

**PENNSYLVANIA SUPERIOR COURT
EASTERN DISTRICT**

COMMONWEALTH OF)	
PENNSYLVANIA)	
Respondent-Appellee,)	
)	3485 EDA 2016
v.)	51-CR-0008035-2007
)	Non-Capital PCRA
)	First-degree murder
BIN WANG,)	Woods-Skipper, J.
Petitioner-Appellant.)	
)	

Opening Brief for Petitioner-Appellant

Appeal from the November 4, 2016 Order Dismissing Bin Wang’s Timely Filed PCRA Petition Entered by the Honorable Shelia Woods-Skipper of the Philadelphia County Common Pleas Court, Criminal Division, 51-CR-0008035-2007

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creating reasonable doubt regarding the Commonwealth's homicide narrative. Trial counsel's ineffectiveness prejudiced Mr. Wang because there is a reasonable probability that had trial counsel presented Davis, Flemings, and Kern the outcome of his trial would have been different. The PCRA court, therefore, erred when it rejected Mr. Wang's trial counsel ineffectiveness claim. U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9... 69

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Claim #6: The cumulative impact of trial counsel’s objectively unreasonable decisions before and during trial undermines confidence in the jury’s conviction entitling Mr. Wang to a new trial. The PCRA court, therefore, erred when it rejected Mr. Wang’s cumulative prejudice claim. U.S. Const. amdots. 5, 6, 8, 14; Pa. Const., art. 1 § 8, 9..... 84

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STATEMENT OF JURISDICTION

Jurisdiction for this appeal is provided for at 42 Pa. C.S. § 742, relating to this Court's exclusive appellate jurisdiction from a Common Pleas Court's final order.

ORDER OR OTHER DETERMINATION IN QUESTION

Under appeal is the November 4, 2016 order dismissing Bin Wang's timely filed PCRA petition entered by the Honorable Shelia Woods-Skipper of the Philadelphia County Common Pleas Court, Pennsylvania, Criminal Division, 51-CR-0008035-2007.¹

On November 11, 2016, Mr. Wang timely appealed.²

CONCISE STATEMENT OF ERRORS AND OPINION

On November 28, Mr. Wang filed his *Concise Statement of Errors on Appeal*.³

On March 20, 2017, Judge Woods-Skipper entered her opinion.⁴

¹ Rp. 1. The *Reproduced Record* will be cited Rp. In her initial dismissal order, Judge Woods-Skipper wrote that she dismissed Mr. Wang's petition after *holding* an evidentiary hearing. In Mr. Wang's notice of appeal, counsel pointed out that Mr. Wang was *denied* an evidentiary hearing. On November 15, 2016, Judge Woods-Skipper entered an amended dismissal order removing the reference to the evidentiary hearing. Rp. 2.

² Rp. 3.

³ Rp. 40-20.

⁴ Rpp. 21-38.

PROCEDURAL HISTORY

On July 7, 2007, the Commonwealth filed an *Information* charging Bin Wang with murder and other offenses in connection with his wife, Sharon Lin's, May 11, 2007 shooting death. The case was assigned to the Honorable Shelia Woods-Skipper. Mr. Wang retained Larry Feinstein to represent him at trial. On November 3, 2008, Mr. Wang pled not guilty, selected a jury trial, and proceeded to trial. On November 6, 2008, the jury found Mr. Wang guilty of first-degree murder and possession of an instrument of a crime. The trial court immediately sentenced Mr. Wang to life imprisonment without parole. On March 20, 2009, Mr. Wang timely appealed (903 EDA 2009). David Rudenstein was appointed as appellate counsel.

On February 10, 2011, this Court affirmed.⁵ On March 10, 2011, Mr. Wang filed a timely *Petition for Allowance of Appeal* (162 EAL 2011), which was denied on August 11, 2011. Mr. Wang did not seek review from the U.S. Supreme Court, making his conviction final on November 9, 2011. On September 7, 2011, Mr. Wang filed a timely *pro se* PCRA petition. On March 12, 2012, Mr. Wang filed a *pro se* amended PCRA petition. On August 14, 2012, appointed counsel, Daniel

⁵ Rpp. 39-54.

Silverman, filed a counseled amended PCRA petition,⁶ which he supplemented on September 28, 2012.⁷

On February 12, 2012, the PCRA court entered a 907 dismissal order, which Silverman objected to on February 27, 2012.⁸ On May 14, 2013, Silverman moved to withdraw as counsel and the PCRA court granted his request. On the same day, John Cotter was appointed as counsel. Cotter filed no substantive pleadings on Mr. Wang's behalf and instead asked for numerous continuances between May 2013 and June 2015, until Mr. Wang retained undersigned counsel.

Counsel entered his appearance on June 15, 2015 and ultimately retained forensic expert Brent Turvey to review the scene photographs and reports and autopsy report to determine if Sharon Lin's death was a homicide or suicide. Based on Mr. Turvey's 35-page affidavit,⁹ counsel filed a second supplemental amended PCRA petition on May 22, 2016.¹⁰ On September 20, 2016, the PCRA court issued a 907 dismissal notice. On October 6, 2016, counsel filed objections to the dismissal notices.¹¹ On October 21, 2016, the PCRA court heard oral arguments to determine if Mr. Wang was entitled to an evidentiary hearing or other relief. On October 24, 2016, filed a post-argument brief requesting the PCRA

⁶ Rpp. 55-91.

⁷ Rpp. 92-98.

⁸ Rpp. 99-114.

⁹ Rpp. 115-149. Mr. Turvey's resume/CV is also included in the *Reproduced Record* at Rpp. 150-171.

¹⁰ Rpp. 172-184.

¹¹ Rpp. 185-241.

court to grant, at the very least, an evidentiary hearing where Mr. Turvey and trial counsel could testify.¹² On November 4, 2016, the PCRA court dismissed Mr. Wang's PCRA petition without a hearing.¹³ On November 11, 2016, Mr. Wang timely appealed.¹⁴

ISSUES PRESENTED

Claim #1: Trial counsel was ineffective for not expanding the scope of his forensic investigation by consulting with and retaining a forensic expert like Brent Turvey to conduct a holistic examination of all the physical evidence. Trial counsel's ineffectiveness prejudiced Mr. Wang because there is a reasonable probability the outcome of his trial would have been different because the physical evidence, as Mr. Turvey's 35-page affidavit makes clear, supported Mr. Wang's suicide narrative far more than the Commonwealth's homicide narrative. The PCRA court, therefore, erred when it rejected Mr. Wang's trial counsel ineffectiveness claim. U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

Claim #2: Trial counsel failed to present the testimony of Mr. Wang's three neighbors—Troy Davis, Timothy Flemings, and Rick Kern—each of whom would have corroborated salient aspects of Mr. Wang's statement and trial testimony, thereby bolstering his defense that Sharon Lin committed suicide and creating reasonable doubt regarding the Commonwealth's homicide narrative. Trial counsel's ineffectiveness prejudiced Mr. Wang because there is a reasonable probability that had trial counsel presented Davis, Flemings, and Kern the outcome of his trial would have been different. The PCRA court, therefore, erred when it rejected Mr. Wang's trial counsel ineffectiveness claim. U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

¹² Rpp. 242-245.

¹³ Rpp. 1-2.

¹⁴ Rp. 3.

Claim #3: Trial counsel failed to object to inadmissible and prejudicial hearsay and “other crimes/bad acts” testimony that Mr. Wang had previously assaulted and mistreated Sharon Lin. Assuming the probative value of this evidence outweighed its prejudicial impact, trial counsel failed to request a cautionary instruction directing the jury to consider this evidence solely for the limited purpose for which it was admitted. Trial counsel’s ineffectiveness prejudiced Mr. Wang because had trial counsel timely objected, the trial court would have excluded this evidence and testimony, and had it done so, there is a reasonable probability the outcome of Mr. Wang’s trial would have been different. Likewise, if timely objected to and timely requested, the trial court would have issued a cautionary instruction prohibiting the jury from considering this evidence for propensity purposes. The PCRA court, therefore, erred when it rejected Mr. Wang’s trial counsel ineffectiveness claim. U.S. Const. amds. 5, 6, 8, 14; Pa. Const. art. I, §§ 9, 23.

Claim #4: Trial counsel failed to request a “missing evidence” instruction based on the Commonwealth’s admitted negligence in failing to preserve evidence from Sharon Lin’s hands that would have enabled forensic examiners to perform gunshot residue testing on Ms. Lin’s hands. The Commonwealth’s negligence deprived Mr. Wang of his due process right to potentially exculpatory evidence. Trial counsel did not have a reasonable basis for not requesting a “missing evidence” instruction, especially after trial counsel mentioned this very fact during trial and closing arguments. Trial counsel’s ineffectiveness prejudiced Mr. Wang because had the trial court issued a “missing evidence” instruction, it is reasonably probable the outcome of Mr. Wang’s trial would have been different. The PCRA court, therefore, erred when it rejected Mr. Wang’s trial counsel ineffectiveness claim. U.S. Const. amds. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

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out differently. The PCRA court, therefore, erred when it rejected Mr. Wang's trial counsel ineffectiveness claim. U.S. Const. amdt. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

Claim #6: The cumulative impact of trial counsel's objectively unreasonable decisions before and during trial undermines confidence in the jury's conviction entitling Mr. Wang to a new trial. The PCRA court, therefore, erred when it rejected Mr. Wang's cumulative prejudice claim. U.S. Const. amdt. 5, 6, 8, 14; Pa. Const., art. 1 § 8, 9.

Claim #7: The PCRA court erred by not granting an evidentiary hearing where trial counsel, Troy Davis, Timothy Flemings, Rick Kerns, and Brent Turvey could testify and present evidence in support of Mr. Wang's suicide narrative and trial counsel ineffectiveness. The PCRA court, therefore, erred when it rejected Mr. Wang's evidentiary hearing request. U.S. Const. amdt. 5, 6, 8, 14; Pa. Const., art. 1 § 8, 9.

SCOPE AND STANDARD OF REVIEW

In reviewing the grant or denial of PCRA relief, the Court examines whether the PCRA court's determination is supported by the record and free of legal error. *Commonwealth v. Mitchell*, 141 A.3d 1277, 1283-1284 (Pa. 2016). The Court, however, applies a *de novo* standard of review to the PCRA court's legal conclusions. *Commonwealth v. Roney*, 79 A.3d 595, 603 (Pa. 2015).

To prevail on a trial counsel ineffectiveness claim, Mr. Wang must demonstrate that trial counsel performed deficiently and the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The deficiency prongs requires a showing that trial counsel's advocacy fell "below an objective standard of reasonableness" in light of "prevailing professional

norms,” *id.* at 686, while the prejudice prong requires showing “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability “is a probability sufficient to undermine confidence in the outcome,” *id.* which it is “not a stringent” standard because it is “less demanding than the preponderance standard.” *Hall v. Kyler*, 190 F.3d 88, 110 (3d Cir. 1999).

Under state law, a petitioner must show (1) the underlying legal claim is of arguable merit, (2) trial counsel’s action or inaction lacked a reasonable basis designed to effectuate his interest(s), and (3) prejudice. *Commonwealth v. Pierce*, 527 A.2d 973, 975–976 (Pa. 1987). The *Pierce* standard is substantively identical to *Strickland*: deficient performance and prejudice. *Commonwealth v. Spatz*, 870 A.2d 822, 829 (Pa. 2005).

The right to a PCRA evidentiary hearing is not absolute. *Commonwealth v. Jordan*, 772 A.2d 1011, 1014 (Pa. Super. 2001). It is within the PCRA court’s discretion to decline to hold a hearing if the petitioner’s claims are “patently frivolous” and have “no support either in the record or other evidence.” *Commonwealth v. Wah*, 42 A.3d 335, 338 (Pa. Super. 2012). It is this Court’s responsibility to examine each claim raised in the PCRA petition in light of the record to determine if the PCRA court erred in its determination that there were

no genuine issues of material fact in controversy and in denying relief without conducting an evidentiary hearing. *Id.*

STATEMENT OF FACTS

A. Scene Investigation and Interviews

On May 11, 2007, around 7 p.m., Sharon Lin (“Lin”) suffered a fatal gunshot wound to the left backside of her head in the second floor bedroom of the home she shared with her husband, Bin Wang.¹⁵ Detectives interviewed multiple witnesses that night.

Timothy Flemings lived across the street from Mr. Wang and Lin, and at the time of the shooting, he was standing on his front porch. Flemings said immediately after hearing a gunshot from the second floor of Mr. Wang’s residence, he saw Mr. Wang “screaming out the window” to “call an ambulance.” Flemings ran to Mr. Wang’s residence and when Mr. Wang opened the door he repeatedly told Flemings, “[S]he shot herself.” Flemings then ran upstairs into the bedroom and saw Lin’s body. Flemings “saw [Lin]’s feet on the head of the bed and saw the rest of her body laying on her right side face up[.]” When Mr. Wang entered the bedroom, he told Flemings “he thought [Lin] was playing.” Flemings said when he told Wang that Lin was still breathing, Mr. Wang “went to the

¹⁵ Rpp. 246-247.

window and asked someone to call an ambulance[.]” Flemings told detectives he never saw Mr. Wang with a firearm and he did not see blood on Mr. Wang.¹⁶

Rick Kern gave a similar statement. Around 7 p.m. that night, Kern was in his second floor bathroom when he heard a “loud bang.” Moments later Kern heard Mr. Wang hollering, “somebody call 911,” and “that his wife had shot herself.” Kern, like Flemings, ran to Mr. Wang’s residence. When Kern entered the residence, Mr. Wang “kept screaming about his wife” because he was “so upset.”¹⁷ Troy Davis also told detectives he was on his front porch at the time of the shooting and that moments after he heard a gunshot he saw Mr. Wang “screaming” from the second floor window, “[S]omeone call 911.”¹⁸

When detectives interviewed Mr. Wang the next day, he said Lin shot herself during an argument. The argument, Mr. Wang said, started the night before, on May 10, 2007, and resulted in Lin leaving their residence that night. They argued about the woman Mr. Wang had met on internet and their money problems. The next morning, May 11, 2007, Mr. Wang went to his body shop around 9 a.m. and returned home between 9:30 and 10 a.m. Lin was home when he arrived home. They argued again for thirty minutes. During this argument, Mr. Wang said he “was so upset” he grabbed his gun and contemplated suicide because he was not sure if he could “take the pressure” anymore. Lin, though,

¹⁶ Rp. 248.

¹⁷ Rp. 249.

¹⁸ Rp. 250.

grabbed the gun from him. Once she did, Mr. Wang and she talked “peacefully” until Lin had to leave for work. Mr. Wang stayed home.¹⁹

Sometime between 3 p.m. and 4 p.m., Lin called Mr. Wang from the body shop. Fifteen minutes later, Lin returned home and made love with Mr. Wang before the two fell asleep until 6:15 or 6:30 p.m. When they woke, though, they argued again. Tired of arguing, Mr. Wang drove to WAWA for cigarettes, but before leaving he grabbed his gun which “was on the heater cover” in their bedroom. When Mr. Wang returned from WAWA, he placed his “gun back on the heater cover” - “the usual place” he kept it.²⁰

Once back from WAWA, Mr. Wang noticed the T.V. had been moved in the bedroom. When he asked Lin why she had moved it, they argued again. Mr. Wang said he walked away from the argument and “walked around the house” to collect his thoughts. When he returned to the bedroom, Lin was laying on the bed with the sheets covering her up to her neck. Unbeknownst to Mr. Wang, Lin had grabbed the gun from the heater cover and hid it under the covers.²¹

Mr. Wang and Lin continued arguing for “several minutes” when Lin “pulled out the gun, put it at her head and said... ‘don’t push me, I’m gonna kill myself.’” Thinking Lin was joking, Mr. Wang turned his head a “little away” and “sighed” in a manner to suggest he did not believe her threat. Mr. Wang said when Lin heard

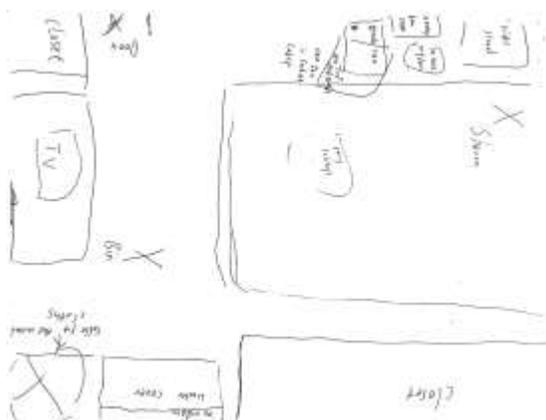
¹⁹ Rp. 253.

²⁰ Rpp. 253-254.

²¹ Rp. 254.

him make the “pfft” sound, Lin “pulled the trigger.” Mr. Wang said he was at the right foot of the bed near the T.V. when Lin shot herself, while Lin was seated near the left head of the bed with her back near or against the head board. Mr. Wang immediately turned and saw Lin fall to the floor with her “eyes... open.” Mr. Wang “ran to the window and screamed to his neighbor across to the street to call the police and ambulance.”²²

The night stand to the left of the bed at the head of the bed was knocked over. When detectives asked how the night stand had been knocked over, Mr. Wang said when Lin shot herself and her body fell off the bed toward the floor it struck the nightstand causing it to knock over. Detectives asked Mr. Wang to draw a diagram of the bedroom and identify where Lin and he were situated when Lin shot herself.²³ Mr. Wang drew the diagram below:



²² Rp. 254. The above diagram Mr. Wang drew is also at Rp. 261

²³ When discussing directionality when referencing the bed’s position, counsel’s directions are based on someone standing at the foot of the bed and facing the bed.

The neighbors, responding officers, and interrogating detectives saw no blood on Mr. Wang's clothing or hands. Also, no officers or detectives swabbed Mr. Wang's hands for gunshot residue ("GSR"), nor did anyone collect Mr. Wang's clothing for GSR testing.²⁴

Officer Anthony Magsam was the first responding officer. When he arrived, Lin's head and back were against the left wall and "tilted right at the corner of the floor."²⁵ Lin's legs "went up" at a 45-degree angle and positioned on the bed near the head of the bed, not far from the nightstand positioned in the left corner of the bedroom.²⁶ Magsam said the distance between the left wall and the bed was 1 ½ feet.²⁷ Officer Joanne Kitz was the second responding officer. She too saw Lin's feet up on the bed near the head of the bed at a 45-degree angle.²⁸ Once medics arrived, Kitz helped medics move Lin's body to the bed. They placed Lin's head at the foot of the bed and her feet at the head of the bed.²⁹

Kitz and paramedics moved Lin's body before the scene was photographed. The only scene photographs, therefore, depict Lin's body on the bed, not on the floor to the left of the bed. Mr. Wang attached the following photograph/diagram

²⁴ NT, Trial, 11/4/2008, p. 217; NT, Trial, 11/5/2009, p. 138.

²⁵ NT, Trial, 11/4/2009, pp. 30-31, 45.

²⁶ NT, Trial, 11/4/2009, pp. 30-31, 45.

²⁷ NT, Trial, 11/4/2009, pp. 45-46, 47; Rp. 270.

²⁸ NT, Trial, 11/4/2009, p. 64.

²⁹ NT, Trial, 11/4/2009, p. 65.

to one of his *pro se* pleadings depicting the positioning of Lin's body when responding officers arrived:



Officers located the gun in the second (bottom) drawer of the nightstand that had fallen over. The first (top) drawer had fallen on top of the second (bottom) drawer.³⁰ The gun was a Taurus 9mm semi-automatic handgun. Also, officers identified a bullet strike mark above the closet to the right of the bed and recovered the fired cartridge casing (“FCC”) at the head of the bed near the nightstand.³¹ Officers recovered the bullet between the mattress and bed frame on the left side of the bed near the headboard.³² The bullet went through Lin's skull and hit the wall (above the closet) opposite where Lin's body came to rest. The

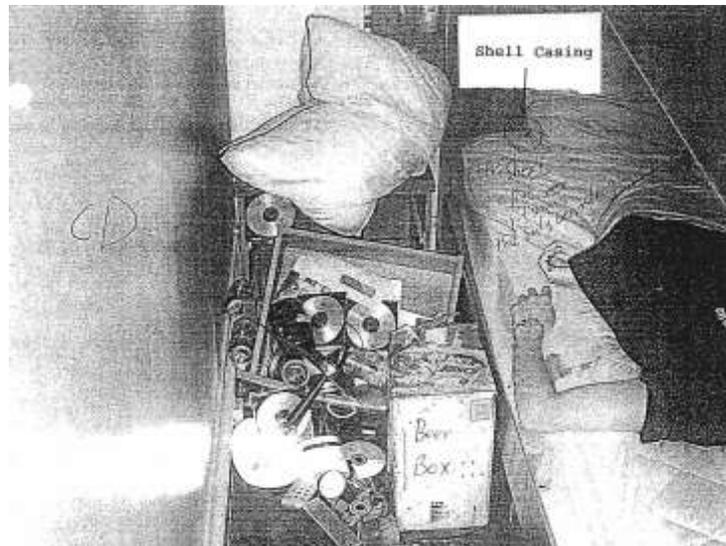
³⁰ NT, Prelim. Hrg., 7/3/2007, p. 58.

³¹ NT, Trial, 11/3/2009, pp. 47-49; Rp. 270.

³² NT, Trial, 11/3/2009, p. 55; Rp. 270.

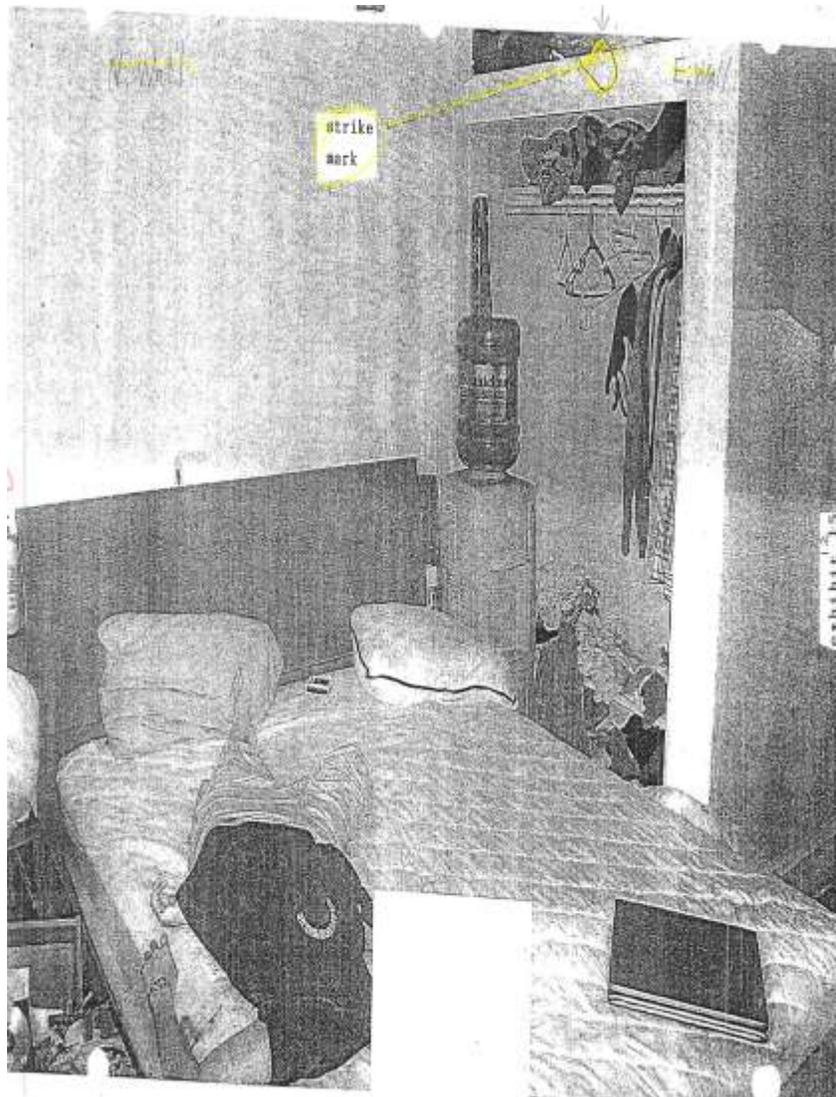
bullet then ricocheted off the wall and fell between the mattress and bed frame.³³

The following photograph show where officers recovered the FCC.



The following photograph shows the location of the strike mark:

³³ NT, Trial, 11/3/2009, p. 53; Rp. 270.



Dr. Gregory McDonald performed Lin's autopsy the next day (May 12th). The entrance wound was to the left backside of Lin's head. Dr. McDonald described the wound as a gaping 3" x 3 1/2" stellate gunshot wound.³⁴ In the "RANGE" section of the report, Dr. McDonald reported finding no muzzle stamp, gunpowder, stipple, or soot surrounding the entrance wound and the "depths of the wound"

³⁴ Rpp. 246-247.

failed “to disclose any gunpowder or soot[.]”³⁵ Dr. McDonald classified the manner of death as homicide, resulting in Mr. Wang’s arrest and charges.

B. Preliminary Hearing, Trial Counsel’s Limited Forensic Investigation, and Trial

1. Preliminary Hearing

McDonald testified at the July 3, 2007 preliminary hearing. Trial counsel represented Mr. Wang at the preliminary hearing. Based on the fact he failed to identify gunpowder, soot, and stippling around the entrance wound and the fact he did not see back spatter or high velocity blood on Lin’s hands, Dr. McDonald opined that the fatal shot was fired at a distance of 3 feet or more away from Lin.³⁶ The wound track, Dr. McDonald said, “proceeded in a leftward, forward, upwards trajectory... through the temporal bone and out the exit wound.”³⁷

2. Trial Counsel’s Limited Forensic Investigation

After the preliminary hearing, trial counsel retained Dr. Paul Hoyer, an experienced forensic pathologist, to examine the autopsy photographs of the entrance wound to determine if the entrance wound was a contact wound. If a contact wound, trial counsel believed this finding would support Mr. Wang’s suicide narrative. Trial counsel did not ask Dr. Hoyer to examine the scene

³⁵ Rpp. 246-247.

³⁶ NT, Prelim. Hrg., 7/3/2007, pp, 8, 9.

³⁷ NT, Prelim. Hrg., 7/3/2007, p. 10.

photographs and other physical evidence to determine whether the scene characteristics or other physical evidence supported Mr. Wang's suicide narrative.

On November 29, 2007, Dr. Hoyer wrote trial counsel and described the entrance wound as a "highly atypical gunshot wound" that showed "features often seen in close range firing."³⁸ In terms of Dr. McDonald's autopsy finding that the entrance wound presented with no soot, stippling, or a muzzle stamp, Dr. Hoyer said these "findings" were "compatible with distant, intermediate[,] and close range gunshot wounds."³⁹ Dr. Hoyer did not opine that the entrance wound was, in fact, a contact wound.

Based on the type of gun used and its dimensions, Dr. Hoyer wrote, "If one were to hold the weapon up-side-down by the barrel, the end of the muzzle would be an inch or more from the edge of the hand. A shot fired in this position would have the end of the muzzle an inch or more from the skin. It would not be a contact gunshot wound."⁴⁰ In terms of opining whether Lin's death was a suicide, Dr. Hoyer wrote, "It is possible [for Lin] to hold the weapon in one hand and fire it with the other hand. This is a commonly used position for suicidal shootings. The [gun's] small size would allow her to place it to the back of her head and shoot herself."⁴¹

³⁸ Rp. 262.

³⁹ Rp. 262.

⁴⁰ Rp. 262.

⁴¹ Rp. 262.

On January 29, 2008, after Dr. Hoyer reviewed the digital autopsy photographs, Dr. Hoyer provided another report that mimicked, nearly word-for-word, his first report and offered no new opinions regarding the entrance wound or other physical evidence on Lin's body or within the scene that potentially supported Mr. Wang's suicide narrative.⁴²

On February 18, 2008, after reviewing Dr. Hoyer's second report, trial counsel wrote Mr. Wang and said, "Unfortunately, the findings are not as strong as I had hoped. In fact, the conclusions will make the suicide argument a very difficult one for a jury to understand."⁴³ On April 2, 2008, trial counsel wrote Mr. Wang and said he had asked Dr. Hoyer "for additional clarification" regarding the exit wound and "soot particulars."⁴⁴ On April 3, 2008, trial counsel had a "very long conversation" with Dr. Hoyer regarding his findings and conclusions.⁴⁵ On April 4, 2008, trial counsel wrote Mr. Wang and summarized Dr. Hoyer's opinion. Trial counsel wrote that while the entry wound is "large," this "by itself does not indicate close-range firing" according to Dr. Hoyer.⁴⁶

On May 19, 2008, in response to Mr. Wang's questions regarding Dr. Hoyer's expected trial testimony, trial counsel wrote Mr. Wang and told him that his trial

⁴² Rp. 263.

⁴³ Rp. 266.

⁴⁴ Rp. 267.

⁴⁵ Rp. 267.

⁴⁶ Rp. 267.

testimony, not Dr. Hoyer's, had to be the testimony that convinced the jury Lin's death was a suicide:

In response to your recent letter, let me make this perfectly clear that Dr. Hoyer is not saying that Sharon's death was absolutely, positively a suicide. He agrees with the physical findings of the medical examiner but comes to a different conclusion as to cause of death. It is your testimony that will persuade the jury that this was a suicide. Dr. Hoyer cannot supply... more information.⁴⁷

In the same letter, trial counsel also told Mr. Wang, "If you want a second opinion and the possibility of a second autopsy (if the body is available), you will need to provide an advance [sic] budget of several thousand dollars."⁴⁸ In response to trial counsel's statement regarding hiring another forensic expert, Mr. Wang sent trial counsel an additional \$3,000.⁴⁹ Mr. Wang also sent trial counsel several diagrams of the bedroom identifying the location of various items of physical evidence and explaining how these locations disproved Dr. McDonald's preliminary hearing opinion that the fatal bullet had to have been fired from a distance of at least 3 feet.⁵⁰

On August 9, 2008, after receiving the \$3,000, trial counsel wrote Mr. Wang and said, "I'm not going to hire a second doctor until we have wrapped up Dr.

⁴⁷ Rp. 268.

⁴⁸ Rp. 268.

⁴⁹ Rp. 269.

⁵⁰ Rp. 269.

Hoyer as a witness.”⁵¹ Trial counsel did not explain what he meant by “wrapped up Dr. Hoyer as a witness.” Trial counsel also stressed to Mr. Wang that the “key” to his case was his testimony: “As I have said from the start, your testimony, clear and concise, is the key to your case.”⁵² Lastly, trial counsel asked Mr. Wang to stop sending him scene diagrams because they were “not helpful.”⁵³

After receiving Dr. Hoyer’s reports and opinions regarding the entrance wound, trial counsel did not consult with or retain another forensic expert to examine the entire bedroom to determine if the remaining items of physical evidence, besides the entrance wound, supported Mr. Wang’s suicide narrative and raised reasonable doubt about the Commonwealth’s homicide narrative.

3. Trial

a. Commonwealth’s Case

At trial, during opening statements, the prosecutor said, “When you see the pictures in this case and you hear from two people at least, the medical examiner [Dr. McDonald], and the firearms examiner [Officer Robert Stott], you will know that Sharon [Lin] did not shoot herself... [and] that this was a cold-blooded killing[.]”⁵⁴

⁵¹ Rp. 269.

⁵² Rp. 269.

⁵³ Rp. 269.

⁵⁴ NT, Trial, 11/3/2008, p. 23.

Officer Terrance Lewis testified that Taurus 9mm semi-automatic handguns ejected their FCCs to the right.⁵⁵ Officer Stott concurred with Lewis' testimony.⁵⁶ Stott also opined that Lin had to have been seated near the left edge of the bed near the bed's midline, facing the closet to the right of the bed, when Mr. Wang fired.⁵⁷ Stott said this position was "more plausible" than Lin being seated against or near the headboard left of center.⁵⁸ Stott based his opinion on the strike mark's location, the location where Lin's body came to rest, the blood spatter on the wall to the left of the bed, and the minimal blood spatter to the head board.⁵⁹ Based on these same considerations, Stott also opined that Lin could not have been seated with her back near or against the headboard facing forward when the fatal shot was inflicted. Based on where Lin was seated when shot, *i.e.*, near the left edge of the bed near its midline, and the strike mark's location, Stott opined that Mr. Wang had to have fired the fatal shot while standing directly behind Lin in the 1 ½' space between the bed and the left wall.⁶⁰ Stott reiterated these opinions on cross-examination.⁶¹

⁵⁵ NT, Trial, 11/3/2009, pp. 66-67.

⁵⁶ NT, Trial, 11/4/2009, pp. 150-151.

⁵⁷ NT, Trial, 11/4/2009, pp. 158, 163.

⁵⁸ NT, Trial, 11/4/2009, p. 158.

⁵⁹ NT, Trial, 11/4/2009, pp. 162-163.

⁶⁰ NT, Trial, 11/4/2009, pp. 153-155, 157.

⁶¹ NT, Trial, 11/4/2009, pp. 170-171, 172-173, 174.

Dr. McDonald testified and said he found no soot or gunpowder on Lin's clothing.⁶² Dr. McDonald also testified he shaved the hair around the entrance wound, visually examined the shavings, without a microscope, for stippling and soot, and found none.⁶³ Dr. McDonald also testified the Medical Examiner's Office did not swab Lin's hands for gunshot residue.⁶⁴

The absence of stippling and soot in Lin's hair shavings and entrance wound led Dr. McDonald to opine that the gun had to have been 3 feet or more away from Lin when fired,⁶⁵ making suicide virtually impossible.⁶⁶ Dr. McDonald also based his 3 feet determination on the lack of blood spatter on Lin's hands.⁶⁷ Dr. McDonald also opined that if Lin was seated against or near the headboard when shot, he would have expected to see blood spatter on the headboard and the left corner walls near the nightstand.⁶⁸ Dr. McDonald classified the manner of death—homicide.⁶⁹

⁶² NT, Trial, 11/5/2009, p. 12.

⁶³ NT, Trial, 11/5/2009, pp. 16, 36.

⁶⁴ NT, Trial, 11/5/2009, p. 35.

⁶⁵ NT, Trial, 11/5/2009, pp. 16-17, 19.

⁶⁶ NT, Trial, 11/5/2009, p. 18.

⁶⁷ NT, Trial, 11/5/2009, pp. 19, 26.

⁶⁸ NT, Trial, 11/5/2009, p. 21.

⁶⁹ NT, Trial, 11/5/2009, p. 29.

b. The Defense's Case

Mr. Wang testified in his own defense and his trial testimony mirrored his statement to detectives.⁷⁰ Dr. Hoyer also testified and described his “basic findings” in the following manner:

I will start at the beginning. Do I agree that Mrs. Wang died of a gunshot wound to the head? Yes. You have to start at the beginning. We have two wounds connected by a track. So she died of a single gunshot wound to the head. The issues, as I see them, and the questions I was asked was which was the entrance wound, which was the exit wound and what can we say about range of fire and is it possible with this weapon to have inflicted the observed wound. Could [Lin] have held the weapon? I can never say for sure she did or did not. All I can say is it is possible.⁷¹

Dr. Hoyer described the entrance wound as “very atypical,”⁷² but he agreed with Dr. McDonald that the entrance wound was not a contact wound.⁷³ Dr. Hoyer, though, disagreed with Dr. McDonald’s opinion that the lack of soot and stipple automatically meant the fatal shot had to be fired at a distance of 3 feet or greater.⁷⁴

⁷⁰ NT, Trial, 11/5/2009, pp. 97-138.

⁷¹ NT, Trial, 11/5/2008, p. 54.

⁷² NT, Trial, 11/5/2008, p. 54

⁷³ NT, Trial, 11/5/2008, pp. 54-55.

⁷⁴ NT, Trial, 11/5/2008, pp. 55-56.

Dr. Hoyer mentioned the hair shavings and said standard practice is to microscopically examine them.⁷⁵ Dr. Hoyer said the lack of evidence regarding range of fire “relate[d]” to the second question trial counsel presented to him:

This then relates to the second question which is it possible for [Lin] to have shot herself? If it is a close gunshot wound, it is. It is a small weapon. She can turn it around and hold it in two hands and fire it, so it is possible for her to have shot herself. I wasn't there. I don't know who did what. All I can say is it is possible.⁷⁶

Dr. Hoyer, therefore, opined if Lin fired the fatal shot, she likely did so with two hands. Dr. Hoyer also testified that the entrance wound's location is one “frequently” seen in suicidal shootings.⁷⁷ At the close of direct-examination, Dr. Hoyer opined “it is possible” Lin held the gun “in her hands and shot herself.”⁷⁸

On cross-examination, when the prosecutor informed Dr. Hoyer that Lin's body and hair shavings were still at the Medical Examiner's Office, Dr. Hoyer said he had been unaware of this fact,⁷⁹ and that had he know of their availability, he would have viewed Lin's body and hair shavings.⁸⁰ Dr. Hoyer also told the prosecutor he agreed with Dr. McDonald that the entrance wound was “not a

⁷⁵ NT, Trial, 11/5/2008, p. 55.

⁷⁶ NT, Trial, 11/5/2008, p. 56.

⁷⁷ NT, Trial, 11/5/2008, p. 57.

⁷⁸ NT, Trial, 11/5/2008, pp. 57-58.

⁷⁹ NT, Trial, 11/5/2008, p. 59.

⁸⁰ NT, Trial, 11/5/2008, pp. 59, 65.

contact wound,”⁸¹ but said he could not determine whether the entrance wound was a close, intermediate, or distant wound.⁸²

When the prosecutor asked if it was “normal” for “someone” to “hold a weapon in one hand and fire it with the other,” Dr. Hoyer testified, “For a suicidal gunshot wound of the head, I believe that is the most common way of holding the weapon.”⁸³ When the prosecutor pressed Dr. Hoyer for his manner of death opinion, he testified, “My opinion is she is shot in the back of the head. We can’t determine the range of fire and it could be a suicide[.]”⁸⁴ In the end, the prosecutor got Dr. Hoyer to concede that the entrance wound’s characteristics made it equally plausible Lin’s death was a homicide:

Prosecutor: You can’t determine the range of firing?

Dr. Hoyer: I don’t believe there is any scientific information that would support going beyond this is not a contact wound.

Prosecutor: So what would be the difference of [Mr. Wang] coming up behind her and shooting her at close range in the back of the head?

Dr. Hoyer: The different between what?

Prosecutor: Between what you are saying and what I am saying?

Dr. Hoyer: None, because I agree that that’s possible.

⁸¹ NT, Trial, 11/5/2008, p. 60.

⁸² NT, Trial, 11/5/2008, p. 63.

⁸³ NT, Trial, 11/5/2008, pp. 71-72.

⁸⁴ NT, Trial, 11/5/2008, pp. 72-73.

Prosecutor: So you are saying it is possible this is a homicide?

Dr. Hoyer: Yes.⁸⁵

c. Closing Arguments

During closing arguments, the prosecutor argued Lin had to be seated at the left foot of the bed when Mr. Wang grabbed her by the hair and shot her in the head.⁸⁶

C. Post-Conviction Proceedings and Brent Turvey's Affidavit

After Mr. Wang filed his *pro se* PCRA petition, the PCRA court appointed Daniel Silverman, who filed a counseled amended petition on August 14, 2012.⁸⁷ Silverman, like trial counsel, never consulted or retained a forensic expert to examine the entire scene and all the physical evidence. However, unlike trial counsel, Silverman did the more egregious act and conceded that Mr. Wang's suicide narrative was "ludicrous" and that "the Commonwealth presented substantial evidence that [Lin's death] was not a suicide."⁸⁸ For instance, Silverman called Mr. Wang's explanation for how the gun ended up in the second drawer of the nightstand "ludicrous."⁸⁹ Silverman also said the Commonwealth "had substantial evidence at its disposal to scientifically refute almost everything

⁸⁵ NT, Trial, 11/5/2008, p. 73.

⁸⁶ NT, Trial, 11/5/2009, pp. 209, 212-213.

⁸⁷ Rpp. 55-91.

⁸⁸ Rpp. 73, 74 n. 11.

⁸⁹ Rp. 73.

[Mr. Wang] said[.]”⁹⁰ Silverman also said Mr. Wang’s statement to detectives “locked [him] into the highly implausible defense of suicide.”⁹¹

After Silverman filed his amended PCRA petition, Mr. Wang immediately moved to have Silverman removed as PCRA counsel. Mr. Wang knew he was innocent because his wife’s death was a suicide and he never gave Silverman permission to concede that his suicide defense was ludicrous. The PCRA court appointed John Cotter after Silverman withdrew, but Cotter filed no substantive pleadings for two years, forcing Mr. Wang to retain undersigned counsel in June 2015.

Once retained, counsel consulted and retained forensic expert and reconstructionist Brent Turvey. Mr. Turvey reviewed the autopsy report, scene reports, digital autopsy photographs, scene photographs, and Dr. Hoyer’s reports.

⁹⁰ Rpp. 73-74. Silverman also wrote that the Commonwealth introduced Mr. Wang’s statement at trial “presumably because it was so implausible and contained assertions that the Commonwealth easily disproved.” Rp. 75.

⁹¹ Rp. 74. Silverman’s statements and concessions were egregious and indefensible. The first time petitioners can challenge trial counsel’s advocacy is during their initial-review PCRA proceedings. *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002). Petitioners are entitled to effective PCRA counsel. *Commonwealth v. Albrecht*, 720 A.2d 693, 699-700 (Pa. 1998). Silverman, therefore, had a state law duty to effectively represent Mr. Wang, meaning Silverman had to do what trial counsel failed to do: examine the entire scene and all the physical evidence to determine whether the scene characteristics and physical evidence supported Mr. Wang’s suicide narrative and/or discredited the Commonwealth’s homicide narrative. Silverman, however, simply took the testimony and opinions of the Commonwealth’s forensic experts at face value and assumed their correctness. Silverman, in other words, based his concession on absolutely no forensic investigation whatsoever. Silverman, therefore, is no better than trial counsel because had Silverman actually examined the entire scene and physical evidence with an experienced forensic expert like Mr. Turvey, he, like trial counsel, would have been able to make “the truth of [Mr. Wang’s] innocence visible.” *Luis v. United States*, 136 S.Ct. 1083, 1089 (2016) (the right to effective trial counsel is the “great engin[e] by which an innocent man can make the truth of his innocence visible[.]”).

Based on his exhaustive review, Mr. Turvey wrote a comprehensive 35-page affidavit explaining why the totality of the physical evidence was far more indicative of suicide than homicide.⁹²

1. The Commonwealth's Three Homicide Narratives

Mr. Turvey first addressed the plausibility of the Commonwealth's three homicide narratives provided by Stott, Dr. McDonald, and the prosecutor.

a. Stott's Homicide Narrative

Stott opined that Lin had to have been seated on the left edge of the bed with her back toward the left wall and facing the closet to the right of the bed. Moreover, based on the strike mark's location above the closet and the blood pooling to the left of the bed, Stott opined Mr. Wang had to have been standing directly behind Lin in the narrow 1 ½' space between the bed and left wall when he fired the fatal shot. According to Mr. Turvey, Stott's opinions are not supported by the physical evidence, the bedroom's dimensions, and Dr. McDonald's testimony.

First, Mr. Turvey opined that Stott's opinion directly contradicts Dr. McDonald's opinion. Dr. McDonald opined that the fatal shot had to have been fired from a distance of 3 feet or greater. However, the distance between the left wall and the edge of the bed is only 1 ½' or 18 inches. The only way Stott's and Dr. McDonald's opinions could co-exist is if Lin was seated in the middle of the bed,

⁹² Rpp. 115-149.

not on the edge. This, however, contradicts Stott's own opinion. Also, if Lin was seated in the middle of the bed, she would not have fallen off the bed.⁹³

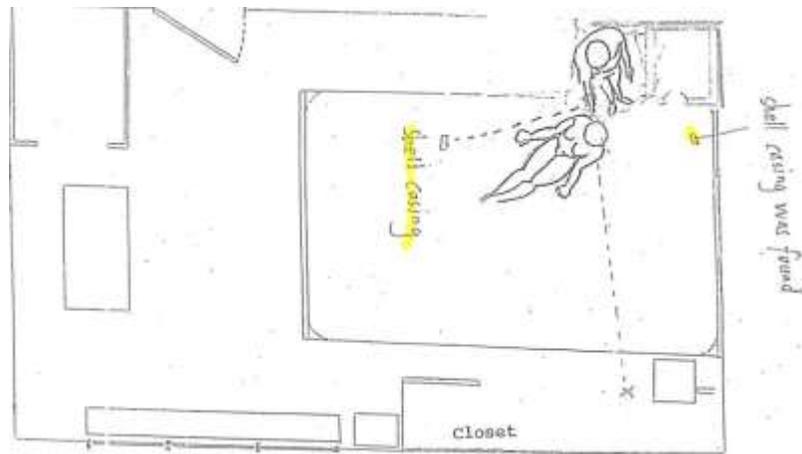
Second, Mr. Turvey said the location of the FCC undermined Stott's opinion. According to Mr. Turvey, if Mr. Wang stood where Stott claimed he stood when he fired the fatal shot, the FCC would have been ejected to the right with great force and would have landed either at the foot of the bed or on the floor near the left foot of the bed, not at the head of the bed near the nightstand.⁹⁴

Stott testified that FCCs fired from Luger 9mm handguns had a tendency to bounce when they hit the floor, the ground, or a hard object. According to Mr. Turvey, if the FCC made contact with the foot of the soft mattress first, the likelihood that it bounced all the way back to the head of the bed was highly improbable. Likewise, if the FCC made contact with the floor at the foot of the bed first, the likelihood that it bounced back up over the bed and all the way to the head of the bed was highly improbable.⁹⁵ The diagram below depicts the problem with Stott's testimony.

⁹³ Rp. 130, ¶¶ 21(a-b).

⁹⁴ Rp. 130, ¶¶ 21(c-d).

⁹⁵ Rp. 130, ¶¶ 21(c-d).



Third, based on Stott’s positional and directional theory, Mr. Wang had to have shot Lin at very close range. According to Mr. Turvey, the likelihood this occurred was slim because if Mr. Wang had shot Lin at such a close range, his clothing and hands would have very likely had back spatter on them. Moreover, the back spatter that would have struck Mr. Wang’s clothing and person would have created a void pattern on the left wall.⁹⁶ Based on Mr. Turvey’s review of the photographs of the left wall, he saw no discernible void pattern.⁹⁷

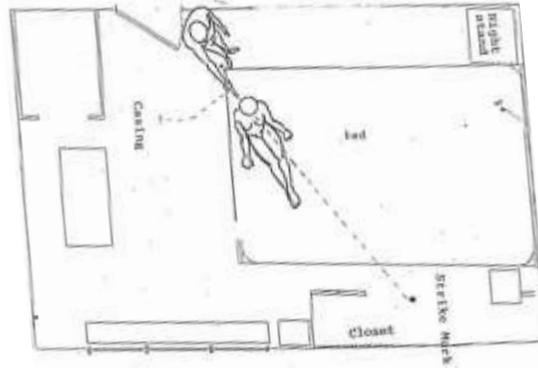
b. The Prosecutor’s Homicide Narrative

The prosecutor argued Lin was seated at the left foot of the bed, near the edge of the bed, when Mr. Wang grabbed her by the hair and shot her.⁹⁸ The diagram below reflects the prosecutor’s positional and directional theory:

⁹⁶ “A void occurs when a person or object blocks the path of the blood. They are important because voids can show investigators if objects are missing from the scene, where a person or persons were at the time of the incident, and if a body was moved... Void patterns are most useful for establishing the position of the victim(s) and assailant(s) within the scene.” www.forensicsciencesimplified.org/blood/principles.html (last visited April 2, 2017).

⁹⁷ Rp. 131, ¶ 21(e).

⁹⁸ NT, Trial, 11/5/2009, pp. 209, 212-213.



According to Mr. Turvey, the prosecutor's theory is not supported by the physical evidence, the bedroom's dimensions, or Dr. McDonald's and Stott's opinions. *First*, it contradicts Stott's testimony because Stott placed Lin on the left edge of the bed near the bed's midline, not the left foot of the bed. *Second*, it also contradicts Dr. McDonald's testimony, who said the fatal shot had to be fired 3 feet or more from Lin. *Third*, responding officers saw no evidence of a struggle on the bed.⁹⁹ *Fourth*, based on the prosecutor's positional theory, the FCC's rightward trajectory would have resulted in it landing on the floor near the foot of the bed. *Fifth*, if Mr. Wang shot Lin at close range, his clothing and hands would likely have had back spatter on them. *Sixth*, if Mr. Wang shot Lin at the left foot of the bed, it would have been virtually impossible for Lin to have knocked over the nightstand

⁹⁹ Rpp. 132-133, ¶¶ 23(a-c).

and for Lin's feet to be on the edge of the bed near the head of the bed.¹⁰⁰ The diagram/photograph below demonstrates how Lin was found.



Eighth, Mr. Turvey opined that the location of the firearm in the nightstand's bottom drawer does not support the prosecutor's theory. According to the prosecutor, after shooting Lin at the foot of the bed, Mr. Wang either threw the firearm to the left corner toward the nightstand or he walked over Lin's body and placed the firearm in the dresser drawer himself. According to the prosecutor, Mr. Wang did one or the other for the sole purpose of hiding the firearm.¹⁰¹ Mr. Turvey opined it is highly unlikely Mr. Wang did either.

¹⁰⁰ Rp. 133, ¶¶ 23(d-f).

¹⁰¹ During closing arguments, the prosecutor argued, "You know what happened here. He tried to hide the gun. He moved the gun. He shot her. He didn't know what to do. He threw it in the drawer in hopes that nobody would find it and then he concocts this whole suicide story." NT, Trial, 11/5/2009, p. 215.

To begin with, when responding officers asked Mr. Wang where the gun was, Mr. Wang pointed toward the left corner of the bedroom, near the nightstand and the area where Lin's body fell to the floor.¹⁰² From a behavioral perspective, if Mr. Wang threw the gun toward the nightstand in the hopes of hiding it, he would not have then immediately identified the firearm's general location once responding officers arrived.¹⁰³

Next, if Mr. Wang concocted the suicide narrative to mask the homicide, as the prosecutor argued, Mr. Wang would not have hid the gun after the shooting. Based on Mr. Turvey's experience, when a perpetrator attempts to stage a homicide shooting to look like a suicide, he places the firearm near the victim's trigger hand because the perpetrator assumes this is where investigators expect to find the firearm in a suspected suicide. The perpetrator does not hide the firearm because doing so defeats the suspect's suicide narrative.¹⁰⁴

Also, if Mr. Wang actually walked the gun over to the nightstand and placed it into the bottom drawer, Mr. Wang would have had to walk over Lin's body. Had he done so, the likelihood of blood transferring to his clothing and shoes was tremendous given the amount of blood emanating from the entrance and exit

¹⁰² NT, Trial, 11/5/2009, p. 137. At trial, Mr. Wang made clear that when he pointed in the nightstand's direction he did so only because he "assumed" that was where the gun ultimately came to rest after Lin shot herself. Mr. Wang did not actually see where the gun ultimately came to rest. *Id.* Mr. Wang said Lin shot herself at the left head of the bed near the nightstand. Thus, it was entirely reasonable for him to assume the gun came to rest somewhere in that general area of the bedroom.

¹⁰³ Rpp. 133-134, ¶¶ 23(h)(i-ii).

¹⁰⁴ Rpp. 133-134, ¶¶ 23(h)(i-v).

wounds onto the floor to the left of the bed. Mr. Wang's person, clothing, and shoes, however, had no blood on them. Moreover, Timothy Flemings, Rick Kern, and Troy Davis each said that immediately after hearing the gunshot they saw and heard Mr. Wang at the second floor window screaming for someone to call an ambulance because his wife had just shot herself. Based on these observations, Mr. Wang could not have walked over Lin's body, placed it into the bottom drawer, and then ran to the window for help within the timeframe described by Flemings, Kern, and Davis.¹⁰⁵

Mr. Turvey also disagreed with the prosecutor's argument it would have been impossible for the firearm to come to rest in the nightstand's bottom drawer if Lin shot herself.¹⁰⁶ According to Mr. Turvey, the prosecutor failed to consider the concept of evidence dynamics, which refers to any influence that changes, relocates, obscures, or obliterates physical evidence, regardless of intent. Here, it is entirely plausible that after Lin shot herself the gun and she both fell toward and against the nightstand, that the momentum and impact of her fall caused the nightstand to tumble forward opening the top and bottom drawers, and that the gun ultimately came to rest in the bottom drawer.¹⁰⁷

¹⁰⁵ Rp. 134, ¶ 23(h)(iv).

¹⁰⁶ NT, Trial, 11/5/2009, pp. 214-215.

¹⁰⁷ Rpp. 134-135, ¶¶ 23(7)(v) & 24, 25.

c. Dr. McDonald's Homicide Narrative

Dr. McDonald opined that the fatal shot had to have been fired 3 feet or more away from Lin. According to Mr. Turvey, based on the bedroom's dimensions and the bed's placement in the bedroom, this eliminates Mr. Wang standing in the narrow 1 ½' space between the bed and the left wall.¹⁰⁸ Also, based on the strike mark's location above the closet to the right of the bed and Lin's final resting position, this means Mr. Wang had to have fired the fatal shot at the foot of the bed to the left of the bed and he had to be standing at least 3 feet from the bed.

According to Mr. Turvey, the physical evidence does not support Dr. McDonald's homicide theory. *First*, if Mr. Wang shot Lin at a distance of 3 feet or more, it would have been virtually impossible for the FCC to have come to rest at the head of the bed. The FCC would have ejected to the right and come to rest on the floor feet from the foot of the bed. Mr. Turvey also opined that the likelihood that the FCC bounced off the floor, while traveling away from the bed, and ricocheted in a direction back toward the bed and all the way back to the head of the bed was virtually impossible.¹⁰⁹

Second, according to Mr. Turvey, the only plausible way Mr. Wang could have created the strike mark above the closet is if he positioned the firearm at an upward trajectory when he fired it. Based on Mr. Wang's height (5'7") and the fact

¹⁰⁸ Rp. 270.

¹⁰⁹ Rp. 136, ¶ 27(a).

he had to be standing 3 feet or more away when he fired, it is very unlikely Mr. Wang would have had the gun positioned at an upward trajectory when he fired it.¹¹⁰ For Dr. McDonald's theory to be correct, Mr. Wang would have had to fire the fatal shot while kneeling on one knee or holding the gun near his hip when he fired. That Mr. Wang did either is extremely unlikely because, again, the FCC would have landed feet from the foot of the bed making it virtually impossible for it to have ricocheted all the way back to the head of the bed.¹¹¹

Third, for Dr. McDonald's 3 feet opinion to be remotely plausible Lin had to have been seated at the foot of the bed near the left edge. This positioning, which is similar to the prosecutor's, cannot be correct according to Mr. Turvey. If Mr. Wang shot Lin at the left foot of the bed, it would have been virtually impossible for Lin to have knocked over the nightstand and for her feet to be in the position they were when responding officers arrived.¹¹²

Fourth, Dr. McDonald's theory also requires Mr. Wang to have placed the firearm in the bottom drawer after shooting Lin. The physical evidence and behavioral analysis disproves this theory. According to Mr. Turvey, based on the physical evidence and evidence dynamics, the most plausible explanation regarding the gun's final resting place is that Lin's body caused the nightstand to

¹¹⁰ Rp. 136, ¶ 27(b).

¹¹¹ Rp. 136, ¶ 27(c).

¹¹² Rp. 137, ¶ 27(d).

tumble forward opening the top and bottom drawers and allowing the gun to come to rest in the bottom drawer.¹¹³

2. The Evidence is More Indicative of Suicide than Homicide

Besides discrediting the Commonwealth's three homicide narratives, Mr. Turvey identified multiple facts and items of evidence that supported Mr. Wang's suicide narrative. *First*, Mr. Turvey explained how the Occam's razor principle supported his opinion.¹¹⁴ *Second*, Mr. Turvey opined that Lin's entrance wound is consistent with a contact wound. As Mr. Turvey pointed out, according to the preeminent forensic pathologist treaty, MEDICOLEGAL INVESTIGATION OF DEATH by Werner Spitz, the image below represents a classic contact wound:



¹¹³ Rp. 137, ¶ 27(e)

¹¹⁴ Occam's razor is "a scientific and philosophical rule that entities should not be multiplied unnecessarily which is interpreted as requiring that the simplest of competing theories be preferred to the more complex or that explanations of unknown phenomena be sought first in terms of known quantities." www.merriam-webster.com/dictionary/Occam's%20razor (last visited April 8, 2017). The simplest explanation of the totality of the physical evidence is that Lin shot herself. The fact the Commonwealth presented three inconsistent theories of how Mr. Wang allegedly shot Lin proves this point. If the Commonwealth's homicide narrative was so simple and plain to see, it would have presented one coherent narrative as to where Lin was seated when Mr. Wang shot her and where Mr. Wang was standing when he shot Lin.

The star-shaped pattern is indicative of a contact wound. Lin's entrance wound is similar because it too has a stellate or star-shaped appearance that is unlike the round or oval perforating wounds seen in other non-boney regions of the body. A photograph of Lin's entrance wound is below:



Third, Mr. Turvey identified multiple reasons why Lin's hands presented with little to no back spatter and why the area in and around the entrance wound presented with no soot. According to Mr. Turvey, Dr. McDonald never considered how Lin's long thick hair and the small size and power of a 9mm semi-automatic handgun would have impacted the amount of back spatter produced upon discharge or the amount of soot and stippling seen in and around the entrance wound. Likewise, Mr. Turvey identified several steps Dr. McDonald failed to take to conclusively establish the absence of soot in and around the entrance wound.

¹¹⁵ Mr. Turvey incorporated these two photographs into his affidavit. Rp. 144.

The failure to take these additional steps undermines his testimony that there was no soot in and around the entrance wound.¹¹⁶

Fourth, Mr. Turvey acknowledged that the mere fact the entrance wound was, in his opinion, a contact wound, did not automatically prove Lin fired the fatal shot. It was “possible Mr. Wang fired the fatal shot,” but Mr. Turvey opined that this was “unlikely” for at least two reasons. Based on the concentration of blood and evidence dynamics on the left wall and in the left corner of the bedroom, Mr. Turvey opined that the fatal shot was fired somewhere at the head of the bed near the nightstand. Thus, if Mr. Wang fired the fatal shot he had to have been standing in the narrow 1½’ space between the left wall and bed. If Mr. Wang fired from this location, Mr. Turvey opined there would have been back spatter on Mr. Wang or his clothing and a void pattern on the left wall.¹¹⁷ Also, if Mr. Wang stood over Lin as he shot her, the gun would have been positioned at a downward trajectory, not an upward one as indicated by the strike mark above the closest to the right of the bed.¹¹⁸

Fifth, Mr. Turvey identified numerous reasons why the physical evidence supports Mr. Wang’s statement and trial testimony that Lin was seated near the head of the bed when the fatal shot was fired.¹¹⁹ *Sixth*, Mr. Turvey opined there

¹¹⁶ Rpp. 143-146, ¶¶ 44-46.

¹¹⁷ Rpp. 146-147, ¶ 46(a).

¹¹⁸ Rp. 147, ¶ 46(b).

¹¹⁹ Rpp. 146-147, ¶¶ 47 (a-c).

were “multiple indicators” Lin “was emotionally and psychologically unstable in the months and days leading to her death[.]”¹²⁰ These “multiple indicators,” according to Mr. Turvey, corroborate Mr. Wang’s suicide narrative.¹²¹

Lastly, Mr. Turvey made clear he based his opinions on information, literature, and scientific research that was available prior to Mr. Wang’s trial in November 2009 and that had trial counsel contacted him in 2008 or 2009, he would have been willing and available to testify and would have testified to the findings, conclusions, and opinions contained in his affidavit.¹²²

¹²⁰ Rp. 137, ¶ 29.

¹²¹ Rpp. 137-143, ¶¶ 28-41.

¹²² Rp. 149, ¶ 49.

ARGUMENTS

Claim #1: Trial counsel was ineffective for not expanding the scope of his forensic investigation by consulting with and retaining a forensic expert like Brent Turvey to conduct a holistic examination of all the physical evidence. Trial counsel's ineffectiveness prejudiced Mr. Wang because there is a reasonable probability the outcome of his trial would have been different because the physical evidence, as Mr. Turvey's 35-page affidavit makes clear, supported Mr. Wang's suicide narrative far more than the Commonwealth's homicide narrative. The PCRA court, therefore, erred when it rejected Mr. Wang's trial counsel ineffectiveness claim. U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

A. When Trial Counsel's Preliminary Investigation Uncovers Facts that Require Additional Investigation

Before the PCRA court, the Commonwealth argued Mr. Wang was not entitled to relief because he merely "shopped" for a forensic expert who provided his "desired" results.¹²³ Contrary to the Commonwealth's position, this case is *not* about expert "shopping," it is about trial counsel's constitutional duty to adequately investigate his client's *entire* case so he can make sound strategic decisions "to advance and protect [his client's] interests," *Commonwealth v. Dunbar*, 470 A.2d 74, 77 (Pa. 1983), which includes being able to effectively cross-examine the Commonwealth's witnesses and to intelligently determine whether a particular forensic expert or *experts* needs to be consulted and retained.

¹²³ Rpp. 271-281.

“[C]ounsel has a duty to make reasonable investigations.” *Strickland v. Washington*, 466 U.S. at 690-691. This duty, 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). “Criminal cases will arise,” however, “where the only reasonable and available defense strategy requires consultation with *experts* or introduction of expert evidence.” *Harrington v. Richter*, 562 U.S. 86, 106 (2011) (emphasis added); *accord Hinton v. Alabama*, 134 S.Ct. 1081, 1088 (2014). Trial counsel, in other words, had a duty to investigate all aspects of Sharon Lin’s death, a duty which involved an independent investigation and understanding of the scene and *all* physical evidence. *Commonwealth v. Williams*, 141 A.3d 440, 476 (Pa. 2016) (Wecht, J., concurring in judgment); *Commonwealth v. Bailey*, 390 A.2d 166, 170 (Pa. 1978).

The issue in Mr. Wang’ case, therefore, is not whether trial counsel should have retained a forensic expert like Mr. Turvey, but “whether the investigation supporting [trial] counsel’s decision” *not to consult and retain this type of forensic expert* “was itself reasonable.” *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (“Our principal concern... is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel’s decision not to introduce mitigating evidence of [the defendant’s] background was itself

reasonable.”). If trial counsel’s decision not to consult and retain a forensic expert is based on a “thorough” and “reasonable” investigation into the facts and *all* physical evidence, trial counsel’s decision is considered “strategic” and “virtually unchallengeable.” *Strickland v. Washington*, 466 U.S. at 690.

Mr. Wang’s sole interest before and during trial was to raise reasonable doubt regarding the Commonwealth’s theory that Lin’s death was a homicide and that Mr. Wang fired the fatal shot. Mr. Wang’s interest was enormous because, if convicted, he faced a most certain death sentence. *Miller v. Alabama*, 132 S.Ct. 2455, 2463 (2012) (comparing “life without parole... to the death penalty itself[.]”). Trial counsel’s constitutional duty, therefore, was to thoroughly investigate the scene and *all* the physical evidence so he could present *every available* defense and argument discrediting the Commonwealth’s homicide narrative and supporting Mr. Wang’s suicide narrative. *Commonwealth v. Bailey*, 390 A.2d at 170 (“[T]he adversary system requires that all available defenses are raised so that the government is put to its proof.”).

Yes, trial counsel consulted and retained *one* forensic expert, Dr. Paul Hoyer, but Dr. Hoyer’s retention did not prevent trial counsel from examining the *entire* scene and *all* the physical evidence to determine if the physical evidence and scene characteristics supported Mr. Wang’s suicide narrative and/or discredited the Commonwealth’s homicide narrative. Moreover, trial counsel’s decision not to

look outside of the entrance wound and Dr. Hoyer's narrow area of expertise was objectively unreasonable because trial counsel knew going into trial that Dr. Hoyer could not and was not going to opine that the entrance wound was a contact wound.¹²⁴ Trial counsel also knew that if Dr. Hoyer testified to the non-contact wound opinions discussed during their pre-trial consultations, the jury would have a difficult time conceptualizing and believing Mr. Wang's suicide narrative.¹²⁵ Furthermore, even if Dr. Hoyer had opined pre-trial that the entrance wound was, in fact, a contact wound, trial counsel still had a duty to expand the scope of his forensic investigation because a contact wound made suicide *and* homicide both *equally* plausible and this is exactly what Dr. Hoyer told trial counsel before trial.¹²⁶ Trial counsel, therefore, did not raise all available defenses because the *scope* of his forensic investigation was unreasonable based on the information he gathered from Dr. Hoyer during their pre-trial consultations.

The *scope* of trial counsel's pre-trial investigation, in other words, depends on what trial counsel uncovers during his preliminary investigation(s). For instance, uncovering certain information will lead a reasonable attorney to stop investigating a particular defense. *Rompilla v. Beard*, 545 U.S. at 383 ("reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste."). The opposite, however, is also true: uncovering

¹²⁴ Rpp. 262-269

¹²⁵ Rp. 266.

¹²⁶ Rpp. 262-269.

certain information can impart on trial counsel a duty to continue investigating and developing evidence regarding a particular defense. *Cf. Wiggins v. Smith*, 539 U.S. at 525 (“The scope of [trial counsel’s] investigation was also unreasonable in light of what counsel actually discovered in the DSS records.”); *Rompilla v. Beard*, 545 U.S. at 284-285 (the scope of trial counsel’s mitigation investigation was objectively unreasonable because trial counsel knew the Commonwealth intended to seek the death penalty and would do so by relying on Rompilla’s prior rape and assault convictions; despite this knowledge, trial counsel never obtained Rompilla’s rape and assault conviction case file). “In assessing the reasonableness of an attorney’s investigation,” therefore, “a court must consider... whether the known evidence would lead a reasonable attorney to investigate further... [because] *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision[.]” *Wiggins v. Smith*, 539 U.S. at 527.

Consequently, once trial counsel realized Dr. Hoyer’s testimony made suicide and homicide equally plausible and that the jury would have great difficulty conceptualizing and believing Mr. Wang’s suicide narrative based on Dr. Hoyer’s testimony, he had a constitutional duty to expand the *scope* of his forensic investigation by examining the *entire* scene and *all* the physical evidence to determine if the physical evidence and scene characteristics supported Mr. Wang’s suicide narrative. Trial counsel, though, “abandoned [his forensic] investigation...

after having acquired only rudimentary knowledge” of the physical evidence by only examining the entrance wound and only consulting Dr. Hoyer. *Wiggins v. Smith*, 539 U.S. at 524.

Realizing Dr. Hoyer’s testimony would not be what he expected or wanted it to be, trial counsel refused to expand the scope of his forensic investigation and instead placed the entirety of his defense on Mr. Wang’s testimony.¹²⁷ This decision was objectively unreasonable. *First*, trial counsel never expanded the scope of his forensic investigation after consulting with Dr. Hoyer, so he had no idea if the physical evidence, rather than Mr. Wang’s testimony, could have been the key to Mr. Wang’s case. *Second*, trial counsel knew the Commonwealth intended to present forensic testimony to support its homicide narrative and he knew Dr. Hoyer’s testimony could not effectively rebut the Commonwealth’s homicide narrative by focusing solely on the entrance wound. *Third*, when two narratives of an event are presented to the jury and only one is claimed to be supported by physical evidence, the jury will find the forensic evidence supported narrative more compelling and credible.

Mr. Wang’s case, therefore, came down to credibility, namely Dr. McDonald’s and Stott’s credibility, and trial counsel knew or should have known that undermining their credibility required a holistic evaluation of the scene and all the physical evidence in order potentially develop and present testimony that

¹²⁷ Exs. 21, 22.

might cast doubt on their credibility. “[W]hen 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. McCaskill*, 468 A.2d 472, 477 (Pa. Super. 1983) (emphasis added).

In the end, the investigation leading to trial counsel’s decision not to consult and retain a forensic expert like Mr. Turvey was objectively unreasonable because the scene presented with multiple pieces of physical evidence and scene characteristics that supported Mr. Wang’s suicide narrative and/or undermined the Commonwealth’s homicide narrative. Had trial counsel adequately researched the scene, the physical evidence, and forensic experts, like Mr. Turvey, the jury would have learned of these items of physical evidence and why they supported Mr. Wang’s suicide narrative far more than the Commonwealth’s homicide narrative.

Again, Mr. Wang’s case is *not* about expert shopping; it is about being an *effective* defense attorney and ensuring “the prosecution’s case [can] survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656 (1984). The *right to effective* counsel, keep in mind, is a “great engin[e] by which an innocent man can make *the truth of his innocence visible*[.]” *Luis v. United States*, 136 S.Ct. at 1089 (emphasis added). Here, by conducting a truncated and unreasonable forensic investigation, trial counsel did not make the “truth” of Mr. Wang’s “innocence visible,” despite the fact the “truth” of Mr. Wang’s innocence was “visible” and staring at him dead in the eyes before trial—had he cared to look for it.¹²⁸

B. State Law Ineffectiveness Standard

To obtain relief on a trial counsel ineffectiveness claim, (1) the claim must have arguable merit, (2) trial counsel’s actions or inactions could not have been based on a reasonable trial strategy, and (3) counsel’s unreasonable decision(s) prejudiced the petitioner. *Commonwealth v. Williams*, 141 A.3d at 454. Mr. Wang satisfies these requirements.

1. Mr. Wang’s Claim Has Argument Merit

To satisfy the “arguable merit” prong “based upon trial counsel’s failure to call an expert witness, the petitioner must prove that an expert witness was willing and available to testify on the subject of the testimony at trial, counsel knew or

¹²⁸ Counsel addresses the “prejudice” issue under the state law prejudice section.

should have known about the witness and the defendant was prejudiced by the absence of the testimony.” *Commonwealth v. Williams*, 141 A.3d at 460. Prejudice in this respect requires the petitioner to “show how the uncalled witnesses’ testimony would have been beneficial under the circumstances of the case.” *Commonwealth v. Sneed*, 45 A.3d 1096, 1109 (Pa. 2012) (quoting *Commonwealth v. Gibson*, 951 A.2d 1110, 1134 (Pa. 2008)). The petitioner’s burden, therefore, is to show that testimony provided by the uncalled witness “would have been helpful to the defense.” *Id.* (quoting *Commonwealth v. Auker*, 681 A.2d 1305, 1319 (Pa. 1996)).

In his affidavit, Mr. Turvey said his findings, conclusions, and opinions could have been presented at Mr. Wang’s trial. Mr. Turvey’s testimony would have been “helpful” to Mr. Wang’s defense. Mr. Turvey systematically dismantled (1) Dr. McDonald’s opinion that Mr. Wang had to have fired the fatal shot from a distance of 3 feet or more,¹²⁹ (2) Stott’s opinion that Mr. Wang had to have fired the fatal shot while standing to the left of the bed in between the wall and the bed,¹³⁰ and (3) the prosecutor’s theory that Lin had to have been seated at the left foot of the bed when Mr. Wang grabbed her by the hair and shot her at close range.¹³¹ Mr. Turvey also identified multiple reasons why he believed the entrance wound is, in fact, a contact wound.¹³² Mr. Turvey also identified numerous scene

¹²⁹ Rpp. 136-137, ¶¶ 27(a-e)

¹³⁰ Rpp. 131-132, ¶¶ 21(a-h)

¹³¹ Rpp., 132-135 ¶¶ 23-25.

¹³² Rpp. 143-147, ¶¶ 44-46.

characteristics and items of physical evidence that make Mr. Wang's suicide narrative far more probable than the Commonwealth's homicide narrative.¹³³ Lastly, Mr. Turvey identified various signs and facts indicating Lin was depressed and suicidal in the months and days before her death.¹³⁴

2. Trial Counsel Did Not Have a Reasonable Basis For Not Consulting and Retaining a Forensic Expert Like Mr. Turvey

When assessing whether trial counsel had a reasonable basis for his acts or omissions, the question is not whether there were other courses of action that counsel could have taken, but “whether counsel’s decision had any basis reasonably designed to effectuate his client’s interest.” *Commonwealth v. Williams*, 141 A.3d at 463. This requires an examination of “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 at 77 (emphasis added).

To determine whether trial counsel made an informed decision regarding a particular issue, *e.g.*, consulting and retaining a forensic expert like Mr. Turvey, the Court must evaluate trial counsel’s investigation leading to this decision. *Commonwealth v. Williams*, 141 A.3d at 463. As demonstrated *supra*, pp. 16-20, based on trial counsel’s pre-trial communications with Dr. Hoyer and trial

¹³³ Rpp. 143-147, ¶¶ 43-48.

¹³⁴ Rpp. 137-143, ¶¶ 28-41.

counsel's awareness that (1) homicide and suicide were *both equally plausible* based on Dr. Hoyer's pre-trial findings and conclusions and that (2) the jury would have great difficulty conceptualizing and believing Mr. Wang's suicide narrative based solely on Dr. Hoyer's entrance wound testimony, trial counsel had a duty to expand the scope of his forensic investigation by examining the entire scene and all the physical evidence. Moreover, there was no harm in consulting with a forensic expert like Mr. Turvey to review the entire scene and all the physical evidence. Indeed, examining the entire scene and all the physical evidence would have been *consistent with* trial counsel's initial reason for retaining Dr. Hoyer, *i.e.*, to potentially develop and present forensic evidence supporting Mr. Wang's suicide narrative.

If trial counsel's decision not to consult and retain another forensic expert was based on his belief that he could effectively cross-examine Dr. McDonald and Stott, then trial counsel was not required to retain and present another forensic expert like Mr. Turvey:

Trial counsel need not introduce expert testimony on his client's behalf if he is able effectively to cross-examine prosecution witnesses and elicit helpful testimony. Additionally, trial counsel will not be deemed ineffective for failing to call a medical, forensic, or scientific expert merely to critically evaluate expert testimony [that] was presented by the prosecution. *Thus, the question becomes whether or not [defense counsel] effectively cross-examined [the Commonwealth's expert witness].*

Commonwealth v. Marinelli, 810 A.2d 1257, 1269 (Pa. 2002) (emphasis added);
Commonwealth v. Williams, 141 A.3d at 464.

Trial counsel did not effectively cross-examine Dr. McDonald or Stott.

a. Stott's Cross-Examination

On direct-examination, Stott opined that Lin had to have been seated on the left edge of the bed near its midline and facing the closet to the right of the bed and that Mr. Wang had to have been standing directly behind her between the bed and left wall when he fired the fatal shot. On cross-examination, Stott reiterated these opinions with little to no challenge from trial counsel. For instance, on direct-examination, Stott opined that the lack of blood spatter on the headboard, the corner left walls, and the mattress made it unlikely that Lin was near or against the headboard when shot. On cross-examination, Stott repeatedly gave the same opinion because trial counsel had no idea how to challenge or undermine his opinion with the totality of the physical evidence.

Counsel: Did you consider, rather than having the body fairly well forward down the bed from the headboard, that perhaps that person is partially away from the headboard but has shot while the head is turned at some angle?
Does that question make sense?

Stott: It is possible for a person to turn their head certainly instead of looking directly in this direction, looking like this. Could it happen? Yes, *but my problem with that is the lack of any blood spatter on that side of*

the room, whether it is on the headboard area, the wall behind the headboard.
(Indicating).

Counsel: No. I am just saying where you saw the blood – maybe we can do this without the photo. Rather than being flat against the headboard, that is a physical impossibility, right?

All I am saying is somewhere in between being against the headboard and being more toward the foot of the bed, somewhere in there but toward the side of the bed where the – did you see the nightstand and you saw the blood; correct?

Stott: Yes.

Counsel: But rather than being in the middle of the bed, more toward that side and then sort of bent over a little bit with the head turned, that would do it. That you would agree with the thoughts you had expressed earlier; is that correct? (Indicating)

Stott: *Are you asking me if the body is now midway, halfway down the bed?*

Counsel: Partway down the bed but the head is bent over and turned?

Stott: If they are halfway down the bed, they wouldn't be anywhere near the headboard. *It appears to me the person was at the edge of the bed with their back toward the wall where she was found laying against and would have fell backward. That is what it appeared to me.*

Counsel: But the head could have been directly in line with the headboard but the head turned. Would you agree with that, that the head is turned?

Stott: Again, the lack of blood spatter is what I find unusual.

Counsel: I am saying turned halfway down the bed but with the head turned, so that the body comes off the bed where the blood is, right?

Stott: Perhaps I am not making myself clear. When the bullet exits the head, that would be followed by an explosive spray of blood and tissue. *I didn't find anything like that in those photographs and I would assume that none of the crime scene investigators did or there would be evidence of it. All the blood that I see is where the victim allegedly fell and her head came to rest on the floor.*¹³⁵

When trial counsel asked another confusing hypothetical regarding the possibility that Lin shot herself, Stott referred to the minimal blood spatter again:

The lack of blood in any other area other than that makes the hypothetical that you proposed to me of her shooting herself in that area near the headboard or partway down the bed, *I find unusual that there is absolutely nothing there.*¹³⁶

Trial counsel's unpreparedness regarding bloodstain pattern analysis and scene reconstruction is evident from trial counsel's follow-up question:

¹³⁵ NT, Trial, 11/4/2008, pp. 170-173.

¹³⁶ NT, Trial, 11/4/2008, p. 174.

Counsel: Well, is it possible there was blood – I don't know if I am getting beyond [myself], but there was some spatter and then it pooled up when the head and the torso went down there?

Stott: Pooled blood and spatter, they call [it] high velocity spatter, are two different things.

The high velocity blood when the gun is fired and the bullet exits, that is leaving a very high velocity. That is sprayed out of the wound. When the victim lies there after being shot and the blood runs from the wound, that just pools.¹³⁷

In short, trial counsel did not effectively cross-examine Stott. *First*, Stott *never* deviated from his initial opinion that Mr. Wang had to have shot Lin while standing to the left of the bed, near the left wall, while Lin had to have been seated at the left edge of the bed, near the midline, facing the closet. Instead of undermining Stott's opinion, trial counsel actually *bolstered* it because his questions and hypotheticals were so poorly thought out and articulated. Indeed, a simple reading of trial counsel's questions makes it painfully obvious how unprepared he was to confront, challenge, and undermine Stott's testimony with the totality of the physical evidence.

Second, based on Dr. McDonald's preliminary hearing testimony, trial counsel knew that Dr. McDonald opined that Mr. Wang had to have fired the fatal shot while standing at least 3 feet from Lin. Stott's opinion, though, contradicted

¹³⁷ NT, Trial, 11/4/2008, p. 175.

Dr. McDonald's opinion. Trial counsel, however, never highlighted the contradiction, never asked Stott how his opinion could be squared with Dr. McDonald's, and never asked Stott whose opinion was correct—his or Dr. McDonald's.

Third, to believe Stott's homicide narrative the jury would have had to believe that a rightward traveling FCC either (1) struck the soft mattress and had enough momentum after striking the soft mattress to bounce all the way back to the head of the bed or (2) struck the floor at the foot of the bed and had enough momentum to bounce all the back up over the foot of the bed and land at the head of the bed near the headboard. The plausibility of either occurring was extremely small, but trial counsel never addressed the implausibility on cross-examination.

Fourth, Stott repeatedly referenced the blood spatter on the left wall to support his opinion. Trial counsel, however, failed to expose significant flaws associated with the blood spatter. For instance, Stott said the blood spatter on the left wall had to be created by back spatter. Back spatter is blood directed back towards the source of energy or force that caused the spatter.¹³⁸ If Mr. Wang stood directly *behind* Lin, the back spatter would have had to have struck Mr. Wang's person, clothing, or trigger hand. Moreover, the back spatter that would have

¹³⁸ Based on his meandering questioning of Stott, it is a wonder if trial counsel knew and understood the dynamics and cause of back spatter.

struck Mr. Wang's clothing and person would have created a void pattern on the left wall, but there is no discernible void pattern on the left wall.

Fifth, if Mr. Wang stood directly behind Lin and fired while she was sitting on the bed, the gun's trajectory would have either been downward or straightforward, not upward as required by the strike mark's location above the closet. Trial counsel, though, never confronted Stott with this inconsistency.

b. Dr. McDonald's Cross-Examination

On direct-examination, Dr. McDonald opined that Mr. Wang had to have been 3 or more feet from Lin when he fired. On cross-examination, trial counsel asked Dr. McDonald if he knew first responders had moved Lin's body. Dr. McDonald said he did, but that this did not change his distance determination or the manner of death.¹³⁹ Trial counsel then asked a series of confusing questions regarding whether responding officers touched Lin's hands, and if so, whether that changed his opinion:

Counsel: Let me ask you this. So you were aware [Ms. Lin's body had been moved]. We did not hear in this courtroom exactly how it was done but we were told that the body at one point – I'm just telling you what we were told. We don't know what happened prior or after but at one point, the head and the torso of the body and I guess the arms follow were on the floor, feet were on the bed. This is what we were told.

¹³⁹ NT, Trial, 11/5/2008, 2008, p. 32.

Then we were told that emergency medical [personnel] moved the body back onto the bed, so that now the head and the torso are – when they moved it apparently to the right, I guess they could have gone to the left or the right but the feet were on the bed and remained on the bed and now the photos that were taken show the head and torso were opposite the headboard after that particular movement. Are you following me?

McDonald: I think so.

Counsel: There is no indication that the hands and arms were not touched. Are you aware of that?

McDonald: That the hands and arms were not touched by whom?

Counsel: Either police personnel, medical personnel, I don't know. Nobody who moved the body testified about the moving of the body.

McDonald: Okay. Understood.

Counsel: Which leaves open the question, well, were the hands touched and so forth and so on. If the hands were touched, rubbed, smeared in blood, does that alter your opinion at all?

McDonald: Regarding?

Counsel: The blood spatter and soot and anything else that was on the hands, and I will follow that up. There are two parts of the question. One, does that by itself alter your opinion?

McDonald: No, it does not. It does not alter my opinion. Just moving a body even in a rough fashion would not remove all those little droplets of blood because I had the opportunity where part of my job is once – in other cases where I have seen the blood spatter, to clean the hands off and it is not a particularly easy job, so even a rough movement of a body would not remove all of the little droplets of blood that I was looking for.¹⁴⁰

On cross-examination, Dr. McDonald conceded that responding officer did not bag Lin's hands, and because of this, they could have "touched" her hands when they moved her body.¹⁴¹ When trial counsel asked if this "touching" could have wiped away the "stippling," Dr. McDonald explained the difference between "gunpowder stipple and soot."¹⁴² Soot, he said, is "very light" and "[c]ertain degrees of it can be wiped off," while gunpowder stipple "is where the gunpowder fragments enter the skin and either are stuck in the skin or they produce an injury to the skin[.]" Gunpowder stipple, Dr. McDonald said, "would not be wiped away."¹⁴³

When trial counsel highlighted several tiny specks of blood on the lower part of Lin's right hand, Dr. McDonald agreed that the tiny specks were blood, but

¹⁴⁰ NT, Trial, 11/5/2008, pp. 30-33.

¹⁴¹ NT, Trial, 11/5/2008, p. 33.

¹⁴² NT, Trial, 11/5/2008, p. 33.

¹⁴³ NT, Trial, 11/5/2008, p. 33.

refused to characterize them as blood spatter.¹⁴⁴ Trial counsel then confusingly asked if the “little dots” could be stippling. Dr. McDonald said, “Again, I looked at the autopsy and I did not notice any gunpowder stipple on the hands.”¹⁴⁵ When trial counsel asked about the hair shavings, Dr. McDonald said he found no gunpowder or soot surrounding the entrance wound or on the hair.¹⁴⁶

Trial counsel then told Dr. McDonald that Stott had testified that based on the absence of soot and stippling, “it was inconclusive as to how near or how far away that gun was from the head[.]”¹⁴⁷ Dr. McDonald said he could not “comment on another person’s testimony.”¹⁴⁸ After trial counsel interrupted, Dr. McDonald continued and said, “My job is to examine the wounds and to look for signs of gunpowder stipple is a type of wound that is produced on the skin and I didn’t see that and that is consistent with a close-range wound and I did not see that.”¹⁴⁹

Recognizing the “inartfulness” of his initial question, trial counsel asked:

Counsel: So is your answer [to] my inartfulness question, was if you factored that in, that is not changing or impacting your testimony?

McDonald: Not at all.¹⁵⁰

¹⁴⁴ NT, Trial, 11/5/2008, p. 34.

¹⁴⁵ NT, Trial, 11/5/2008, p. 34

¹⁴⁶ NT, Trial, 11/5/2008, p. 36.

¹⁴⁷ NT, Trial, 11/5/2008, p. 37.

¹⁴⁸ NT, Trial, 11/5/2008, pp. 37-38.

¹⁴⁹ NT, Trial, 11/5/2008, p. 38.

¹⁵⁰ NT, Trial, 11/5/2008, p. 38.

Trial counsel's questioning makes clear he did not effectively cross-examine Dr. McDonald. *First*, if Mr. Wang shot Lin at a distance of more than 3 feet, it would have been virtually impossible for the FCC to come to rest at the head of the bed, which is a critical fact trial counsel never broached during his cross-examination. *Second*, the only plausible way Mr. Wang could have created the strike mark above the closet is if he positioned the gun at an upward trajectory. Based on Mr. Wang's height (5'7"), and the fact he had to have been standing 3 feet or more from Lin under Dr. McDonald's theory, it is very unlikely Mr. Wang positioned the gun in an upward trajectory when he fired at Lin.

Third, based on Dr. McDonald's distance theory, the strike mark's location, and the fact Lin fell off the bed, Lin had to have been seated at the foot of the bed near the left edge according to Dr. McDonald. This position, however, cannot be correct for at least two reasons. To begin with, if Mr. Wang shot Lin at the left foot of the bed, it would have been virtually impossible for (1) Lin to have knocked over the nightstand and for (2) Lin's feet to be in the position they were in when responding officers arrived. Trial counsel, though, never highlighted these obvious and critical facts during his cross-examination. *Fourth*, Dr. McDonald's positional theory differed from Stott's positional theory. Trial counsel, though, never addressed this fact, never had Dr. McDonalds explain how his and Stott's opinions

could co-exist, and never asked Dr. McDonald which opinion was correct—his or Stott’s.

c. Summary of Trial Counsel’s Cross-Examinations

The substance of trial counsel’s questions and the confusing manner in which he asked them plainly demonstrates he was unprepared to question, challenge, and undermine Dr. McDonald’s and Stott’s opinions by focusing on the totality of the physical evidence. Many of trial counsel’s questions made no sense and Dr. McDonald’s and Stott’s responses make this clear. Both, at one point or another, asked counsel to clarify his questioning because it was so confusing and unintelligible. Overall, then, trial counsel’s decision not to expand the scope of his forensic investigation cannot be supported by his ineffective cross-examinations of Dr. McDonald and Stott. To the contrary, trial counsel’s ineffective cross-examinations proves why he needed to examine the entire scene and consult and retain a forensic expert like Mr. Turvey. Mr. Turvey would have identified numerous avenues of cross-examination undermining Dr. McDonald’s and Stott’s opinions.

d. Trial Counsel’s Closing Arguments Also Demonstrate He Should Have Expanded the Scope of his Forensic Investigation

During closing arguments, trial counsel questioned the physical evidence and scene investigation, suggesting that the physical evidence, if it had been

properly collected and examined, would have likely produced evidence in support of Mr. Wang's suicide narrative.¹⁵¹ The problem with trial counsel's argument is obvious: The jury knew trial counsel retained a forensic pathologist to review the autopsy report and photographs and offer an opinion regarding the entrance wound. Knowing this, the jury likely questioned trial counsel's decision not to retain another forensic expert to review the entire scene and all the physical evidence. Stated differently, if trial counsel truly believed the other physical evidence had the potential to support Mr. Wang's suicide narrative, he surely would have retained another forensic expert to examine this evidence and to explain how it supported Mr. Wang's suicide narrative and/or discredited the Commonwealth's homicide narrative. That trial counsel did not do this, however, likely raised suspicions with the jury to Mr. Wang's detriment.

3. Prejudice

The Commonwealth based its case on Dr. McDonald's and Stott's testimony.

The prosecutor conceded this point during closing arguments:

Dr. McDonald is the key piece in this entire case. He is the expert. He told you in order to see close-range firing, the gun would be 3 feet from the head. She is 5 foot, 2. How far do you think she could reach her arm? I am 5 foot, 9. I can just about do it. 72 pounds, 5 foot, 2. Do you really think she would shoot herself in the head, in the back of the head? It doesn't make sense. It doesn't add up.

¹⁵¹ NT, Trial, 11/5/2008, pp. 191-192.

The ballisticsian, he told you, that splatter, that is blood splatter. That is where the gun was fired from right in that general area next to the bed. There is 1-and-a-half feet between the wall and the bed. That is where this entire incident took place.¹⁵²

The case, therefore, turned on whether trial counsel could develop and present evidence from the scene that undermined Dr. McDonald's and Stott's opinions and/or supported Mr. Wang's suicide narrative. Had trial counsel consulted and retained a forensic expert like Mr. Turvey, who analyzed the *entire* scene and *all* the physical evidence, trial counsel would have developed the findings, conclusions, and opinions presented in Mr. Turvey's affidavit. Had trial counsel presented these findings, conclusions, and opinions "there is a reasonable probability" the result of Mr. Wang's trial "would have been different." *Commonwealth v. Bomar*, 104 A.3d 1179, 1202 (Pa. 2014), because, as Mr. Turvey explained in his affidavit, the evidence supporting Mr. Wang's suicide narrative far outweighs the evidence supporting the Commonwealth's homicide narrative.

The prejudice issue can best be explained by an eyewitness analogy. A hooded gunman walked onto a public basketball court and fatally shot the victim. Police quickly responded to the scene and interviewed two men who were playing basketball with the victim at the time he was shot. The other remaining players fled the scene once the gunmen opened fire. These two men, however, identified the other four men by providing officers their names and addresses. These two

¹⁵² NT, Trial, 11/5/2008, pp. 214-215.

men, moreover, ultimately identified John Smith as the gunman based on a photograph array. Detectives, though, never contacted and interviewed the other four men to determine what and who they saw during the shooting. Detectives interviewed John Smith, but Smith maintained his innocence and said he was at home alone at the time of the shooting watching *Law & Order*. Smith, though, is ultimately charged with first-degree murder based on the identification evidence.

Before trial, Smith's trial attorney hired an investigator and instructed him to interview the two men who identified Smith. Both men stuck to their identifications. Despite their confirmations, Smith's trial attorney never instructed his investigator to interview the other four men to determine what and who they saw. Instead, because his trial attorney was a skilled and experienced trial litigator with impeccable cross-examination skills, he believed he could effectively cross-examine the two men to undermine their identifications and raise sufficient doubt for an acquittal. Trial counsel's assessment, however, was wrong because the jury convicted Smith of first-degree murder based on the two men's identifications.

John Smith collaterally attacked his conviction and his PCRA attorney interviewed the other four men. All four men could not describe the gunman's face because it was covered with a hood, but each said the gunman was over 6 foot tall. John Smith, though, was only 5'5". Based on this new evidence, John Smith received a new trial because trial counsel was ineffective for not expanding the

scope of his pre-trial investigation and interviewing the other four men to determine what and who they saw. Had trial counsel interviewed the four men, trial counsel could have informed the jury that four people listed the gunman at over 6 feet tall and Smith was only 5'5".

Mr. Wang's case is similar to John Smith's case. Here, the scene characteristics and multiple items of physical evidence, *e.g.*, the strike mark's, FCC's, and gun's locations, the bedroom's dimensions, the absence of a void pattern on the left wall, the lack of blood on Mr. Wang, Lin's positioning when responding officers arrived, the fact the nightstand was knocked over, are analogous to the four men who John Smith's trial attorney did not interview. Had trial counsel expanded the scope of his forensic investigation, after consulting with Dr. Hoyer, and examined the entire scene and all the physical evidence, trial counsel had the ability to "make the truth of [Mr. Wang's] innocence visible[.]" *Luis v. United States*, 136 S.Ct. at 1089. The only difference between the eyewitness case and Mr. Wang's case is that Mr. Wang's trial counsel needed an expert to help him see and understand the exculpatory value of the scene characteristics and remaining items of physical evidence.

In the absence of Mr. Turvey's testimony or similar testimony from another forensic expert, the Court can have no confidence in Mr. Wang's conviction and requires the Court to grant him a new trial based on trial counsel's ineffectiveness.

C. Evidentiary Hearing Issue

The record and Mr. Turvey's affidavit warrant a new trial—without the need of an evidentiary hearing. The record, namely Dr. Hoyer's pre-trial reports, trial counsel's communications with Dr. Hoyer, and trial counsel's pre-trial letters to Mr. Wang, plainly demonstrates he did not have a reasonable basis for not expanding the scope of his forensic investigation and hiring an expert like Mr. Turvey to examine the entire scene and all the physical evidence.

Moreover, in rejecting this claim, the PCRA court did not challenge Mr. Turvey's qualifications or his findings, conclusions, and opinions. Rather, it merely held that trial counsel performed effectively by retaining and presenting Dr. Hoyer at trial. Under state law, moreover, neither the PCRA court nor this Court can assess the credibility of Mr. Turvey's findings, conclusions, and opinions because only the fact-finder at trial can assess Mr. Turvey's credibility and what affect his credibility would have had on Mr. Wang's trial. *Commonwealth v. Adams*, 350 A.2d 412, 416 (Pa. 1976) (“The testimony of Salina Canon and the letter from the prison doctor would have corroborated appellant's testimony about his beating and fear. We cannot determine what effect this testimony would have had in appellant's 1952 trial, but it is evidence that the jury should have had an opportunity to consider.”); *Commonwealth v. Smith*, 275 A.2d 98, 100 n. 1 (Pa. 1971) (“It is clear that the PCHA hearing judge disbelieved this witness and from a

reading of his testimony this is understandable. A 1967 post-conviction hearing judge, however, certainly cannot determine the effect an alibi witness' testimony might have had at a 1964 trial.”); *Commonwealth v. Washington*, 361 A.2d 670, 675 (Pa. Super. 1976) (“It might be argued that the error was harmless because the jury would undoubtedly have disbelieved the alibi witness’s testimony. (Grimes, it will be recalled, was appellant’s girlfriend and hence an interested witness.) Her credibility, however, is to be assessed by the fact-finder at trial, and not by the hearing judge or appellate court in PCHA proceedings.”).

Thus, because the record demonstrates trial counsel did not have a reasonable decision for not expanding the scope of his forensic investigation, Mr. Wang is entitled to a new trial without the need for an evidentiary hearing.

Claim #2: Trial counsel failed to present the testimony of Mr. Wang's three neighbors—Troy Davis, Timothy Flemings, and Rick Kern—each of whom would have corroborated salient aspects of Mr. Wang's statement and trial testimony, thereby bolstering his defense that Sharon Lin committed suicide and creating reasonable doubt regarding the Commonwealth's homicide narrative. Trial counsel's ineffectiveness prejudiced Mr. Wang because there is a reasonable probability that had trial counsel presented Davis, Flemings, and Kern the outcome of his trial would have been different. The PCRA court, therefore, erred when it rejected Mr. Wang's trial counsel ineffectiveness claim. U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

The pre-trial discovery included statements from three of Mr. Wang's neighbors—Troy Davis, Timothy Fleming, and Rick Kern.¹⁵³ In their statements, all three said that immediately after they heard a gunshot they saw and heard Mr. Wang at the second floor window frantically screaming for help and asking for someone to call an ambulance because his wife had just shot herself. During his interrogation, Mr. Wang said his wife shot herself.¹⁵⁴ At trial, Mr. Wang testified that his wife shot herself. The fact Mr. Wang—with no time to fabricate a defense or other exculpatory explanation for what happened— simultaneously asked others to help his wife and call the police and an ambulance tends to prove lack of criminal intent and lack of malice and is generally exculpatory.

¹⁵³ Rpp. 96-98, 248-251.

¹⁵⁴ Rpp. 252-261.

Trial counsel, though, never subpoenaed or called Davis, Flemings, and Kern in support of Mr. Wang's suicide defense. This despite the fact trial counsel recognized pre-trial that the outcome of Mr. Wang's trial rested largely on whether the jury believed Mr. Wang's trial testimony and version of events. Based on the record, moreover, trial counsel's decision not to subpoena and present Davis, Flemings, and Kern was based on no investigation, meaning his decision not to call these witnesses cannot be considered strategic and virtually unchallengeable.

Trial counsel's ineffectiveness prejudiced Mr. Wang and the prejudice is self-evident. These three witnesses would have corroborated Mr. Wang's version of events and hammered home the fact Mr. Wang had absolutely no time to hide the gun in the nightstand's bottom drawer and no time to fabricate a defense. In the absence of Davis, Mr. Flemings, and Kern's trial testimony, the Court can have no confidence in Mr. Wang's conviction warranting a new trial.

Claim #3: Trial counsel failed to object to inadmissible and prejudicial hearsay and “other crimes/bad acts” testimony that Mr. Wang had previously assaulted and mistreated Sharon Lin. Assuming the probative value of this evidence outweighed its prejudicial impact, trial counsel failed to request a cautionary instruction directing the jury to consider this evidence solely for the limited purpose for which it was admitted. Trial counsel’s ineffectiveness prejudiced Mr. Wang because had trial counsel timely objected, the trial court would have excluded this evidence and testimony, and had it done so, there is a reasonable probability the outcome of Mr. Wang’s trial would have been different. Likewise, if timely objected to and timely requested, the trial court would have issued a cautionary instruction prohibiting the jury from considering this evidence for propensity purposes. The PCRA court, therefore, erred when it rejected Mr. Wang’s trial counsel ineffectiveness claim. U.S. Const. amdts. 5, 6, 8, 14; Pa. Const. art. I, §§ 9, 23.

A. Underlying Facts

Commonwealth witness Denise Weber testified she was Mr. Wang’s neighbor and often saw Sharon Lin crying alone at night, and on several occasions saw Lin with swelling and bruises.¹⁵⁵ Trial counsel did not object to Weber’s testimony on the basis that it constituted impermissible “other crimes” or “bad acts” testimony.

Officer Anthony Magsam testified he had previously responded to a domestic dispute at Mr. Wang’s residence, where Mr. Wang physically abused Lin. Magsam testified that on this occasion he heard Mr. Wang yelling at Lin because Lin did not order him dinner.¹⁵⁶ Trial counsel objected on the basis that he did not

¹⁵⁵ NT, Trial, 11/4/2008, pp. 16-17.

¹⁵⁶ NT, Trial, 11/4/2008, pp. 52-53.

“open the door” when his first question on cross-examination was whether Magsam had previously seen Mr. Wang.¹⁵⁷ Trial counsel, however, did not object on the basis Magsam’s testimony constituted inadmissible “other crimes” and “bad acts” testimony. Magsam also testified Mr. Wang’s residence “was a common address” to which police frequented.¹⁵⁸ Trial counsel, however, did not object on the basis this testimony constituted inadmissible “other crimes” and “bad acts.”

Officer Ashley Johnson testified she had also previously responded to Mr. Wang’s residence for a domestic dispute. When Johnson responded, Lin complained Mr. Wang had been communicating with another woman on the Internet and that she felt “alone... in this country.” After quelling the disturbance Johnson left, but she returned later that night to quell another argument between Mr. Wang and Lin.¹⁵⁹

Officer Esteban Roche testified he read electronic communications (emails and chats) between Elaine, the “other woman,” and Lin that established Mr. Wang had been communicating regularly with Elaine, that Lin called Mr. Wang “lazy” and a “liar,” and that Lin viewed her life as very difficult.¹⁶⁰

¹⁵⁷ NT, Trial, 11/4/2008, p. 41.

¹⁵⁸ NT, Trial, 11/4/2008, p. 54.

¹⁵⁹ NT, Trial, 11/4/2008, pp. 69-70, 78, 80.

¹⁶⁰ NT, Trial, 11/4/2008, pp. 122-127.

B. Other Crimes and Bad Acts Case Law

The Commonwealth's evidence that Mr. Wang (1) physically abused Lin by inflicting bruises and swelling sufficient for a neighbor to call the police on one occasion and for the police to intervene on another, (2) verbally abused his wife by yelling at her as though she were his slave, (3) regularly caused domestic disturbances sufficient for the police to intervene on various occasions, (4) yelled at the police on a prior occasion, (5) was unfaithful in his marriage, (6) was a liar, and (7) was lazy all constituted "other crimes" and "bad acts" for which Mr. Wang was not on trial. Trial counsel, however, never objected to any of this evidence on this basis. To the extent some of this evidence was relevant and that its relevance outweighed its prejudicial impact, trial counsel never requested a cautionary jury instruction directing the jury not to consider this as propensity evidence.

1. Other Crimes/Bad Acts

Evidence that a defendant had committed prior criminal acts or previously engaged in bad behavior is universally recognized as highly prejudicial and therefore admissible only in very limited circumstances. *Old Chief v. United States*, 519 U.S. 172, 180 (1997); Pa.R.Evid. 404(b). Where highly prejudicial evidence has been admitted for a limited purpose, a prosecutor errs, and undermines the trial's fairness, when she utilizes the evidence beyond its permissible purpose. *Old Chief v. United States*, 519 U.S. 190. The prejudice versus probative value inquiry,

Pa.R.Evid. 403, is not solely a matter of state evidentiary law. Where the prejudicial impact of evidence outweighs its evidentiary value, due process is violated. *Albrecht v. Horn*, 485 F.3d 103, 128 (3d Cir. 2007).

Much of the evidence outlined above amounted to other crimes and bad acts that were irrelevant to begin with. It did not further the inquiry whether petitioner killed Lin to know that Mr. Wang (1) allegedly beat Lin on prior occasions, (2) was lazy and a liar, (3) yelled at Lin because she did not order him dinner, (4) yelled at police when they once intervened, and (5) regularly caused domestic disturbances. None of this evidence was necessary or relevant for the purpose of proving “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” Pa.R.Evid. 404(b)(2).

The only plausible purpose this evidence could have been relevant to proving was motive, but Mr. Wang’s statement provided the Commonwealth with sufficient evidence of motive. Mr. Wang willingly and honestly told detectives that he and Lin had been arguing the day before, the day of, and moments before the shooting about Mr. Wang’s Internet relationship with Elaine, their money troubles, and the fact Lin moved the T.V. in the bedroom.¹⁶¹ Thus, there was no need to introduce all the above-mentioned other crimes and bad acts testimony because the probative value of it did not outweigh its unfair prejudice to Mr. Wang. Pa.R.Evid. 404(b)(2). This substance and quantity of this evidence, in other

¹⁶¹ Rpp. 252-261.

words, amounted to character assassination, which is precisely what the prosecutor engaged in during closing arguments.¹⁶² Trial counsel, therefore, was ineffective for not objecting to the above-mentioned evidence and for not objecting to the prosecutor's character assassination during closing arguments.

2. Cautionary Instruction

The Commonwealth's theory was that Mr. Wang killed Lin when he became enraged upon discovering she was communicating with Elaine behind his back and interfering with his relationship with her. To establish motive, then, the Commonwealth introduced evidence proving Mr. Wang was being unfaithful to Lin by communicating with Elaine.¹⁶³ Assuming this evidence as well as the above-mentioned other crimes and bad acts evidence was admissible hearsay, Mr. Wang was entitled to a instruction informing the jury this evidence was only admissible for a limited purpose and could not be used as propensity evidence. *Commonwealth v. Hutchinson*, 811 A.2d 556, 561 (Pa. 2002). As the Pennsylvania Supreme Court emphasized, "it [is] extremely important that the jury understand in every case the limited purpose of such evidence." *Commonwealth v. Billa*, 555 A.2d 835, 841 (Pa. 1989). Trial counsel, therefore, was ineffective for failing to request a cautionary instruction.

¹⁶² NT, Trial, 11/5/2008, pp. 204, 205, 206.

¹⁶³ NT, Trial, 11/4/2009, pp. 111-113, 122, 124-125, 126-127.

3. Hearsay

Officer Roche's testimony that electronic communications he read between Lin and Elaine, neither of whom testified, contained statements by Lin describing Mr. Wang as a liar, a cheater, lazy, and an all-around no-good person was also inadmissible hearsay. They were out-of-court statements and the Commonwealth clearly offered them to prove the truth of the matters asserted within them, namely that Mr. Wang was a lying, cheating, lazy, all-around no-good husband and person who was fully capable of shooting his wife in cold-blood. If these out-of-court statements were not offered for their truth, they were irrelevant and inadmissible. Pa.R.Evid. 402. No exception to the hearsay ruled applied to this evidence, Pa.R.Evid. 802, and Mr. Wang did not waive the hearsay objection under the forfeiture-by-wrongdoing doctrine because there was no evidence Mr. Wang killed Lin to prevent her from testifying, a necessary element of that rule. *Giles v. California*, 552 U.S. 353 (2008). Trial counsel, therefore, was ineffectiveness for not objecting on hearsay grounds to this testimony.

C. Prejudice

Trial counsel's ineffectiveness prejudiced Mr. Wang because had he timely objected to this hearsay evidence, there is a reasonable probability the evidence would have been prohibited. By not objecting, though, the Commonwealth used this hearsay evidence for the sole purpose of assassinating Mr. Wang's character.

By assassinating his character, if the jury had any doubts regarding the Commonwealth's forensic experts and evidence, the jury could minimize these doubts by rationalizing that Mr. Wang is a terrible, abusive, and philandering husband who had the capacity and propensity to shoot his wife in cold-blood. Had the jury only been presented non-hearsay evidence regarding the shooting, the scene, and the physical evidence, there is a reasonable probability the outcome of Mr. Wang's trial would have been different.

Claim #4: Trial counsel failed to request a “missing-evidence” instruction based on the Commonwealth’s admitted negligence in failing to preserve evidence from Sharon Lin’s hands that would have enabled forensic examiners to perform gunshot residue testing on Ms. Lin’s hands. The Commonwealth’s negligence deprived Mr. Wang of his due process right to potentially exculpatory evidence. Trial counsel did not have a reasonable basis for not requesting a “missing evidence” instruction, especially after trial counsel mentioned this very fact during trial and closing arguments. Trial counsel’s ineffectiveness prejudiced Mr. Wang because had the trial court issued a “missing evidence” instruction, it is reasonably probable the outcome of Mr. Wang’s trial would have been different. The PCRA court, therefore, erred when it rejected Mr. Wang’s trial counsel ineffectiveness claim. U.S. Const. amdts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

It is standard practice to swab the decedent’s hands for gunshot residue (“GSR”) in shooting deaths where suicide is a potential manner of death.¹⁶⁴ Here, when responding officers arrived, Mr. Wang immediately told them Lin had shot and killed herself. Responding officers, therefore, knew suicide was a potential manner of death. Detective Timothy Bass, however, acknowledged that responding officers, scene detectives, and the Medical Examiner’s Office negligently failed to swab Lin’s hands for the sole purpose of determining whether GSR was on her hands.¹⁶⁵ A positive GSR test from either of Lin’s hands would

¹⁶⁴ Vincent J. DiMaio et al., *Gunshot residue testing in suicides: Part I: Analysis by scanning electron microscopy with energy-dispersive x-ray*, 28 AM. J. FORENSIC MED. PATHOL. 187-190 (2007).

¹⁶⁵ NT, Trial, 11/4/2008, p. 217.

have significantly bolstered Mr. Wang's suicide narrative because the presence of GSR is strong forensic evidence indicating Lin recently fired a gun.¹⁶⁶

“Due process requires the full opportunity to defend against the charges.” *Commonwealth v. Deans*, 610 A.2d 32, 34 (Pa. 1992). Thus, the Commonwealth has an obligation to refrain from destroying potentially exculpatory evidence that prevents the accused from fully defending himself against the Commonwealth's charges. *Commonwealth v. Chapman*, 386 A.2d 994, 1000-1003 (Pa. 1978). If the lost evidence “is such that the lower court cannot say with assurance that the [items] would not have been favorable for [the defendant],” the “appropriate remedy is to grant [the defendant] a new trial” with “a missing-evidence instruction.” *Id.* at 1005; accord *Commonwealth v. Deans*, 610 A.2d at 34. The focus under *Chapman* must be on whether the Commonwealth's conduct impeded the defendant's ability to adequately and meaningfully defend himself.

In *Dean*, for instance, after collecting an allegedly forged lottery ticket and charging the defendant, the Commonwealth negligently lost the lottery ticket, preventing the defendant from performing tests on the lottery ticket to prove that it was not forged. The error constituted a due process violation, irrespective of the Commonwealth's good or bad faith. *Commonwealth v. Dean*, 610 A.2d at 34.¹⁶⁷ In

¹⁶⁶ www.forensicmag.com/article/2014/08/gunshot-residue-collection-decisions-make-or-break-case (last visited April 9, 2017).

¹⁶⁷ Federal law is different. Under *Arizona v. Youngblood*, 488 U.S. 1 (1988), the prosecution violates the federal constitutional only if it destroyed, misplaced, or did not collect the potentially

Chapman, police destroyed a pair of undershorts, which prevented the defense from performing potentially exculpatory tests. *Commonwealth v. Chapman*, 386 A.2d at 1000-1003.

In Mr. Wang's case, the Commonwealth's negligence most certainly impeded his ability to defend himself against the homicide charge. Had trial counsel timely objected and made the proper request, citing the law outlined here, the trial court would have been obligated to issue a "missing-evidence" instruction that the jury could draw a negative inference from the fact responding officers, detectives, and the Medical Examiner's Office negligently failed to collect and preserve the potentially exculpatory GSR evidence on Lin's hands. Trial counsel did not have a reasonable basis for not objecting and requesting a missing-evidence instruction, especially after he criticized the prosecution for not swabbing Lin's hands for GSR evidence.¹⁶⁸

Prejudice, therefore, is self-evident. Had either of Lin's hands tested positive for GSR, such results would have been powerful exculpatory evidence in support of Mr. Wang's suicide narrative. The jury, therefore, should have been instructed it could draw an adverse inference from the prosecution's negligence. Based on the facts, there is a reasonable probability the jury would have drawn an

exculpatory evidence in "bad faith." Under state law, though, there is no need to determine whether the police acted in bad faith when it failed to collect and preserve GSR swabs from Lin's hands that potentially contained exculpatory GSR evidence.

¹⁶⁸ NT, Trial, 11/5/2009, pp. 190, 197.

adverse inference and had it done so there is a reasonable probability the outcome of Mr. Wang's trial would have been different. Mr. Wang is entitled to a new trial.

Claim #5: During the charge conference, when the trial court gave no mention of issuing an instruction regarding Mr. Wang's theory of defense, *i.e.*, Sharon Lin committed suicide, trial counsel failed to object and failed to request an instruction informing the jury of Mr. Wang's suicide defense. Trial counsel's ineffectiveness prejudiced Mr. Wang because had the jury been properly and specifically instructed, there is a reasonable probability Mr. Wang's trial would have turned out differently. The PCRA court, therefore, erred when it rejected Mr. Wang's trial counsel ineffectiveness claim. U.S. Const. amdts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

Mr. Wang presented a suicide defense. The trial court never instructed the jury regarding Mr. Wang's suicide defense, *i.e.*, what it was or how the jury should consider it. Trial counsel failed to object or otherwise request an instruction such as, "The defendant presented a defense of suicide. If you find that the victim killed herself, or that the evidence of suicide creates a reasonable doubt on any one of the elements of the charged offenses, then you must find the defendant not guilty."

As a general matter, "[t]he trial court is required to instruct the jury in order to clarify the issues so that they understand the questions involved. The court must also instruct on the law applicable to the issues which arise out of the evidence and the arguments presented." *Commonwealth v. Birch*, 644 A.2d 759, 762 (Pa. Super. 1994). It is black letter law that where there is evidence introduced at trial to support a particular defense, the trial court is required to instruct on it irrespective of how unpersuasive it may seem. *Commonwealth v. Borgella*, 611 A.2d 699, 700 (Pa. 1992). A defendant's due process rights are violated where the

omission of an instruction on the defense theory, when viewed in light of the totality of the circumstances, renders the trial unfair. *United States ex rel. Means v. Solem*, 646 F.2d 322, 332 (8th Cir. 1980).

Mr. Wang's theory of defense was suicide. Mr. Wang testified and told detectives Lin shot and killed herself. Dr. Hoyer testified that while it would have been difficult for Lin to shoot herself, it was still physically possible for her to do so. Despite this evidence, the trial court said nothing, at any time, about suicide during its instructions. Consequently, the trial court's failure to instruct on the theory of defense was not harmless and trial counsel should have objected and requested a proper "theory of defense" instruction.

Based on trial counsel's statements to Mr. Wang before trial and Mr. Wang's suicide defense at trial, there simply can be no legitimate reason for trial counsel to have failed to object to the omission of an instruction regarding Mr. Wang's suicide defense. Prejudice, therefore, is self-evident. Mr. Wang was deprived of having his theory of defense presented by the trial court to the jury as a viable option during its deliberations. Mr. Wang is entitled to a new trial.

Claim #6: The cumulative impact of trial counsel’s objectively unreasonable decisions before and during trial undermines confidence in the jury’s first-degree murder conviction entitling Mr. Wang to a new trial. The PCRA court, therefore, erred when it rejected Mr. Wang’s cumulative prejudice claim. U.S. Const. amdts. 5, 6, 8, 14; Pa. Const., art. 1 § 9.

“[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, 319 (Pa. 2011). A “bald averment of cumulative prejudice does not constitute a claim.” *Id.* The petitioner, therefore, must “set[] forth a specific, reasoned, and legally and factually supported argument for [his cumulative prejudice] claim.” *Id.* The collective impact of trial counsel’s numerous errors speaks for itself.

The jury heard from two Commonwealth experts who repeatedly said the physical evidence proved Lin’s death was a homicide. The jury heard from one defense expert who merely said suicide and homicide were *both equally plausible* manners of death based on the entrance wound’s characteristics. The jury, however, never heard from a forensic expert like Mr. Turvey who would have methodically explained how numerous scene characteristics and items of physical evidence supported Mr. Wang’s suicide narrative and/or undermined the Commonwealth’s homicide narrative. The jury also never heard from three eyewitnesses who described seeing Mr. Wang at the second floor window,

immediately after hearing the gunshot, screaming for someone to call an ambulance because his wife had just shot herself.

The jury also heard and substantively considered multiple inadmissible hearsay statements attacking Mr. Wang's character and painting a damning portrait of him. Even for those admissible hearsay statements, the trial court failed to instruct the jury that it could not use the other crimes and prior bad acts character evidence to establish that Mr. Wang acted in accordance with this character evidence when the shooting occurred. The totality of the hearsay character evidence, therefore, made it all the more likely the jury would find Dr. McDonald's and Stott's forensic testimony credible, reliable, and incriminating. Add to this the fact the trial court never instructed the jury regarding Mr. Wang's suicide defense and the fact the jury did not receive a missing-evidence instruction regarding the potentially exculpatory GSR evidence on Lin's hands and it is not hard to see how and why the jury convicted Mr. Wang of first-degree murder.

Again, trial counsel's objectively unreasonable decision-making played a role in each of these errors and the cumulative impact of these errors renders Mr. Wang's trial fundamentally unfair warranting a new trial for him.

Claim #7: The PCRA court erred by not granting an evidentiary hearing where trial counsel, Troy Davis, Timothy Flemings, Rick Kerns, and Brent Turvey could testify and present evidence in support of Mr. Wang's suicide narrative and trial counsel ineffectiveness. The PCRA court, therefore, erred when it rejected Mr. Wang's evidentiary hearing request. U.S. Const. amdots. 5, 6, 8, 14; Pa. Const., art. 1 § 8, 9.

It is within the PCRA court's discretion to decline to hold a hearing if the petitioner's claims are "patently frivolous" and have "no support either in the record or other evidence." *Commonwealth v. Wah*, 42 A.3d at 338. It is this Court's responsibility to examine each claim to determine if the PCRA court erred in its determination that there were no genuine issues of material fact in dispute and in denying relief without an evidentiary hearing. *Id.*

As Mr. Wang's brief painstakingly establishes, there are genuine issues of material fact regarding each of his claims. In his first claim, for instance, Mr. Turvey's 35-page affidavit plainly demonstrates and methodically discusses the disputed issues of fact regarding the physical evidence and scene characteristics.¹⁶⁹ Mr. Wang's remaining trial counsel ineffectiveness claims raise material issues of disputed fact, namely why trial counsel failed or refused to call certain witnesses, object to inadmissible hearsay evidence, or request certain jury instructions.

Mr. Wang is entitled to an evidentiary hearing.

¹⁶⁹ Mr. Wang, as mentioned, believes he is entitled to a new trial based on this claim without an evidentiary hearing. *Supra*, pp. 67-68. In the alternative, Mr. Turvey's affidavit demonstrates the material issues of fact in dispute regarding this claim.

CONCLUSION

WHEREFORE, based on the foregoing facts and authorities, Mr. Wang respectfully requests this Court to vacate his convictions and to grant him a new trial based on trial counsel's ineffectiveness.

Respectfully submitted this the 11th day of April, 2017.

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CERTIFICATE OF SERVICE

On April 11, 2017, counsel e-filed Mr. Wang's opening brief via PAC-File. The Commonwealth received email notification of the filing along with a PDF copy of Mr. Wang's opening brief.

CERTIFICATION OF COMPLIANCE

Pursuant to Pa.R.A.P. 2135(d), counsel certifies Mr. Wang's brief exceeds 14,000, but counsel filed a motion with the Court requesting permission to exceed the 14,000 word counsel and explaining why counsel needed additional words to adequately argue and complete Mr. Wang's brief.