UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

QUAWI SMITH	)	
	)	
PETITIONER-PLAINTIFF,	)	
	)	
V.	)	
	)	**2:16-CV-4762-RK**
MICHAEL OVERMYER,	)	
SUPERINTENDANT	)	
DISTRICT ATTORNEY'S OFFICE	)	
	)	
DEFENDANT-RESPONDENT.	)	
	)	

Amended 2254 Petition

1. Petitioner-Plaintiff, Quawi Smith, by and through counsel, Craig M. Cooley, respectfully files his *Amended 2254 Petition* which is presented in good faith and based on the following facts and point of authorities.

STATEMENT OF FACTS

2. On October 21, 2002, someone shot and killed Jermaine Daniels in front of the Chinese store near 58th Street and Belmar Street. The day after, on October 22nd, detectives made a significant break when an eyewitness, Julius Williams, identified the gunman as Kwamin Lester.[1] Williams gave the following account of the shooting:

[1] Ex. 1; NT, Trial, 3/30/2006, at 63, 65, 66.

a. He, Jermaine Daniels, Conrad [LKU], Jonathan Brown, and Antoine Ford were walking toward the Chinese store when a Blue Corsica tried to run over Jonathan Brown. There were two individuals in the Blue Corsica. Raheem Sample was the driver and Kwamin Lester was the passenger. The Blue Corsica drove up to Windsor Street, made a U-turn, came back, and parked in front of the Chinese store.

b. At this point, Jonathan Brown gave Jermaine Daniels a gun and told Daniels and the others to leave. Jonathan said, "I'm going back... and get these niggers, they tried to run me over, I'm tired of this shit." Jonathan left the group and walked toward 59th Street, while Williams, Daniels, Ford, and Conrad walked toward 58th Street. When Daniels stopped and turned around, however, they all walked back in Jonathan's direction. When the group caught up with Jonathan, Daniels walked across the street and had words with Raheem Sample in front of the Chinese store.

c. When Daniels turned to leave, however, Kwamin Lester exited the Chinese store and shot him, before shooting at Williams and the others with two different guns. When Williams and the others ran, Lester gave chase and continued shooting until both guns were emptied. Williams identified the guns as a .38 caliber and .22 caliber.

d. Williams told detectives Raheem Sample tried running them over because Williams and the others knew Sample was responsible for CeeDee Mausaray's murder.[2] For reasons still unknown, detectives never interviewed Kwamin Lester, nor pursued him as a suspect.[3] Nor did detective interview Raheem Sample.[4] Rather, detectives and the Commonwealth built its case against Mr. Smith based on the following individuals: (1) Kanard Jones, (2) Dell Roberson, (3) Shawnna Lee-Gibbs, (4) Antonio Ford, and (5) Detective Timothy Bass.

A. Kinard Jones

3. In April 2003, Detective Bass allegedly attempted to interview Kanard Jones, but Jones refused to talk.[5] Jones was not incarcerated in April 2003. On May 28, 2003, police arrested Jones on drug charges (CP-51-CR-1000131-2003) and again on June 29, 2003 (CP-51-CR-0808701-2003). On July 22, 2003, detectives had Jones transported to homicide where they interrogated him over the course of two days.[6] On July 23, 2003, after fifteen hours of interrogation without an attorney or food, Jones signed a statement identifying Mr. Smith as the gunman.[7] Jones identified

[2] Ex. 1.
[3] NT, Trial, 3/30/2006, at 62, 64, 65.
[4] NT, Trial, 3/30/2006, at 53.
[5] NT, Trial, 3/30/2006, at 50.
[6] NT, Trial, 3/28/2006, at 31, 41, 67.
[7] NT, Trial, 3/28/2006, at 25-32, 51-64, 67, 68, 69, 71.

Mr. Smith based on a photographic show-up, meaning Detective Bass showed Jones one photograph of only one suspect, *i.e.*, Mr. Smith.[8]

4. Jones did not handwrite his statement. Instead, Bass typed the statement *after* the interrogation and allegedly had Jones read and sign it. There is a signature on the statement, but Jones' first name is misspelled: his first name is spelled K-A-N-N-A-R-D on the statement, but the correct spelling is K-A-N-A-R-D.[9] Likewise, the date of birth on the statement is February 9, 1985, but the correct date is February 19, 1985.[10]

5. Jones allegedly told Bass he was across the street at 58th Street and Belmar Street when he saw Jermaine Daniels in front of the Chinese store. Jones said Daniels was going to confront Mr. Smith because Mr. Smith had attempted to rob Daniels a few days before. Jones allegedly told Bass he saw Daniels confront Mr. Smith, at which point Jones saw Mr. Smith pull a gun and shoot Daniels on the front left side of the forehead. Jones then saw Mr. Smith take two additional shots at Daniels as Daniels fell to the ground. Jones allegedly told Bass Mr. Smith was by himself when Daniels confronted him and he (Mr. Smith) shot Daniels. Jones also allegedly told Bass he heard gunshots from what he believed to be another gun, that Mr. Smith's gun was a small gun, but the other gun sounded like a larger gun.

[8] NT, Trial, 3/28/2006, at 56-57; *see also* NT, Trial, 3/30/2006, at 70 (Bass admitting to showing Jones a single photograph of Mr. Smith).
[9] NT, Trial, 3/28/2006, at 69.
[10] NT, Trial, 3/28/2006, at 46.

Jones allegedly told Bass he did not see the second gunman and that he ran to his grandmother's house after the shooting. Jones allegedly told Bass he knew Mr. Smith because they grew up in the same neighborhood. Although Jones allegedly grew up with Mr. Smith, Jones told Bass he only knew Mr. Smith as Quawi and did not know his last name.[11]

6. At trial, Jones denied witnessing the shooting and denied signing the statement because he would not have misspelled his name or written the wrong date of birth.[12] Jones said he learned of the shooting from his mother who saw Jermaine Daniels lying on the street after the shooting.[13] The Commonwealth impeached Jones with his statement and photographic show-up identification.[14]

7. Jones also testified that while he grew up in the same neighborhood as Mr. Smith they barely knew one another.[15] He also said he could not recall the last time he had seen Mr. Smith before Daniels' murder. He said it had to have been more than a year before the shooting.[16]

B. Shawnna Lee-Gibbs

8. Detective Bass interviewed Shawnna Lee-Gibbs ("Shawnna") on July 24, 2003, nine months after the shooting, but only a week after Dell Roberson's and Abdule

[11] NT, Trial, 3/28/2006, at 51, 55-60.
[12] NT, Trial, 3/28/2006, at 25-32, 46, 47, 65, 69.
[13] NT, Trial, 3/28/2006, at 32.
[14] NT, Trial, 3/28/2006, at 45, 55-60.
[15] NT, Trial, 3/28/2006, at 27.
[16] NT, Trial, 3/28/2006, at 32.

Johnson's drug arrests. *See infra*, ¶¶ 14-18 (discussing Roberson's and Johnson's drug arrest).[17] Shawnna is Donna Gundy's sister. Donna Gundy is Mr. Smith's mother, making Shawnna Mr. Smith's aunt.[18] After Roberson's and Johnson's arrests, Bass was "persistent" in wanting to talk with Shawnna regarding the shooting.[19] Shawnna finally agreed and asked Bass to interview her at her job.[20]

9. In her July 24, 2003 statement, Shawnna said she went to the Chinese store shortly before the shooting and saw Mr. Smith and another guy at the store.[21] Shawnna said Mr. Smith frequently carried two guns, one on each hip, but that night she did not see him with any guns.[22] She left the store and went home, but a short while later she heard several gunshots. She looked out her window and saw three men running from Belmar Street towards 58th Street. The three men ran into a house on Belmar's 5700 block. Mr. Smith was not one of the three men.[23]

10. Concerned Mr. Smith was near the vicinity of the shooting, Shawnna drove to the Chinese store. When she arrived, police had already cordoned off the scene, but when one of her friends saw Daniels' body on the ground, she told her Mr. Smith was not the victim. Shawnna returned home, called Homicide the next day,

[17] NT, Trial, 3/28/2006, at 97, 98, 102.
[18] NT, Trial, 3/28/2006, at 81.
[19] NT, Trial, 3/28/2006, at 110.
[20] NT, Trial, 3/28/2006, at 100, 110.
[21] Ex. 2.
[22] Ex. 2.
[23] Ex. 2.

and reported what she saw to Detective McKelvie, but had no further communication with Homicide after speaking with McKelvie.[24]

11. During her statement, Shawnna mentioned a June 2003 drive-by shooting of her house. She did not see the shooting, but said a neighbor told her Mr. Smith was the gunman.[25] Shawnna also told Bass that Mr. Smith visited her one day in September 2002, before the Daniels shooting, and showed her a small gun with a brown handle.[26]

12. At trial, Shawnna testified she saw Mr. Smith at the Chinese store the night of the shooting and spoke with him briefly before walking home.[27] When she saw Mr. Smith, he did not have a gun.[28] Ten to fifteen minutes later, Shawnna testified she heard gunshots from her bedroom and saw three to four men running from the area of the shooting. She could not identify the men.[29] She testified she quickly drove to the Chinese store to check on Mr. Smith. Once there, someone told her the victim was not Mr. Smith.[30]

13. After viewing her statement, Shawnna recalled telling Bass she frequently saw Mr. Smith carrying two guns.[31] She also recalled telling Bass that Mr. Smith came to her house one day in September 2002 and showed her a small gun with a

[24] Ex. 2.
[25] Ex. 2.
[26] Ex. 2.
[27] NT, Trial, 3/28/2006, at 86.
[28] NT, Trial, 3/28/2006, at 119.
[29] NT, Trial, 3/28/2006, at 90.
[30] NT, Trial, 3/28/2006, at 91-93.
[31] NT, Trial, 3/28/2006, at 103-107.

brown handle.[32] When the prosecutor asked her about the June 2003 drive-by shooting, trial counsel objected thrice on relevance and unfair prejudice grounds and asked that her testimony be stricken,[33] but the trial court overruled the objections after the prosecutor said Dell Roberson's testimony would tie the facts of the drive-by shooting together and establish its relevance.[34] Shawnna described the drive-by shooting, but did not know the gunman's identity.[35] When the trial court questioned her regarding the drive-by shooting, Shawnna said she never reported it to the police.[36]

C. Dell Roberson

14. On July 16, 2003, police went to Shawnna's house searching for a drug dealer.[37] Dell Roberson was at Shawnna's house because they had two sons together.[38] Abdule Johnson was also at Shawnna's house when police arrived.[39] Police found drugs and drug paraphernalia and arrested Roberson (CP-51-CR-1000142-2003) and Johnson (CP-51-CR-1000142-2003), but not Shawnna.[40]

15. After Roberson informed police he had information about Jermaine Daniels' murder, detectives interviewed him the next day–July 17th–where he identified Mr.

[32] NT, Trial, 3/28/2006, at 108.
[33] NT, Trial, 3/28/2006, at 96, 97, 102.
[34] NT, Trial, 3/28/2006, at 97, 101-103, 113-117.
[35] NT, Trial, 3/28/2006, at 101-102, 113-114.
[36] NT, Trial, 3/28/2006, at 115.
[37] NT, Trial, 3/28/2006, at 147.
[38] NT, Trial, 3/28/2006, at 87, 124, 147.
[39] NT, Trial, 3/28/2006, at 147.
[40] NT, Trial, 3/28/2006, at 157; Exs. 3-4.

Smith as the gunman.[41] Roberson told Bass he saw Mr. Smith at a friend's house sometime after the murder and that Mr. Smith was "acting real weird" and was "real quiet."[42] When Roberson and his friend asked Mr. Smith what was wrong, Mr. Smith allegedly said he had "just killed somebody on 59th Street" by shooting him in the head.[43] Mr. Smith then allegedly told Roberson what happened the night of the shooting.

16. Mr. Smith allegedly told Roberson he was by himself standing outside the Chinese store when 2 or 3 "boys" from 57th Street and Belmar Street approached the Chinese store. Mr. Smith said they stood across the street from the Chinese store holding guns. One of the guys approached Mr. Smith and told him not to "hustle" in that area anymore. Mr. Smith pulled his .22 or .25 caliber gun from his pants and shot the guy in the head. Mr. Smith shot the guy a few more times after he fell to the ground. Mr. Smith said one of the guy's friends must have fired shots at him because he told Roberson he got shot during the shooting. Mr. Smith then told Roberson he ran to a graveyard and hid in the grass before returning to his car.[44]

[41] NT, Trial, 3/28/2006, at 131.
[42] NT, Trial, 3/28/2006, at 136.
[43] NT, Trial, 3/28/2006, at 136.
[44] NT, Trial, 3/28/2006, at 136-138 (summarizing statement).

17. Roberson also mentioned an incident sometime after Christmas of 2002 where Mr. Smith allegedly pulled a .357 on him and threatened him.[45] Roberson also mentioned the drive-by shooting and said he saw Mr. Smith shoot five to seven times into Shawnna's house.[46]

18. After Roberson gave his statement, the Commonwealth dismissed his drug charges on February 11, 2004, but not Abdule Johnson's charges. Instead, Johnson pled guilty on July 8, 2005 and received a 3 to 6 year prison sentence.[47]

19. At trial, Roberson admitted to saying what he said in his July 17, 2003 statement, but said he fabricated the entire statement.[48] Roberson said when officers arrested him and Johnson, they also intended to arrest Shawnna, but Roberson convinced officers not to when he said he had information regarding Daniels' murder.[49] Roberson testified, though, he had no direct knowledge of the shooting, as he claimed in his statement, he never had a conversation with Mr. Smith regarding any murder, when he saw Mr. Smith sometime after the shooting, Mr. Smith did not have a gun, and he never saw Mr. Smith with a gun before Daniels' shooting. Rather, Roberson only heard, through word on the street, what supposedly happened to Daniels.[50] Roberson testified he fabricated his statement

[45] NT, Trial, 3/28/2006, at 144.
[46] NT, Trial, 3/28/2006, at 145.
[47] Exs. 3-4.
[48] NT, Trial, 3/28/2006, at 136, 145, 146.
[49] NT, Trial, 3/28/2006, at 147.
[50] NT, Trial, 3/28/2006, at 131, 140, 141, 142, 158.

to protect Shawnna: "[Shawnna] was really upset. She was crying a lot. I didn't want her to get arrested. So, I said what I heard."[51]

20. In terms of the alleged gun incident in December 2002, the prosecutor read the part of Roberson 's statement regarding this incident into the record. Trial counsel objected on relevancy and unfair prejudice grounds, but the trial court overruled it.[52] According to the statement, sometime after Christmas 2002, Mr. Smith approached Roberson's car, pulled out a .357 firearm, pointed it at Roberson, and pulled back the hammer. Mr. Smith then asked Roberson if he had a problem. When Roberson said no, Mr. Smith drove away.[53] After the prosecutor read this portion of his statement into the record, Roberson admitted it was what he told detectives, but he again admitted to fabricating this portion of his statement to ensure detectives did not arrest Shawnna.[54] Roberson also testified he did not see Mr. Smith in December 2002.[55]

21. When the prosecutor initially questioned Roberson about the drive-by shooting, Roberson testified he saw the car drive by, heard the gunshots, and said the gunman looked like Mr. Smith, but was unsure.[56] Based on the trial court's

[51] NT, Trial, 3/28/2006, at 147, 157, 158.
[52] NT, Trial, 3/28/2006, at 144.
[53] NT, Trial, 3/28/2006, at 144.
[54] NT, Trial, 3/28/2006, at 145, 146, 147.
[55] NT, Trial, 3/28/2006, at 129.
[56] NT, Trial, 3/28/2006, at 128.

prior ruling when Shawnna testified,[57] trial counsel did not object to this line of questioning or Roberson's testimony. Later during direct-examination, the prosecutor read the portion of Roberson's statement discussing the drive-by shooting into the record.[58] Before reading this portion of the statement into the record, trial counsel objected, but it was overruled.[59] After the prosecutor read the statement, Roberson testified he never told detectives that he saw Mr. Smith: "I didn't say I seen him. I can't say it was him for sure."[60]

22. Confused by Roberson's testimony, the trial court asked, "So what, you are trying to just get [Mr. Smith] in trouble that night or what? You thought you would just mention [Mr. Smith's] name to the police and implicate him?"[61] It was at this point Roberson explained why he fabricated his entire statement, *i.e.*, he did not want detectives to arrest Shawnna, so he falsely told detectives he had information regarding Daniels' murder.[62]

[57] The trial court overruled trial counsel's objections when the prosecutor asked Shawnna questions regarding the June 2003 drive-by because the prosecutor informed the trial court Roberson 's testimony would establish why the drive-by shooting questions and topic were relevant. NT, Trial, 3/28/2006, at 96, 97, 102.
[58] NT, Trial, 3/28/2006, at 145.
[59] NT, Trial, 3/28/2006, at 144.
[60] NT, Trial, 3/28/2006, at 146.
[61] NT, Trial, 3/28/2006, at 146.
[62] NT, Trial, 3/28/2006, at 146-147.

D. Antoine Ford

23. On December 9, 2003, detectives interrogated Antoine Ford, resulting in a signed statement detectives typed after the interrogation.[63] In his statement, Ford said he, Kanard Jones, Julius Williams, and Jonathan Brown were walking on Belmar Street and 58th Street when they stopped and spoke with Jermaine Daniels. They were across the street from the Chinese store. As they spoke with Daniels, Ford saw someone in the front doorway of the Chinese store. A short while later, that person walked over and had a heated argument with Daniels, prompting Daniels to shove this person. After the shoving, Daniels yelled to Jonathan; when Daniels yelled, Ford turned toward Jonathan and heard a gunshot. When Ford turned toward the gunshot, he saw Daniels fall to the ground, before hearing more gunshots. Ford ran toward 58th Street, while the gunman ran toward 60th Street. Ford said the man who argued with Daniels was not the gunman. Ford described the man who got into the argument with Daniels as 17 years-old, 5'7", and 200 lbs.[64] Ford never identified Mr. Smith as the gunman.

24. At trial, Ford said the information in his statement did not come from him. Instead, detectives fed him the information.[65] Ford also said that on December 9, 2003, he had a status hearing regarding a pending drug charge.[66] While at the

[63] NT, Trial, 3/30/2006, at 13.
[64] NT, Trial, 3/30/2006, at 17-26.
[65] NT, Trial, 3/30/2006, at 25, 28.
[66] NT, Trial, 3/30/2006, at 12, 31.

courthouse awaiting his hearing, officers detained him, transported him to Homicide, and interrogated him for several hours without *Mirandizing* him or providing him access to counsel.[67]

25. After Ford's interrogation, Bass handwrote a statement, but Ford said he did not review or sign it.[68] The only thing Ford recalled telling Bass was that he was friends with Daniels and that he knew nothing about the shooting.[69] Ford also said he did not know Mr. Smith and had never seen him before.[70] Ford did not identify Mr. Smith as the gunman.

E. Detective Timothy Bass

26. On October 22, 2002, Detective Baker interviewed Julius Williams, which included the following dialogue:

> Baker: Do you know the name(s) of the person(s) who shot and killed Jermaine Daniels?
>
> Williams: Yes. 'Kawi.'
>
> Baker: How long have you known 'Kawi'?
>
> Williams: For about four years.
>
> Baker: In that four years how often have you seen or been in the company of 'Kawi'?
>
> Williams: For the first two years straight, it was an everyday thing.

[67] NT, Trial, 3/30/2006, at 12, 31.
[68] NT, Trial, 3/30/2006, at 24.
[69] NT, Trial, 3/30/2006, at 13, 25.
[70] NT, Trial, 3/30/2006, at 28-30.

Baker: I'm showing you a photograph of a male, is this male the person you are talking about? [Shown pp/867177 assigned to Kwamin Lester]

Williams: Yes.

Baker: Is that the male that shot Jermaine Daniels on the 21st of October 2002?

Williams: Yes.

27. Baker had Williams sign and date Kwamin Lester's photograph, which he did. Williams also wrote in all capital: **HE KILLED JERMAINE**.[71]

28. Having reviewed Williams' statement and identification, Baker's report summarizing Williams' identification, and having re-interviewed Williams on April 8, 2003 solely to have Williams reconsider his identification of Lester,[72] Bass testified, "[It] wasn't my understanding that [Lester] was the actual shooter. My understanding was he was a possible suspect at that time."[73] Bass then described how he showed Williams a photo array on April 8, 2003 that included Mr. Smith's photograph, and asked Williams if he wanted to "clarify" his identification.[74] Bass said Williams recanted his identification of Lester and identified Mr. Smith as the gunman.[75]

[71] Ex. 1.
[72] NT, Trial, 3/30/2006, at 69.
[73] NT, Trial, 3/30/2006, at 63.
[74] NT, Trial, 3/30/2006, at 67-68
[75] NT, Trial, 3/30/2006, at 69.

29. The Commonwealth never presented Julius Williams and presented no evidence he was unavailable to testify. Trial counsel objected to Bass' testimony regarding Williams' identification of Mr. Smith on hearsay grounds, but the trial court overruled it.

F. Forensic Evidence

30. Responding officers found Daniels' body 1 to 2 feet from the front door of the Chinese store.[76] CSI personnel identified blood spatter inside the Chinese store.[77] They also recovered six fired cartridge cases ("FCCs") near the Chinese store as well as across the street from the Chinese store.[78] FCCs 1 and 2 were determined to be .25 caliber autos, while FCCs 3, 4, 5 and 6 were determined to be .40 caliber S&W.[79] The Commonwealth's firearms expert was certain that a minimum of two guns were fired during the shooting–a .25 caliber auto pistol and a .40 caliber S&W.[80]

31. Four bullets were collected from the scene and Daniels' body: two from Daniels' body, one from a phone booth near the Chinese store, and one from a nearby car window.[81] B2 and B3 were the bullets recovered from Daniels' body and they were determined to be .25 caliber bullets.[82]

[76] NT, Trial, 3/29/2006, at 23.
[77] NT, Trial, 3/29/2006, at 13.
[78] NT, Trial, 3/29/2006, at 13.
[79] NT, Trial, 3/29/2006, at 77.
[80] NT, Trial, 3/29/2006, at 79-81.
[81] NT, Trial, 3/29/2006, at 80.
[82] NT, Trial, 3/29/2006, at 72-75.

AEDPA DEFERENCE IS INAPPLICABLE

32. AEDPA's requirements reflect a "presumption that state courts know and follow the law," *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002); *accord Burt v. Titlow*, 134 S.Ct. 10, 15 (2013), and AEDPA "is designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). AEDPA, therefore, demands that "state-court decisions be given the benefit of the doubt[.]" *Felkner v. Jackson*, 562 U.S. 594, 598 (2011); *accord Woods v. Etherton*, 136 S. Ct. 1149, 1153 (2016).

33. AEDPA "create[d] an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings." *Uttecht v. Brown*, 551 U.S. 1, 10 (2007). AEDPA's purpose "is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction." *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (quotations and citation omitted). In the end, AEDPA's "standard is demanding but not insatiable," *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005), because "deference does not imply abandonment or abdication of judicial review" nor does it "by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

34. ADEPA deference, however, only applies when the petitioner has raised and fairly presented his federal claims in the state courts and the state courts have adjudicated these federal claims on the merits. 28 U.S.C. § 2254(d)(1) & (2). If the petitioner did not farily present a federal claim in the state courts due to initial-review post-conviction counsel's ineffectiveness, ADEPA deference is not applicable because there is not state court adjudication.

35. The first time Mr. Smith could have challenged trial counsel's advocacy was during his initial-review PCRA proceedings. *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002). All of Mr. Smith's federal trial counsel ineffectiveness ("IAC") claims raised and argued below were *not* raised and fairly presented by initial-review PCRA attorney. Mr. Smith's federal IAC claims, therefore, are defaulted. However, because of *Grant* and because Mr. Smith's federal IAC claims are "substantial" and have "merit," the Court can overlook the defaults and adjudicate Mr. Smith's federal IAC claims *de novo*. *Martinez v. Ryan*, 566 U.S. 1, 14 (2012); *accord Porter v. McCollum*, 558 U.S. 30, 39 (2009) (holding *de novo* review of the allegedly deficient performance of petitioner's trial counsel was necessary because the state courts had failed to address this prong of *Strickland* analysis); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (holding *de novo* review of the prejudice prong of *Strickland* was required where the state courts rested their rejection of an ineffective assistance

claim on the deficient performance prong and never addressed the issue of prejudice); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (same).

36. Mr. Smith's federal appellate counsel IAC claim was also not raised by initial-review PCRA counsel and is also defaulted. Mr. Smith, however, can rely on *Martinez* to overcome his default. The first time Mr. Smith could challenge appellate counsel's advocacy was during his initial-review PCRA proceedings. *Commonwealth v. Figueroa*, 29 A.3d 1177, 1180 n.6 (Pa. Super. 2011) ("Direct appeal counsel's effectiveness cannot be challenged except during a PCRA proceeding."). As a result, based on this procedural limitation and the Supreme Court's reasoning in *Martinez* and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), if initial-review PCRA counsel did not raise a "substantial" appellate counsel IAC claim, Mr. Smith can rely on PCRA counsel's ineffectiveness to establish cause and prejudice to overcome the default. *Nguyen v. Curry*, 736 F.3d 1287, 1293 (9th Cir. 2013); *Blakey v. Wenerowicz*, No. 3:13-cv-00575, 2016 U.S. Dist. LEXIS 80723, at *22-24 (M.D. Pa. June 20, 2016) (acknowledging that *Martinez* applies to defaulted appellate counsel IAC claims, but rejecting petitioner's *Martinez* argument because the allegedly meritorious appellate issue was meritless).

37. The Sixth Amendment right to effective counsel applies equally to both trial and appellate counsel. *Compare Gideon v. Wainwrigh*t, 372 U.S. 335, 344 (1963) (trial counsel) ("[A]ny person haled into court, who is too poor to hire a lawyer,

cannot be assured a fair trial unless counsel is provided for him."), and *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (trial counsel) ("[The defendant] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."), with *Evitts v. Lucey*, 469 U.S. at 396 (appellate counsel) ("A first appeal as of right… is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney."), and *Douglas v. California*, 372 U.S. 353, 3571 (1963) (appellate counsel) ("[W]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.").

38. There is nothing in the Supreme Court's jurisprudence to suggest that the Sixth Amendment right to effective counsel is weaker or less important for appellate counsel than for trial counsel. In *Coleman* v. *Thompson*, 501 U.S. 772 (1991), the Court made clear that the dividing line between cases in which state-court procedural default should, or should not, be forgiven was the line between constitutionally ineffective and merely negligent counsel:

> Where a petitioner defaults a claim *as a result of the denial of the right to effective assistance of counsel*, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that federal habeas review entails.

Id. at 754 (emphasis added).

39. In *Coleman*, the Supreme Court did not distinguish between trial and appellate counsel ineffectiveness. In *Martinez*, the Supreme Court emphasized the importance of effective appellate counsel:

> As *Coleman* recognized, an attorney's errors during an appeal on direct review may provide cause to excuse a procedural default; for if the attorney appointed by the State to pursue the direct appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims.

Martinez v. Ryan, 566 U.S. at 11.

40. *Martinez*'s fundamental point is that a "substantial" ineffectiveness claim deserves one chance to be heard during initial-review post-conviction proceedings:

> When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim... [I]f counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims.
> The same is not true when counsel errs in other kinds of postconviction proceedings[.]
> ...
> [T]he initial-review collateral proceeding... is in many ways the equivalent of a prisoner's direct appeal... because... no other court has addressed the claim.

Id. at 10-11.

41. *Martinez's* reasoning is equally true of appellate counsel ineffectiveness claims, especially in Pennsylvania. Defendants cannot raise trial counsel ineffectiveness claims on direct appeal. *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002). The Pennsylvania Supreme Court premised its holding in *Grant* on the realization that trial counsel ineffectiveness claims cannot be adequately pled and meaningfully adjudicated without the development and introduction of off-the-record evidence. *Id*. at 736-738. Appellate counsel ineffectiveness claims, however, cannot be raised on appeal not because of the necessity for off-the-record evidence, but because the appeal was the proceeding in which the ineffectiveness occurred. Consequently, the first time a Pennsylvania inmate can vindicate his Sixth Amendment and due process right to effective appellate counsel is during his initial-review PCRA proceedings. *Commonwealth v. Figueroa*, 29 A.3d at1180 n.6. In either case, initial-review PCRA proceeding is the first place in which an ineffectiveness claim can be presented, considered, and adjudicated. If an ineffective PCRA attorney procedurally defaults and forfeits an underlying trial *or* appellate counsel ineffectiveness claim, no court will ever hear that underlying ineffectiveness claim.

42. The procedural default in *Coleman* was the result of *appellate* post-conviction counsel's failure to timely appeal the trial court's denial of the petitioner's state habeas petition. *Coleman* v. *Thompson*, 501 U.S. at 727. *Martinez*,

though, made clear that the cause-and-prejudice rule was appropriate in *Coleman* because the petitioner had been able to present his claims in an initial-review post-conviction proceeding. *Martinez*, however, distinguished *Coleman*, but not on the ground that the underlying claim was an appellate counsel ineffectiveness claim. Rather, *Martinez* emphasized that *Coleman*

> did not present the occasion to apply [its holding] to determine whether attorney errors in initial-review collateral proceedings may qualify as cause for a procedural default. *The alleged failure of counsel in Coleman was on appeal from an initial-review collateral proceeding, and in that proceeding the prisoner's claims had been addressed by the state habeas trial court*.

Martinez v. Ryan, 566 U.S. at 10 (emphasis added).

43. *Martinez* was cautious to confine its holding to ineffective assistance during *initial-review* collateral proceedings in state court:

> The rule of *Coleman* governs in all but the limited circumstances recognized here. The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts. It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons.

Id. at 16 (citations omitted).

44. This passage specifies that *Martinez* applies only in the "limited circumstances recognized here." The passage, in other words, limits *Martinez* to procedural defaults by post-conviction counsel at the *initial-review* collateral proceeding. The passage, however, cannot be read to limit *Martinez* to only one kind of Sixth Amendment ineffectiveness claim, *i.e.*, *trial* counsel ineffectiveness claims.

45. This interpretation is consistent with the question the Supreme Court asked at the beginning of its opinion in *Martinez*: "[W]hether a federal habeas court may excuse a procedural default of an *ineffective assistance claim* when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding." *Id*. at 5 (emphasis added). The Supreme Court did not narrowly define the question by limiting it to trial counsel ineffectiveness claims. Instead, the question encompassed, without qualification or limitation, "an ineffective assistance claim." Consequently, *Martinez* applies to all Sixth Amendment ineffective-assistance claims, both trial and appellate, that have been procedurally defaulted by ineffective post-conviction counsel at the initial-review post-conviction proceedings.

46. On January 13, 2017, the Supreme Court granted certiorari in *Davila v. Davis*, 16-6219, to address the issue of whether *Martinez* applies to defaulted appellate counsel ineffectiveness claims.

FEDERAL CLAIMS

I. Trial and Appellate Counsel Ineffectiveness Claims

47. Mr. Smith has a right to effective trial counsel. U.S. Const. amdt. 6; *Strickland v. Washington*, 468 U.S. 668, 688 (1984). Trial counsel's purpose is to "test[] the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged." *Martinez v. Ryan*, 566 U.S. 1, 12 (2012). The right to effective representation, consequently, is "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984). Trial counsel, as a result, "has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, 468 U.S. at 688. Thus, unless a defendant receives effective representation, "a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan*, 446 U.S. 330, 343 (1980). In short, the right to effective representation is the "great engine by which an innocent man can make the truth of his innocence visible[.]" *Luis v. United States*, 136 S. Ct. 1083, 1089 (2016) (quotations and citation omitted).

48. Mr. Smith also has a due process right to effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387, 394, 396 (1985). Thus, direct appeal "require[s] careful advocacy to ensure that rights are not forgone and that

substantial legal and factual arguments are not inadvertently passed over." *Penson v. Ohio*, 488 U.S. 75, 85 (1988). While appellate counsel need not raise all non-frivolous claims, *Jones v. Barnes*, 463 U.S. 745, 752-753 (1983), they must "examine the record with a view to selecting [and presenting] the most promising issues for review." *Id*. at 752. In short, appellate counsel cannot "abandon" or dismiss "substantial matter[s] of arguable merit," but instead must "brief each significant arguable issue." *Commonwealth v. Townsell*, 379 A.2d 98, 101 (Pa. 1977).

49. To prevail on an ineffectiveness claim, Mr. Smith must demonstrate counsel's performance was deficient and the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. at 687. The deficiency prong "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. This prong is "necessarily linked to the practice and expectations of the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (quoting *Strickland v. Washington*, 466 U.S. at 688). Thus, when a court reviews an IAC claim, "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland v. Washington*, 466 U.S. at 688. The prejudice prong requires showing a reasonable probability that, but for trial counsel's errors, the proceeding's results would have been different. A

reasonable probability, in other words, "is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S at 694.

> **Claim 1: Trial counsel was ineffective for failing to make a federal confrontation objection when Bass testified to the substance of Julius Williams' April 4, 2003 testimonial, out-of-court statement, where Williams allegedly recanted his identification of Kwamin Lester and instead identified Mr. Smith as the gunman. U.S. Const. admts. 6, 8, 14.**

A. Underlying Facts

50. At trial, on cross-examination, trial counsel elicited testimony from Detective Bass that Julius Williams initially identified Kwamin Lester.[83] On redirect, when the prosecutor asked Bass whether Williams had "clarif[ied]" his identification, Bass said, "Yes, [Williams] did clarify the misidentification of October [2002], and, in fact, identified the defendant, Quawi Smith, from a photo lineup."[84] Trial counsel objected, but only on state hearsay ground, not federal confrontation grounds.[85] Moreover, the Commonwealth never presented Williams so he could testify regarding the alleged photographic identification he made of Mr. Smith on April 8, 2003 and the Commonwealth presented no evidence or argument establishing that Williams was unavailable to testify.

51. By not making a timely federal confrontation objection, trial counsel waived this claim for appellate review under state law. *Commonwealth v. Baumhammers*,

[83] NT, Trial, 3/30/2006, at 66-67.
[84] NT, Trial, 3/30/2006, at 69.
[85] NT, Trial, 3/30/2006, at 69.

960 A.2d 59, 73 (Pa. 2008) ("it is axiomatic that issues are preserved when objections are made timely to the error or offense"); Pa.R.A.P., Rule 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").

52. Trial counsel should have objected on federal confrontation grounds because Williams' alleged April 8, 2003 recantation and new identification of Mr. Smith was clearly "testimonial" under *Crawford v. Washingto*n, 541 U.S. 36, 51-52 (2004). Trial counsel's ineffectiveness prejudiced Mr. Smith because, had trial counsel objected, the trial court would have sustained the objection and prohibited Bass from mentioning Williams' alleged new identification of Mr. Smith. Had the trial court not learned of Williams' new identification, there is a reasonable probability the outcome of Mr. Smith's trial would have been different.

B. Confrontation Clause Case Law

53. The U.S. Constitution reads, in part: "In all criminal prosecutions, the accused shall enjoy the right… to be confronted with the witnesses against him[.]" U.S. Const. amdt. 6. Defendants, consequently, have the right to confront those witnesses who provide "testimonial" statements. *Crawford v. Washington*, 541 U.S. at 51-52. A "testimonial" statement is "typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact. An accuser who makes a formal statement to government officers bears testimony in a sense

that a person who makes a casual remark to an acquaintance does not." *Id*. at 51. Thus, a statement is "testimonial" if the declarant "reasonably expect[s]" the statement "to be used prosecutorially," *id*. at 51-52, or if "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006).

54. According to Bass' testimony, the primary purpose of re-interviewing Julius Williams on April 8, 2003 was "to establish or prove past events potentially relevant" to the future criminal prosecution of Jermaine Daniels' shooter. In other words, Bass interviewed Williams for the sole purpose of having him reconsider his initial identification and to make another identification of Daniels' shooter. Likewise, Williams could have "reasonable expected" his new identification of Mr. Smith to be used by the Commonwealth if and when it prosecuted Mr. Smith for Daniel's murder.

55. Consequently, Williams' identification of Mr. Smith was "testimonial" under the purest constitutional sense. Thus, had trial counsel properly objected on confrontation grounds, the trial court would have had to prohibit Bass from discussing Williams' new identification of Mr. Smith, stricken Bass' testimony regarding Williams' identification (if trial counsel objected immediately after Bass discussed Williams' testimony), or forced the Commonwealth to produce Williams so Mr. Smith could confront and cross-examine him.

C. Prejudice

56. Had the trial court prohibited Bass from testifying regarding Williams' identification or stricken Bass' testimony, it is reasonably probable the outcome of Mr. Smith's trial would have been different. Stated differently, the Court can have no confidence in Mr. Smith's convictions because the trial court heard and substantively considered Williams' out-of-court photographic identification of Mr. Smith. During closing arguments, the trial court told trial counsel it could and would substantively consider Williams' identification:

> Mr. Pugh: Judge, even if you took everything that you just said and held it to be true, then you would have to look at the misidentification. That occurred the day after in this particular case.
>
> Court: Whose misidentification?
>
> Mr. Pugh: Well, there was a Julius Jones [sic] that identified someone else other than the defendant that is sitting in the courtroom.
>
> Court: Do you know why I let that in?
>
> Mr. Pugh: And, it is fresh, Judge. It wasn't a year later like many of these statements were taken. That was taken the very next day.
>
> Court: Do you know why I let that in?
>
> ....
>
> Court: I let it in because it was too important – and I didn't know what the answer to it was – too important a

> case, the stakes are too high to not admit it, if it was in possession of the police.
>
> Mr. Pugh: Correct.
>
> Court: Now, you had it in discovery because I decided to let it in, because if there is an identification of someone other than the defendant, I certainly want to know that before I make my decision.
>
> Mr. Pugh: Sure.
>
> Court: And, then we found out that there was a second interview, which was objected to, but you wanted it in, I let it in, and [the prosecutor] has every right to have any further explanation of what about that identification, and it was cleared up as having been a misidentification. Fair enough?

57. Before Bass mentioned Williams' alleged recantation and new identification of Mr. Smith, the Commonwealth presented Jones, but Jones testified he never identified Mr. Smith and that his statement was false. The Commonwealth impeached Jones with his statement, but Jones' testimony still raised legitimate doubt regarding his alleged identification of Mr. Smith.

58. No other Commonwealth witness, besides Jones, offered direct eyewitness evidence linking Mr. Smith to the shooting. In his July 17, 2003 statement, Dell Roberson claimed Mr. Smith had told him, sometime after the shooting, that he had shot someone in the head, but Roberson admitted at trial he fabricated his statement to protect Shawnna Lee-Gibbs, his girlfriend and mother of his two

children. Roberson's testimony, therefore, also raised legitimate doubt regarding Mr. Smith's alleged confession.

59. Also, the narratives provided in Williams', Jones', and Ford's pre-trial statements as well as Mr. Smith's alleged confession to Roberson differed significantly from one another.[86]

a. Williams, who was interviewed the day after the shooting, mentioned that a blue Corsica with two passengers tried to run over Jonathan Brown. The blue Corsica then did a u-turn and parked in front of the Chinese store. Jones and Ford never mentioned a blue Corsica or any vehicle for that mater and none mentioned the fact a car tried to run over Brown. Likewise, Mr. Smith's alleged confession did not mention a blue Corsica or attempting to run someone off the street. Williams also said Daniels walked across the street, to the side of the Chinese store, and confronted Raheem Sample. Williams, though, said Sample did not shoot Daniels. Rather, while Daniels argued with Sample, Williams said he saw a man exit the Chinese store holding two guns, a .38 and a .22, and this man shot Daniels with both guns. Williams identified the gunman as Kwamin Lester. Regardless of the gunman's identity, this version of the shooting differed significantly from Jones' and Ford's statements and Mr. Smith's alleged confession.

[86] Had the Commonwealth presented Williams, as they should have, his statement would have been introduced into evidence. Williams' statement, as mentioned, differed significantly from Kanard Jones' and Antoine Ford's statements and Mr. Smith's alleged confession.

b. In Jones' statement, for instance, Bass wrote that Jones told him that he saw Daniels walk across the street to the Chinese store to confront Mr. Smith. Unlike Williams, who said Daniels confronted one of the two men who tried to run over Jonathan Brown, Jones said Daniels confronted Mr. Smith because Mr. Smith allegedly tried to rob Daniels a few weeks before. As they argued, Jones said he saw Mr. Smith pull a gun and shoot Daniels. Unlike Williams, who said the man who argued with Daniels was with someone else (*i.e.*, Lester), Jones said the man who argued with and shot Daniels was by himself.

c. According to Roberson's statement, Mr. Smith confessed to him sometime after the shooting. Mr. Smith's alleged confession, though, is inconsistent with Williams' and Jones' narratives. For instance, Mr. Smith mentioned nothing about driving a blue Corsica or trying to run over Daniels and his friends, which is odd because, if Mr. Smith confessed to Roberson about murdering Daniels, why not also mention the fact he tried to run over Daniels and his friends before he shot and killed Daniels. Likewise, whereas Williams mentioned the gunman was with someone else (*i.e.*, Lester was with Samples), Mr. Smith allegedly told Roberson he was by himself when Daniels confronted him in front of the Chinese store. Furthermore, whereas Jones said Daniels confronted Mr. Smith because of a previous robbery attempt, Mr. Smith allegedly told Roberson that Daniels confronted him because Daniels wanted him to "stop

hustling" in the area around the Chinese store. Mr. Smith also allegedly told Roberson that one of the victim's friends must have fired at him because he (Mr. Smith) got shot during the shooting. Lastly, Mr. Smith allegedly told Roberson he ran to a nearby graveyard after the shooting and hid there for a while before returning to his car and driving home. The Commonwealth presented no medical evidence that Mr. Smith ever suffered a gunshot wound the night of the shooting or anytime before or after the shooting. Likewise, CSI personnel never identified a trail of blood leading away from the shooting scene and leading to the nearby cemetery.

d. According to Ford's statement, Ford was with Jones, Williams, and Jonathan Brown when they ran into Daniels across the street from the Chinese store. Unlike Williams' and Jones' statements and Mr. Smith's alleged confession, Ford said a man who was standing in front of the Chinese store crossed the street and began arguing with Daniels. When Daniels shoved the man, the man pulled a gun and shot Daniels. In Ford's statement, therefore, Daniels got shot on the opposite side of the street of the Chinese store. This cannot be true, however, because responding officers found Daniels 1 to 2 feet away from the front door of the Chinese store.

60. Moreover, the physical evidence did not support Williams', Jones', and Ford's statement.

a. The Commonwealth's firearms expert was certain at least two guns were fired during the shooting based on the .25 caliber and .38 caliber S&W FCCs collected from the scene.

i. Williams mentioned two firearms, but he said the gunman fired two guns at once when he shot at Daniels. Thus, while this aspect of Williams' testimony is somewhat consistent with the physical evidence, it is nowhere near consistent with Jones' and Ford's statements.

ii. Jones and Ford only mentioned seeing and hearing one person shooting (*i.e.*, the gunman).

61. This was the state of the Commonwealth's case before Bass mentioned Williams' alleged recantation of his Lester identification and new identification of Mr. Smith. However, once the trial court learned of and substantively considered Williams' new identification of Mr. Smith, it is reasonably probable Williams' new identification of Mr. Smith minimized the doubts created by the physical evidence and the inconsistencies between Jones' and Ford's statements and Mr. Smith's alleged confession. This is especially likely because Mr. Smith was denied the opportunity to confront and cross-examine Williams regarding his October 22, 2002 statement and his alleged recantation and new identification on April 8, 2003.

62. Based on the trial court's statements during closing arguments and when it rendered its verdict, the trial court obviously believed Williams honestly

misidentified Lester and correctly identified Mr. Smith as the gunman. Based on these facts, the trial court substantively relied on Williams' new identification of Mr. Smith and used this line of reasoning when finding Mr. Smith guilty of first-degree murder: If Williams identified Mr. Smith, then Jones' initial identification of Mr. Smith must also be correct and Jones' trial testimony is likely false because he simply did not want to identify Mr. Smith in open court. Likewise, if Williams *and* Jones identified Mr. Smith, then Roberson's statement is true, but his trial testimony is likely false because Roberson simply did not want to implicate Mr. Smith in open court. Lastly, if Roberson's statement is true, then Mr. Smith confessed to Roberson, and Williams' and Jones' identifications must be correct.

63. Mr. Smith is entitled to a new trial.

> **Claim 2: Appellate counsel was ineffective for failing to raise a meritorious state law claim under Pa.R.Evid. 401 and 403 based Shawnna Lee-Gibbs's and Dell Roberson's trial testimony regarding the June 2003 drive-by shooting and the December 2002 incident where Mr. Smith allegedly threatened Roberson with a .357 firearm. Both incidents were irrelevant and unfairly prejudicial under Pa.R.Evid. 401 and 403 and the trial court should not have admitted and substantively considered them when it rendered its verdict. U.S. Const. admts. 6, 8, 14.**

A. Underlying Facts

64. During Shawnna Lee-Gibbs' direct-examination testimony, the prosecutor asked her about the June 2003 drive-by shooting. Trial counsel objected on

relevance and unfair prejudice grounds, but the trial court overruled the objection.[87] The prosecutor withdrew the question, but moments later the prosecutor asked Shawnna if she had "problems" at her home sometime after Daniels' murder. Trial counsel again objected on relevance and unfair prejudice grounds. The trial court overruled the objection, but only after the prosecutor informed the trial court that Dell Roberson's testimony would establish the relevance of this line of question.[88]

65. Shawnna then testified she was upstairs in her house when a bullet came through her upstairs window. She said her two children as well as her friend and her friend's two children were also in the house at the time of the shooting.[89] She said she did not see the individual who fired the bullet through the window.[90]

66. During Dell Roberson's direct-examination, the prosecutor asked him a series of questions regarding the drive-by shooting.[91] Roberson testified he saw the car drive down the street, circle the block, and drive back toward Shawnna's house, at which point he heard a shot fired. Roberson said he did not recognize the car, but testified the gunman, "looked like Quawi."[92] Trial counsel did not object to this line of questioning or Roberson's testimony because of the trial

[87] NT, Trial, 3/28/2006, at 96.
[88] NT, Trial, 3/28/2006, at 97, 102.
[89] NT, Trial, 3/28/2006, at 102.
[90] NT, Trial, 3/28/2006, at 102.
[91] NT, Trial, 3/28/2006, at 127-128.
[92] NT, Trial, 3/28/2006, at 128.

court's prior rulings regarding trial counsel's objections relating to Shawnna's testimony about the drive-by shooting.[93]

67. After the prosecutor asked a few more questions regarding the drive-by shooting, the trial court asked the prosecutor how Roberson's testimony was relevant:

> The defendant is charged with possession of an instrument of crime on the alleged date of 10-21. He's charged with homicide of Mr. Daniels. What is the relevance of his testimony or anybody else's testimony about a bullet going through the girlfriend's window?[94]

68. When prosecutor told the trial court she was "still tying" Roberson's testimony together with Shawnna's testimony, the trial court permitted the prosecutor to continue this line of questioning.[95] The prosecutor asked a series of questions unrelated to the drive-by shooting, but eventually returned to the drive-by shooting and read the portion of Roberson's statement discussing the drive-by shooting into the record.[96]

69. During his direct-examination, the prosecutor also asked Roberson about the December 2002 incident where Mr. Smith allegedly threatened him with a .357 firearm. Trial counsel objected on relevance and unfair prejudice grounds, but was

[93] The trial court overruled trial counsel's objections when the prosecutor asked Shawnna questions regarding the drive-by because the prosecutor informed the trial court Roberson 's testimony would establish why the drive-by shooting questions and topic were relevant. NT, Trial, 3/28/2006, at 96, 97, 102.
[93] NT, Trial, 3/28/2006, at 145.
[94] NT, Trial, 3/28/2006, at 129.
[95] NT, Trial, 3/28/2006, at 130.
[96] NT, Trial, 3/28/2006, at 145.

overruled.[97] The prosecutor then read the portion of Roberson's statement discussing the gun incident into the record. According to Roberson's statement, Mr. Smith was driving around the neighborhood shortly after Christmas of 2002 when he saw Roberson's car. Mr. Smith pulled along side Roberson's car, pulled out a .357 firearm, pulled back the hammer, and asked Roberson if he had a problem. When Roberson said he did not have a problem, Mr. Smith drove away.[98]

70. During closing arguments, the prosecutor emphasized the drive-by shooting and gun incident and argued that Kanard Jones, Dell Roberson, and Antoine Ford recanted their statements because they knew Mr. Smith was a bad man who would probably harm them or their family if they identified him as the gunman:

> [Shawnna] also testifies, which corroborates Mr. Roberson, is that at some point, although we are not sure of it, Mr. Roberson says that sometime after Christmas, she says that her house is shot into. And, what Mr. Roberson said, who is the neighbor across the street at that point says, that he sees the defendant; that the defendant comes out, and the first thing the defendant does is to sit there and show him a 357. This is somebody that...
>
> ...
>
> I mean pointed it at him.

[97] NT, Trials, 3/28/2006, at 144.
[98] NT, Trial, 3/28/2006, at 144.

> Then comes around the block a couple of more other times. And, then Mr. Roberson says shoots into his aunt's house.
>
> ...
>
> But, that was his message to everybody in the neighborhood, that I am going to shoot at my aunt's house, and I'm not above that. So, if you all come here and you all are going to talk about me, that is what you are looking at. And, that is why these witnesses came up here and did not testify consistently to what they told the police. Because they know what the talk in the street is. And, obviously, they know what [Mr. Smith is] capable of. He killed Mr. Daniels, and he was going to make sure that nobody talked. So, you have Miss Gibbs.
>
> ...
>
> It is clear, Your Honor, that the reason why Mr. Jones and Mr. Ford and Mr. Roberson come here and recant their statement, based upon what had happened with Mr. Smith shooting that night. Why would Mr. Roberson make that up? He has no reason to make that up. Miss Gibbs has no reason to make up the fact that someone had shot into her house.[99]

71. The trial court *substantively* relied on Shawnna's trial testimony and Roberson's statement and trial testimony regarding the drive-by shooting and gun incident when it found Mr. Smith guilty of first-degree murder. In fact, when discussing Roberson's testimony and recantation, the trial court suggested Roberson recanted his statement because, if he did not, Mr. Smith would probably harm him, like he tried to harmed Shawnna:

[99] NT, Trial, 3/30/2006, at 117, 118, 124.

Based on the evidence that I have heard and the way that I have looked at the evidence every which way that I have looked at the evidence, taken into account the three witnesses who come in here and just basically lie, as was obvious to this Court,

...

Based on their recantation of statements that they clearly, as far as this Court is concerned, gave to the police, gave some details, one of which included statement by Mr. Roberson, you know, about the -- basically the admission soon after this shooting, and Mr. Roberson's behavior and manner of testifying in here, watching him when he denied that there was any altercation involving you on the street on the days that you shot into the house, basically saying he didn't see what he said to the police or told the police that he saw, *it is an indication to me that maybe there is a very good reason why they didn't come in here and own up to the statements that they gave to the police*.

In other words, as I would tell a jury, y*ou can in fact adopt the original statements as substantive evidence, which means that I can believe everything they said in their earlier statements and this Court does, notwithstanding the fact that each of them came in here and did a dance to the south. It is not uncommon here*. I'm not concerned with other cases. But, in this courtroom I find that *they did go south for the reason* -- for whatever reason. *And, this Court chooses to believe each of their statements as substantive evidence*.

And, therefore, I conclude that on count one you are in fact guilty of first degree murder. Because these statements taken together with the fact that a man was shot in the head and then shot a second time is an indication that even in that short period of time of your anger, from that shove, you had formulated in your mind the intent to do not only great bodily harm to the

> individual that you shot, but that you intended to kill him.[100]

72. Although trial counsel timely objected to Shawnna's and Roberson's testimony regarding the drive-by shooting and gun incident, appellate counsel never raised a "substantial" state law claim under Pa.R.Evid. 401 and 403, arguing that the drive-by shooting and gun incident evidence was not only irrelevant, it was unfairly prejudicial to Mr. Smith. Appellate counsel, therefore, was ineffective and his ineffectiveness prejudiced Mr. Smith.

B. Pennsylvania Rules of Evidence

73. Under state law, evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence and (b) the fact is of consequence in determining the action. Pa.R.Evid. 401. Whether evidence has a tendency to make a given fact more or less probable is to be determined by the court in the light of reason, experience, scientific principles and the other testimony offered in the case. Pa.R.Evid. 401, *Comments*.

74. Based on Pa.R.Evid. 401, the drive-by shooting and gun incident evidence was irrelevant, *i.e.*, neither incident had a tendency to make a consequential fact more or less probable than it would be without this evidence. During closing arguments, the prosecutor *finally* explained the Commonwealth's theory of relevance. The drive-by shooting and gun incident were relevant, the prosecutor

[100] NT, Trial, 3/30/2006, at 128-131 (emphasis added).

said, because they showed that Mr. Smith was trying to eliminate or threaten witnesses who implicated him in Daniels' murder.[101] The prosecutor's argument is false and illogical: Shawnna and Roberson both testified the drive-by shooting occurred in June 2003–a *month before* they implicated Mr. Smith. Likewise, the gun incident occurred in December 2002, *seven months before* Roberson implicated Mr. Smith. Consequenlty, the only plausible reason why the Commonwealth introduced this evidence was to persuade the trial court that Mr. Smith was a violent and bad individual, *i.e.*, the type of individual who would shoot an unarmed man in the head.

75. Accordingly, because the drive-by shooting and gun incident were irrelevant to any consequential fact regarding Daniels' murder, the trial court should *not* have *substantively* considered this evidence because "[e]vidence that is not relevant is not admissible." Pa.R.Evid. 402.

76. Even if the drive-by shooting and gun incident were somehow relevant, which they clearly were not, both still should have been excluded because whatever probative value they may have had, if any, was outweighed by the danger of unfair prejudice. Pa.R.Evid. 403. In a Comment to Rule 403, unfair prejudice is defined as "a tendency to suggest decision on an improper basis or to divert the [fact-finder's] attention away from its duty of weighing the evidence impartially." Rule 403, therefore "requires a trial court to weigh probative value and prejudice—

[101] NT, Trial, 3/30/2006, at 117, 118, 124.

the costs and benefits of relevant evidence—viewing it as part of a whole and not in isolation. Inherent in the rule is the assumption that the court has an adequate record, one that will mirror or provide great insight into what will develop at trial." *Commonwealth v. Hicks*, 91 A.3d 47, 53 (Pa. 2014). The trial court ultimately ruled on the admissibility of the drive-by shooting and gun incident when it issued its verdict. Thus, the trial court had an adequate record to conclude that the drive-by shooting and gun incident were not only irrelevant, they were unfairly prejudicial.

77. The extreme prejudice from the drive-by shooting and gun incident evidence speaks for itself. The drive-by shooting and gun incident were nothing more than "prior bad acts" evidence aimed at persuading the trial court that Mr. Smith acted in conformity with these prior acts or to show Mr. Smith's criminal and violent propensity. However, "evidence of prior bad acts or unrelated criminal activity is inadmissible to show that a defendant acted in conformity with those past acts or to show criminal propensity." *Commonwealth v. Sherwood*, 982 A.2d 483, 497 (Pa. 2009) (citing Pa.R.E. 404(b)(1)). The trial court, moreover, should exercise its discretion "to exclude the other-crimes evidence, even when it has substantial independent relevancy, if in [its] judgment its probative value for this purpose is outweighed by the danger that it will stir such passion in the [fact-finder] as to sweep them beyond a rational consideration of guilt or innocence of the crime on trial." *Commonwealth v. Ulatoski*, 371 A.2d 186, 191 n.11 (Pa. 1977).

78. That the Commonwealth did not file a pre-trial 404(b) motion adds significant credence to the fact the Commonwealth presented the gun incident drive-by shooting for one reason only: to inflame the fact-finder's passions and to persuade it that Mr. Smith was a violent indivual in order to divert the fact-finder's focus away from the significant shortcomings with the Commonwealth's case, such as: (1) Julius Williams identified Kwamin Lester as the gunman, (2) the bullets and FCCs collected from the scene proves at least two guns were discharged during the shooting, (3) the fact Kanard Jones identified Mr. Smith nine-months after the shooting based on a photographic show-up, (4) the Commonwealth never produced Julius Williams to discuss the alleged recantation of his initial identification of Lester and new identification of Mr. Smith, (5) the fact Jones recanted his alleged identification of Mr. Smith, (6) the fact Dell Roberson testified he fabricated his statement to protect Shawnna Lee-Gibbs, (7) the fact Williams', Jones', and Antione Ford's narratives regarding the shooting differed significantly from one another, and (8) the fact none of the Commonwealth's witnesses made an in-court identification of Mr. Smith.

79. Rather than presenting eyewitness and forensic evidence to explain the inconsistencies with its witnesses' statements and the forensic evidence, the Commonwealth presented irrelevant and prejudicial evidence that portrayed Mr. Smith as a violent man who drove around his neighborhood wreaking havoc on

and threatening neighbors and even family members. Indeed, according to Shawnna's and Roberson's testimony, Mr. Smith fired a shot into a house that had two adults and *four children* in it at the time of the shooting. What better way to divert the fact-finder's attention away from the many shortcomings of the Commonwealth's case than to introduce testimony that Mr. Smith's violent and reckless behavior put the lives of four children in grave danger.

80. Had appellate counsel raised this state law evidentiary claim on appeal, counsel would have had to demonstrate the trial court abused its discretion by substantively considering the gun incident and drive-by shooting. "Abuse of discretion is not merely an error of judgment, but rather where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will." *Commonwealth v. Aikens*, 990 A.2d 1181, 1184-1185 (Pa. Super. 2010). Based on the record before the trial court, its decision to admit and substantively rely on the drive-by shooting and gun incident when rendering its verdict was manifestly unreasonable because the evidence had absolutely no relevance to any consequential fact regarding Jermaine Daniels' murder and it was extremely prejudicial. The trial court, therefore, abused its discretion.

C. Prejudice

81. The trial court's error prejudiced Mr. Smith. That the evidence should have been excluded under Rule 403 explains and demonstrates the prejudice. Had the evidence been excluded, it is reasonably probable the outcome of Mr. Smith's trial would have been different.

82. When it rendered its verdict, the trial court made clear it believed Kanard Jones, Dell Roberson, and Antoine Ford's trial testimony was false and that all three fasley testified and refused to implicate Mr. Smith because all three feared Mr. Smith. According to the trial court, all three feared Mr. Smith because they knew Mr. Smith had a proclivity to threaten and harm people if they harmed or disrespected him in any way, such as implicating him in a murder. The irrelevant and prejudicial drive-by shooting and gun incident, therefore, formed the foundation of the trial court's reasoning for disbelieving and discrediting Jones', Roberson's, and Ford's trial testimony.

83. Without this irrelevant and prejudicial evidence, in other words, there is a reasonable probability the trial court's focus would have been properly directed at the relevant and non-prejudicial evidence and the numerous shortcomings of the Commonwealth's case. Had the trial court fairly considered and evaluated the Commonwealth's case, instead of focusing on Mr. Smith's alleged prior bad acts,

there is a reasonable probability the outcome of Mr. Smith's trial would have been different.

84. For instance, the trial court could have found Mr. Smith guilty of third-degree murder. As trial counsel argued,[102] the forensic evidence clearly established two firearms discharged bullets during the shooting which strongly suggested that, if Mr. Smith shot Daniels, there is a real possibility Mr. Smith and Daniels had words and that both pulled weapons and fired at one another. Likewise, the trial court could have aquitted Mr. Smith of all charges because the Commonwealth simply did not prove that Mr. Smith was, in fact, the shooter.

85. In short, there is a reasonable probability that had appellate counsel raised this claim on direct appeal, the state courts would have ruled in Mr. Smith's favor and granted him a new trial. Mr. Smith, therefore, is entiled to a new trial based on appellate counsel's prejudicial ineffectiveness.

> **Claim 3: Trial counsel was ineffective for failing to file a motion to suppress Kanard Jones' photographic show-up identification of Mr. Smith and for failing to object to the admission of Jones' photographic show-up identification of Mr. Smith. U.S. Const. admts. 6, 8, 14.**

A. Underlying Facts

86. The Commonwealth presented only one witness, Kanard Jones, who allegedly identified Mr. Smith as the man who shot Jermaine Daniels. At trial, Jones did not identify Mr. Smith as the gunman, but the Commonwealth

[102] NT, Trial, 3/30/2006, at 91-94.

introduced his statement where he allegedly identified Mr. Smith as the gunman after Detective Bass showed him a single photograph of Mr. Smith. Jones, therefore, allegedly identified Mr. Smith nine months after the shooting based on a photographic show-up. The photographic show-up was unnecessary because Bass could have easily incorporated Mr. Smith's photograph into a photo array, like Bass allegedly did with Julius Williams on April 8, 2003.

87. During her closing arguments, the prosecutor relied extensively on Jones' statement and identification Mr. Smith to argue that the Commonwealth had met its burden of proving Mr. Smith guilty of first-degree murder:

> So, I would say to Your Honor as I would say to a jury, you, as the finder of fact, you have to decide do you believe what Mr. Ford and Mr. Roberson and Mr. Jones said here on the stand, or, as I would tell a jury, the law says that you can take this statement, if it is made verbatim, if it is adopted, as if these were the words that Mr. Ford and Mr. Jones and even Mr. Roberson spoke. The words that they spoke to the police, they spoke here to the jury.
>
> And, if you look at their statements, Your Honor, these statements are exquisite with detail, indicating that they were there.
>
> Mr. Jones says that I was across the street in the 58th Street block of Belmar, and Jermaine was across the street at the Chinese store. There was -- Jermaine was standing outside the store.
>
> And, Your Honor, I would submit to you that both of them were right outside that store.

> Then I saw the defendant pull a gun and he shot Jermaine in the head. And, he's pointing to the left side of his forehead. Then Jermaine went down, and he shot him one other time.
>
> **He says**: Then I start running. I ran down 59th Street to Windsor, and then ran to my grandmom's house. Before I ran away, I saw Quawi running down Belmar Street going to the cemetery.
>
> You know, Your Honor, based on the testimony from Officer Moore that in fact there is a very large cemetery. That if you run west, as Mr. Jones I submit to you saw Mr. Smith run, there is a cemetery right there.
>
> And, I submit to Your Honor that the 40 caliber, because Mr. Jones also in his statement says **in the question**: Did you have a gun that night? Answer: No. But, I could tell that somebody else was shooting another gun. It sounded bigger than the gun that Quawi used to kill Jermaine. That gun started firing after Quawi already shot Jermaine and he was running away.
>
> It's perfectly consistent with where the 40 fired cartridge cases are found, which are across the street.
>
> All the boys come down the street. They wait for Jermaine to cross the street. Jermaine crosses the street.[103]

88. While articulating its reasons for finding Mr. Smith guilty of first-degree murder, the trial court ruled that it substantively considered Jones' statement.[104]

[103] NT, Trial, 3/30/2006, at 119-122.
[104] NT, Trial, 3/30/2006, at 129-132.

89. Under state law, a photographic show-up constitutes "a clearly suggestive procedure." *Commonwealth v. Bradford*, 451 A.2d 1035, 1036 (Pa. Super. 1982) ("We deplore the single photograph procedure utilized by the police officer in this case. The display of a single photograph to a witness by the police in this case was a clearly suggestive procedure."). Likewise, under state law, "[f]ollowing a suggestive pre-trial identification procedure, a witness should not be permitted to make an in-court identification unless the prosecution establishes by *clear and convincing evidence* that the totality of the circumstances affecting the witness's identification did not involve a substantial likelihood of misidentification." *Commonwealth v. Fowler*, 352 A.2d 17, 19 (Pa. 1976). Despite these facts and case law, trial counsel failed to file a pre-trial suppression motion asking that Jones' photographic identification be suppressed.

90. The failure to file a suppression motion fell below professional norms and it prejudiced Mr. Smith. Had a suppression motion been filed there is a reasonable probability Jones' identification would have been suppressed, and had it been suppressed, there is a reasonable probability the outcome of Mr. Smith's trial would have been different.

B. Eyewitness Case Law

91. Identification evidence "is arguably the most powerful form of evidence." *Commonwealth v. Walker*, 92 A.3d 766, 779 (Pa. 2014). Although powerful, eyewitness identifications are also "widely considered to be one of the least reliable forms of evidence." *Id*. We know this from the voluminous scientific research and the three-hundred plus DNA exonerations. *Id*; *accord* www.innocenceproject.org (as of March 8, 2017, there have been 349 DNA exonerations and eyewitness misidentification is the greatest contributing factor in these cases, playing a role in more than 70% of exonerations). In short, "advances in scientific study have strongly suggested that eyewitnesses are apt to erroneously identify a person as the perpetrator of a crime when certain factors are present." *Id*. at 780 (emphasis added).

92. The U.S. Constitution "protects a defendant against a conviction based on evidence of questionable reliability[.]" *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012). Eyewitness evidence, therefore, is viewed critically under the Due Process Clause, *Kirby v. Illinois*, 406 U.S. 682, 690-691 (1972) ("[I]t is always necessary to scrutinize any pretrial confrontation[.]"), especially when identifications are procured using unnecessarily suggestive procedures because "[e]yewitness evidence derived from suggestive circumstances… is uniquely resistant to the ordinary tests of the adversary process." *Perry v. New Hampshire*, 565 U.S. 228, 252

(2012) (Sotomayer, J., dissenting); *United States v. Wade*, 388 U.S. 218, 229 (1967) ("[T]he influence of improper suggestion upon identifying witnesses… accounts for more miscarriages of justice than any other single factor.").

93. Due process, consequently, "requires suppression of an eyewitness identification" when "law enforcement officers use an identification procedure that is both suggestive and unnecessary." *Perry v. New Hampshire*, 565 U.S. at 238-239. Unnecessary suggestiveness, therefore, "contains two component parts: that concerning the suggestiveness of the identification, and that concerning whether there was some good reason for the failure to resort to less suggestive procedures." *United States v. Stevens*, 935 F.2d 1380, 1389 (3d Cir. 1991).

94. Even if an identification procedure is both suggestive and unnecessary, "suppression of the resulting identification is not the inevitable consequence." *Perry v. New Hampshire*, 565 U.S. at 239. Instead of mandating a *per se* exclusionary rule, "the Due Process Clause requires courts to assess, on a case-by-case basis, whether improper police conduct created a 'substantial likelihood of misidentification.'" *Id*. at 238 (quoting *Neil v. Biggers*, 409 U.S., 188, 201 (1972). Where the "indicators of [a witness'] ability to make an accurate identification are outweighed by the corrupting effect of law enforcement suggestion, the identification should be suppressed." *Id.* at 239 (quotation and citation omitted).

In short, accuracy "is the linchpin in determining the admissibility of identification testimony[.]" *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

95. Trial courts may consider the following factors when assessing the accuracy of an unnessarly suggestive identification: (1) the witness's opportunity to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of prior descriptions provided by the witness; (4) the witness' level of certainty regarding his identification; and (5) the length of time between the crime and identification. *Manson v. Brathwaite*, 432 U.S. at 114.

C. Application of Eyewitness Case Law

1. Unnecessarily Suggestive

96. Under state law, as mentioned, a photographic show-up constitutes "a clearly suggestive procedure." *Commonwealth v. Bradford*, 451 A.2d at 1036. In *Bradford*, the victim had her pocketbook "snatched" from her at around 9:00 a.m. The victim told detectives she got a "good look" at the perpetrator's side "profile." The victim chased the perpetrator for "several minutes," but was only "able to observe" his "facial characteristics for three to four seconds." *Id*. at 1036. When a bystander heard the victim's screams and ran toward the scene, he saw the perpetrator's face twice for a "minimum" of "eight to ten seconds." *Id*.

97. Two days after the robbery, detectives showed the victim a single photograph of Bradford. The victim could not identify Bradford because her

primary view of the perpetrator was a side profile view, not a "front facial" view. *Id*. At the preliminary hearing, which was held nineteen days after the incident, the victim indicated that while Bradford had less hair than the perpetrator, she said Bradford was the right size, had the right build, and possessed almost identical features as her assailant. At trial, five months after the incident, the victim positively identified Bradford as the robber. *Id*. at 1036. In regards to the eyewitness, when detectives showed him a single photograph of Bradford nine days after the incident, the witness identified Bradford as the robber. This witness positively identified Bradford at both the preliminary hearing and trial. *Id*.

98. At trial, Bradford filed a suppression motion asking that the victim's and witness' out-of-court and in-court identifications be suppressed. The trial court denied the motion. On appeal, the first thing the Pennsylvania Superior Court said was, "We deplore the single photograph procedure utilized by the police officer in this case. The display of a single photograph to a witness by the police in this case was a clearly suggestive procedure." *Id*. at 1036.

99. The facts here are indistinguishable from *Bradford*. Thus, the manner in which Bass showed Jones a single photograph of only one suspect, *i.e.*, Mr. Smith, constitutes a "clearly suggestive procedure." This outcome is unsurprising because the "practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned," *Stovall v.*

Denno, 388 U.S. 293, 302 (1967), "because, by its very nature, it suggests that the police think they have caught the perpetrator of the crime." *United States v. Brownlee*, 454 F.3d at 138.

100. Bass' photographic show-up was also *unnecessary* because there were no exigent circumstances requiring a photographic show-up. *Brisco v. Ercole*, 565 F.3d 80, 88-89 (2d Cir. 2009) ("Exigent circumstances generally weigh in favor of concluding that a showup identification procedure was not unnecessarily suggestive[.]"). For instance, a show-up procedure "may be necessary in such circumstances to quickly confirm the identity of a suspect, or to ensure the release of an innocent suspect." *Stovall v. Denno*, 388 U.S. at 302 (concluding that suggestive show-up identification procedure did not violate due process because sole eyewitness to crime was at risk of dying and was unable to travel from her hospital bed to police station for lineup). Likewise,

> [i]mmediate show-ups can serve... important interests. For example, show-ups allow identification before the suspect has altered his appearance and while the witness' memory is fresh.... In our view, such considerations will justify a show-up in a limited number of circumstances, such as where the police apprehend a person immediately after the crime and in close proximity to the scene.

Vazquez v. Rossnagle, 163 F. Supp. 2d 494, 498 (E.D. Pa. 2001) (citing *United States v. Funches*, 84 F.3d 249, 254 (7th Cir. 1996)).

101. Bass interviewed Jones nine months after the shooting. However, neither Bass nor the Commonwealth explained why Bass could not have presented Jones with a photo array. Indeed, according to Bass, he showed Julius Williams a photo array on April 8, 2003. If a photographic array was possible for Williams, it was surely possible for Jones. When there are no exigent circumstances, a photo array or line-up should "be employed whenever necessary to ensure the accuracy and reliability of identifications[.]" *United States v. Sebetich*, 776 F.2d 412, 420 (3d Cir. 1985).

2. Substantial Likelihood of Misidentification

102. Based on following factors, had trial counsel moved to suppress Jones' identification, there is a reasonable probability it would have been suppressed.

103. *First*, Jones' identification is inherently unreliable because the narrative he gave regarding the shooting was so dramatically different than the narratives provided by Julius Williams and Antoine Ford.[105] This uncertainty undermines Jones' identification and makes it inherently unreliable.

104. *Second*, Jones made his alleged identification nine months after the shooting.

105. *Third*, its was dark out when the shooting occurred.

[105] Had trial counsel filed a timely pre-trial motion, he (or they) could have referenced the extreme differences between Williams' and Jones' statements. At the suppression hearing, trial counsel could have introduced Williams' statement into the record to demonstrate the dramatic differences between Jones' and Williams' statements.

106. *Fourth*, Jones never actually described the gunman before Bass showed him a photograph of Mr. Smith. Thus, there is no way to determine if Jones could actually describe the gunman; if so, if Mr. Smith actually fit Jones' description; and if Jones' identification of Mr. Smith was based on his memory of the shooting or the clearly suggestive context by which Bass showed him only one photograph of one suspect, *i.e.*, Mr. Smith.

107. *Fifth*, had trial counsel filed a suppression motion, Jones would have testified, and based on his trial testimony, there is a reasonable probability Jones would have testified he did *not* identify Mr. Smith because he did *not* witness he shooting.

108. *Sixth*, Jones never made an in-court identification of Mr. Smith at trial, a suppression hearing, or the preliminary hearing.

109. *Seventh*, the "corrupt" or "suggestive" manner in which Bass asked Jones to identify the gunman, *i.e.*, by showing him a photograph of only one suspect, outweighed those factor(s) indicating Jones correctly identified Mr. Smith, if there were any such factors.

110. Consequently, had trial counsel moved to suppress Jones' identification before trial, there is a reasonable probability the trial court would have suppressed it.

3. Prejudice

111. The introduction of Jones' identification prejudiced Mr. Smith. There is "nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says '*That's the one*!'" *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (emphasis in original; citation omitted). Had Jones' identification been suppressed, there is a reasonable probability the outcome of Mr. Smith's trial would have been different.

112. Jones' identification bolstered Julius Williams' identification and Dell Roberson's statement that Mr. Smith allegedly confessed to him. Williams' identification had to be viewed with some doubt because the Commonwealth never produced Williams to testify. Jones' identification, however, removed this doubt because if Jones identified Mr. Smith, then Williams' identification must be accurate and if Williams' identification is accurate so to must be Jones' identification. There also had to be some doubt with Roberson's statement based on Roberson's trial testimony indicating he fabricated his statement to protect Shawnee Lee-Gibbs. Jones' and Williams' identifications, however, removed this doubt because if Jones and Williams correctly identified Mr. Smith, then Roberson's statement was more likely to be true than his trial testimony. If Roberson's statement was true, then Mr. Smith confessed, and if Mr. Smith confessed, then Jones' and Williams' identification had to be accurate.

113. Without Jones' identification, in other words, there is a reasonable probability the outcome of Mr. Smith's trial would have been different. Mr. Smith, therefore, is entitled to a new trial based on trial counsel's prejudicial ineffectiveness.

Claim 4: Trial counsel was ineffective for failing to introduce evidence regarding Dell Roberson's July 16, 2003 drug arrest, which ultimately resulted in his July 17, 2003 statement implicating Mr. Smith, as well as the fact the Commonwealth dismissed Roberson's drug charges. U.S. Const. admts. 6, 8, 14

A. Underlying Facts

114. The Commonwealth's case rested in significant part on Dell Roberson's July 16, 2003 statement. At trial, Roberson admitted he told detectives that Mr. Smith confessed to him, but he said he fabricated the statement to protect Shawnna. According to Roberson, officers had come to his house looking for a drug dealer and when they found drugs they were going to arrest him, his friend, and Shawnna. Roberson saw that Shawnna was scared and upset, so he told officers he had information regarding Jermaine Daniels' murder.[106]

115. Roberson, though, never mentioned (1) that officers actually arrested him, (2) the date of his arrest, and (3) the date he gave his statement. Neither the prosecutor nor trial counsel introduced evidence corroborating Roberson's testimony–even though such evidence was easily accessible before trial. With no

[106] NT, Trial, 3/28/2006, at 147.

evidence corroborating Roberson's explanation for why he fabricated his statement, the trial court found Roberson's trial testimony incredible and his statement credible:

> Based on their recantation of statements that they clearly, as far as this Court is concerned, gave to the police, gave some details, one of which included statement by Mr. Roberson, you know, about the -- basically the admission soon after this shooting, and Mr. Roberson's behavior and manner of testifying in here, watching him when he denied that there was any altercation involving you on the street on the days that you shot into the house, basically saying he didn't see what he said to the police or told the police that he saw, it is an indication to me that maybe there is a very good reason why they didn't come in here and own up to the statements that they gave to the police.[107]

116. Had trial counsel simply run Roberson's name through the Philadelphia County docket database before trial they would have learned the following facts. Officer Ralph Domenic arrested Roberson (CP-51-CR-1000142-2003) and his friend Abdule Johnson (CP-51-CR-1000142-2003) on July 16, 2003 and charged both with possession with intent to deliver, possession of an instrument of crime, and criminal conspiracy.[108] There are no docket records indicating Officer Domenic arrested Shawnna Lee-Gibbs on this date.

[107] NT, Trial, 3/30/2006, at 129-130.
[108] Exs. 3-4.

117. Roberson gave his statement to Detective Bass incriminating Mr. Smith the next very day-July 17, 2003. There are no records indicating Johnson gave a statement implicating Mr. Smith in Jermaine Daniels' murder. The Commonwealth dismissed Roberson's charges on February 11, 2004, but not Abdule Johnson's charges. Instead, Johnson pled guilty on July 8, 2005 and received a 3 to 6 year prison sentence.[109]

B. Prejudice

118. The absence of this information prejudiced Mr. Smith. Had trial counsel developed, presented, and argued this evidence there is a reasonable probability the trial court would have actually believed Roberson's testimony regarding why he falsely claimed that Mr. Smith confessed to him. The sequence of events and the fact Officer Domenic never arrested Shawnna adds significant corroboration and credibility to Roberson's trial testimony.

119. Likewise, Roberson's statement that Mr. Smith confessed to him was suspect to begin with because the narrative Mr. Smith allegedly told Roberson differed significantly from the narrative Karnard Jones allegedly told Bass. Jones, for instance, told Bass Daniels confronted Mr. Smith because Mr. Smith had attempted to rob Daniels a few weeks before. Roberson, though, told Bass that Mr. Smith allegedly confessed that Daniels confronted him (Mr. Smith) because he was "hustling" near the Chinese store. Likewise, Jones never mentioned that anyone

[109] Exs. 3-4.

other than Mr. Smith fired a gun during the shooting. Roberson, however, told Bass that Mr. Smith allegedly confessed that one of Daniels' friends had to have shoot at him because he (Mr. Smith) got shot during the shooting. Lastly, despite allegedly suffering a gunshot wound during the shooting, CSI personnel never located a trail of blood leading away from the scene.

120. In the end, had the trial court found Roberson's trial testimony credibile and truthful, there is a reasonable probability the outcome of Mr. Smith's trial would have been different. If Roberson's testimony was true, then Mr. Smith did not confess to him. If Mr. Smith did not confess, then the doubts regarding Jones' and Williams' identifications are significant enough to raise reasonable doubt.

121. Mr. Smith is entitled to a new trial based on trial counsel's prejudicial ineffectiveness.

> **Claim 5: The cumulative prejudice from trial counsel's and the trial court's multiple errors so undermine the trial court's verdict that it violates Mr. Smith's right to due process. U.S. Const. admts. 6, 8, 14.**

122. The "cumulative error doctrine allows a petitioner to present a standalone claim asserting the cumulative effect of errors at trial that so undermined the verdict as to constitute a denial of his constitutional right to due process." *Collins v. Sec'y of the Pa. Dep't of Corr.*, 742 F.3d 528, 542 (3d Cir. 2014); *accord Albrecht v.*

Horn, 485 F.3d 103, 139 (3d Cir. 2007) (holding that petitioner could not show that the cumulative prejudice of trial errors "undermined the reliability of the verdict").

123. A cumulative evidence claim is a "standalone claim" that must be raised in the state courts. *Collins v. Sec'y of the Pa. Dep't of Corr.*, 742 F.3d at 542. Initial-review PCRA counsel did not raise a standalone cumulative evidence claim. The Court, therefore, must review the claim *de novo*. Under *de novo* review, relief must be granted if there is a reasonbable probability the outcome of the petitioner's trial would have been different had the multiple errors not occurred.

124. There is a reasaonble probability that had the four abovementioned errors not occurred the outcome of Mr. Smith's trial would have been different.

a. Confrontation error: Bass' testimony regarding Julius Williams' "testimonial" statement and identification allowed the trial court to substantively consider Williams' identification of Mr. Smith without cross-examination. Thus, Mr. Smith was deprived of the opportunity to undermine Williams' identification. The trial court, therefore, substantively considered what it believed to be a *pristine* and *accurate* identification of Mr. Smith. Indeed, the trial court, itself, described Williams' initial identification of Kwamin Lester as a *misidentification*, which clearly meant the trial court believed Williams' identification of Mr. Smith was accurate and correct. Cross-examination, however, would likely cast significant doubt on Williams' identification because trial counsel would have emphasized the

significant differences between Williams' narrative of the shooting and Kanard Jones' and Antoine Ford's narratives. As mentioned, Williams' identification impacted the trial court's view of Jones' identification and Mr. Smith's alleged confession to Dell Roberson. Williams' identification made Jones' identification appear more believable and accurate and Roberson's statement that Mr. Smith confessed to him more credible.

b. Prior Bad Acts: Williams' unconfronted identification significantly bolstered the Commonwealth's case; so to did the the prosecutor's irrelevant and prejudicial use of the drive-by shooting and gun incident. Both prior bad acts did nothing other than assassinate Mr. Smith's character and paint him as a violent criminal who had no problem threatening or killing people. Neither were relevant to whether Mr. Smith shot and killed Jermaine Daniels.[110]

c. Unnecessarily suggestive identification: Just as Williams' identification bolstered Jones' identification, Jones' identification bolstered Williams' identification, which in turn made Roberson's statement regarding Mr. Smith's alleged confession more believable. The prior bad acts evidence also made the

[110] If Mr. Smith threatened Roberson with a .357 and committed the drive-by shooting, these alleged incidents did not prevent Roberson and Shawnna from implicating Mr. Smith in Daniels' murder, even though both alleged incidents occurred *before* Roberson and Shawnna gave their statements. This fact, on its face, debunks the trial court's rationale for disbelieving Roberson's trial testimony. If Roberson was scared of Mr. Smith, because Mr. Smith allegedly pulled a .357 on him and alleged confessed to him to murdering someone, then Roberson surely would have never implicated Mr. Smith in his July 17, 2003 statemen to Bass.

identifications and alleged confession more believable because the trial court viewed Mr. Smith as a violent individual.

d. Evidence surrounding Dell Roberson's arrest: The lack of evidence corroborating Roberson's trial testimony regarding why he falsely claimed Mr. Smith confessed to him, impacted the trial court's credibility assessment of Roberson. The information contained in the docket sheets shows that Officer Domenic arrested Roberson and Abdule Johnson on July 16, 2003, but not Shawnna, and charged both with multiple felony drug charges. Roberson gave his statement implicating Mr. Smith the very next day–July 17, 2003. The docket sheets also show the Commonwealth dismissed Roberson's charges in February 2004, but forced Johnson to pled guilty and serve a 3 to 6 year prison term.

e. This evidence corroborates Roberson's testimony regarding why he falsely claimed Mr. Smith confessed to him, but trial counsel did not develop or present this evidence during cross-examination. The absence of this evidence allowed the trial court to find Roberson's trial testimony incredible, which in turn made Roberson's statement more credible. If Roberson's statement was credible, then his claim that Mr. Smith confessed to him must be true, and if Mr. Smith confessed, Jones' and Williams' identifications must be true and accurate.

125. In short, each trial error affected how the trial court perceived the Commonwealth's evidence. All four errors made the Commonwealth's evidence

appear more incriminating, while making Mr. Smith look like a violent man. Thus, there is a reasonable probability that had the four errors not occurred the outcome of Mr. Smith's trial would have been different.

126. Mr. Smith is entitled to a new trial based on the cumulative impact of all four trial errors.

CONCLUSION

127. WHEREFORE, based on the forgoing facts and authorites, Mr. Smith respectfully requests the Court to issue him a writ of habeas corpus because his conviction are unconstitutional under federal law and the U.S. Constitution.

Respectfully submitted this the **13th day** of **March, 2017**.

/s/Craig M. Cooley
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CERTIFICATE OF SERVICE

On March 13, 2017, counsel e-filed Mr. Smith's *Amended 2254 Petition* using the CM/ECF system. The Commonwealth, therefore, received an email notification of the filing along with a PDF copy of Mr. Smith's *Amended 2254 Petition*.