it was for a robbery. Because
[8] then I started freaking out that I didn't rob
[9] anybody and I didn't kill anybody. So what am I
[10] doing here?
[11] **Q.** Do you remember talking to some
[12] detectives?
[13] **A.** Yes.
[14] **Q.** Do you remember their names?
[15] **A.** The only one I remember is Detective
[16] Crone.
[17] **Q.** Detective Rossiter, would he be another
[18] one?
[19] **A.** I didn't speak when him. The only other
[20] detective I spoke to was Detective Crone. There
[21] was a female detective that came in briefly before
[22] Detective Crone did. That's how I first learned
[23] what I was actually there for when she came in.
[24] **Q.** Do you remember ever meeting another male
[25] detective?

WILLIAM GEFTMAN

[1]
[2] **A.** No. Other than someone who let me out to
[3] go to the bathroom, I don't.
[4] **Q.** You don't remember sitting at a table or a
[5] chair and there being two male detectives in the
[6] room with you?
[7] **A.** No. Not as far as I can recall.
[8] **Q.** What did Detective Crone proceed to ask
[9] you about?
[10] **A.** About the night in question and the murder
[11] of Fatima, of Fats.
[12] **Q.** The person that you know as Fats?
[13] **A.** Yes.
[14] **Q.** Did he ask you if you were there?
[15] **A.** Yes.
[16] **Q.** Did you tell him that you were?
[17] **A.** I informed him that I was not there during
[18] any of that. That I had left in the morning.
[19] **Q.** Did he ask you who was present at the
[20] times you were there?
[21] **A.** Yeah.
[22] **Q.** Did you tell him?
[23] **A.** Yeah. The same people that you questioned
[24] me about.
[25] **Q.** And while you were being asked these

WILLIAM GEFTMAN

[1]
[2] questions, were you near a computer?
[3] **A.** No. When I was being asked originally, I
[4] was there for two days, that day into the next day.
[5] And actually if I can remember correctly, I think I
[6] left at 11:00 the next night. And at this point we
[7] were in the room, and he was asking questions about
[8] if I knew anything; anything that I thought
[9] happened, heard happen, saw happen.
[10] **Q.** Did you tell him?
[11] **A.** Did I tell him?
[12] **Q.** Did you tell him the information that you
[13] know?
[14] **A.** Yes.
[15] **Q.** Did you tell him anything else?
[16] **A.** Other than what I knew?
[17] **Q.** Other than the things you already
[18] testified to today.
[19] **A.** I'm confused. I'm sorry.
[20] **MR. ZARALLO:** Your Honor, if I
[21] could mark this document as C-25?
[22] **THE COURT:** Very well.
[23] (The exhibit was marked for
[24] identification as C-25.)
[25] **COURT OFFICER:** C-25 has been
WILLIAM GEFTMAN

[1]
[2] marked, your Honor.
[3] **BY MR. ZARALLO:**
[4] **Q.** Ms. Marcelis, this is C-25.
[5] Do you recognize that?
[6] **A.** This is the statement the detective typed.
[7] **Q.** Now, looking at the first page, you have
[8] what's called a redacted statement. Certain
[9] personal information is blacked out.
[10] **A.** Okay.
[11] **Q.** Do you see the top where there's a box,
[12] investigation, interview record?
[13] **A.** Yes.
[14] **Q.** It has your name; correct?
[15] **A.** Correct.
[16] **Q.** Rachel Lynn Marcelis?
[17] **A.** Yes.
[18] **Q.** How old were you when you gave this
[19] statement?
[20] **A.** I'm sorry?
[21] **Q.** How old were you at the date of this
[22] statement?
[23] **A.** Nineteen.
[24] **Q.** I'm asking you.
[25] **A.** What was the date?
WILLIAM GEFTMAN

[1]
 [2] **Q.** How old were you on May 3rd of 2007?
 [3] **A.** I was 19.
 [4] **Q.** Does it have your age here?
 [5] **A.** Yes.
 [6] **Q.** And your date of birth, is that date of
 [7] birth yours?
 [8] **A.** Yes.
 [9] **Q.** After you were asked questions, the police
 [10] gave you the document to read over, didn't they?
 [11] **A.** Yes.
 [12] **Q.** And they asked you to read it?
 [13] **A.** Yes.
 [14] **Q.** And did they ask you to sign it?
 [15] **A.** Yes.
 [16] **Q.** And is that your signature that appears
 [17] down at the bottom of the page?
 [18] **A.** Yeah.
 [19] **Q.** And looking at the first page? We will
 [20] take it as it goes.
 [21] **A.** Yes.
 [22] **Q.** The first question right below the name
 [23] and address information is, "Are you known by any
 [24] other names?" That's the first question. You
 [25] could read along.

WILLIAM GEFTMAN

[1]
 [2] **A.** Okay.
 [3] **Q.** And the answer, "No."
 [4] **A.** Yes.
 [5] **Q.** Is that the answer that you gave them?
 [6] **A.** Yes.
 [7] **Q.** And that's accurate?
 [8] **A.** Yes.
 [9] **Q.** The next question is, "Can you read and
 [10] write English?"
 [11] **A.** Yes.
 [12] **Q.** What answer did you give them?
 [13] **A.** "Yes."
 [14] **Q.** And that's true; you can?
 [15] **A.** Yes. I can read and write English.
 [16] **Q.** They asked you how far you went in school;
 [17] correct?
 [18] **A.** Yes.
 [19] **Q.** And what did you tell them?
 [20] **A.** I was attending West Chester University.
 [21] **Q.** Is that accurate?
 [22] **A.** Yes.
 [23] **Q.** And they asked you, "QUESTION: Can you
 [24] tell me what you know in relation to the shooting
 [25] death of Fatima Whitfield?"

WILLIAM GEFTMAN

[1]
 [2] What's the answer you gave?
 [3] **A.** "I only know her as Fats."
 [4] **Q.** And you were shown a picture; is that
 [5] correct?
 [6] **A.** Yes.
 [7] **Q.** And you identified the picture as the
 [8] person that you know as Fats?
 [9] **A.** Yes.
 [10] **Q.** I'm going to ask you at this time to flip
 [11] all the way over to the twelfth page of the
 [12] statement. I know this is a photocopy.
 [13] **A.** The picture?
 [14] **Q.** Yes, the picture.
 [15] Is that the picture you identified
 [16] as Fats?
 [17] **A.** Yes.
 [18] **MR. ZARALLO:** Your Honor, may we
 [19] publish this to the jury?
 [20] **THE COURT:** Certainly.
 [21] **BY MR. ZARALLO:**
 [22] **Q.** Is that the picture that you were shown?
 [23] **A.** Yes.
 [24] **Q.** Now, when you were shown the picture, was
 [25] it folded in half?

WILLIAM GEFTMAN

[1]
 [2] **A.** Was the name and information not showing?
 [3] **Q.** Correct.
 [4] **A.** Yes.
 [5] **Q.** So you only saw the picture; right?
 [6] **A.** Yes.
 [7] **Q.** And you gave the name that you knew her
 [8] as?
 [9] **A.** Yes.
 [10] **Q.** And you signed that?
 [11] **A.** Yes.
 [12] **Q.** Back to the first page of the statement.
 [13] "QUESTION: Can you tell me what
 [14] occurred in relation to her death?
 [15] Now, there's a paragraph right
 [16] there. This is like a narrative version.
 [17] "I had just met her the day she was
 [18] killed. She was killed on Saturday April 21st. We
 [19] were at Tweezy's apartment at 15th and Allegheny.
 [20] I'm not exactly sure which apartment number it was.
 [21] It was the last apartment down a long hallway.
 [22] I"--
 [23] **MR. WALLACE:** Objection. This has
 [24] already been testified to.
 [25] **THE COURT:** Sustained.

WILLIAM GEFTMAN

[1]
 [2] **BY MR. ZARALLO:**
 [3] **Q.** Let me ask you this: Just reading the
 [4] part of that answer that's on that first page, is
 [5] that all accurate information?
 [6] **A.** One moment.
 [7] **Q.** Take your time.
 [8] **A.** Yes.
 [9] **Q.** So the very top of page two, when you were
 [10] getting ready to leave, who did you say was still
 [11] there in the apartment?
 [12] **A.** Myself, Babs, Tweezy, Fra, Snub, Corey and
 [13] another female that I didn't know.
 [14] **Q.** Did you identify a picture of Tweezy as
 [15] well?
 [16] **A.** Yes.
 [17] **Q.** Did you at some point learn his name was
 [18] Antoine Pemberton?
 [19] **A.** Yes.
 [20] **Q.** He's the person who didn't legally own the
 [21] apartment but who moved in there?
 [22] **A.** Yes.
 [23] **Q.** Do you remember being asked if you ever
 [24] saw anybody with a gun inside the apartment?
 [25] **A.** Yes.

WILLIAM GEFTMAN

[1]
 [2] lot of these people you identified; correct?
 [3] **A.** Yes.
 [4] **Q.** Without going through every one of them?
 [5] **A.** Yes.
 [6] **Q.** You identified Tweezy.
 [7] You already said you identified a
 [8] person you know as Snub?
 [9] **A.** Yes.
 [10] **Q.** You identified a person you know as Fra or
 [11] Fredo?
 [12] **A.** Yes.
 [13] **Q.** And you identified the defendant?
 [14] **A.** Yes.
 [15] **Q.** You also were asked to describe your
 [16] relationship with the defendant, and you indicated
 [17] you used to date; is that correct?
 [18] **A.** Yes.
 [19] **Q.** Incidentally were you close to his family
 [20] as well?
 [21] **A.** Yes.
 [22] **Q.** That's written down in your statement,
 [23] too; right?
 [24] **A.** I'm not sure where you're looking.
 [25] **Q.** I'm looking at the second to last

WILLIAM GEFTMAN

[1]
 [2] **Q.** Now, without reading your statement, did
 [3] you? Without reading the answer there, did you see
 [4] anybody with a gun?
 [5] **A.** Yes.
 [6] **Q.** Who did you see with a gun?
 [7] **A.** A girl. I didn't know who she was.
 [8] **Q.** What kind of gun did you see her with?
 [9] **A.** A black one. I'm not familiar.
 [10] **Q.** That's okay.
 [11] **A.** The shorter one.
 [12] **Q.** A black gun?
 [13] **A.** Yes.
 [14] **Q.** That's the only person you saw with a gun?
 [15] **A.** Yes.
 [16] **Q.** Now, the question there, the second
 [17] question from the top, "Did you see any person with
 [18] a gun inside Tweezy's apartment?"
 [19] "There was a girl in the bedroom
 [20] and you heard her say something like, Don't I look
 [21] cute" --
 [22] **MR. WALLACE:** Objection.
 [23] **THE COURT:** Sustained.
 [24] **BY MR. ZARALLO:**

[25] **Q.** You were shown several photographs of a
 WILLIAM GEFTMAN

[1]
 [2] **question:** "What is your relationship with Corey?"
 [3] The last sentence after you summarized, I used to
 [4] date him.
 [5] **A.** Yes. I was close with his family.
 [6] **Q.** Now, the last question on the page
 [7] is, "What happens when you leave the apartment?"
 [8] Do you see that question?
 [9] **A.** Yes.
 [10] **Q.** Now, here in your statement it says you
 [11] left the apartment. I'll skip down to the relevant
 [12] part.
 [13] "We got into my car. I was
 [14] driving. We went to go get Dutches or something to
 [15] eat. We been out of the apartment for ten or 15
 [16] minutes when Corey called Fra on his cell phone and
 [17] Fra said something like 'Who the fuck?' 'What
 [18] happened?' Then he said we would be right there."
 [19] Do you remember that happening?
 [20] **A.** What happened at the end of when we left
 [21] the apartment?
 [22] **Q.** Ma'am, I just want to know if you remember
 [23] that conversation in the car.
 [24] **A.** No.
 [25] **Q.** Moving on.

WILLIAM GEFTMAN

[1]
[2] **A.** Cordell called my phone.
[3] **Q.** "Fra got off the phone and told me to go
[4] back down Allegheny. We started asking Fra what
[5] was going on. Fra said, Corey said that someone
[6] got shot in the apartment. All of us were kind of
[7] yelling in the car because we didn't know who would
[8] have been shot or who would have shot someone. We
[9] got back down to Allegheny. We were right by Broad
[10] and Allegheny. Corey was on the corner smoking a
[11] cigarette. Tweezy was with him with a scared look
[12] on his face."

[13] Do you see that part?

[14] **A.** Yes.

[15] **Q.** Is that what you told the police?

[16] **A.** Yes.

[17] **Q.** And you signed the bottom of that page;
[18] correct?

[19] **A.** Correct.

[20] **Q.** You signed the bottom of this page and
[21] then we flipped the page and the answer continues.

[22] "Tweezy and Corey walked towards my
[23] car. Corey was getting into my backseat when
[24] Tweezy walked up to the passenger's side of the
[25] car. I asked Tweezy what happened because we had

WILLIAM GEFTMAN

[1]
[2] just left. Tweezy was shaking his head saying,
[3] 'She's gone. She's gone.' Corey got in the car.
[4] Fra turned around and asked what had happened. We
[5] pulled off and Corey had said, 'I shot her.'"

[6] Do you see that?

[7] **A.** Yes.

[8] **Q.** Is that what you told the police?

[9] **A.** Yeah.

[10] **Q.** "Corey had this blank stare like he wasn't
[11] there. We kept asking who is shot. Corey said
[12] that it was Fats. He said that he left his cell
[13] phone charger there or something stupid like that
[14] and he wasn't thinking. We kept asking what
[15] happened. Corey said that Fats was gone. That she
[16] was dead."

[17] Do you see that?

[18] **A.** Yes.

[19] **Q.** That's what you told the police?

[20] **A.** Yes.

[21] **Q.** And that's what they typed down?

[22] **A.** Yeah.

[23] **Q.** The statement on the page?

[24] **A.** Yes.

[25] **Q.** Incidentally, who's Corey?

WILLIAM GEFTMAN

[1]
[2] **A.** The defendant.
[3] **Q.** Indicating by point of finger the
[4] defendant.
[5] Moving on, "Corey said that he shot
[6] her twice in the head. Snub started freaking out
[7] because Fats was his niece's mom. Fra was yelling
[8] to him like, what the fuck is wrong with you? Snub
[9] was punching the chair and screaming at Corey. I
[10] kept asking him what happened. Corey said he had
[11] given Fats \$70 but she wouldn't have sex with him
[12] and that she wouldn't give him his money back.

[13] Corey said he kept telling Fats to give it back but
[14] she wouldn't. So he told everyone to get out and
[15] then he shot her. I didn't understand what Corey
[16] meant. So I asked if everyone left but Fats stayed
[17] behind. Corey said that Tweezy was there. I don't
[18] remember who asked him about the gun, but Corey
[19] said he left it. Later on we found out that Tweezy
[20] had it but that was a few days later."

[21] Is that what you told the police?

[22] **A.** Yes.

[23] **Q.** The next question is, "Where do you drive
[24] after you pick up Corey?"

[25] "ANSWER: We were driving to

WILLIAM GEFTMAN

[1]
[2] Corey's house. Fra and Snubs were screaming at
[3] him. When we got to Corey's house, they told him
[4] to get the fuck out of the car. At that point
[5] Corey was gone. It was like his brain shut off.
[6] Like he was just there. Like just a body. Nothing
[7] inside. I arrived at Fra's mom's house. Corey and
[8] Fra are brothers. They live together at the given
[9] address. Me, Fra and Snub go inside. Corey was
[10] outside smoking a cigarette. We were talking to
[11] Fra and Corey's mother. We didn't tell her about
[12] the shooting.

[13] "We left of the house to go get the
[14] Dutches which is the reason we left the apartment
[15] in the first place. When I walked out of the
[16] house, Mack was outside. So he got into my car
[17] with us. We were driving by the basketball courts
[18] at the schoolyard. I think it was around 15th and
[19] Sydenham."

[20] That's what you told the police?

[21] **A.** When I did tell the police, that
[22] originally I had --

[23] **Q.** You will get a chance to explain. Right
[24] now I'm asking you a yes or no question.

[25] **A.** Yes.

WILLIAM GEFTMAN

[1]
[2] **Q.** What's written down there is what you told
[3] the police?
[4] **A.** Yeah.
[5] **Q.** And then you were shown a photograph of
[6] somebody you identified as the person known as
[7] Mack? After you flip through the text, it would be
[8] the first photograph.
[9] **A.** Yes.
[10] **Q.** You identified the person you know as Mack
[11] and you signed that picture?
[12] **A.** Yes.
[13] **Q.** At that time you were asked, "Where is
[14] everyone in your car?"
[15] And without looking at your
[16] statement, do you remember where everybody was in
[17] your car at this point?
[18] **A.** When I went to his mom's, Fra was driving,
[19] I was in the passenger's seat and I think Corey was
[20] behind me and Snub was in the backseat but behind
[21] the driver's side.
[22] **Q.** After you dropped Corey off, where was
[23] everybody in the car?
[24] **A.** I'm not quite sure.
[25] **Q.** Well, if you look back down in your
WILLIAM GEFTMAN

[1]
[2] statement to the question that says, "QUESTION:
[3] Where is everyone in your car?"
[4] "ANSWER: I'm driving. Mack is in
[5] the front seat. Snub and Fredo are in the
[6] backseat"; correct?
[7] **A.** Yes.
[8] **Q.** Is that what you told the detective?
[9] **A.** Yes.
[10] **Q.** And after that there's a question and
[11] answer about something that happened afterwards;
[12] correct?
[13] **A.** Yes.
[14] **Q.** Now, at some point that day did you go to
[15] Wilkes-Barre?
[16] **A.** Yes.
[17] **Q.** Did you hear from Tweezy at some point?
[18] **A.** Tweezy had called me several -- probably
[19] about seven to ten times after all of this
[20] threatening me that he would kill me with the same
[21] gun that he killed Fats with.
[22] **Q.** Now, did you know how Tweezy came into
[23] possession of that gun?
[24] **A.** From what he had told me, he said that he
[25] had it. It was his gun. And that he had it in the
WILLIAM GEFTMAN

[1]
[2] apartment, he had it after the apartment and this
[3] incident and he still had it till that day.
[4] **Q.** Now, I'm going to refer you back to the
[5] third page of your statement. The third page.
[6] **A.** Okay.
[7] **Q.** It would be the very top. It starts in
[8] the middle of the paragraph. The first words are
[9] "look on his face." Do you see where I am? Are
[10] you on the third or second page? Turn the page
[11] from where you are.
[12] **A.** This is the first page?
[13] **Q.** Right.
[14] **A.** Second.
[15] **Q.** The third page. The very first words on
[16] this page are the words "look on his face."
[17] **A.** Yes.
[18] **Q.** Now, the bottom of that paragraph, the
[19] **last sentence:** "I don't remember who asked him
[20] about the gun but Corey said that he left it.
[21] Later on we found out that Tweezy had it. That was
[22] a few days later."
[23] Now, earlier you testified that
[24] that was what you told the police was accurate?
[25] **A.** Yes. Not that it was accurate. I said
WILLIAM GEFTMAN

[1]
[2] that that's what I told the police.
[3] **Q.** We will get to that.
[4] At the end of your statement, and
[5] this would be at the end of the actual typed words,
[6] fifth page, where the interview ends, were you
[7] asked to sign that page as well?
[8] **A.** Yes.
[9] **Q.** And you signed every page of this
[10] interview?
[11] **A.** Yes.
[12] **Q.** And the detective had given you the
[13] interview to read over, right?
[14] **A.** They had it on the computer, sure.
[15] **Q.** They let you read it?
[16] **A.** Yes.
[17] **Q.** And if you agreed with it, they asked you
[18] to sign it?
[19] **A.** They told me I had to sign it or they
[20] weren't letting me leave and I would miss my
[21] finals.
[22] **Q.** That's what they told you?
[23] **A.** Yes.
[24] **Q.** Now, the next page after your statement --
[25] would you flip the page -- what does this form say?
WILLIAM GEFTMAN

[1]
 [2] This is what?
 [3] **A.** "Consent to videotape statement."
 [4] **Q.** They gave you the option; do you want to
 [5] be videotaped?
 [6] **MR. WALLACE:** Objection, Judge.
 [7] Paraphrasing, they gave him the option.
 [8] **THE COURT:** Sustained. You can
 [9] rephrase it.
 [10] **BY MR. ZARALLO:**
 [11] **Q.** Let's look at this document. It says,
 [12] "Consent to videotape statement." It's a form
 [13] that's preprinted with certain words written in
 [14] handwriting; correct?
 [15] **A.** Yes.
 [16] **Q.** It says, "I, Rachel Marcellis, do freely and
 [17] voluntarily consent to the videotape and audio
 [18] cassette recording of an interview with Detective
 [19] Crone/Detective K. Rossiter of the Philadelphia
 [20] Police Department, Homicide Unit, on May 3rd,
 [21] 2007."
 [22] Is that what it says?
 [23] **A.** Yes.
 [24] **Q.** And there's your signature again right
 [25] below that?

WILLIAM GEFTMAN

[1]
 [2] **A.** Correct.
 [3] **Q.** And then there's the date 5/3/07; right?
 [4] **A.** Yes.
 [5] **Q.** And the time, 11:35 p.m.?
 [6] **A.** Yes.
 [7] **Q.** You said you remembered this ending
 [8] somewhere past 11:00?
 [9] **A.** Yes.
 [10] **Q.** So you agreed to be videotaped?
 [11] **A.** I was told the only way I was allowed to
 [12] leave to make it back to school to do my final.
 [13] And they had taken my car which all my paperwork
 [14] for school was in. And if I consented to what they
 [15] wanted me to do and told them what they wanted me
 [16] to.
 [17] **Q.** That must have been very upsetting for
 [18] you.
 [19] **A.** Yeah. I was never in trouble before, so.
 [20] **Q.** In fact, you, yourself, even got a lawyer
 [21] when you found out you were going to be subpoenaed
 [22] to testify; right?
 [23] **A.** Yes.
 [24] **Q.** Did you and your attorney file a complaint
 [25] against Detectives Crone and Rossiter?

WILLIAM GEFTMAN

[1]
 [2] **A.** No.
 [3] **Q.** You didn't go to Internal Affairs?
 [4] **A.** I had --
 [5] **Q.** Ma'am, yes or no?
 [6] **A.** No.
 [7] **Q.** You didn't go tell someone that the
 [8] Philadelphia police detectives kidnapped me and
 [9] refused to let me leave unless I agreed to sign a
 [10] statement that's not true and I agreed to be
 [11] videotaped saying things that aren't true?
 [12] **A.** Yes.
 [13] **Q.** Yes, what?
 [14] **A.** Yes, I did tell them. I told the lawyer I
 [15] have now and the previous lawyer.
 [16] **Q.** Really?
 [17] **A.** Yes.
 [18] **Q.** Did you ever go to tell anybody in the
 [19] Internal Affairs Division of the police department?
 [20] **A.** No.
 [21] **Q.** Did either one of your lawyers ever bring
 [22] you to Internal Affairs for a full interview?
 [23] **A.** No.
 [24] **Q.** Did you ask to do that?
 [25] **A.** I didn't know anything about that process.

WILLIAM GEFTMAN

[1]
 [2] **No.** I informed them as to what happened and
 [3] assumed that it was basically their job from there
 [4] to know what was right and what was wrong. I'm not
 [5] very familiar with most laws.
 [6] **Q.** Are you saying, Ms. Marcellis, and I want
 [7] to be clear, that you're not sure if it's right or
 [8] wrong to accuse somebody of murder if it's not
 [9] true?
 [10] **A.** Yes, it is wrong.
 [11] **Q.** And you're saying that's what you did
 [12] here?
 [13] **A.** Yes.
 [14] **MR. ZARALLO:** Your Honor, at this
 [15] time I'm going to mark as C-26 the video
 [16] cassette. I did have a hard copy for the
 [17] court.
 [18] **THE COURT:** Counsel, I assume you
 [19] have seen it.
 [20] **MR. WALLACE:** Yes.
 [21] **MR. ZARALLO:** It was provided in
 [22] discovery.
 [23] **BY MR. ZARALLO:**
 [24] **Q.** Ma'am, I'm going to ask you to take a look
 [25] up on the screen here.

WILLIAM GEFTMAN

[1]
 [2] **A.** Yes.
 [3] **Q.** Who do we see in this picture?
 [4] **A.** Myself, Detective Crone with the bald head
 [5] and I'm not sure who the other man was. That was
 [6] the first time I had seen him.
 [7] **Q.** So now that you have seen this, you do
 [8] remember there being another detective in the room
 [9] with you?
 [10] **A.** You asked if there was a detective while I
 [11] was giving my statement or being questioned. There
 [12] wasn't. This is the only time when someone was in
 [13] the room.
 [14] **Q.** I think I asked you if at any time but I'm
 [15] not going to quibble with you over that.
 [16] **MR. ZARALLO:** Your Honor, may I
 [17] have a brief recess while I iron out a
 [18] technical malfunction?
 [19] **THE COURT:** Let's take a short
 [20] recess.
 [21] Ms. Marcelis, you can step down for
 [22] a minute. Please do not discuss your
 [23] testimony.
 [24] - - -
 [25] (At this time a recess was taken.)
 WILLIAM GEFTMAN

[1]
 [2] - - -
 [3] **THE COURT:** All parties are
 [4] present. Bring the jury out.
 [5] (Jury is present.)
 [6] **THE COURT:** Counsel, you may
 [7] proceed.
 [8] **BY MR. ZARALLO:**
 [9] **Q.** Ms. Marcelis, I believe you identified
 [10] yourself, Detective Crone, the other person.
 [11] You now remember Detective
 [12] Rossiter; correct?
 [13] **A.** Yes.
 [14] **Q.** And this is after you had signed the
 [15] consent to videotape form?
 [16] **A.** Yes.
 [17] **Q.** What we see here occurs after you signed
 [18] the consent to be videotaped?
 [19] **A.** Yes.
 [20] **Q.** Now, I'm going to ask you to take a look
 [21] at this and tell me if this is the way it went
 [22] down.
 [23] (Videotape is played.)
 [24] **Q.** Is that the videotaped portion of your
 [25] statement?
 WILLIAM GEFTMAN

[1]
 [2] **A.** Was that the videotape?
 [3] **Q.** Was what we just looked at and listened
 [4] to, was this the videotaped portion of your
 [5] statement?
 [6] **A.** Yes. But there are things omitted.
 [7] **Q.** There are thing omitted?
 [8] **A.** Yes.
 [9] **Q.** Just so we are clear, during this two
 [10] minutes or so that you were on videotape, just so
 [11] I'm clear, your testimony is that you were forced
 [12] to say and do things; correct.
 [13] **A.** I was given the option that if I wanted to
 [14] leave, that was how I did it. And I was going to
 [15] give them what they wanted and not what I
 [16] originally had stated to them.
 [17] **Q.** I see.
 [18] You must have been pretty upset at
 [19] this point.
 [20] **A.** And that was all -- you see how I laughed
 [21] and was like, yeah. That was all stated after
 [22] that. And they told me right then and there that
 [23] they were deleting it off. I was like, That's
 [24] funny. This has been two days from hell. You
 [25] locked me in here. Didn't let me out of the room.
 WILLIAM GEFTMAN

[1]
 [2] Forced me to tell you what it is you wanted. And
 [3] kind of just went off on a tangent about how
 [4] horrible it was.
 [5] **Q.** That's what you say at this point?
 [6] **A.** At the end of that. Because I laugh and I
 [7] say, Yeah. You act like this is an F-ing hotel.
 [8] **Q.** So this statement cuts off?
 [9] **A.** Yeah.
 [10] **Q.** Well, why don't we look a little bit more.
 [11] Could we dim the lights again.
 [12] (Videotape is played.)
 [13] **Q.** You look very upset there, Ms. Marcelis,
 [14] don't you?
 [15] **MR. WALLACE:** Objection.
 [16] **THE COURT:** Sustained.
 [17] Next question.
 [18] **BY MR. ZARALLO:**
 [19] **Q.** Ms. Marcelis, you indicated that you're
 [20] close to the defendant's family; right?
 [21] **A.** Yes.
 [22] **Q.** You dated the defendant for awhile?
 [23] **A.** Yes.
 [24] **Q.** You didn't want to come here and testify
 [25] today, did you?
 WILLIAM GEFTMAN

[1]
 [2] **A.** Did I want to come here and testify?
 [3] **Q.** Yes.
 [4] **A.** I didn't want to come here and give this
 [5] statement.
 [6] **Q.** When you were subpoenaed, I asked you to
 [7] come to the D.A.'s office to have a prep and go
 [8] over your statement.
 [9] What did you tell me?
 [10] **A.** When I was subpoenaed yesterday?
 [11] **Q.** When you were subpoenaed prior to this;
 [12] correct?
 [13] **A.** I was subpoenaed prior to this and my
 [14] lawyer had spoken to you. I'm not sure as to when
 [15] you're talking about.
 [16] **Q.** Well, at some point you know the request
 [17] was made that you sit down and discuss your
 [18] subpoena and your testimony in court; correct?
 [19] **A.** Correct.
 [20] **Q.** You didn't want to do that, did you?
 [21] **A.** The lawyer advised me not to.
 [22] **Q.** And in fact, when I asked you yesterday
 [23] to review your statement, you refused to do that as
 [24] well, didn't you?
 [25] **A.** Yes.

WILLIAM GEFTMAN

[1]
 [2] **Q.** You never told me that you were forced to
 [3] say anything; right?
 [4] **A.** No.
 [5] **Q.** You and I were face-to-face yesterday
 [6] right there.
 [7] Did you tell me, look, these
 [8] detectives framed this guy? They threatened me.
 [9] They kidnapped me. They held me hostage. They
 [10] forced me to play act?
 [11] **MR. WALLACE:** Objection. Advice of
 [12] counsel. She didn't have to answer.
 [13] **THE COURT:** Sustained.
 [14] **BY MR. ZARALLO:**
 [15] **Q.** Did you tell me that?
 [16] **A.** My lawyer advised me not to say anything
 [17] to you. He was present.
 [18] **Q.** Referring back to C-25, your statement.
 [19] **A.** Okay.
 [20] **Q.** Just so we're clear, you testified the
 [21] entire first page here, that's all accurate
 [22] information; right?
 [23] **A.** Yeah.
 [24] **Q.** And the entire second page, that's all
 [25] accurate information?

WILLIAM GEFTMAN

[1]
 [2] **A.** I would have to look at the second page.
 [3] **Q.** We went through it one-by-one. I don't
 [4] want to rush you.
 [5] I'm sorry. The second page up to
 [6] the last question is what you testified to?
 [7] **A.** No. The second page up to the last
 [8] question is accurate.
 [9] **Q.** It is accurate?
 [10] **A.** Yes.
 [11] **Q.** Basically right up until that last
 [12] question, right up until they asked you, what
 [13] happens when you leave the apartment, you were
 [14] asked questions and you answered them; right?
 [15] **A.** Yes.
 [16] **Q.** The part that gets inaccurate is when you
 [17] talk about the defendant admitting that he shot
 [18] someone in the head?
 [19] **A.** Yes.
 [20] **Q.** The third page, the part where you talk
 [21] about where everybody is in the car, that's
 [22] accurate; right?
 [23] **A.** Yes.
 [24] **Q.** And all the photographs that they asked
 [25] you to identify, that was all accurate and

WILLIAM GEFTMAN

[1]
 [2] truthful; people you recognized, names you knew?
 [3] **A.** Yes.
 [4] **Q.** Right?
 [5] **A.** Yes.
 [6] **Q.** The part about where you went to after you
 [7] got Corey, once again, that's accurate?
 [8] It's the second question: "Where
 [9] did you drive after you pick up Corey?"
 [10] **A.** Where we went is accurate. That whole
 [11] statement is not accurate.
 [12] **Q.** I'm asking you about that question. I'm
 [13] asking you one question at a time.
 [14] **A.** That question is not completely accurate.
 [15] Yes, we did go to his mother's house. Yes. Part
 [16] of the statement stating that we went to Corey's
 [17] house, his mother's house, but I -- and took him
 [18] there is accurate but not all of it.
 [19] **Q.** The next page, it mostly refers to another
 [20] incident; is that correct?
 [21] **A.** Correct.
 [22] **Q.** And the second to the last page at the
 [23] very bottom.
 [24] You told detectives that you got a
 [25] call from Tweezy; is that correct?

WILLIAM GEFTMAN

[1]
[2] **A.** Yes.
[3] **Q.** And the last question is, "Tell me about
[4] that phone call"; right?
[5] **A.** Yes.
[6] **Q.** Were you forced to say that answer or is
[7] that answer accurate?
[8] **A.** Yes.
[9] **Q.** In fact, you testified --
[10] **MR. WALLACE:** Objection, Judge.
[11] Yes, it was forced and yes, it was
[12] accurate.
[13] **THE COURT:** Sustained.
[14] **THE WITNESS:** Yes, that was
[15] accurate about him calling me.
[16] **BY MR. ZARALLO:**
[17] **Q.** Are you sure?
[18] **A.** Yes.
[19] **Q.** You told the detectives that Tweez called
[20] you and threatened to kill you with the same gun
[21] that blew that fat bitch's head off. You said
[22] that. They typed it up and wrote it; correct?
[23] **A.** Yes.
[24] **Q.** And again, you signed it?
[25] **A.** Yes.
WILLIAM GEFTMAN

[1]
[2] **MR. ZARALLO:** Thank you very much,
[3] Ms. Marcelis. I have no further questions.
[4] **THE COURT:** You may cross-examine.
[5] **MR. WALLACE:** Thank you.
[6] ---
[7] CROSS-EXAMINATION
[8] ---
[9] **BY MR. WALLACE:**
[10] **Q.** Good afternoon.
[11] The interview that we just watched,
[12] that wasn't a videotape of your statement, was it?
[13] **A.** No. That was quite some time after my
[14] statement. I was --
[15] **Q.** Quite some time.
[16] Like over a day; right?
[17] **A.** It was not even -- I was in there two days
[18] in total. It was later on that evening. It
[19] probably had been maybe -- my assumption was like
[20] an hour, two hours after my statement.
[21] **Q.** Look at the very first page of your
[22] statement.
[23] **A.** Yes.
[24] **Q.** Do you see about ten lines down,
[25] "Brought in by police"?
WILLIAM GEFTMAN

[1]
[2] **A.** Yes.
[3] **Q.** What date is that?
[4] **A.** Brought in by police 5/2/07.
[5] **Q.** Is there any time in there?
[6] **A.** No.
[7] **Q.** So that's missing, the time when they
[8] brought you in?
[9] **A.** Yes.
[10] **Q.** For some reason they didn't put that in;
[11] is that right?
[12] **A.** Correct.
[13] **Q.** What time of the day was it when you were
[14] brought in? Was it nighttime? Daytime?
[15] **A.** Daytime, afternoon.
[16] **Q.** Some time in the afternoon?
[17] **A.** Some time between lunch and dinner, I
[18] would say.
[19] **Q.** Some time between 12:00 and 6:00?
[20] **A.** Yes.
[21] **Q.** So that would mean on 5/2 you got there
[22] some time between 12:00 in the afternoon and 5:00
[23] in the afternoon; correct?
[24] **A.** Yes.
[25] **Q.** And you signed that so-called consent form
WILLIAM GEFTMAN

[1]
[2] at what time? What time does it say? Do you have
[3] that page in front of you? I think it's the first
[4] page right after you have the statement.
[5] **A.** 5/3 at 11:35 p.m.
[6] **Q.** So when you signed this videotaped
[7] statement, in that 30 seconds we just saw or the
[8] minute that we just saw on that videotape, that
[9] took place at 11:35 p.m.; correct?
[10] **A.** Yes.
[11] **Q.** A minimum of 36 hours after you were
[12] picked up; correct?
[13] **A.** Correct.
[14] **Q.** The only thing they videotaped was that
[15] last 30 seconds or minute, whatever it was that we
[16] just saw on the film; correct?
[17] **A.** Yes.
[18] **Q.** Did they videotape all these questions and
[19] answers?
[20] **A.** No.
[21] **Q.** Did they tell you they could?
[22] **A.** No. They told me that I was a prisoner,
[23] but they didn't have to read me my rights. I
[24] couldn't call anyone. And that I was to sit there
[25] and was not allowed to leave and would not be able
WILLIAM GEFTMAN

[1]
[2] to -- I was a college student. I had finals coming
[3] up. I wouldn't be able to get my homework and
[4] things like that from my car or be able to leave
[5] without giving them the statement the way they
[6] wanted it.
[7] **Q.** In fact, when you finished the videotape,
[8] you started to get up and leave, didn't you?
[9] **A.** Yes.
[10] **Q.** What did they tell you to do?
[11] **A.** Sit back down.
[12] **Q.** When did you get out?
[13] **A.** It was -- oh, goodness. It was pretty
[14] late. West Chester is approximately a half-hour,
[15] 45 minutes, depending on traffic, from here. I
[16] didn't get home until about 1:00 in the morning.
[17] **Q.** So it was another hour before you got
[18] home; right?
[19] **A.** Yes. Yes.
[20] **Q.** And how long would you estimate the
[21] statement took? How long did they talk to you
[22] about this statement?
[23] And if I understand you correctly,
[24] it was Detective Crone that questioned you and not
[25] Rossiter who later appears for the videotape; is
WILLIAM GEFTMAN

[1]
[2] that correct?
[3] **A.** Yes. That's when I had first seen him.
[4] **Q.** Now, how long were you in the interview
[5] room when you were first brought in before you
[6] first talked to a detective?
[7] **A.** I was brought in. It was probably -- I
[8] first talked to a detective as soon as I was
[9] brought in. And then I was informed that I would
[10] be allowed to leave. And I couldn't tell how long
[11] it was because of the timewise. I know that I
[12] knocked on the door to use the bathroom and find
[13] out what was going on. And Detective Crone had
[14] left and no one was there. And I was informed I
[15] was a prisoner. I could go to the bathroom and
[16] then they would lock me back in this room.
[17] **Q.** Did Detective Crone eventually come back?
[18] **A.** Yes. The next morning.
[19] **Q.** The next morning?
[20] **A.** Yes.
[21] **Q.** So let's assume you got there late that
[22] afternoon, around 5:00.
[23] You didn't start talking to the
[24] police until the following morning about the
[25] statement, giving this statement?
WILLIAM GEFTMAN

[1]
[2] **A.** This statement wasn't until, I would say,
[3] getting closer to dinnertime.
[4] **Q.** So you were there 24 hours?
[5] **A.** Yes.
[6] **Q.** If you came in around 5:00 on the 2nd and
[7] they didn't talk to you until around dinnertime the
[8] following day, that's approximately 24 hours later
[9] before the statement even started; right?
[10] **A.** Yes.
[11] **Q.** So you walked into Homicide. A detective
[12] introduced himself?
[13] **A.** Yes.
[14] **Q.** Put you in the room, in an interview room,
[15] I suppose; right?
[16] **A.** Yes.
[17] **Q.** Anyone else in there with you?
[18] **A.** Just me.
[19] **Q.** And you sat there for 24 hours with the
[20] exception of going to the bathroom?
[21] **A.** Yes. He would come in and ask me a
[22] question. If it was not the answer that he wanted,
[23] it was like a punishment. He would leave the room
[24] and lock the door again and I would be in there. .
[25] **Q.** And this started how long after you first
WILLIAM GEFTMAN

[1]
[2] got there?
[3] **A.** From when I first came in.
[4] **Q.** So he introduced himself, I'm Detective
[5] Crone. Indicated to you that he wanted to ask you
[6] some questions about Fatima's Whitfield's death;
[7] something like that?
[8] **A.** Yes. That's how I learned it wasn't a
[9] robbery that I was in for.
[10] **Q.** That's when you found out that even though
[11] they told you they were picking you up for a
[12] robbery, it had nothing to do with a robbery;
[13] right?
[14] **A.** Yes.
[15] **Q.** And then you told them what? What you
[16] testified to today?
[17] **A.** No.
[18] **Q.** You didn't even get to that; correct?
[19] **A.** No.
[20] **Q.** And he would leave?
[21] **A.** Yes.
[22] **Q.** How long would you stay before he came
[23] back and resumed the question?
[24] **A.** It varied. Maybe 20 minutes or up to
[25] three hours. The one night he asked me questions
WILLIAM GEFTMAN

[1]
 [2] and then left for the night and didn't come back
 [3] until the next day.
 [4] **Q.** I guess the shift was over and he left;
 [5] right?
 [6] **A.** Yes.
 [7] **Q.** Nobody else came in to take his place?
 [8] **A.** No.
 [9] **Q.** And the next time you saw him is when he
 [10] came back the next day?
 [11] **A.** Yes. It was 4:00 in the morning. I asked
 [12] to go to the bathroom. That's the first time I saw
 [13] a clock since I was in there. I started freaking
 [14] out about what's going on. I was told it would
 [15] only take however long. That I would be able to
 [16] leave.
 [17] **Q.** And none of that was videotaped as far as
 [18] you know; right?
 [19] **A.** No. No.
 [20] **Q.** The only thing that was videotaped is when
 [21] they asked you to look at the statement, is that
 [22] your signature and did you identify these pictures?
 [23] That's the only part that's on that videotape;
 [24] correct?
 [25] **A.** Yes.

WILLIAM GEFTMAN

[1]
 [2] **Q.** Now, look at the form.
 [3] What does it say?
 [4] **A.** Consent to videotape statement.
 [5] **Q.** Statement; right?
 [6] **A.** Yes.
 [7] **Q.** Not to have affirmed statement. It says a
 [8] consent to videotape the statement; correct?
 [9] **A.** Yes.
 [10] **Q.** And you said earlier before anybody even
 [11] asked you this, Detective Rossiter had nothing to
 [12] do with the questioning of you; is that correct?
 [13] **A.** No. No.
 [14] **Q.** And the first time you saw him was when
 [15] the videotape took place 36 hours later; correct?
 [16] **A.** Yes.
 [17] **Q.** You also indicated that you did receive
 [18] threatening calls from Tweezy; correct?
 [19] **A.** Yes.
 [20] **Q.** And Tweezy because of the nicknames
 [21] involved is the gentleman you know also as Antoine
 [22] Pemberton; correct?
 [23] **A.** Yes.
 [24] **Q.** And the district attorney asked you to
 [25] read that statement several times to make sure it

WILLIAM GEFTMAN

[1]
 [2] was accurate. I'm going to read it one more time.
 [3] You tell me if it's accurate. It's the last page
 [4] of the statement, top of the page.
 [5] **A.** Yes.
 [6] **Q.** "I was back home from Wilkes-Barre last
 [7] week."
 [8] Now, you gave this statement from
 [9] 5/2 to 5/3/07; correct?
 [10] **A.** Yes.
 [11] **Q.** So is it fair to assume that the calls
 [12] were made some time in April?
 [13] **A.** Yes.
 [14] **Q.** "I was back home from Wilkes-Barre. This
 [15] was last week. He was calling my cell phone from a
 [16] private number. He had been calling repeatedly.
 [17] Most of the phone calls were like, I know where you
 [18] are and that he was going to get me, to kill me;
 [19] that sort of thing. I basically told him that he
 [20] wasn't scary. That's when he said something to the
 [21] effect of he was going to kill me with the same gun
 [22] that blew that fat bitch's head off."
 [23] Isn't that what he said to you?
 [24] **A.** Correct.
 [25] **Q.** And that was Pemberton talking to you;

WILLIAM GEFTMAN

[1]
 [2] correct?
 [3] **A.** Yes.
 [4] **Q.** It wasn't Corey calling you, threatening
 [5] you?
 [6] **A.** No.
 [7] **Q.** Did Corey ever call you and tell you not
 [8] to cooperate with the police?
 [9] **A.** No.
 [10] **Q.** Did he ever even call during that period?
 [11] **A.** No.
 [12] **Q.** By Corey, I mean Cordell also known as
 [13] Corey.
 [14] **A.** Yes. The defendant.
 [15] **Q.** You also indicated that you did see a gun
 [16] in that room that night during the festivities or
 [17] party that was going on?
 [18] **A.** Yes.
 [19] **Q.** And it wasn't a silver gun. It was a
 [20] black gun, you said?
 [21] **A.** Yes.
 [22] **Q.** And it was in the hands of some girl?
 [23] **A.** Yes.
 [24] **Q.** Was she posing for pictures or something?
 [25] **A.** When I turned around, it was kind of like,

WILLIAM GEFTMAN

[1]
 [2] Don't I look cute?
 [3] **Q.** Did she have it in her hand?
 [4] **A.** Yes.
 [5] **MR. WALLACE:** Thank you.
 [6] **THE COURT:** Any redirect?
 [7] **MR. ZARALLO:** Very briefly, your
 [8] Honor.
 [9] ---
 [10] REDIRECT EXAMINATION
 [11] ---
 [12] **BY MR. ZARALLO:**
 [13] **Q.** That last part about the calls from
 [14] Tweezy, they didn't omit that from your statement,
 [15] did they? They wrote it down.
 [16] You said they wrote it?
 [17] **A.** Yes.
 [18] **Q.** It didn't have anything to do with Corey;
 [19] right?
 [20] **A.** Correct.
 [21] **Q.** Incidentally, did you make your finals on
 [22] time?
 [23] **A.** Yes. I ended up making them.
 [24] **Q.** What date was your first final?
 [25] **A.** I cannot remember offhand. They ended up
 WILLIAM GEFTMAN

[1]
 [2] being in May.
 [3] **Q.** And you initially came into contact with
 [4] the police the early afternoon you said between
 [5] lunch and 1:00, I believe you said?
 [6] **A.** Lunch and dinnertime.
 [7] **Q.** Between lunch and dinner?
 [8] **A.** Yes.
 [9] **Q.** That's several hours.
 [10] **A.** Between 12:00 and 5:00. I'm not sure what
 [11] time it was.
 [12] **Q.** Could it have been after 5:00?
 [13] **A.** No. It would have been prior.
 [14] **Q.** What makes you so certain? How do you
 [15] know it would have been prior?
 [16] **A.** Because I was only coming down because
 [17] Corey's mom had cooked and I hadn't seen her in
 [18] awhile. And she asked me to come down and get
 [19] something to eat. And I said I had to go back up.
 [20] Because of it being finals, I had papers and things
 [21] to work on. I was meeting a roommate of mine who
 [22] had the same class at 6:00.
 [23] **Q.** So on May 2nd you were actually on your
 [24] way to eat dinner with the defendant's family?
 [25] **A.** I wasn't eating there. I was going to get
 WILLIAM GEFTMAN

[1]
 [2] food from there and then go back to school
 [3] essentially.
 [4] **Q.** Does the defendant's mother regularly cook
 [5] dinner for you so you could bring it back to
 [6] school?
 [7] **A.** The defendant's mother, Miss Debbie, would
 [8] cook for everyone. She would cook all the time if
 [9] I was coming there to stay or leave.
 [10] **Q.** You say it takes about an hour and a half
 [11] to go back and forth to school?
 [12] **A.** Well, a half-hour to 45 minutes, depending
 [13] on traffic.
 [14] **Q.** You drove 45 minutes, a half-hour to pick
 [15] up dinner, turn around and drive back?
 [16] **A.** Yeah. The defendant's mother was sick at
 [17] the time. And although at the time I hated him, I
 [18] thought his mother was always very nice to me. And
 [19] she had asked me if I would come down, stop down
 [20] and say hi and she would make me something to eat
 [21] to bring back up to school.
 [22] **Q.** I see.
 [23] At some point today prior to your
 [24] testimony did somebody tell you what other
 [25] witnessed testified to?
 WILLIAM GEFTMAN

[1]
 [2] **A.** No.
 [3] **Q.** Nobody approached you in the hallway?
 [4] **A.** No, no one approached me in the hallway.
 [5] **Q.** You didn't talk to anybody that was in the
 [6] courtroom today?
 [7] **A.** In general conversation I spoke with my
 [8] father but not about court.
 [9] **Q.** And nobody told you what Antoine Pemberton
 [10] said or anything along those lines?
 [11] **A.** No.
 [12] **Q.** Did you ever tell anyone that you were
 [13] going to testify that I lied because I was mad at
 [14] Corey? Did you ever tell anybody that, Ms.
 [15] Marcelis?
 [16] **A.** That I?
 [17] **Q.** That you lied to the police? Your
 [18] testimony was going to be that you lied to the
 [19] police because you were mad at Corey?
 [20] **A.** People are aware that I lied to the police
 [21] because I was mad at Cordell. And if it got me to
 [22] go home and got him in trouble, it killed two birds
 [23] with one stone is my mindset.
 [24] **Q.** Okay. I see now we are getting down to
 [25] it.
 WILLIAM GEFTMAN

[1]
[2] So you were mad --
[3] **MR. WALLACE:** Objection.
[4] **THE COURT:** Sustained. Counsel,
[5] let refrain from the comments and ask
[6] questions.
[7] **BY MR. ZARALLO:**
[8] **Q.** So you were mad at Cordell the day that
[9] this happened?
[10] **A.** At the time, yes, I was.
[11] **Q.** And you lied to him to get him in trouble?
[12] **A.** They weren't accepting what I believed to
[13] be the truth. Which was I had originally said that
[14] my belief was that Antoine, per the phone
[15] conversation, was the one that committed the
[16] murder. They told me that they weren't hearing it.
[17] They knew that wasn't true and I did, too. And
[18] that I was going to tell them what they wanted.
[19] And I figured that would get me out. I didn't like
[20] him at the time. Why not.
[21] **Q.** Well, when you said, "Kill two birds with
[22] one stone," that made it sound like there were two
[23] things you wanted to accomplish.
[24] **A.** That I got to go home. That I got to go
[25] back to school. I got my car back and I could go
WILLIAM GEFTMAN

[1]
[2] back to my little life. Me and Corey didn't get
[3] along. That was kind of, You screwed me over, so
[4] now I'm going to screw you over. Who has the last
[5] laugh?
[6] **Q.** Well, just so I'm clear, you told the
[7] detectives that Tweezy killed Fats?
[8] **A.** Yes. That was my first statement when I
[9] went in. They told me if I told them, they would
[10] let me go home and give me my car and everything.
[11] **Q.** You told the detectives that you were
[12] there and you saw Fats get shot?
[13] **A.** No. I told them -- they asked me if I
[14] knew anything about it. I said I heard through the
[15] grapevine that it was Tweez. And he had called me
[16] and threatened me that if I cooperated, he was
[17] going to kill me with the same gun. That would
[18] lead to conclude --
[19] **Q.** So they didn't put the first part in but
[20] they gladly put the second part in?
[21] **A.** They wouldn't take the first part at all.
[22] **Q.** The second part they had no problem with;
[23] right?
[24] **A.** No. Because they said that Corey did it
[25] and that's what they were going to prosecute.
WILLIAM GEFTMAN

[1]
[2] **Q.** I'm asking you about the second part
[3] regarding Tweezy. First part they didn't take it
[4] in your words. The second part they recorded
[5] faithfully and accurately every word you said?
[6] **MR. WALLACE:** Objection.
[7] **THE COURT:** Sustained.
[8] **BY MR. ZARALLO:**
[9] **Q.** Did they record the second part faithfully
[10] and accurately, every word that you said?
[11] **A.** About the phone calls?
[12] **Q.** Yeah.
[13] **A.** Yeah.
[14] **Q.** And just not the first part?
[15] **A.** No.
[16] **MR. ZARALLO:** That's it. Thank
[17] you very much.
[18] **THE COURT:** Any recross, counsel?
[19] ---
[20] RE-CROSS-EXAMINATION
[21] ---
[22] **BY MR. WALLACE:**
[23] **Q.** Just to clear the air, you never saw me
[24] before you walked into this room, did you?
[25] **A.** No. Well, yesterday I was here.
WILLIAM GEFTMAN

[1]
[2] **Q.** You were here?
[3] **A.** Yes.
[4] **Q.** And did I talk to you?
[5] **A.** No.
[6] **Q.** And have I approached you?
[7] **A.** No.
[8] **Q.** Did anybody approach you on my behalf?
[9] **A.** No.
[10] **MR. WALLACE:** Nothing else.
[11] Thank you, ma'am.
[12] **THE COURT:** Thank you, ma'am. You
[13] may step down.
[14] Commonwealth, you may call your
[15] next witness.
[16] **MR. ZARALLO:** Your Honor, the
[17] Commonwealth calls Detective James Crone.
[18] **COURT OFFICER:** State your full
[19] name, spell your last, state your badge
[20] number and division.
[21] **THE WITNESS:** Detective James
[22] Crone, C-R-O-N-E, badge number 759,
[23] Philadelphia Police Department, Detective
[24] Bureau, Homicide Unit.
[25] ---
WILLIAM GEFTMAN