

PHILADELPHIA COUNTY COMMON PLEAS COURT
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA)	
)	
Respondent,)	
)	
v.)	CP-51-CR-0011476-2011
)	First-degree murder (PCRA)
)	Trial Court: DeFino-Nastasi
RAFIQ DIXON)	
Defendant-Petitioner)	

Amended PCRA Petition

1. Petitioner, **Rafiq Dixon**, by and through counsel, **Craig M. Cooley**, respectfully files his *Amended PCRA Petition*, which is filed in good faith, and based on the following facts and points of authorities.

2. The Court “may grant leave to amend” a petition “at any time” and amendments “shall be freely allowed to achieve substantial justice.” Pa.R.Crim.P. 905(A). Allowing Mr. Dixon to amend his pending PCRA petition will “achieve substantial justice” because trial counsel failed to present evidence and witnesses in support of Mr. Dixon’s innocence. Mr. Dixon, therefore, respectfully requests the Court’s permission to amend his pending PCRA petition.

PROCEDURAL HISTORY

3. On **October 6, 2011**, the Commonwealth filed an *Information* charging **Rafiq Dixon** him with **first-degree murder** and **VUFA** in connection with **Joseph Pinkney’s April 27, 2011** shooting death.

4. Mr. Dixon **pled not guilty** and proceeded to a **jury trial** before the **Honorable Rose M. DeFino-Nastasi** (“trial court”). **Robert Mozenter** served as **trial counsel**.

5. On **July 25, 2012**, the jury convicted Mr. Dixon of **first-degree murder** and **VUFA**. The trial court sentenced Mr. Dixon to life imprisonment for the murder conviction.

6. Mr. Dixon appealed (**2215 EDA 2012**), with **Norris Gelman** serving as appellate counsel, but the Superior Court affirmed on **July 1, 2014**, and the Pennsylvania Supreme Court denied Mr. Dixon's timely *Petition for Allowance of Appeal* on **November 16, 2014** (**360 EAL 2014**). Mr. Dixon did not file a cert petition with the U.S. Supreme Court, meaning his conviction became final on **February 16, 2015**. *Caspari v. Bohlen*, 510 U. S. 383, 390 (1994); 42 Pa. C.S. § 9545(b)(3).

7. On **November 30, 2015**, Mr. Dixon's filed a timely PCRA petition, 42 Pa. C.S. § 9545(b)(1), which he respectfully amends today with this pleading.

STATEMENT OF FACTS

A. Shooting and Investigation

8. On April 27, 2011, a man with a shirt wrapped around his face accosted Joseph Pinkney as he stood outside the corner store near 51st Street and Race Street and shot him multiple times. The corner store's surveillance cameras captured the shooting. Pinkney was speaking with Devon Collins and Shaquil Gressom when the gunman accosted him.

9. The video footage captured Collins immediately run from the scene when the gunman accosted Pinkney. Gressom, who was standing to Collins' left, cannot be seen in the video footage when the gunman accosted Pinkney. Collins and Gressom did not contact police after the shooting and identify the gunman.

10. Investigators did not have a suspect until Zelenia Lomax contacted investigators on May 8, 2011 and told them her "cousin," Rafiq Dixon, purchased a cell phone from Pinkney in November 2010. The cell phone did not work, so Mr. Dixon "and his friends jumped" Pinkney. Pinkney then approached Mr. Dixon's mother, Sonya Dixon, and Sonya and Pinkney "had words." Sonya told Mr. Dixon about Pinkney approaching her and Mr. Dixon allegedly told Lomax, "I'm going to kill him when I see [him], won't nobody know what I did." Mr. Dixon also allegedly told Lomax, "[D]on't nobody run up on my mom like that." Lomax told investigators she spoke with Mr. Dixon and told him she would give him \$100 to

resolve the cell phone issue, but Mr. Dixon allegedly told her “he didn’t want the money” because “it was not about the money.”¹

11. Lomax did not recall the month or date when Pinkney told her about Mr. Dixon and his friends jumping him, nor did she recall the month or date when she confronted Mr. Dixon about the cell phone issue and offered to give him \$100 to resolve the issue.²

12. On May 16, 2011, police picked up Devon Collins and brought him to Homicide for questioning. According to Collins’ typed-written statement, which he signed, he was with Shaquil Gressom walking toward the corner store when Pinkney approached him and asked if he wanted to purchase zanax pills. As he spoke with Pinkney, the gunman accosted Pinkney and shot him. Collins said he recognized the gunman as “Feek,” someone he had seen around the neighborhood the last four years or so. Collins described Feek as 5’4” and brown skinned. Collins identified Rafiq Dixon as the gunman from an 8-man photo array. Collins’ statement mentioned nothing about the gunman wearing a shirt or towel around his face to mask his identity.³

13. On May 22, 2011, police picked up Shaquil Gressom and brought him to Homicide for questioning. Gressom corroborated Collins’ statement regarding Pinkney approaching Collins about purchasing zanex as well as the gunman accosting and shooting Pinkney. Gressom said he “didn’t know” the gunman and he “froze” when he saw the gunman accost Pinkney. Gressom said he “ran off down Race Street” after the first shot. As he ran, Gressom “looked back and saw” the gunman “shoot four more times” at Pinkney. Gressom described the gunman as a “short” black male. Gressom then identified Rafiq Dixon as the gunman from an 8-man photo array. Gressom’s statement mentioned nothing about the gunman wearing a shirt or towel around his face to mask his identity.⁴

B. Preliminary Hearing

1. Shaquil Gressom

14. Gressom testified at Mr. Dixon’s October 5, 2011 preliminary hearing and said the gunman had a shirt covering his nose and mouth and all he saw were the

¹ Ex. 1.

² Ex. 1.

³ Ex. 2.

⁴ Ex. 3.

gunman's eyes.⁵ Based on the shirt, the prosecutor asked Gressom if he could identify the gunman in court. Gressom said, "Not really."

Prosecutor: When the shooter came around the corner, did you see his face?

Gressom: No, he had a shirt covering his face.

Prosecutor: What part of his face was covered?

Gressom: The nose and mouth area.

Prosecutor: Could you see any part of his face?

Gressom: No, but just the eye part, that's about it.

Prosecutor: Okay. Based upon what you saw, are you able to identify the shooter?

Gressom: Not really.

Prosecutor: Do you see the person in the room that was there that night?

Gressom: No.⁶

15. After the prosecutor impeached Gressom with his May 22, 2011 statement, where he identified Mr. Dixon as the gunman, Gressom made in-court identification of Mr. Dixon.⁷

16. On cross-examination, Gressom said he smoked marijuana everyday and he was high at the time of the shooting because he had smoked a bag of marijuana not long before the shooting.⁸ Gressom also admitted on cross the shooting "happened real quick," that he "ran" after the first shot because he was "scared to death," and that he had never seen the gunman before.⁹ Gressom also said he told

⁵ NT, Prelim. Hrg., 10/5/2011, pp. 12-13, 34, 36.

⁶ *Id.*, p. 13.

⁷ *Id.*, pp. 25-26.

⁸ *Id.*, p. 30.

⁹ *Id.*, pp. 31, 36, 37.

detectives during his May 22, 2011 interview that the gunman had a shirt covering his nose and mouth.¹⁰

17. Gressom also said detectives pointed to Mr. Dixon's photograph in the photo array and that he only signed his May 22, 2011 statement so he could go home because if he did not give a statement detectives told him they were "gonna keep" him at Homicide.

Counsel: So when you said that is the man, you meant that this is the man that you put a circle around in this picture; is that correct?

Gressom: Yes

Counsel: Well, who told you to put a circle around that picture, anybody?

Gressom: No.

Counsel: Well, why did you pick that picture out?

Gressom: I didn't pick it out; they picked it out, to tell you the truth.

Counsel: Well, that's what I'm asking you.

Gressom: Yeah, they picked it out. I ain't know who this man is.

Counsel: Well, why did you sign it?
....

Gressom: So I could go home.

Counsel: How long were you in there before they questioned you?

Gressom: I wasn't there that long. They was gonna keep me if I wasn't going to tell them nothing.¹¹

¹⁰ *Id.*, pp. 34-35.

2. Devon Collins

18. Collins also testified at the preliminary hearing and said he did not see where the gunman came from, nor did he see the gunman shoot Pinkney because he immediately ran when he saw the gunman's gun:

Prosecutor: Sir, the person that you knew as Fiq, where did that person come from?

Collins: I didn't see where he came from.

Prosecutor: All right. At what point did you notice him being there?

Collins: This is what I seen from off the camera. I didn't see nobody specifically because the shirt was over the person's head.

...

Prosecutor: Okay. Now, when... you noticed Fiq there, did you see a gun in his hand?

Collins: Yes.

Prosecutor: Where was the gun pointed?

Collins: I don't know; I took off.

Prosecutor: How many times did – did you see him fire?

Collins: No.

...

Prosecutor: Okay. You did not see where Fiq came from, you said, right?

Collins: No.

Prosecutor: Okay. Well, did you see Fiq actually shoot?

¹¹ *Id.*, pp. 38-39.

Collins: No, I didn't see. He had a shirt over his head from when the camera – when we was in the district, the camera has him poke his head around the corner.¹²

19. On cross-examination, Collins told trial counsel he ran after the first shot, not after seeing the gun.¹³

20. Collins said he returned to the corner store a “few days” after the shooting and asked if it had surveillance footage of the shooting. It did and he watched the footage. Collins claimed he recognized Mr. Dixon as the gunman from the video footage as well.¹⁴ Despite recognizing Mr. Dixon as the gunman the night of the shooting as well as a few days after the shooting, Collins never contacted authorities and reported this information.¹⁵ Collins said he did not contact police because the shooting was “none of my business.”¹⁶

21. On cross-examination, when trial counsel asked Collins how he could have identified the gunman if the gunman had a shirt wrapped around his face, Collins said he captured a glimpse of the gunman's face because the shirt was “coming down.”¹⁷

22. In terms of his May 16, 2011 statement, Collins said detectives picked him up, said he was under investigation for a homicide, and took him to Homicide where he stayed for two days handcuffed to a chair.¹⁸ He said detectives showed him photographs of the shooting, but not the video footage. Detectives arrested him two months later, in July 2011, charged him with being a material witness, and placed him on house arrest. Collins was still on house when he testified.¹⁹

¹² *Id.*, pp. 44, 45, 46-47.

¹³ *Id.*, p. 63.

¹⁴ *Id.*, pp. 47-48.

¹⁵ *Id.*, pp. 55-56, 72.

¹⁶ *Id.*, p. 63.

¹⁷ *Id.*, pp. 62-63.

¹⁸ *Id.*, pp. 64-69.

¹⁹ *Id.*, p. 72.

C. Trial

1. Devon Collins

23. Devon Collins testified and said he recognized the gunman as “Feek” when the gunman accosted Pinkney. He said he had known Feek for “some years” and had seen him “around the area” a “few times.”²⁰

24. Collins said the shooting happened very quickly and that when he first looked toward the gunman his attention and focus were on the gun, not the gunman’s face.

Prosecutor: What was it that drew your attention to him?

Collins: The gun.²¹

25. When Collins shifted his focus to the gunman, he saw a towel or shirt covering the gunman’s face, exposing only his eyes and nose: “He had a shirt wrapped around his face and his eyes and nose was out.”²² Despite only seeing gunman’s nose and eyes, Collins still recognized the gunman as “Feek,” someone he had known for “some years” and had seen “around the area” a “few times.”²³ Collins said he was “sure it was Feek that came around the corner and did the shooting.”²⁴

26. Collins then said the shirt “fell off” when the gunman ran “around the corner” and accosted Pinkney.²⁵ The prosecutor showed Collins exhibit C-29, the video footage of the shooting, and stopped the video as the gunman turned the corner, and asked, “[D]id the shirt fall from his face at this point?” Collins said, “Yes.” The prosecutor then asked, “So you can see his face at this point?” Collins replied, “Yes.”²⁶ On cross-examination, trial counsel impeached Collins with his preliminary hearing testimony, where Collins repeatedly said he did not see where the gunman came from and that when he saw the gunman he focused on the gun,

²⁰ NT, Trial, 7/17/2012, pp. 141-142, 154, 157, 159.

²¹ *Id.*, p. 159.

²² NT, Trial, 7/17/2012, pp. 159-160, 161.

²³ *Id.*, pp. 141-142, 154, 157, 159, 161.

²⁴ *Id.*, p. 232.

²⁵ *Id.*, pp. 162-163, 187-188.

²⁶ *Id.*, pp. 186-187

not the gunman's face, and that he immediately ran when he saw the gun.²⁷ Trial counsel then played C-29 to show the jury that the gunman's shirt did not fall down.²⁸ After playing C-29, Collins admitted he could not see the gunman's face when the gunman turned the corner and accosted Pinkney:

Counsel: You can't see his face there, can you?

Collins: No.

Counsel: As a matter of fact, what you do see is a person running around the corner with something over his head; isn't that right?

Collins: Yes.²⁹

27. Collins said he heard a "click" and assumed the gunman's gun jammed. Collins did not see what the gunman did after he heard the "click" because he ran once he heard the "click."³⁰ On cross-examination, Collins said he "took off" when he saw the gun because he was scared of getting shot.³¹ Collins, therefore, said he never actually saw Pinkney get shot and that he only learned Pinkney was shot after he, *i.e.*, Collins, returned to the corner store that night.³² Collins heard gunshots as he ran, but he was unsure how many and told prosecutor he "wasn't counting" as he ran.³³

28. Collins said he saw the video footage a "few days" after the shooting when he returned to the corner store and asked to see the video. When he viewed it, he said he recognized Mr. Dixon as the gunman.³⁴ Despite knowing the gunman's identity, Collins never contacted the police because, according to him, he "didn't have anything to do with it."³⁵

29. In terms of his statement, Collins said police picked him up, took him to Homicide, handcuffed him to a chair in an interrogation room, and questioned

²⁷ *Id.*, pp. 206-209 (referring to NT, Prelim. Hrg., 10/5/2011, pp. 44-45, 46-47).

²⁸ *Id.*, pp. 220-221, 222.

²⁹ *Id.*, p. 222.

³⁰ *Id.*, pp. 144-145.

³¹ *Id.*, p. 219.

³² *Id.*, p. 148.

³³ *Id.*, p. 146.

³⁴ *Id.*, pp. 178-179.

³⁵ *Id.*, pp. 150, 198-199.

him for two days.³⁶ During his statement, Collins described the gunman as 5'4" and brown skinned.³⁷

2. Shaquil Gressom

30. Shaquil Gressom testified and said, "Somebody came around the corner with a gun and just waved it and I just stood there."³⁸ Gressom also said the gunman "just stood there for a second and then approached [Pinkney]."³⁹ He saw the gun and said the gunman was pointing it "straightforward" with both arms outstretched in front of him.⁴⁰ He also heard Pinkney say, "stop, chill, don't, don't."⁴¹ When Gressom saw the gunman, he "backed up" and ran once he heard the first shot.⁴² Once Gressom began running he did not see the gunman so he did not know what direction the gunman ran.⁴³ Gressom heard four more shots as he ran.⁴⁴

31. When the gunman turned the corner, Gressom said he did "not quite" look at the gunman, but when the gunman accosted Pinkney a second later, he saw the gunman and the gunman did not have "anything covering his face."⁴⁵ Gressom said he "really couldn't" see the gunman's face, but then said he "seen his face."⁴⁶ Gressom also said he wears glasses because he has difficulty seeing: "I wear glasses. I see you. I didn't see you very well but I seen you."⁴⁷ Gressom said he had never seen the gunman before.⁴⁸

32. Later during his direct-examination, Gressom reiterated the gunman did not have his "face covered."

Prosecutor: Did the shooter have his face covered or not?

³⁶ *Id.*, pp 153, 199-201, 202-203, 214, 223-224, 225.

³⁷ *Id.*, p. 156.

³⁸ NT, Trial, 7/18/2012, p. 57.

³⁹ *Id.*, p. 59.

⁴⁰ *Id.*, p. 59.

⁴¹ *Id.*, p. 58.

⁴² *Id.*, pp. 58, 60.

⁴³ *Id.*, p. 62.

⁴⁴ *Id.*, p. 63.

⁴⁵ *Id.*, p. 73.

⁴⁶ *Id.*, p. 73.

⁴⁷ *Id.*, pp. 73-74.

⁴⁸ *Id.*, pp. 67-68, 80, 82.

Gressom: No.

Prosecutor: Did you see the shooter's face?

Gressom: Yes.⁴⁹

33. Gressom described the gunman as shorter than 5'7", stocky, and husky.⁵⁰ Gressom then said, "I seen the man's face. He is in this courtroom. He is right there. There is no if, and's or but's."⁵¹ When the prosecutor asked him if he identified Mr. Dixon from a photo array, Gressom said he did not immediately identify Mr. Dixon and that he had to look at the photographs a couple times.⁵²

34. On cross-examination, Gressom admitted to being high on marijuana when the shooting occurred and to smoking marijuana "once and awhile."⁵³ In terms of the shooting, Gressom said the shooting happened "very quickly," he ran "very fast" after first shot because he was scared, and as a result, he did not turn around and did not see anything after the first shot.⁵⁴ When asked whether he spoke with the prosecutor or detectives before trial, Gressom said police picked him up the day before he testified, held him at Homicide, and told him he was not free to leave.⁵⁵

35. Trial counsel impeached Gressom with his preliminary hearing testimony where he testified the gunman had a shirt around his face. Gressom told trial counsel his preliminary hearing testimony "was a lie."⁵⁶ Trial counsel then had the following back-and-forth with Gressom regarding what parts of his preliminary hearing testimony were untrue.

Counsel: So you lied under oath?

Gressom: No. It was right there. He had his face covered. When the first shot fired, I left.

⁴⁹ *Id.*, p. 74.

⁵⁰ *Id.*, p. 76.

⁵¹ *Id.*, p. 72.

⁵² *Id.*, p. 79.

⁵³ *Id.*, pp. 80-81.

⁵⁴ *Id.*, p. 82.

⁵⁵ *Id.*, pp. 83-84.

⁵⁶ *Id.*, p. 90.

Counsel: You said under oath this person who did the shooting had a shirt around his face and today you are saying he didn't have a shirt around his face.

Gressom: I told you I was nervous.

Counsel: But were you nervous when you told the cops he had a shirt around his face?

Gressom: Yeah, a little bit. I wasn't scared.

Counsel: I see. You were nervous but not scared?

Gressom: So you lied under oath?

Gressom: I didn't lie under oath. I just said I was nervous.

Counsel: Here is the next question, a T-shirt over his face? Answer, yeah, like around his head and his nose, like it was on top of his head but it was around his nose and his mouth. Do you remember that question and that answer?

Gressom: Yeah.

Counsel: Is that a lie too?

Gressom: No. I said when he came – his face was covered but after the first shot, I don't know.

Counsel: Because you took off?

Gressom: Yeah.

Counsel: Did he or die he not, the person who did the shooting, did he or did he not have something around his face; yes or no?

Gressom: He did for a minute, yeah.

Counsel: So you see a person come around, waving a gun, bang, and you take off in a second?

Gressom: Yeah.

Counsel: You never saw that person before in your life?

Gressom: I never did.

Counsel: So the person did have something around his face when he came around the corner, is that correct?

Gressom: For a second, yeah.

...

Counsel: [Asked about prelim testimony where Gressom said he only saw the gunman's eyes] and asked, "Is that a lie too or is that the truth?"

Gressom: No. That was the truth.

Counsel: So you didn't see the man's face. You just saw his eyes, a person you had never seen before in your life. You hear a gunshot. You take off in the opposite direction. That is the truth; right?

Gressom: Yeah.⁵⁷

36. When Gressom said he picked Mr. Dixon's photograph out of the photo array, not detectives, trial counsel impeached him with his preliminary hearing

⁵⁷ *Id.*, pp. 90-92.

testimony where Gressom said, “They [i.e., detectives] picked it out, to tell you the truth.”⁵⁸ Gressom replied that his preliminary hearing testimony was not true.⁵⁹

37. When trial counsel asked Gressom about his May 22, 2011 statement, Gressom testified he “said anything” that “came to [his] mind” when he spoke with the detectives so “they would get off [his] back” and let him go home.⁶⁰ Gressom’s response spawned this back-and-forth with trial counsel:

Counsel: So you gave a statement because you were afraid they were going to keep you; right?

Gressom: Yeah.

Counsel: You didn’t want to get arrested or be involved in any homicide; right?

Gressom: Yeah.

Counsel: They told you to give a statement because, otherwise, you weren’t going home; right?

Gressom: Yes.⁶¹

38. Trial counsel asked Gressom once more if his preliminary hearing testimony where he said detectives picked out Mr. Dixon’s photograph was true. Gressom now said it was true.

Counsel: So you didn’t know who that man was they were showing you? They told you to pick that picture out, didn’t they?

Gressom: Yeah.⁶²

⁵⁸ *Id.*, p. 96 (referencing NT, Prelim. Hrg., 10/5/2011, pp. 38-39).

⁵⁹ *Id.*, p. 96.

⁶⁰ *Id.*, pp. 96-97.

⁶¹ *Id.*, pp. 97-98.

⁶² *Id.*, p. 99.

39. On redirect, the prosecutor first asked Gressom, “Do you agree that you just said two different things to me and to Defense Counsel just now about who picked out the person’s picture who did the shooting in the statement?”⁶³ Gressom immediately backtracked from his cross-examination testimony and told the jury he was the one who picked Mr. Dixon’s photograph from the photo array, not the detectives.⁶⁴

40. He also said when the gunman came around the corner the gunman was holding the gun in one hand and holding his t-shirt up over his nose with his other hand. Gressom said the t-shirt covered half of the gunman’s face, but he also said the t-shirt “came down” for a split second, which allowed him to capture a glimpse of the gunman’s face for a “split second” before the gunman readjusted the t-shirt over his nose.⁶⁵

3. Zelenia Lomax

41. Zelenia Lomax testified and said she knew Pinkney because she dated his cousin Nigel Johnson.⁶⁶ She said she had a conversation with Pinkney regarding a cell phone 2 or 3 weeks before his death.⁶⁷ Trial counsel objected several times on hearsay grounds because Lomax kept referring to what Pinkney told her. The trial court sustained the objection and asked Lomax, “They were fighting over a cell phone?” Lomax said, “Yes.”⁶⁸ Lomax said Pinkney sold cell phones and other items throughout the neighborhood.⁶⁹

42. Based on what Pinkney told her regarding the cell phone, Lomax went to Mr. Dixon’s house and spoke with Mr. Dixon, who allegedly told her that Pinkney “pulled a gun on [his] mom[.]”⁷⁰ Lomax said, “At one point I was like all of this is about a cell phone. I could give you a few dollars and [Mr. Dixon] said to me, if I kill him, nobody would know because he burnt so many people in the neighborhood.”⁷¹ Lomax testified she offered to give Mr. Dixon \$100 to replace the cell phone, but Mr. Dixon allegedly told her “it ain’t about the money.”⁷²

⁶³ *Id.*, p. 104.

⁶⁴ *Id.*, p. 105.

⁶⁵ *Id.*, pp. 105-107.

⁶⁶ *Id.*, p. 13.

⁶⁷ NT, Trial, 7/18/2012, pp. 15-16, 18.

⁶⁸ *Id.*, p. 17.

⁶⁹ *Id.*, pp. 18, 19.

⁷⁰ *Id.*, p. 16.

⁷¹ *Id.*, p. 16.

⁷² *Id.*, p. 18.

43. Lomax did not report Mr. Dixon's threat to the police because she "didn't believe it" at the time, but she told Pinkney about Mr. Dixon's threat.⁷³ After learning of Pinkney's murder, Lomax never confronted Mr. Dixon because she did not think Mr. Dixon "did it" and she did not want to believe he did it.⁷⁴ Lomax, however, said she had conversation with Nigel Johnson after Pinkney's murder and Johnson—who was Pinkney's cousin—encouraged her to contact the police. Lomax decided to call, but had Johnson make the initial call to the police.⁷⁵

44. On cross-examination, Lomax said she spoke to Mr. Dixon about the cell phone issue two weeks after Pinkney told her Mr. Dixon and his friends jumped him, but Lomax could not recall the month or date of this alleged conversation.⁷⁶

4. Jury Instructions, Deliberations, and Questions

45. The trial court gave a *Kloiber* instruction regarding Collins' and Gressom's identifications.⁷⁷

46. The jury deliberated for four days – July 19th, 20th, 24th, and 25th, during which time it asked ten questions:

Question #1: "The jury requests the video exhibit from in front of the store, the poster exhibit of the street, and the poster exhibit of the body."

Question #2: "May the jury have the photo array as given to both eyewitnesses during their interviews and the photo of 'Tracey' and the court's record regarding Tracy."

Question 3: "May the jury have the trial testimony given regarding 'Tracey' read to us."

Question: #3a: "May the jury have the photo arrays to both eyewitnesses at their interviews and the photo of Tracy."

⁷³ *Id.*, p. 20.

⁷⁴ *Id.*, pp. 21, 28, 29.

⁷⁵ *Id.*, p. 22.

⁷⁶ *Id.*, pp. 26-27.

⁷⁷ *Id.*, pp. 185-186.

Question #4: “The request to see the defendant stand so we may better see what he looks like.”

Question #5: “May the jury request all the crime scene photos with the flags showing the scene and the shells.”

Question #6a: “Could we please see the police (statement) Shaquille [sic] Gressom and Devon gave to authorities on 5/22/12 and 5/11/12 [sic].”

Question #6b: “May the jury request to see the video of the incident.”

Question #7a: “We could like to here [sic] Devon’s testimony of how and when he ID’d the defendant.”

Question #7b: “We would like to hear the trial testimony of how Devon identified the shooter as he came around the corner and the description of the alleged covered face.”⁷⁸

47. After asking these questions, on the fourth day of deliberations (July 25th), the jury sent a note informing the trial court it was deadlocked: “The jury at this time is at a deadlocked. We are unable to come to a decision, and we don’t expect to reconcile to a unanimous vote at any point.”⁷⁹ The trial court read a standard *Allen* charge and instructed the jury to continue deliberating.⁸⁰

48. After further deliberations, the jury sent the trial court another question regarding Zelenia Lomax:

Question #9: “The jury would like to hear the testimony of Zellina [sic] Lomax with regard to her conversation with Rafik [sic] and ‘Joseph Pinkney.’”⁸¹

⁷⁸ Ex. 4.

⁷⁹ Ex. 4; NT, Trial, 7/25/2012, pp. 2-3.

⁸⁰ NT, Trial, 7/25/2012, pp. 3-4.

⁸¹ Ex. 4.

49. The jury ultimately convicted Mr. Dixon of first-degree murder and carrying a firearm in public.⁸²

PCRA REQUIREMENTS

50. Mr. Dixon must meet the following conditions to be eligible for PCRA relief. 42 Pa. C.S. § 9543(a)(1)-(a)(4).

51. *First*, Mr. Dixon must show he has been convicted of a crime under the laws of this Commonwealth and is serving a prison sentence. 42 Pa. C.S. § 9543(a)(1). Mr. Dixon stands convicted of first-degree murder and VUFA and is serving a life sentence at SCI-Greene (Inmate No. KQ-6194).

52. *Second*, Mr. Dixon must present cognizable claims under 42 Pa. C.S. § 9543(a)(2). Mr. Dixon alleges state and federal claims that: (1) undermine the truth-determining process; and (2) establish ineffective assistance of counsel. 42 Pa. C.S. §§ 9543(a)(2)(i & ii).

53. *Third*, Mr. Dixon's claims cannot be previously litigated or waived. 42 Pa. C.S. §9543(a)(3). Mr. Dixon's claims focus on trial counsel's ineffectiveness—or claims that could not have been raised until PCRA proceedings. *Commonwealth v. Grant*, 813 A.2d 726, 738 (Pa. 2002). Consequently, Mr. Dixon's claims have not been previously litigated or waived.

54. *Fourth*, Mr. Dixon must demonstrate he filed his PCRA petition within one year of when his conviction became final. 42 Pa. C.S. § 9545(b)(1). Mr. Dixon's conviction became final on February 16, 2015 and Mr. Dixon filed his PCRA petition on December 2, 2015, making his PCRA petition timely.

CLAIMS FOR RELIEF

A. Trial and Appellate Counsel Ineffectiveness Claims

55. Mr. Dixon has a right to effective trial counsel. *Strickland v. Washington*, 468 U.S. 668, 688 (1984). Trial counsel's purpose is to "test[] the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged." *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012). The right to effective representation, consequently, is "the right of the accused to require the prosecution's case to survive the crucible of

⁸² NT, Trial, 7/25/2012, pp. 10-11.

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. at 688. Thus, unless a defendant receives effective representation, “a serious risk of injustice infects the trial itself.” *Cuyler v. Sullivan*, 446 U.S. 330, 343 (1980). In short, the right to effective representation is the “great engine by which an innocent man can make the truth of his innocence visible[.]” *Luis v. United States*, 136 S. Ct. 1083, 1089 (2016) (quotations and citation omitted).

56. To prevail on an ineffectiveness claim, Mr. Dixon must demonstrate that trial counsel performed deficiently and the deficient performance prejudiced him. *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 [to] 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 a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. A reasonable probability “is a probability sufficient to undermine confidence in the outcome,” *id.*, which it is “not a stringent” standard to satisfy because it is “less demanding than the preponderance standard.” *Hall v. Kyler*, 190 F.3d 88, 110 (3d Cir. 1999); accord *Kyles v. Whitley*, 514 U.S. 419, 435 (1995); *Nix v. Whiteside*, 475 U.S. 157, 175 (1986).

57. Under state law, a petitioner must show (1) the underlying legal claim is of arguable merit, (2) trial counsel’s action or inaction lacked any objectively reasonable basis designed to effectuate his interest(s), and (3) prejudice. *Commonwealth v. Pierce*, 527 A.2d 973, 975–976 (Pa. 1987). When assessing whether trial counsel had a “reasonable basis” for a particular act or omission, the question is not whether there were other courses of action available, but “whether counsel’s decision had any basis reasonably designed to effectuate his client’s interest.” *Commonwealth v. Williams*, 141 A.3d 440, 463 (Pa. 2016). Put differently, the issue is “whether counsel made an informed choice, which at the time the decision was made reasonably could have been considered *to advance and protect [the] defendant’s interests.*” *Commonwealth v. Dunbar*, 470 A.2d 74, 77 (Pa. 1983) (emphasis added). Trial counsel’s action or omission will be considered unreasonable if the petitioner establishes “that an alternative not chosen offered a potential for success substantially greater than the course actually pursued.” *Commonwealth v. Howard*, 719 A.2d 233, 237 (Pa. 1998).

58. 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. Spatz*, 870 A.2d 822, 829 (Pa. 2005); accord *Commonwealth v. Williams*, 936 A.2d 12, 19 (Pa. 2007).

Claim #1: Trial counsel was ineffective for not presenting the mother of Rafiq Dixon's two children, Ima Francis, as an alibi witness, even though Mr. Dixon told trial counsel before trial he was with Ima Francis at the time of the shooting and instructed trial counsel to present Ima Francis as an alibi witness. U.S. Const. amdots. 5, 6, 8, 14; Pa. Const., art. I, §§ 8, 9.

59. To obtain relief on a claim trial counsel failed to present a witness, Mr. Dixon must establish: (1) the witness existed; (2) the witness was available to testify; (3) counsel knew, or should have known, about the witness; (4) the witness was willing to testify; and (5) the absence of the witness's testimony denied him a fair trial. *Commonwealth v. Sneed*, 45 A.3d 1096, 1108-1109 (Pa. 2012). Mr. Dixon satisfies these requirements.

60. Before trial, Mr. Dixon informed trial counsel he was innocent of Joseph Pinkney's murder because he was with his two sons and their mother, Ima Francis, at the time of the shooting. Mr. Dixon instructed trial counsel to contact Ima Francis, interview her, and present her as an alibi witness. Trial counsel informed Mr. Dixon he had no intention of contacting Ima Francis as an alibi witness, unless he "really ha[d] to," because trial counsel's primary strategy was to "discredit" Devon Collins, Shaquil Gressom, and Zelenia Lomax.⁸³

61. Trial counsel never interviewed or attempted to interview Ima Francis before trial.

62. Ima Francis would have testified on Mr. Dixon's behalf.⁸⁴

63. Trial counsel never filed an alibi notice as required under Pa.R.Crim.P. 567.

⁸³ Ex. 5.

⁸⁴ Ex. 5.

64. Trial counsel never called Ima Francis as an alibi witness. Had trial counsel called Ima Frances as an alibi witness, she would have testified to the following:

a. Between 2010 until his arrest in July 2011, Mr. Dixon lived at 622 Spruce Street in Darby, Pennsylvania.

b. Mr. Dixon was with her and their two sons at their 622 Spruce Street residence at the time of the shooting on April 27, 2011.⁸⁵

65. Trial counsel's decision not to call Ima Francis cannot be deemed strategic because trial counsel never interviewed or attempted to interview Ima Francis. An act or omission by trial counsel can only be deemed strategic and virtually unchallengeable if trial counsel's *investigation preceding* the act or omission was reasonable. Here, trial counsel conducted no investigation whatsoever regarding Ima Francis. As a result, trial counsel's decision not to present her as an alibi witness cannot be considered reasonable trial strategy.

66. Trial counsel's failure to interview and present Ima Francis prejudiced Mr. Dixon.

a. Based on the jury's prolonged deliberations and questions, and the fact it remained deadlocked momentarily, the jury did not find Devon Collins' and Shaquil Gressom's identifications immediately credible, and rightfully so.

b. As the video footage demonstrates, Collins and Gressom had, at best, 2 to 3 seconds to capture a glimpse of a gunman who had a shirt wrapped around his head in such a way that only exposed his eyes. Likewise, both testified they spent part of this 2 to 3 seconds focused on the gunman's gun, not the gunman's face. Thus, both had, at best, perhaps 1 to 1.5 seconds to see the gunman's eyes.

c. Moreover, at the preliminary hearing, Gressom said he could not identify the gunman because of the shirt. Gressom also testified at the preliminary hearing he did not select Mr. Dixon's photograph from the photo array; the detectives circled Mr. Dixon's photograph for him.

d. Likewise, Gressom testified at trial that the gunman lowered the shirt with his hand during the shooting and this was why he was able to see the

⁸⁵ Ex. 5.

gunman's face. The video footage, though, proves this testimony is false because the gunman never touched his face or the shirt.

e. Collins also gave conflicting testimony regarding his identification, namely at what point did he see the gunman's face, during the 1 to 1.5 seconds he possibly had to view the gunman. Collins first said he did not see the gunman until the gunman accosted Pinkney with the gun drawn. Collins then said he actually saw the gunman as the gunman turned the corner because it was at this point the gunman's shirt fell down and quickly exposed his face. Collins then said when he initially saw the gunman his focus was directed at the gun, not the gunman's face. Lastly, despite supposedly knowing the gunman's identity the night of the shooting and a few days later when he viewed the video footage at the corner store, Collins never called police to report what he knew and he never mentioned his knowledge to Gressom.

f. These facts and inconsistencies raised significant doubt with the jury. Thus, had trial counsel presented Ima Francis, there is a reasonable probability the jury would have relied on her testimony to conclude Collins and Gressom misidentified Mr. Dixon, resulting in Mr. Dixon's acquittal.

67. Mr. Dixon is entitled to a new trial.

Claim #2: Trial counsel was ineffective for not presenting Rafiq Dixon's mother, Sonya Dixon, as a defense witness to rebut Zelenia Lomax's testimony and the Commonwealth's claim Mr. Dixon fled, even though Mr. Dixon told trial counsel before trial his mother would refute Zelenia Dixon's pre-trial statement and trial testimony and the Commonwealth's claim that he fled after Pinkney's murder. U.S. Const. amdts. 5, 6, 8, 14; Pa. Const., art. I, §§ 8, 9.

68. To obtain relief on a claim trial counsel failed to present a witness, Mr. Dixon must establish: (1) the witness existed; (2) the witness was available to testify; (3) counsel knew, or should have known, about the witness; (4) the witness was willing to testify; and (5) the absence of the witness's testimony denied him a fair trial. *Commonwealth v. Sneed*, 45 A.3d at 1108-1109. Mr. Dixon satisfies these requirements.

69. Before trial, trial counsel received Zelenia Lomax's May 8, 2011 statement. Lomax contacted investigators on May 8, 2011 and told them her "cousin," Rafiq Dixon, purchased a cell phone from Pinkney in November 2011. The cell phone did not work, so Mr. Dixon "and his friends jumped" Pinkney. Pinkney then approached Mr. Dixon's mother, Sonya Dixon, and "had words" with her. Sonya told Mr. Dixon about Pinkney approaching her and Mr. Dixon allegedly told Lomax, "I'm going to kill him when I see [him], won't nobody know what I did." Mr. Dixon said "don't nobody run up on my mom like that." Lomax told investigators she spoke with Mr. Dixon and told him she would give him \$100 to resolve the cell phone issue, but Mr. Dixon told her "he didn't want the money" because "it was not about the money."⁸⁶

70. At trial, Lomax testified she spoke with Pinkney 2 to 3 weeks *before his murder* and it was during this conversation Pinkney told her about Mr. Dixon and his friends jumping him, *i.e.*, Pinkney.⁸⁷ Two weeks later Lomax said she went to Mr. Dixon's house and spoke with Mr. Dixon and during this conversation Mr. Dixon allegedly told Lomax that Pinkney pulled a gun on his mother and that he was going to kill Pinkney for this.⁸⁸

71. Before trial, Mr. Dixon informed trial counsel Lomax's statement was completely false, including the claim Pinkney "had words with" or "threatened" his mother, Sonya Dixon, and instructed trial counsel to interview Sonya Dixon and to present her as a defense witness to rebut Lomax's testimony.

72. Trial counsel never interviewed or attempted to interview Sonya Dixon.

73. Sonya Dixon would have testified on Mr. Dixon's behalf.⁸⁹

74. At trial, Lomax testified she spoke to Mr. Dixon after Pinkney told her Mr. Dixon and his friends jumped him, *i.e.*, Pinkney, regarding a cell phone, and that during this conversation, Mr. Dixon told Lomax that Pinkney had pulled a gun on his mother.

75. Trial counsel never called Sonya Dixon as a defense witness to rebut Lomax's testimony.

⁸⁶ Ex. 1.

⁸⁷ NT, Trial, 7/18/2012, pp. 15-16.

⁸⁸ *Id.*, pp. 26-27.

⁸⁹ Ex. 5.

76. During closing arguments, the prosecutor argued that Sonya Dixon called Mr. Dixon after detectives went to her house in search of Mr. Dixon, and that based on the information Sonya Dixon provided Mr. Dixon, Mr. Dixon fled the area.⁹⁰

77. Trial counsel's decision not to call Sonya Dixon cannot be considered reasonable trial strategy because trial counsel never interviewed or attempted to interview Sonya Dixon. An act or omission by trial counsel can only be considered strategic and virtually unchallengeable if trial counsel's investigation preceding the act or omission was reasonable. Here, trial counsel conducted no investigation whatsoever regarding Sonya Dixon and he never interviewed or attempted to interview Sonya Dixon.

78. Trial counsel's failure to interview and present Sonya Dixon prejudiced Mr. Dixon.

a. Zelenia Lomax represented the Commonwealth's only motive witness. Without Lomax's testimony, the Commonwealth had no evidence regarding why Mr. Dixon may have possibly wanted to shoot and killed Pinkney. Attacking Lomax's credibility, therefore was of paramount importance. Discrediting Lomax would have also called into question Collins' and Gressom's identifications because the motive and identification issue went hand-in-hand, *i.e.*, if the Commonwealth presented credible and believable evidence Rafiq Dixon had a legitimate motive to shoot and kill Pinkney, such evidence added weight and credibility to Collins' and Gressom's identifications.

b. Lomax's testimony, though, was suspect for a variety of reasons. According to Lomax, she spoke with Pinkney 2 to 3 weeks before his murder and it was during this conversation Pinkney told her about Mr. Dixon and his friends jumping him.⁹¹ Lomax then testified she had her incriminating conversation with Mr. Dixon *2 weeks after* her conversation with Pinkney.⁹² Consequently, if Lomax spoke with Mr. Dixon *2 weeks after* her conversation with Pinkney, Lomax had to had had this incriminating conversation with Mr. Dixon *a week-or-so before the shooting*. Lomax met with detectives on May 8, 2011, which was only *a week and a half after* the shooting and therefore only *two and a half weeks after* Lomax allegedly had this incriminating conversation with Mr. Dixon. Despite the closeness in time between her alleged incriminating conversation with Mr. Dixon

⁹⁰ NT, Trial, 7/19/2012, p. 133.

⁹¹ NT, Trial, 7/18/2012, pp. 15-16.

⁹² *Id.*, pp. 26-27.

and her interview with detectives, Lomax never told detectives her alleged conversation with Mr. Dixon occurred only two and a half weeks prior to her conversation with them, *i.e.*, the detectives. Indeed, when detectives asked, “Zelenia, when did you confront Fiq about the altercation between him and Joe?” Lomax replied, “I can’t remember the exact date but like I said this was back in November of last year.”⁹³ In other words, during Lomax’s interview with detectives, Lomax implied she confronted Mr. Dixon’s *months before* Pinkney’s murder, which, if true, contracts her trial testimony where she said she confronted Mr. Dixon a week or so before Pinkney’s murder.

c. Based on the length of its deliberations and questions, the jury did not give immediate or perhaps any credibility to Lomax’s testimony. In fact, the jury’s last question to the trial court was to have Lomax’s testimony read back to it, particularly Lomax’s testimony regarding her alleged conversations with Pinkney and Mr. Dixon.⁹⁴

d. Sonya Dixon would have testified that she did not know a Joseph Pinkney, that a Joseph Pinkney never “had words with her” about being jumped by Mr. Dixon, and that a Joseph Pinkney never threatened her with a gun.⁹⁵

e. Sonya Dixon would have also testified she had not communicated with Mr. Dixon in the many months preceding Pinkney’s shooting and she did not have Mr. Dixon’s contact information during this time.⁹⁶ This fact is corroborated by Detective Nordo’s June 4, 2011 “*Attempts to Apprehend – Log*” sheet, which he handwrote after he and other detectives spoke with Sonya Dixon on June 4, 2011. Det. Nordo wrote,

... were met by mother, identical brother & nephew inside 5114 Haverford Avenue – mother explains of a physical fight between herself & Rafiq out front of the house six months ago – haven’t seen or heard from him nor do they know of a cell phone # - cell phone contacts checked – no cell phone numbers found and nothing to indicate fugitive lives in that residence.⁹⁷

⁹³ Ex. 1.

⁹⁴ Ex. 4.

⁹⁵ Ex. 5.

⁹⁶ Exs. 5-6.

⁹⁷ Ex. 8.

f. Sonya Dixon would have also testified she never communicated with Mr. Dixon *after* detectives came to her house on June 4, 2011 and June 9, 2011.⁹⁸

g. Collectively, Sonya Dixon's testimony would have contradicted every aspect of Lomax's testimony. Had trial counsel contradicted Lomax on so many points, there is a reasonable probability the outcome of Mr. Dixon's trial would have been different. Again, the jury's assessment of Lomax's credibility very likely impacted its assessment of Collins' and Gressom's identifications. Consequently, by thoroughly discrediting Lomax, trial counsel would have called into question the credibility and believability of Collins' and Gressom's identifications.

79. Mr. Dixon is entitled to a new trial.

Claim #3: Trial counsel was ineffective for advising Mr. Dixon not to testify because, if he testified, the Commonwealth could impeach him with his 2008 possession with intent to sell or deliver conviction. Mr. Dixon's conviction for possession with intent to sell or deliver, however, is not a *crimen falsi* and therefore could not have been used by the Commonwealth to impeach Mr. Dixon had he testified. U.S. Const. amds. 5, 6, 8, 14; Pa. Const., art. I, §§ 8, 9.

80. Mr. Dixon informed trial counsel he wanted to testify on his own behalf.

81. Trial counsel advised Mr. Dixon not to testify because if he testified the Commonwealth could impeach him with his prior convictions.⁹⁹

82. Based on trial counsel's advice regarding prior convictions and impeachment, Mr. Dixon chose not to testify when the trial court questioned him about testifying in open court.¹⁰⁰

83. Trial counsel's advice to Mr. Dixon was wrong.

84. "It is well settled that a witness may be impeached on the basis of a prior conviction only if the crime involves dishonesty or false statement."

⁹⁸ Exs. 5-6.

⁹⁹ Ex. 5.

¹⁰⁰ NT, Trial, 7/19/2012, pp. 82-85.

Commonwealth v. Penn, 439 A.2d 1154, 1160 (Pa. 1982); accord *Commonwealth v. Williams*, 573 A.2d 536, 538 (Pa. 1990). The *crimen falsi* conviction, moreover, must have occurred within 10 years of the trial at which the witness is testifying. Pa.R.E. 609(b).

85. In the ten years preceding Mr. Dixon's July 2012 trial, Mr. Dixon only had one conviction, a 2008 possession with intent to sell or deliver drugs conviction. (CP-51-CR-0510661-2005).¹⁰¹ Convictions for possession or sale of drugs are not *crimen falsi*. *Commonwealth v. Causey*, 833 A.2d 165, 169 (Pa. Super. 2003); *Commonwealth v. Coleman*, 664 A.2d 1381, 1385 (Pa. Super. 1995). Convictions for drug possession are not *crimen falsi*. *Commonwealth v. Hernandez*, 862 A.2d 647 (Pa. Super. 2004).

86. Thus, had Mr. Dixon testified, the Commonwealth could not have mentioned his 2008 possession with intent to sell or deliver conviction because it did not involve dishonesty or a false statement.

87. Trial counsel's advice, consequently, was wrong and therefore fell below professional norms. *Hinton v. Alabama*, 134 S.Ct. 1081, 1089 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*."). Stated differently, trial counsel's unreasonable failure to prepare for trial, *i.e.*, to know Mr. Dixon's specific convictions and whether they can be used as impeachment evidence, is "an abdication of the minimum performance required of defense counsel." *Commonwealth v. Brooks*, 839 A.2d 245, 248 (Pa. 2003) (quoting *Commonwealth v. Perry*, 644 A.2d 705, 709 (Pa. 1994)).

88. Trial counsel's erroneous advice prejudiced Mr. Dixon.

a. First and foremost, trial counsel's erroneous advice prevented Mr. Dixon from exercising his fundamental trial right to testify on his own behalf. *Rock v. Arkansas*, 483 U.S. 44, 49 (1987).

b. Had Mr. Dixon testified, he would have:

i. Denied all of Zelenia Lomax's allegations, *i.e.*, he never purchased a cell phone from Pinkney, he never jumped Pinkney, he never had a conversation with his mother where his mother told him Pinkney threatened her

¹⁰¹ Ex. 7.

with a gun, and he never had a conversation with Lomax, let alone a conversation with her where he told her he wanted to kill Pinkney.

ii. Denied shooting Pinkney on April 27, 2011 because he was at home (622 Spruce Street) with Ima Francis and their two sons at the time of the shooting.

iii. Denied he was trying to flee the area and evade the police.

c. Based on this testimony, there is a reasonable probability the outcome of Mr. Dixon's trial would have been different.

Claim #4: The cumulative prejudice from trial counsel's multiple unreasonable acts or omissions rendered Mr. Dixon's trial fundamentally unfair. U.S. Const. amds. 5, 6, 8, 14; Pa. Const. art. I, § 8, 9.

89. “[C]umulative prejudice from individual claims may be properly assessed in the aggregate when the individual claims have failed due to lack of prejudice[.]” *Commonwealth v. Hutchinson*, 25 A.3d 277, 318 (Pa. 2011); accord *Commonwealth v. Johnson*, 966 A.2d 523, 532 (Pa. 2009) (citing *Commonwealth v. Perry*, 537 Pa. 385, 644 A.2d 705, 709 (Pa. 1994) for the principle that a new trial may be awarded due to cumulative prejudice accrued through multiple instances of trial counsel's ineffective representation). However, “an appellant who claims cumulative prejudice [must set] forth a specific, reasoned, and legally and factually supported argument for the claim.” *Id.* at 319.

90. Under *Strickland* and *Pierce*, a professionally unreasonable act or omission is prejudicial when the act or omission undermines confidence in the defendant's conviction. The same standard applies regarding the cumulative impact of trial counsel's multiple professionally unreasonable acts or omissions. Here, trial counsel failed to present three key witnesses: (1) Ima Francis, (2) Sonya Dixon, and (3) Mr. Dixon. Each witness would have challenged, undermined, and rebutted the Commonwealth's three primary witnesses, *i.e.*, Devon Collins, Shaquil Gressom, and Zelenia Lomax. The failure to present Ima Francis's alibi testimony, Sonya Dixon's testimony, and Mr. Dixon's testimony undermine confidence in his conviction for the following reasons.

a. *First*, to assess prejudice, the Court must first examine the strength of the Commonwealth's case. Here, Collins, Gressom, and Lomax each had

significant credibility problems for one reason or another and the jury's protracted deliberations make this self-evident. If the Commonwealth's case was overwhelming or even moderately overwhelming, it would not have taken the jury four days to determine the guilt-innocence issue.

b. *Second*, because the Commonwealth's case was far from overwhelming, the jury had its doubts about Mr. Dixon's guilt, as evidenced by its four days of deliberations and questions.

c. *Third*, when the first two points are combined, it is self-evident that the scales of justice could have been tilted to the acquittal side had trial counsel provided the jury with a modicum of evidence undermining the Commonwealth's case or bolstering Mr. Dixon's innocence claim.

i. Sonya Dixon's and Mr. Dixon's testimony would have undermined the Commonwealth's case by rebutting and challenging every aspect of Zelenia Lomax's testimony.

ii. Ima Frances' and Mr. Dixon's alibi testimony would have killed two birds with one stone; it would have undermined Collins' and Gressom's identification and bolstered Mr. Dixon's innocence claim.

91. Consequently, had Ima Frances, Sonya Dixon, and Mr. Dixon testified, there is a reasonable probability the outcome of Mr. Dixon's trial would have been different.

92. Mr. Dixon is entitled to a new trial.

RIGHT TO AN EVIDENTIARY HEARING

93. Mr. Dixon is entitled to summary relief where there are not disputes to material facts. Pa.R.Crim.P. 907(2). However, the PCRA court "shall order a hearing" when the PCRA petition "raises material issues of fact." Pa.R.Crim.P. 908(A)(2); *accord Commonwealth v. Williams*, 732 A.2d 1167, 1189-1190 (Pa. 1999). A hearing cannot be denied unless the Court is "certain" Mr. Dixon's petition lacks "total" merit. *Commonwealth v. Bennett*, 462 A.2d 772, 773 (Pa. Super. 1983); *accord Commonwealth v. Rhodes*, 416 A.2d 1031, 1035-1036 (Pa. Super. 1979). Even in "borderline cases Petitioners are to be given every conceivable legitimate benefit in the disposition of their claims for an evidentiary hearing." *Commonwealth v. Pulling*, 470 A.2d 170, 173 (Pa. Super. 1983). Thus,

an “evidentiary hearing should... be conducted where the record does not clearly refute the claim of an accused that his plea was unlawfully induced.” *Id.* (citing numerous guilty plea cases). Mr. Dixon is entitled to a hearing because his petition raises material issues of fact regarding trial counsel’s effectiveness.

94. Mr. Dixon is entitled to an evidentiary hearing regarding each of his four claims for relief where Ima Frances, Sonya Dixon, and Mr. Baxter can testify.¹⁰²

RIGHT TO DISCOVERY

95. All of Mr. Dixon’s claims are trial counsel ineffectiveness allegations, two of which concern witnesses trial counsel allegedly knew about, but did not interview or call at trial. Mr. Dixon can allege and testify that he told trial counsel about Ima Francis and Sonya Dixon, but counsel must develop and present any and all evidence to corroborate this allegation. Put differently, the validity of Mr. Dixon’s trial counsel ineffectiveness claim regarding the failure to interview and call Ima Francis and Sonya Dixon depends on Mr. Dixon developing and presenting evidence that trial counsel knew these witnesses’ names, contact information, and relevance to Mr. Dixon’s defense.

96. Mr. Dixon, consequently, respectfully requests the Court to enter an order compelling trial counsel to turn over the following work-product to undersigned counsel: (1) handwritten notes trial counsel took when he spoke with Mr. Dixon in-person or over the phone, (2) all letters Mr. Dixon wrote and mailed to trial counsel, (3) all letters trial counsel typed and mailed to Mr. Dixon, (4) all memos trial counsel typed or handwrote regarding his review of the discovery, the Commonwealth’s witnesses, potential defense witnesses, and potential trial strategies, (5) all typed memos or handwritten notes summarizing trial counsel’s interview of any defense witnesses, and (6) all typed memos or handwritten notes summarizing trial counsel’s investigator’s interviews with any defense witnesses.

97. Under Pa.R.Crim.P. 902(E)(1)’s “extraordinary circumstances” standard, post-conviction discovery is warranted if the requested discovery “may arguably support one or more of [the petitioner’s] PCRA theories.” *Commonwealth v. Frey*, 41 A.3d 605, 613 (Pa. Super. 2012). Here, the content contained in the requested discovery “may arguably support” Mr. Dixon’s ineffectiveness claims for failing to interview and call Ima Frances and Sonya Dixon.

¹⁰² Ima Frances’, Sonya Dixon’s, and Mr. Dixon’s certifications are incorporated in the appendix. Pa.R.Crim.P. 902(A)(15).

98. Trial counsel's work-product is not protected under these circumstances. The common law and statutory law protects the attorney-client privilege as well as the attorney's work-product. *Commonwealth v. Sims*, 521 A.2d 391, 394 (Pa. 1987); 42 Pa. C.S. § 5916; *Commonwealth v. Dennis*, 859 A.2d 1270, 1278 (Pa. 2004). Nevertheless, a petitioner who challenges trial counsel's effectiveness cannot invoke the attorney-client privilege to prevent counsel from responding to the allegations. *Commonwealth v. Chmiel*, 738 A.2d 406, 414 (1999). "In effect, the client's attack on the competence of counsel serves as a waiver of the privilege as to the matter at issue." *Id.* Because "ineffectiveness challenges do not waive the attorney-client privilege or work product doctrine as to all material counsel may possess, [Pennsylvania] precedent requires an issue-specific analysis of waiver." *Commonwealth v. Flor*, 136 A.3d 150, 159 (Pa. 2016); accord *Commonwealth v. Harris*, 32 A.3d 243, 252 (Pa. 2011) (holding that when a petitioner challenges counsel's effectiveness in a post-conviction petition, he only has waived his privileges to the extent that he "puts the privileged materials in issue[.]"); *Commonwealth v. Chmiel*, 738 A.2d at 424 (holding that "an attorney may not respond to allegations of ineffectiveness by disclosing client confidences unrelated to such allegations"); see also 42 Pa.C.S. § 9545(d)(3) ("When a claim for relief is based on an allegation of ineffective assistance of counsel as a ground for relief, any privilege concerning counsel's representation *as to that issue* shall be automatically terminated.") (emphasis added).

99. Here, the requested work-product is "issue-specific" and therefore trial counsel must provide it to undersigned counsel so he can meaningfully and adequately develop, present, and argue Mr. Dixon's ineffectiveness claims.

RIGHT TO AMEND

100. Mr. Dixon reserves the right to amend or supplement his petition if: (1) he develops new facts relevant to his claims; or (2) his amended petition is defective. Pa.R.Crim.P. 905(A) ("Amendment shall be freely allowed to achieve substantial justice"); Pa.R.Crim.P. 905(B) (when a petition is "defective," the PCRA court "shall order amendment of petition").¹⁰³

¹⁰³ Counsel, for instance, is currently in the process of obtaining the most up-to-date addresses for Sonya Dixon and Ima Francis. Once counsel obtains this information, he will amend Mr. Dixon's petition with this information.

CONCLUSION

WHEREFORE, Rafiq Dixon respectfully requests the following relief:

1. An evidentiary hearing where he, Ima Francis, and Sonya Dixon can testify.
2. An order compelling trial counsel to disclose the requested work-product.
3. A new trial.
4. Any other relief the Court deems necessary to protect and vindicate Mr. Dixon's right to fundamentally fair post-conviction proceedings.

Respectfully submitted this the 23rd day of December, 2016.

/s/Craig M. Cooley

Craig M. Cooley

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CERTIFICATE OF SERVICE

On December 23, 2016, when counsel e-filed a copy of Mr. Dixon's *Amended PCRA Petition*, the Commonwealth received an email notification of the filing and a PDF copy of Mr. Dixon's *Amended PCRA Petition*.

**PHILADELPHIA COUNTY COMMON PLEAS COURT
CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA)	
)	
Respondent,)	
)	
v.)	CP-51-CR-0011476-2011
)	First-degree murder (PCRA)
)	Trial Court: DeFino-Nastasi
RAFIQ DIXON)	
Defendant-Petitioner)	
)	

Pa.R.Crim.P. 902(A)(15) Certifications

1. If the Court grants an evidentiary hearing, Mr. Dixon will present **Ima Frances**. Mr. Dixon expects Ima Francis to testify to the following:

a. She is the mother of Mr. Dixon’s two sons.

b. Mr. Dixon was with her and their two sons the night of April 27, 2011 when Joseph Pinkney occurred.

2. If the Court grants an evidentiary hearing, Mr. Dixon will present **Sonya Dixon**. Mr. Dixon expects Sonya Dixon to testify to the following:

a. She is Mr. Dixon’s mother.

b. She did not know Joseph Pinkney.

c. She never had a conversation with Joseph Pinkney.

d. Joseph Pinkney never had words with her or pulled a gun on her.

e. She never had a conversation with Mr. Dixon where she told Mr. Dixon that Joseph Pinkney physically threatened her or threatened her with a gun.

f. At the time of Joseph Pinkney's shooting, she was not on speaking terms with Mr. Dixon and she did not have his contact information, including his address or cell phone number.

3. If the Court grants an evidentiary hearing, Mr. Dixon will testify on his own behalf and testify to the following:

a. He is innocent of Joseph Pinkney's murder and he told trial counsel this before trial.

b. He told trial counsel he was with Ima Frances and his two sons at the time of Joseph Pinkney's shooting and instructed trial counsel to interview Ima Frances and to present her as an alibi witness.

c. He told trial counsel to contact his mother, Sonya Dixon, because his mother would rebut and challenge every aspect of Zelenia Lomax's pre-trial statement and likely trial testimony.

d. He and his mother were not on speaking terms in the months leading up to after Joseph Pinkney's shooting.

e. Trial counsel advised him not to testify because the Commonwealth could and would impeach him with his prior convictions.

f. Trial counsel never advised him that his prior convictions had to involve dishonesty or a false statement.

g. Had trial counsel informed him that the Commonwealth could not use his 2008 possession with intent to sell or deliver conviction as impeachment, he would have testified on his own behalf.

Respectfully submitted this the 23rd day of **December, 2016.**

/s/Craig M. Cooley
COOLEY LAW OFFICE