Received 6/16/2018 10:39:23 PM Superior Court Eastern District

Filed 6/16/2018 10:39:00 PM Superior Court Eastern District
4046 EDA 2017

SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA **Appellee-Respondent,**	)	
v.	)	**4046 EDA 2017** **CP-51-CR-0011476-2011** **PCRA: Non-capital** **DeFino-Nastasi, J.**
RAFIQ DIXON **Appellant-Petitioner.**	)	

Petitioner-Appellant's Opening Brief

Appeal from the November 12, 2017 Order Dismissing Rafiq Dixon's PCRA Petition Entered by the Honorable Rose Marie Defino-Nastasi of the Philadelphia County Common Pleas Court, Criminal Division, CP-51-CR-0011476-2011

Craig M. Cooley
COOLEY LAW OFFICE
1308 Plumdale Court
Pittsburgh, PA 15239
Pa. Bar No.: 315673
412-607-9346 (cell)
919-287-2531 (fax)
craig.m.cooley@gmail.com
www.pa-criminal-appeals.com
Counsel for Rafiq Dixon

TABLE OF CONTENTS

TABLE ON AUTHORITIES

CASES

CODES/RULES/STATUTES

STATEMENT OF JURISDICTION

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

ORDER OR OTHER DETERMINATION IN QUESTION

Under appeal is the November 17, 2017 order dismissing Rafiq Dixon's PCRA petition entered by the Honorable Rose Maria Defino-Nastasi of the Philadelphia County Common Pleas Court, Criminal Division, CP-51-CR-0011476-2011.[1]

On December 15, 2017, Mr. Dixon appealed.[2]

On January 11, 2018, Mr. Dixon filed his *Concise Statement of Errors on Appeal*.[3]

On March 27, 2018, Judge Defino-Nastasi filed her 1295(a) opinion.[4]

PROCEDURAL HISTORY

On October 6, 2011, the Commonwealth filed an *Information* charging Rafiq Dixon him with first-degree murder and VUFA in connection with

---

[1] Rp. 1. Rp = Reproduced Record page number(s).
[2] Rp. 3.
[3] Rpp. 7-9.
[4] Rp. 10.

Joseph Pinkney's April 27, 2011 shooting death. Mr. Dixon pled not guilty and proceeded to a jury trial before the Honorable Rose Marie DeFino-Nastasi ("trial court"). Robert Mozenter served as trial counsel. On July 25, 2012, after four (4) days of deliberations, the jury convicted Mr. Dixon of first-degree murder and VUFA. The trial court sentenced him to life imprisonment for the murder conviction.

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

On December 1, 2015, Mr. Dixon filed his PCRA petition,[5] which he supplemented on August 27, 2017 and August 30, 2017.[6] On November 17, 2017, the PCRA court denied Mr. Dixon's PCRA petition without a hearing.[7] On December 15, 2017, Mr. Dixon appealed.[8]

---

[5] Rpp. 22-29.
[6] Rpp. 30-63.
[7] Rpp. 105-114, 115-117.
[8] Rp. 1.

ISSUES PRESENTED

Mr. Dixon respectfully submits the following claims for the Court's consideration and adjudication:

> Claim #1: Trial counsel was ineffective for not presenting the mother of Mr. Dixon's two children, Ima Francis, as an alibi witness, even though Mr. Dixon told trial counsel before trial he was with Ima Francis at the time of the shooting and instructed trial counsel to present Ima Francis as an alibi witness. U.S. Const. amdts. 5, 6, 8, 14; Pa. Const., art. I, §§ 8, 9.
>
> Claim #2: Trial counsel was ineffective for not presenting Mr. Dixon's mother, Sonya Dixon, as a defense witness to rebut Zelenia Lomax's testimony and the Commonwealth's claim Mr. Dixon fled, even though Mr. Dixon told trial counsel before trial his mother would refute Zelenia Dixon's pre-trial statement and trial testimony and the Commonwealth's claim he fled after Pinkney's murder. U.S. Const. amdts. 5, 6, 8, 14; Pa. Const., art. I, §§ 8, 9.
>
> Claim #3: Trial counsel was ineffective for advising Mr. Dixon not to testify because, if he testified, the Commonwealth could impeach him with his 2008 possession with intent to sell or deliver ("PWID") conviction. Mr. Dixon's PWID conviction, however, is not a *crimen falsi* and therefore could not have been used by the Commonwealth to impeach Mr. Dixon had he testified. U.S. Const. amdts. 5, 6, 8, 14; Pa. Const., art. I, §§ 8, 9.
>
> Claim #4: The cumulative prejudice from trial counsel's multiple unreasonable acts or omissions rendered Mr. Dixon's trial fundamentally unfair. U.S. Const. amdts. 5, 6, 8, 14; Pa. Const. art. I, § 8, 9.

Claim #5: If the Court finds the record insufficient to engage in meaningful appellate review of Mr. Dixon's trial counsel ineffectiveness claims, it should remand Mr. Dixon's case to the PCRA court with instructions to hold an evidentiary hearing where Mr. Dixon, Ima Francis, Sonya Dixon, and trial counsel can testify and the PCRA court can make the types of findings and conclusions necessary for meaningful appellate review. U.S. Const. amdts. 5, 6, 8, 14; Pa. Const. art. I, § 8, 9.

STANDARD OF REVIEW

A. Standard of Review – Claims #1 thru #4

In reviewing the grant or denial of PCRA relief, the Court examines whether the PCRA court's findings and conclusions are supported by the record and free of legal error. *Commonwealth v. Mitchell*, 141 A.3d 1277, 1283-1284 (Pa. 2016). The PCRA court's factual findings are entitled to deference, but its legal conclusions are reviewed *de novo*. *Commonwealth v. Hawkins*, 894 A.2d 716, 722 (Pa. 2006).

To prevail on an ineffectiveness claim, Mr. Dixon must demonstrate trial counsel performed deficiently and the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The deficiency prong "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to] the defendant by the Sixth Amendment." *Id.* at 687. The prejudice prong requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome," *Id.* at 694, which is "not a stringent" standard because it is "less demanding than the preponderance standard." *Hall v. Kyler*, 190 F.3d 88, 110 (3d Cir. 1999).

Under state law, Mr. Dixon must show (1) his claim has arguable merit, (2) trial counsel's action or inaction lacked a reasonable basis, and (3) prejudice. *Commonwealth v. Pierce*, 527 A.2d 973, 975–976 (Pa. 1987). *Pierce* is identical to *Strickland*: deficient performance and prejudice. *Commonwealth v. Spotz*, 870 A.2d 822, 829 (Pa. 2005).

B. Standard of Review – Claim #5

The right to a PCRA evidentiary hearing is not absolute. *Commonwealth v. Jordan*, 772 A.2d 1011, 1014 (Pa. Super. 2001). It is within the PCRA court's discretion to decline to hold a hearing if the petitioner's claims are "patently frivolous" and have "no support either in the record or other evidence." *Commonwealth v. Wah*, 42 A.3d 335, 338 (Pa. Super. 2012). It is this Court's responsibility to examine each claim raised in the PCRA petition in light of the record to determine if the PCRA court erred in its determination that there were no genuine issues of material fact in controversy and in denying relief without conducting an evidentiary hearing. *Id.*

STATEMENT OF FACTS

A. Shooting and Investigation

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

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

Investigators did not have a suspect until Zelenia Lomax contacted investigators on May 8, 2011 and told them her "cousin," Rafiq Dixon, purchased a cell phone from Pinkney in November 2010. The cell phone did not work, so Mr. Dixon "and his friends jumped" Pinkney. Pinkney then approached Mr. Dixon's mother, Sonya Dixon, and Sonya and Pinkney "had words." Sonya told Mr. Dixon about Pinkney approaching her and Mr. Dixon allegedly told Lomax, "I'm going to kill him when I see [him], won't nobody

know what I did." Mr. Dixon also allegedly told Lomax, "[D]on't nobody run up on my mom like that." Lomax told investigators she spoke with Mr. Dixon and told him she would give him $100 to resolve the cell phone issue, but Mr. Dixon allegedly told her "he didn't want the money" because "it was not about the money."[9]

Lomax did not recall the month or date when Pinkney told her about Mr. Dixon and his friends jumping him, nor did she recall the month or date when she confronted Mr. Dixon about the cell phone issue and offered to give him $100 to resolve the issue.[10]

On May 16, 2011, police picked up Devon Collins and brought him to Homicide for questioning. According to Collins's typed-written statement, which he allegedly signed, he was with Shaquil Gressom walking toward the corner store when Pinkney approached him and asked if he wanted to purchase zanax pills. As he spoke with Pinkney, the gunman accosted Pinkney and shot him. Collins said he recognized the gunman as "Feek," someone he had seen around the neighborhood the last four years or so. Collins described Feek as 5'4" and brown skinned. Collins identified Mr. Dixon as the gunman

[9] Rpp. 64-65.
[10] Rpp. 64-65.

from an 8-man photo array. Collins mentioned nothing about the gunman wearing a shirt or towel around his face to mask his identity.[11]

On May 22, 2011, police picked up Shaquil Gressom and brought him to Homicide for questioning. Gressom corroborated Collins's statement regarding Pinkney approaching Collins about purchasing zanex as well as the gunman accosting and shooting Pinkney. Gressom said he "didn't know" the gunman and he "froze" when he saw the gunman accost Pinkney. Gressom said he "ran off down Race Street" after the first shot. As he ran, Gressom "looked back and saw" the gunman "shoot four more times" at Pinkney. Gressom described the gunman as a "short" black male. Gressom then allegedly identified Mr. Dixon as the gunman from an 8-man photo array. Gressom's statement mentioned nothing about the gunman wearing a shirt or towel around his face to mask his identity.[12]

B. Preliminary Hearing

1. Shaquil Gressom

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

[11] Rpp. 68-72.
[12] Rpp. 73-78.

the gunman's eyes.[13] Based on the shirt, the prosecutor asked Gressom if he could identify the gunman in court. Gressom said, "Not really."

> Prosecutor: When the shooter came around the corner, did you see his face?
>
> Gressom: No, he had a shirt covering his face.
>
> Prosecutor: What part of his face was covered?
>
> Gressom: The nose and mouth area.
>
> Prosecutor: Could you see any part of his face?
>
> Gressom: No, but just the eye part, that's about it.
>
> Prosecutor: Okay. Based upon what you saw, are you able to identify the shooter?
>
> Gressom: Not really.
>
> Prosecutor: Do you see the person in the room that was there that night?
>
> Gressom: No.[14]

After the prosecutor impeached Gressom with his May 22, 2011 statement, where he identified Mr. Dixon as the gunman, Gressom made an in-court identification of Mr. Dixon.[15] On cross-examination, Gressom said he

---

[13] NT, Prelim. Hrg., 10/5/2011, pp. 12-13, 34, 36.
[14] *Id.*, p. 13.
[15] *Id.*, pp. 25-26.

smoked marijuana every day and he was high at the time of the shooting because he had smoked a bag of marijuana not long before the shooting.[16] Gressom also admitted on cross that the shooting "happened real quick," that he "ran" after the first shot because he was "scared to death," and that he had never seen the gunman before.[17] Gressom also said he told detectives during his May 22, 2011 interview that the gunman had a shirt covering his nose and mouth.[18]

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

> Counsel: So when you said that is the man, you meant that this is the man that you put a circle around in this picture; is that correct?
>
> Gressom: Yes
>
> Counsel: Well, who told you to put a circle around that picture, anybody?
>
> Gressom: No.
>
> Counsel: Well, why did you pick that picture out?

[16] *Id.*, p. 30.
[17] *Id.*, pp. 31, 36, 37.
[18] *Id.*, pp. 34-35.

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

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

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

....

Counsel: Well, why did you sign it?

Gressom: So I could go home.

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

Gressom: I wasn't there that long. They was gonna keep me if I wasn't going to tell them nothing.[19]

2. Devon Collins

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

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

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

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

[19] *Id.*, pp. 38-39.

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

...

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

Collins: Yes.

Prosecutor: Where was the gun pointed?

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

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

Collins: No.

...

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

Collins: No.

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

Collins: No, I didn't see. He had a shirt over his head from when the camera – when we was in the district, the camera has him poke his head around the corner.[20]

[20] *Id.*, pp. 44, 45, 46-47.

On cross-examination, Collins said he ran after the first shot, not after seeing the gun.[21]

Collins said he returned to the corner store a "few days" after the shooting and asked if it had surveillance footage of the shooting. It did, and he watched the footage. Collins claimed he recognized Mr. Dixon as the gunman from the video footage.[22] Despite recognizing Mr. Dixon as the gunman the night of the shooting as well as a few days after the shooting, Collins never contacted authorities and reported this information.[23] Collins said he did not contact police because the shooting was "none of my business."[24]

On cross-examination, when trial counsel asked how he could have identified the gunman if the gunman had a shirt wrapped around his face, Collins said he captured a glimpse of the gunman's face because the shirt was "coming down."[25]

In terms of his May 16, 2011 statement, Collins said detectives picked him up, said he was under investigation for a homicide, and took him to Homicide

---

[21] *Id.*, p. 63.
[22] *Id.*, pp. 47-48.
[23] *Id.*, pp. 55-56, 72.
[24] *Id.*, p. 63.
[25] *Id.*, pp. 62-63.

where he stayed for two days handcuffed to a chair.[26] He said detectives showed him photographs of the shooting, but not the video footage. Detectives arrested him two months later, in July 2011, charged him with being a material witness, and placed him on house arrest. Collins was still on house when he testified at the preliminary hearing.[27]

C. Trial

1. Devon Collins

Collins testified and said he recognized the gunman as "Feek" when the gunman accosted Pinkney. He said he had known Feek for "some years" and had seen him "around the area" a "few times."[28] Collins said the shooting happened very quickly and that when he first looked at the gunman his attention and focus were on the gun, not the gunman's face.

> Prosecutor: What was it that drew your attention to him?
>
> Collins: The gun.[29]

---

[26] *Id.*, pp. 64-69.
[27] *Id.*, p. 72.
[28] NT, Trial, 7/17/2012, pp. 141-142, 154, 157, 159.
[29] *Id.*, p. 159.

When Collins shifted his focus to the gunman, he saw a towel or shirt covering the gunman's face, exposing only his eyes and nose.[30] Despite only seeing the gunman's nose and eyes, Collins still recognized the gunman as "Feek," someone he had known for "some years" and had seen "around the area" a "few times."[31] Collins said he was "sure it was Feek that came around the corner and did the shooting."[32]

Collins then said the shirt "fell off" when the gunman ran "around the corner" and accosted Pinkney.[33] The prosecutor showed Collins exhibit C-29, the video footage of the shooting, and stopped the video as the gunman turned the corner, and asked, "[D]id the shirt fall from his face at this point?" Collins said, "Yes." The prosecutor then asked, "So you can see his face at this point?" Collins replied, "Yes."[34]

On cross-examination, trial counsel impeached Collins with his preliminary hearing testimony, where Collins repeatedly said he did not see where the gunman came from and that when he saw the gunman he focused on the gun, not the gunman's face, and that he immediately ran when he saw

---

[30] NT, Trial, 7/17/2012, pp. 159-160, 161.
[31] *Id.*, pp. 141-142, 154, 157, 159, 161.
[32] *Id.*, p. 232.
[33] *Id.*, pp. 162-163, 187-188.
[34] *Id.*, pp. 186-187

the gun.[35] Trial counsel then played C-29 to show the jury that the gunman's shirt did not fall down.[36] After playing C-29, Collins admitted he could not see the gunman's face when the gunman turned the corner and accosted Pinkney:

> Counsel: You can't see his face there, can you?
>
> Collins: No.
>
> Counsel: As a matter of fact, what you do see is a person running around the corner with something over his head; isn't that right?
>
> Collins: Yes.[37]

Collins said he heard a "click" and assumed the gunman's gun jammed. Collins did not see what the gunman did after he heard the "click" because he ran once he heard the "click."[38] On cross-examination, Collins said he "took off" when he saw the gun because he was scared of getting shot.[39] Collins, therefore, said he never actually saw Pinkney get shot and that he only learned Pinkney was shot after he, *i.e.*, Collins, returned to the corner store that

---

[35] *Id.*, pp. 206-209 (referring to NT, Prelim. Hrg., 10/5/2011, pp. 44-45, 46-47).
[36] *Id.*, pp. 220-221, 222.
[37] *Id.*, p. 222.
[38] *Id.*, pp. 144-145.
[39] *Id.*, p. 219.

night.[40] Collins heard gunshots as he ran, but he was unsure how many and told prosecutor he "wasn't counting" as he ran.[41]

Collins said he saw the video footage a "few days" after the shooting when he returned to the corner store and asked to see the video. When he viewed it, he said he recognized Mr. Dixon as the gunman.[42] Despite knowing the gunman's identity, Collins never contacted the police because, according to him, he "didn't have anything to do with it."[43]

In terms of his statement, Collins said police picked him up, took him to Homicide, handcuffed him to a chair in an interrogation room, and questioned him for two days.[44] During his statement, Collins described the gunman as 5'4" and brown skinned.[45]

2. Shaquil Gressom

Shaquil Gressom testified and said, "Somebody came around the corner with a gun and just waved it and I just stood there."[46] Gressom also said the gunman "just stood there for a second and then approached [Pinkney]."[47] He

---

[40] *Id.*, p. 148.
[41] *Id.*, p. 146.
[42] *Id.*, pp. 178-179.
[43] *Id.*, pp. 150, 198-199.
[44] *Id.*, pp 153, 199-201, 202-203, 214, 223-224, 225.
[45] *Id.*, p. 156.
[46] NT, Trial, 7/18/2012, p. 57.
[47] *Id.*, p. 59.

saw the gun and said the gunman was pointing it "straightforward" with both arms outstretched in front of him.[48] He also heard Pinkney say, "stop, chill, don't, don't."[49] When Gressom saw the gunman, he "backed up" and ran once he heard the first shot.[50] Once Gressom began running he did not see the gunman so he did know what direction the gunman ran.[51] Gressom heard four more shots as he ran.[52]

When the gunman turned the corner, Gressom said he did "not quite" look at the gunman, but when the gunman accosted Pinkney a second later, he saw the gunman and the gunman did not have "anything covering his face."[53] Gressom said he "really couldn't" see the gunman's face, but then said he "seen his face."[54] Gressom also said he wore glasses because he has difficulty seeing: "I wear glasses. I see you. I didn't see you very well but I seen you."[55] Gressom said he had never seen the gunman before.[56]

---

[48] *Id.*, p. 59.
[49] *Id.*, p. 58.
[50] *Id.*, pp. 58, 60.
[51] *Id.*, p. 62.
[52] *Id.*, p. 63.
[53] *Id.*, p. 73.
[54] *Id.*, p. 73.
[55] *Id.*, pp. 73-74.
[56] *Id.*, pp. 67-68, 80, 82.

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

> Prosecutor: Did the shooter have his face covered or not?
>
> Gressom: No.
>
> Prosecutor: Did you see the shooter's face?
>
> Gressom: Yes.[57]

Gressom described the gunman as shorter than 5'7", stocky, and husky.[58] Gressom then said, "I seen the man's face. He is in this courtroom. He is right there. There is no if, and's or but's."[59] When the prosecutor asked if he identified Mr. Dixon from a photo array, Gressom said he did not immediately identify Mr. Dixon and that he had to look at the photographs a couple times.[60]

On cross-examination, Gressom admitted to being high on marijuana when the shooting occurred and to smoking marijuana "once and awhile."[61] In terms of the shooting, Gressom said the shooting happened "very quickly,"

---

[57] *Id.*, p. 74.
[58] *Id.*, p. 76.
[59] *Id.*, p. 72.
[60] *Id.*, p. 79.
[61] *Id.*, pp. 80-81.

he ran "very fast" after the first shot because he was scared, and as a result, he did not turn around and did not see anything after the first shot.[62] When asked whether he spoke with the prosecutor or detectives before trial, Gressom said police picked him up the day before he testified, held him at Homicide, and told him he was not free to leave.[63]

Trial counsel impeached Gressom with his preliminary hearing testimony where he testified the gunman had a shirt around his face. Gressom told trial counsel his preliminary hearing testimony "was a lie."[64] Trial counsel then had the following back-and-forth with Gressom regarding what parts of his preliminary hearing testimony were untrue.

> Counsel: So you lied under oath?
>
> Gressom: No. It was right there. He had his face covered. When the first shot fired, I left.
>
> Counsel: You said under oath this person who did the shooting had a shirt around his face and today you are saying he didn't have a shirt around his face.
>
> Gressom: I told you I was nervous.
>
> Counsel: But were you nervous when you told the cops he had a shirt around his face?

---

[62] *Id.*, p. 82.
[63] *Id.*, pp. 83-84.
[64] *Id.*, p. 90.

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

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

Gressom: So you lied under oath?

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

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

Gressom: Yeah.

Counsel: Is that a lie too?

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

Counsel: Because you took off?

Gressom: Yeah.

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

Gressom: He did for a minute, yeah.

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

Gressom: Yeah.

> Counsel: You never saw that person before in your life?
>
> Gressom: I never did.
>
> Counsel: So the person did have something around his face when he came around the corner, is that correct?
>
> Gressom: For a second, yeah.
>
> ...
>
> Counsel: [Asked about prelim testimony where Gressom said he only saw the gunman's eyes] and asked, "Is that a lie too or is that the truth?"
>
> Gressom: No. That was the truth.
>
> Counsel: So you didn't see the man's face. You just saw his eyes, a person you had never seen before in your life. You hear a gunshot. You take off in the opposite direction. That is the truth; right?
>
> Gressom: Yeah.[65]

When Gressom said he – and not detectives – picked Mr. Dixon's photograph out of the photo array, trial counsel impeached him with his preliminary hearing testimony where he said, "They [*i.e.*, detectives] picked it out, to tell you the truth."[66] Gressom replied that his preliminary hearing testimony was untrue.[67]

---

[65] *Id.*, pp. 90-92.
[66] *Id.*, p. 96 (referencing NT, Prelim. Hrg., 10/5/2011, pp. 38-39).
[67] *Id.*, p. 96.

When trial counsel asked about his May 22, 2011 statement, Gressom testified he "said anything" that "came to [his] mind" when he spoke with the detectives so "they would get off [his] back" and let him go home.[68] Gressom's response spawned this back-and-forth with trial counsel:

> Counsel: So you gave a statement because you were afraid they were going to keep you; right?
>
> Gressom: Yeah.
>
> Counsel: You didn't want to get arrested or be involved in any homicide; right?
>
> Gressom: Yeah.
>
> Counsel: They told you to give a statement because, otherwise, you weren't going home; right?
>
> Gressom: Yes.[69]

Trial counsel asked again if his preliminary hearing testimony - where he said detectives picked out Mr. Dixon's photograph - was true. Gressom now said it was true.

> Counsel: So you didn't' know who that man was they were showing you? They told you to pick that picture out, didn't they?
>
> Greesom: Yeah.[70]

---

[68] *Id.*, pp. 96-97.
[69] *Id.*, pp. 97-98.
[70] *Id.*, p. 99.

On redirect, the prosecutor first asked, "Do you agree that you just said two different things to me and to Defense Counsel just now about who picked out the person's picture who did the shooting in the statement?"[71] Gressom immediately backtracked from his cross-examination testimony and told the jury he was the one who picked Mr. Dixon's photograph from the photo array, not the detectives.[72]

He also said when the gunman came around the corner the gunman was holding the gun in one hand and holding his t-shirt up over his nose with his other hand. Gressom said the t-shirt covered half of the gunman's face, but he also said the t-shirt briefly "came down," which allowed him to capture a glimpse of the gunman's face for a "split second" before the gunman readjusted the t-shirt over his nose.[73]

3. Zelenia Lomax

Zelenia Lomax testified and said she knew Pinkney because she dated his cousin Nigel Johnson.[74] She said she had a conversation with Pinkney regarding a cell phone 2 or 3 weeks before his death.[75] Trial counsel objected

---

[71] *Id.*, p. 104.
[72] *Id.*, p. 105.
[73] *Id.*, pp. 105-107.
[74] *Id.*, p. 13.
[75] NT, Trial, 7/18/2012, pp. 15-16, 18.

several times on hearsay grounds because Lomax kept referring to what Pinkney told her. The trial court sustained the objection and asked Lomax, "They were fighting over a cell phone?" Lomax said, "Yes."[76] Lomax said Pinkney sold cell phones and other items throughout the neighborhood.[77]

Based on what Pinkney told her regarding the cell phone, Lomax went to Mr. Dixon's house and spoke with Mr. Dixon, who allegedly told her that Pinkney "pulled a gun on [his] mom[.]"[78] Lomax said, "At one point I was like all of this is about a cell phone. I could give you a few dollars and [Mr. Dixon] said to me, if I kill him, nobody would know because he burnt so many people in the neighborhood."[79] Lomax testified she offered to give Mr. Dixon $100 to replace the cell phone, but Mr. Dixon allegedly told her "it ain't about the money."[80]

Lomax did not report Mr. Dixon's threat to the police because she "didn't believe it" at the time, but she told Pinkney about Mr. Dixon's threat.[81] After learning of Pinkney's murder, Lomax never confronted Mr. Dixon

---

[76] *Id.*, p. 17.
[77] *Id.*, pp. 18, 19.
[78] *Id.*, p. 16.
[79] *Id.*, p. 16.
[80] *Id.*, p. 18.
[81] *Id.*, p. 20.

because she did not think Mr. Dixon "did it" and she did not want to believe he did it.[82] Lomax, however, said she had a conversation with Nigel Johnson after Pinkney's murder and Johnson – who was Pinkney's cousin – encouraged her to contact the police. Lomax decided to call, but had Johnson make the initial call to the police.[83]

On cross-examination, Lomax said she spoke to Mr. Dixon about the cell phone issue two weeks after Pinkney told her Mr. Dixon and his friends jumped him, but Lomax could not recall the month or date of this alleged conversation.[84]

4. Jury Instructions, Deliberations, and Questions

The trial court gave a *Kloiber* instruction regarding Collins's and Gressom's identifications.[85] The jury deliberated for four days – July 19th, 20th, 24th, and 25th – during which time it asked ten questions:

> Question #1: "The jury requests the video exhibit from in front of the store, the poster exhibit of the street, and the poster exhibit of the body."
>
> Question #2: "May the jury have the photo array as given to both eyewitnesses during their interviews

[82] *Id.*, pp. 21, 28, 29.
[83] *Id.*, p. 22.
[84] *Id.*, pp. 26-27.
[85] *Id.*, pp. 185-186.

> and the photo of 'Tracey' and the court's record regarding Tracy."
>
> Question 3: "May the jury have the trial testimony given regarding 'Tracey' read to us."
>
> Question: #3a: "May the jury have the photo arrays to both eyewitnesses at their interviews and the photo of Tracy."
>
> Question #4: "The request to see the defendant stand so we may better see what he looks like."
>
> Question #5: "May the jury request all the crime scene photos with the flags showing the scene and the shells."
>
> Question #6a: "Could we please see the police (statement) Shaquille [sic] Gressom and Devon gave to authorities on 5/22/12 and 5/11/12 [sic]."
>
> Question #6b: "May the jury request to see the video of the incident."
>
> Question #7a: "We could like to here [sic] Devon's testimony of how and when he ID'd the defendant."
>
> Question #7b: "We would like to hear the trial testimony of how Devon identified the shooter as he came around the corner and the description of the alleged covered face."[86]

After asking these questions, on the fourth day of deliberations, July 25th, the jury sent a note informing the trial court it was deadlocked: "The jury

[86] Rpp. 79-89.

at this time is at a deadlocked. We are unable to come to a decision, and we don't expect to reconcile to a unanimous vote at any point."[87] The trial court read a standard *Allen* charge and instructed the jury to continue deliberating.[88] After further deliberations, the jury sent the trial court another question regarding Zelenia Lomax:

> Question #9: "The jury would like to hear the testimony of Zellina [sic] Lomax with regard to her conversation with Rafik [sic] and 'Joseph Pinkney."[89]

'

[87] Rp. 90; NT, Trial, 7/25/2012, pp. 2-3.
[88] NT, Trial, 7/25/2012, pp. 3-4.
[89] Rp. 91.

ARGUMENTS

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

A. Introduction

Eyewitness identification is "one of the least reliable forms of evidence." *Commonwealth v. Walker*, 92 A.3d 766, 779 (Pa. 2014) ("[E]yewitness identifications are widely considered to be one of the least reliable forms of evidence."). The DNA exoneration cases have repeatedly proved this point: "Eyewitness misidentification is the greatest contributing factor to wrongful convictions proven by DNA testing, playing a role in more than 70% of convictions overturned through DNA testing nationwide." www.innocenceproject.org/causes/eyewitness-misidentification (last visited June 15, 2018).

As the DNA exonerations make evident, accurately identifying someone with good visibility and no visual impairments is quite difficult. Thus, the ability to accurately capture, store, and recall the details of a person's face during a spilt-second encounter with that person, when the person is wearing

a shirt coving his face, running, and holding and firing a firearm makes it all the more difficult. This, however, represents the linchpin of the Commonwealth's case. The identifications Collins and Gressom allegedly made were manifestations of a split-second encounter with a masked gunman.

The Commonwealth's case, therefore, turned on the jury's assessment of Collins's and Gressom's credibility. Accordingly, trial counsel had a duty to interview all witnesses who had the potential of undermining Collins's and Gressom's credibility. According to Mr. Dixon's affidavit, he told trial counsel he was with Ima Francis and their two sons the day and night of Pinkney's shooting.[90] Once he learned this information, trial counsel had a duty to – at the very least – interview Ima Francis to determine if Mr. Dixon's alibi claim was credible. In other words, the reasonableness of trial counsel's *decision* not to present Mr. Dixon's alibi defense and Ima Francis turns on the *reasonableness of the investigation trial counsel conducted before* making this decision.

Here, because trial counsel never interviewed Ima Francis his pre-decision investigation was objectively unreasonable which made his decision not to present Mr. Dixon's alibi defense objectively unreasonable as well.

[90] Rpp. 92-93.

According to Mr. Dixon's affidavit, trial counsel premised his decision not to present an alibi defense on his (trial counsel's) belief he could raise reasonable doubt by simply cross-examining Collins and Gressom.[91] Had trial counsel *interviewed* Ima Francis and found her (and Mr. Dixon's) alibi claim unreliable or questionable, he could have reasonably argued he made a strategic decision to focus on his cross-examination skills rather than presenting an alibi defense.

Trial counsel, though, never interviewed Ima Francis, which prevented him from adequately assessing her (and Mr. Dixon's) alibi claim. Counsel (Cooley), however, interviewed Ima Francis during Mr. Dixon's PCRA proceedings, found her alibi testimony wholly credible, and obtained an affidavit from her explaining Mr. Dixon's whereabouts on the day and night of the shooting. *Commonwealth v. Dennis*, 950 A.2d 945, 960 (Pa. 2008) ("[T]he question of failing to *interview* a witness is distinct from failure to call a witness to testify.") (emphasis added); *Commonwealth v. Perry*, 644 A.2d 705, 709 (Pa. 1994) ("Counsel's failure to *interview* witnesses was ineffective, arguably per se") (emphasis added); *Commonwealth v. Jones*, 437 A2d 958, 959 (Pa. 1981) (same).

---

[91] Rp. 92-93.

From a state law perspective, trial counsel did not have a reasonable basis not to, at the very least, interview Ima Francis before trial. When assessing whether trial counsel had a reasonable basis for his acts or omissions, the question is not whether there were other courses of action counsel could have taken, but "whether counsel's decision [to act or not act] had any basis reasonably designed to effectuate his client's interest." *Commonwealth v. Williams*, 141 A.3d 440, 463 (Pa. 2016). This requires an examination of "whether counsel made an *informed* choice, which at the time the decision was made reasonably could have been considered to advance and protect [the] defendant's interests." *Commonwealth v. Dunbar*, 470 A.2d 74, 77 (Pa. 1983) (emphasis added). Here, by not interviewing Ima Francis, trial counsel's inaction did *nothing* to protect or advance Mr. Dixon's interests, which was to raise sufficient doubt regarding the Commonwealth's case to obtain an acquittal.

As counsel indicated at the September 29, 2017 PCRA status hearing where the PCRA court ultimately dismissed Mr. Dixon's PCRA petition, counsel (Cooley) spoke with trial counsel over the phone on August 16, 2017 and asked him if he recalled Mr. Dixon's case, and if so, if he recalled Ima Francis the alibi witness. Trial counsel could not recall Mr. Dixon's case and

asked counsel to send him a factual summary of Mr. Dixon's case to see if it could jog his memory. Counsel faxed trial counsel a factual summary that day – August 16, 2017. Later that week, counsel called trial counsel again and trial counsel said, even after reading the factual summary, he had no recollection of Mr. Dixon's case.[92]

Trial counsel is ineffective if he failed to pursue a course of action that "offered a potential for success substantially greater than the tactics actually utilized." *Commonwealth v. Badger*, 393 A.2d 642, 644 (Pa. 1978). Here, had trial counsel simply *interviewed* Ima Francis, like counsel did, this course of action offered a "potential for success substantially greater" than the tactics trial counsel utilized – which was to do nothing.

Trial counsel's objectively unreasonable decisions of not interviewing Ima Francis and presenting her as an alibi witness prejudiced Mr. Dixon. The length of the jury's deliberations and the number of questions it asked represents convincing evidence it had doubts about the Commonwealth's case. If Gressom's and Collins's identifications represented "overwhelming"

---

[92] When counsel contacted trial counsel on August 16, 2017, he sought answers regarding Ima Francis (Claim #1), Sonya Dixon (Claim #2), and trial counsel's advice to Mr. Dixon regarding whether he should or should not testify based on his 2008 PWID conviction (Claim #3). Based on trial counsel's inability to recall anything about Mr. Dixon's case, particularly any decisions he made before and during trial, counsel got no answers.

evidence of guilt, as the PCRA court found,[93] it would not have taken the jury four (4) days and ten (10) questions to determine the guilt-innocence issue.

More importantly, based on how the gunman killed Pinkney, this was *not* a case where the jury struggled between the charges of first- and third-degree murder. Likewise, this was not a self-defense case. The evidence overwhelmingly proved the gunman was guilty of first-degree murder, as he obviously premediated Pinkney's death and had the specific intent of killing him. Thus, the fundamental issue the jury struggled with *had to be* the *gunman's identity*. Consequently, if it took the jury four (4) days and ten (10) questions to resolve the identity issue, it had to view Collins's and Gressom's identifications with a certain level of doubt.

In the end, the jury obviously believed the doubts it had regarding their identifications were insufficient to warrant an acquittal. However, had trial counsel interviewed Ima Francis and presented her as an alibi witness, the jury would have had to confront the fundamental truth that a person cannot be in two places at once. *Commonwealth v. Roxberry*, 602 A.2d 826, 827 (Pa. 1992) (an alibi is "a defense that places the defendant at the relevant time in a

[93] Rp. 18 (NT, PCRA Hrg., 9/27/2017, pp. 9, 10, 11).

different place than the scene involved and so removed therefrom as to render it impossible for him to be the guilty party."[94]

It is reasonably probable, therefore, this fundamental truth would have created more doubt in the jury's eyes. Put differently, it is reasonably probable that had the jury heard Ima Francis's alibi testimony "at least one juror would have harbored a reasonable doubt about whether" Mr. Dixon was the gunman. *Buck v. Davis*, 137 S.Ct. 759, 776 (2017). Consequently, the absence of Ima Francis's alibi testimony undermines confidence in the jury's first-degree murder verdict warranting a new trial for Mr. Dixon.

B. Relevant case law

Mr. Dixon has a right to effective trial counsel. *Strickland v. Washington*, 468 U.S. at 688. Trial counsel's purpose is to "test[] the prosecution's case to

---

[94] In *Commonwealth v. Pounds*, 417 A.2d 597 (Pa. 1980), the Supreme Court held that a trial court, faced with alibi evidence, should instruct a jury generally that "it should acquit if [defendant's] alibi evidence, even if not wholly believed, raises a reasonable doubt of his presence at the scene of the crime at the time of its commission and, thus, of his guilt. *Id.* at 603. The instruction, the Court held, was critically important to offset "the danger that the failure to prove the defense will be taken by the jury as a sign of the defendant's guilt." *Id.* The Court explained that the defendant bears no burden of proof in a criminal case, and that to infer guilt based upon a failure to establish an alibi "contravenes the presumption of innocence and the Commonwealth's burden of proving the offense beyond a reasonable doubt." *Id.* at 603 n.17. Given these concerns, the Court unequivocally held that "[a] defendant is entitled to an alibi instruction when evidence of alibi... has been introduced." *Id.* at 602; *accord Commonwealth v. Hawkins*, 894 A.2d at 717-718.

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).

Mr. Dixon's sole interest before and during trial was to raise reasonable doubt regarding the Commonwealth's claim he shot and killed Joseph Pinkney on April 27, 2011. Mr. Dixon's interest was enormous because, if convicted, he faced a most certain death sentence. *Miller v. Alabama,* 567 U.S. 460, 740 (2012) (comparing "life without parole... to the death penalty itself[.]"). Trial counsel's duty, therefore, was to thoroughly investigate the shooting so he

could present *every available* defense and argument discrediting the Commonwealth's theory and its two eyewitnesses. *Commonwealth v. Bailey*, 390 A.2d 166, 170 (Pa. 1978) ("[T]he adversary system requires that all available defenses are raised so that the government is put to its proof.").

Trial counsel, in other words, had "a duty to make reasonable investigations," *Strickland v. Washington*, 466 U.S. at 690-691, and to prepare for trial in such a way to be able to present "all available defenses" so "the government is put to its proof." *Commonwealth v. Bailey*, 390 A.2d at 170. Trial counsel's unreasonable failure to prepare for trial is "an abdication of the minimum performance required of defense counsel." *Commonwealth v. Brooks*, 839 A.2d 245, 248 (Pa. 2003) (quoting *Commonwealth v. Perry*, 644 A.2d at 709). The "duty to investigate... include[s] a duty to interview *certain potential* witnesses; and a prejudicial failure to fulfill this duty, unless pursuant to a reasonable strategic decision, may lead to a finding of ineffective assistance." *Commonwealth v. Johnson*, 966 A.2d 523, 535-536 (Pa. 2009) (emphasis added).

The "duty to investigate" case law, therefore, "stand[s] for the proposition that, at least where there is a limited amount of evidence of guilt, it is *per se* unreasonable not to attempt to investigate and interview known

eyewitnesses in connection with defenses that hinge on the credibility of other witnesses." *Commonwealth v. Dennis*, 950 A.2d at 960. Consequently, "the onus is *not* upon a criminal defendant to identify what types of evidence may be relevant and require development and pursuit. Counsel's duty is to discover such evidence through his own efforts, including pointed questioning of his client[.]" *Commonwealth v. Malloy*, 856 A.2d 767, 788 (Pa. 2004).

The *scope* of trial counsel's investigation depends on what trial counsel learns from (1) the discovery, (2) his own preliminary investigation(s), and (3) the communications he has with his client. For instance, uncovering certain facts can impart on trial counsel a duty to continue investigating and developing additional facts and evidence regarding a particular defense. *Cf. Wiggins v. Smith*, 539 U.S. 510, 525 (2003) ("The scope of [trial counsel's] investigation was also unreasonable in light of what counsel actually discovered in the DSS records."); *Rompilla v. Beard*, 545 U.S. 375, 284-285 (2005) (scope of trial counsel's mitigation investigation was objectively unreasonable because trial counsel knew the Commonwealth intended to seek the death penalty and would do so by relying on Rompilla's prior rape and assault convictions; despite this knowledge, trial counsel never obtained Rompilla's rape and assault conviction case file). "In assessing the

reasonableness of an attorney's investigation," therefore, "a court must consider... whether the known evidence would lead a reasonable attorney to investigate further.... [because] *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision[.]" *Wiggins v. Smith*, 539 U.S. at 527.

The duty to investigate all potential defense witnesses is imperative when the Commonwealth's case depends on the credibility of only two eyewitnesses, like Collins and Gressom in Mr. Dixon's case. "[W]hen the Commonwealth's case is... dependent upon the credibility of its witnesses, trial counsel *must* explore the testimony of *any* witness... whose testimony *might* cast doubt on the testimony of the Commonwealth's witnesses." *Commonwealth v. Nock*, 606 A.2d 1380, 1382 (Pa. Super. 1992) (emphasis added).

Stated differently, "[i]n a case where virtually the only issue is the credibility of the Commonwealth's witness versus that of the defendant, failure to explore *all alternatives available* to assure that the jury heard the testimony of a known witness who might be capable of casting a shadow upon the Commonwealth witness's truthfulness is ineffective assistance of counsel." *Commonwealth v. McCaskill*, 468 A.2d 472, 477 (Pa. Super. 1983) (emphasis

added); *Commonwealth v. Abney*, 350 A.2d 407, 410 (Pa. 1976); *Commonwealth v. Twiggs*, 331 A.2d 440, 443 (Pa. 1975).

C. Application of law to facts

Before trial, Mr. Dixon informed trial counsel he was innocent of Joseph Pinkney's murder because he was with his two sons and their mother, Ima Francis, at the time of the shooting. Mr. Dixon instructed trial counsel to contact Ima Francis, interview her, and present her as an alibi witness. Trial counsel informed Mr. Dixon he had no intention of contacting Ima Francis as an alibi witness, unless he "really ha[d] to," because his (trial counsel's) primary strategy was to "discredit" Collins, Gressom, and Lomax.[95]

Trial counsel never interviewed or attempted to interview Ima Francis. Trial counsel never called Ima Francis as an alibi witness. Based on her affidavit, which Mr. Dixon attached to his 1st supplemental amended PCRA petition, Ima Francis would have testified on Mr. Dixon's behalf.[96] Had trial counsel called Ima Frances as an alibi witness, she would have testified to the following. Between 2010 until his arrest in July 2011, Mr. Dixon lived at 622 Spruce Street in Darby, Pennsylvania. Mr. Dixon was with her and their two

[95] Rpp. 92-93.
[96] Rp. 114.

sons at their 622 Spruce Street residence at the time of the shooting on April 27, 2011.[97]

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

Trial counsel's failure to interview and present Ima Francis prejudiced Mr. Dixon. Based on the jury's prolonged deliberations and questions, and the fact it remained deadlocked momentarily, the jury did not find Collins's and Gressom's overwhelmingly pristine and accurate. As the video footage demonstrates, Collins and Gressom had 2 to 3 seconds at best to capture a glimpse of a gunman who had a shirt wrapped around his head in such a way that only exposed his eyes. Likewise, both testified they spent part of this 2 to

[97] Rpp. 92-93.

3 second period focused on the gunman's gun, not his face. Thus, both had perhaps 1 to 1.5 seconds at best to see the gunman's eyes.

Moreover, at the preliminary hearing, Gressom said he could not identify the gunman because of the shirt. Gressom also testified at the preliminary hearing he did not select Mr. Dixon's photograph from the photo array; rather, the detectives circled Mr. Dixon's photograph for him. Likewise, Gressom testified at trial the gunman lowered the shirt with his hand during the shooting and this was why he was able to see the gunman's face. The video footage, though, proves this testimony is false because the gunman never touched his face or the shirt.

Collins also gave conflicting testimony regarding his identification, namely at what point did he see the gunman's face, during the 1 to 1.5 seconds he possibly had to view the gunman. Collins first said he did not see the gunman until the gunman accosted Pinkney with the gun drawn. Collins then said he actually saw the gunman as the gunman turned the corner because it was at this point the gunman's shirt fell down and quickly exposed his face. Collins then said when he initially saw the gunman his focus was directed at the gun, not the gunman's face. Lastly, despite supposedly knowing the gunman's identity the night of the shooting and a few days later when he

viewed the video footage at the corner store, Collins never called police to report what he knew, and he never mentioned his knowledge to Gressom.

These facts and inconsistencies raised significant doubt with the jury. Thus, had Ima Francis told the jury Mr. Dixon was with her and their two sons at the time of the murder, it is reasonably probable the outcome of Mr. Dixon's trial would have been different. Put differently, had Ima Francis testified, it is reasonably probable "at least one juror would have harbored a reasonable doubt," *Buck v. Davis*, 137 S.Ct. at 776, regarding the Commonwealth's first-degree murder count. Indeed, the accuracy of Collins's and Gressom's identifications were already suspect based on their trial testimony. If Ima Francis would have testified, consequently, it is reasonably probable at least one juror would have found that both identifications were misidentifications and used this finding to vote for acquittal.

Lastly, by undermining the Commonwealth's identification evidence, Ima Francis's alibi testimony would have also undermined Zelina Lomax's motive testimony. On May 8, 2011, Lomax went to the investigators and told them her cousin, Rafiq Dixon, purchased a cell phone from Pinkney in November 2011. The cell phone did not work, so Mr. Dixon "and his friends jumped" Pinkney. Pinkney then approached Mr. Dixon's mother, Sonya

Dixon, and "had words" with her. Sonya Dixon, Lomax said, told Mr. Dixon about Pinkney approaching her and Mr. Dixon allegedly told Lomax, "I'm going to kill him when I see [him], won't nobody know what I did." Mr. Dixon also allegedly told Lomax, "[D]on't nobody run up on my mom like that." Lomax told investigators she spoke with Mr. Dixon and told him she would give him $100 to resolve the cell phone issue, but Mr. Dixon told her "he didn't want the money" because "it was not about the money."[98]

At trial, Lomax testified she spoke with Pinkney 2 to 3 weeks *before his murder* and it was during this conversation Pinkney told her about Mr. Dixon and his friends jumping him.[99] Two weeks later Lomax said she went to Mr. Dixon's house and spoke with Mr. Dixon and during this conversation Mr. Dixon allegedly told Lomax that Pinkney pulled a gun on his mother and that he was going to kill Pinkney for doing so.[100]

Had Ima Francis presented her alibi testimony, it is reasonably probable the jury would have had substantial – *acquittal worthy* - doubts regarding Collins's and Gressom's identifications. If the jury had substantial doubts as to whether Mr. Dixon was the gunman, these doubts would have impacted its

[98] Rpp. 64-65.
[99] NT, Trial, 7/18/2012, pp. 15-16.
[100] *Id.*, pp. 26-27.

assessment of Lomax's testimony and credibility. If the jury honestly felt Mr. Dixon was not the gunman, it is reasonably probable it would have found Lomax's *motive* testimony quite suspect and worthy of little to no weight.

In the end, the absence of Ima Francis's alibi testimony undermines confidence in the jury's first-degree murder verdict. Mr. Dixon, therefore, is entitled to a new trial.

D. The PCRA court's finding that the Commonwealth presented overwhelming evidence of guilt is clearly wrong

Mr. Dixon briefly mentioned this point *supra*, p. 34, but this particularly finding of the PCRA court needs to be further exposed for its absurdity. The PCRA court said Ima Francis's testimony would have had absolutely no impact on the jury's assessment of Collins's and Gressom's identifications because, according to the PCRA court, their identifications represented "overwhelming" evidence of Mr. Dixon's guilt.[101] There are at least three problems with this finding.

First, by characterizing Collins's and Gressom's identifications as "overwhelming" evidence of guilt, the PCRA court implicitly found that there were no problems regarding their identifications. The record belies this

[101] Rp. 18 (NT, PCRA Hrg., 9/29/2017, pp, 9, 10, 11).

finding. Both identifications presented with significant problems: (1) problems associated with being able to accurately capture an adequate view of the gunman's face; and (2) problems associated with the manner/process in which investigators procured their identifications.

Second, the jury's deliberations and questions belie the PCRA court's "overwhelming" evidence finding. As mentioned, if Collins's and Gressom's identifications were so pristine and "overwhelming," it would not have taken the jury four (4) days of deliberations and ten (10) questions to resolve the fundamental issue of Mr. Dixon's trial, which was the gunman's identity. The length of deliberations and the number of questions makes clear the evidence was *not* overwhelming.

Third, to suggest an alibi witness can never undermine an identification – or multiple identifications – is absurd. An alibi witness places the defendant somewhere else – other than the crime scene – at the time the crime was committed. A person cannot be in two places at once. An alibi witness, therefore, can substantially undermine an eyewitness's identification of the defendant as the perpetrator.

The PCRA court erred in this respect and Mr. Dixon is entitled to a new trial.

E. The PCRA court did not find that Mr. Dixon did not inform trial counsel of Ima Francis

The PCRA court rejected this claim, not because Mr. Dixon never informed trial counsel of Ima Francis, but because he could not "show that the absence" of Ima Francis's testimony "prejudiced him."[102] The PCRA court found that Ima Francis "existed" and she was "available" for Mr. Dixon's trial. The PCRA court, though, said this regarding whether trial counsel knew of Ima Francis: "That Counsel was informed of the existence of the witness, this Court doesn't know. That is something you would have to have a hearing on if the Court found that there was a question as to whether the absence of the testimony of this witness prejudiced [Mr. Dixon][.]"[103]

As argued in Claim #5, if the Court finds the record inadequate for meaningful appellate review, it should remand to the PCRA court with instructions to hold an evidentiary hearing where trial counsel can testify and explain his reasoning for not calling Ima Francis as an alibi witness.

[102] Rp. 17 (NT, PCRA Hrg., 9/27/2017, p. 7).
[103] Rp. 17 (NT, PCRA Hrg., 9/27/2017, pp. 7-8).

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

A. Introduction

As explained *supra*, pp. 43-45, Zelina Lomax's statement and trial testimony represented the only motive evidence presented by the Commonwealth. According to Mr. Dixon's affidavit, he told trial counsel Lomax's statement was completely false, including the claim Pinkney "had words with" or "threatened" his mother, Sonya Dixon, and instructed trial counsel to interview his mother and to present her as a defense witness to rebut Lomax's testimony. Trial counsel never interviewed or attempted to interview Sonya Dixon. Had trial counsel attempted to interview Sonya Dixon, she would have spoken with him, and had trial counsel asked her to testify, she would have testified on her son's behalf.[104]

[104] Rp. 113.

Based on the "failure to interview" and "duty to investigate" case law mentioned *supra*, pp. 35-40, trial counsel had a duty to – at the very least – interview Sonya Dixon to confirm whether Mr. Dixon's statements to him regarding the falsity of Lomax's pre-trial statement were true. Consequently, because trial counsel never interviewed – or even attempted to interview – Sonya Dixon, his decision not to present her as a defense witness cannot be considered strategic or informed.

Rather, trial counsel's refusal to even attempt to interview her was objectively unreasonable, particularly because it was foreseeable the Commonwealth would present Loxmax at trial as its lone *motive* witness. As mentioned, an act or omission by trial counsel can only be considered strategic and virtually unchallengeable if trial counsel's investigation preceding the act or omission was reasonable. Here, trial counsel conducted no investigation whatsoever regarding Sonya Dixon and he never interviewed or attempted to interview her. Counsel (Cooley), however, interviewed Sonya Dixon during Mr. Dixon's PCRA proceedings, found her testimony wholly credible and truthful, and obtained an affidavit from her discrediting Lomax's

testimony in its entirety. Sonya Dixon's affidavit would have also discredited any argument that Mr. Dixon fled.[105]

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

Lomax's testimony, though, was suspect for a variety of reasons. According to Lomax, she spoke with Pinkney 2 to 3 weeks before his murder and it was during this conversation Pinkney told her about Mr. Dixon and his friends jumping him.[106] Lomax then testified she had her incriminating conversation with Mr. Dixon *2 weeks after* her conversation with Pinkney.[107]

---

[105] Rpp. 94-95, 113.
[106] NT, Trial, 7/18/2012, pp. 15-16.
[107] *Id.*, pp. 26-27.

Consequently, if Lomax spoke with Mr. Dixon 2 weeks *after* her conversation with Pinkney, Lomax had to have had this incriminating conversation with Mr. Dixon a *week-or-so before the shooting*. Lomax met with detectives on May 8, 2011, which was only a *week and a half after* the shooting and therefore only *two and a half weeks after* Lomax allegedly had this incriminating conversation with Mr. Dixon.

Despite the closeness in time between her alleged incriminating conversation with Mr. Dixon and her interview with detectives, Lomax never told detectives her alleged conversation with Mr. Dixon occurred only two and a half weeks prior to her conversation with them, *i.e.*, the detectives. Indeed, when detectives asked, "Zelenia, when did you confront Fiq about the altercation between him and Joe?" Lomax replied, "I can't remember the exact date but like I said this was back in November of last year."[108] In other words, during Lomax's interview with detectives, Lomax implied she confronted Mr. Dixon's *months before* Pinkney's murder, which, if true, contracts her trial testimony where she said she confronted Mr. Dixon a week or so before Pinkney's murder.

[108] Rpp. 64-65.

Sonya Dixon would have testified that she did not know a Joseph Pinkney, that a Joseph Pinkney never "had words with her" about being jumped by Mr. Dixon, and that a Joseph Pinkney never threatened her with a gun.[109] Sonya Dixon would have also testified she had not communicated with Mr. Dixon in the many months preceding Pinkney's shooting and she did not have Mr. Dixon's contact information during this time.[110] This fact is corroborated by Detective Nordo's June 4, 2011 "*Attempts to Apprehend – Log*" sheet, which he handwrote after he and other detectives spoke with Sonya Dixon on June 4, 2011. Det. Nordo wrote,

> … were met by mother, identical brother & nephew inside 5114 Haverford Avenue – mother explains of a physical fight between herself & Rafiq out front of the house six months ago – haven't seen or heard from him nor do they know of a cell phone # - cell phone contacts checked – no cell phone numbers found and nothing to indicate fugitive lives in that residence.[111]

Sonya Dixon would have also testified she never communicated with Mr. Dixon *after* detectives came to her house on June 4, 2011 and June 9, 2011.[112]

---

[109] Rp. 113.
[110] Rpp. 94-95.
[111] Rp 104.
[112] Rpp. 94-95.

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

Mr. Dixon, therefore, is entitled to a new trial.

B. The PCRA court's findings

The PCRA court found that Sonya Dixon existed and would have testified at Mr. Dixon's trial.[113] The PCRA court, though, made no finding regarding whether it found Mr. Dixon's affidavit credible where he averred that he asked and told trial counsel to interview Sonya Dixon: "Whether Counsel knew of [Sonya Dixon's] existence or not would be a factual determination for this Court to make if this Court found that there was a question of whether the absence of the testimony prejudiced [Mr. Dixon]."[114]

[113] Rp. 18 (NT, PCRA Hrg., 9/27/2017, p. 9).
[114] Rp. 18 (NT, PCRA Hrg., 9/27/2017, p. 9).

Thus, the PCRA court rejected the claim not because trial counsel never knew about Sonya Dixon, but because the Commonwealth's "overwhelming" evidence made Sonya Dixon's testimony an afterthought.[115] Lastly, the PCRA court found Sonya Dixon's testimony essentially useless because her testimony would have only "refute[ed] the motive," and according to the PCRA court, "motive doesn't have to be proven in any case."[116] The PCRA court's findings are wrong and problematic for multiple reasons.

First, as argued *supra*, pp. 45-46, the PCRA court's finding that the Commonwealth presented "overwhelming" evidence of guilt is simply belied by Collins's and Gressom's own testimony as well as the jury's multiple questions and lengthy deliberations.

Second, of course motive is not an element of any offense, but that misses the point entirely. The point is that by presenting motive evidence, the prosecutor provided the jury with a narrative as to *why* Mr. Dixon would want to kill Pinkney and the "*why do this*" question tied into the "*who did this*" question. If Mr. Dixon had no connection or reason to kill Pinkney, this fact could have altered the jury's assessment of Collins's and Gressom's

[115] Rpp. 17-18 (NT, PCRA Hrg., 9/27/2017, pp. 9, 10, 11).
[116] Rp. 18 (NT, PCRA Hrg., 9/27/2017, p. 11).

questionable identifications and resulted in Mr. Dixon's acquittal. The prosecutor knew this, and this was why she presented Lomax's testimony.

In other words, the fact the prosecutor is not legally obligated to prove motive, does not make motive evidence any less damaging or prejudicial to the defendant. To the contrary, once the prosecutor articulates what she believes to be the motive and then introduces evidence and witnesses to support her motive theory, the motive evidence is *always* damaging to the defendant. This is especially true in a "whodunit" case like this one where the motive evidence and the identification evidence created a unique symbiotic relationship: both forms of evidence needed each other to survive. Here, the motive evidence breathed life into the identifications and vice versa.

Consequently, because trial counsel knew or should have known the prosecutor was going to call Lomax as a motive witness, he had a duty to seek out all potential witnesses and/or evidence that would have undermined her motive testimony and credibility. He did not, despite the fact his client specifically told him to interview his mother and to present her for the sole purpose of discrediting Lomax's motive testimony.

Mr. Dixon, consequently, is entitled to a new trial.

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

A. Introduction

A defendant's right to testify on his own behalf is a fundamental tenet of American jurisprudence and is explicitly guaranteed by the Federal and Pennsylvania Constitutions. U.S. Const. admt. 6; Pa. Const. art. I, § 9; *Commonwealth v. Nieves,* 746 A.2d 1102, 1105 (Pa. 2000). The "decision to testify on one's own behalf is ultimately a decision to be made by the accused after consultation with counsel." *Commonwealth v. Baldwin*, 8 A.3d 901, 903 (Pa. Super. 2010).

Mr. Dixon wished to exercise his right to testify and informed trial counsel he wanted to testify. According to Mr. Dixon's affidavit, trial counsel advised him not to testify because, if he testified, the Commonwealth could impeach him with his prior convictions.[117] Based on trial counsel's advice, Mr. Dixon chose not to testify.[118]

---

[117] Rpp. 92-93.
[118] NT, Trial, 7/19/2012, pp. 82-85.

Trial counsel's advice, however, was wrong. "It is well settled that a witness may be impeached on the basis of a prior conviction only if the crime involves dishonesty or false statement." *Commonwealth v. Penn*, 439 A.2d 1154, 1160 (Pa. 1982). The *crimen falsi* conviction, moreover, must have occurred within ten (10) years of the trial at which the witness is testifying. Pa.R.Evid. 609(b).

In the ten years preceding Mr. Dixon's trial, he only had one conviction, a 2008 PWID conviction (CP-51-CR-0510661-2005).[119] Convictions for possession or sale of drugs are not *crimen falsi*. *Commonwealth v. Causey*, 833 A.2d 165, 169 (Pa. Super. 2003); *Commonwealth v. Coleman*, 664 A.2d 1381, 1385 (Pa. Super. 1995). Convictions for drug possession are not *crimen falsi*. *Commonwealth v. Hernandez*, 862 A.2d 647 (Pa. Super. 2004). Consequently, had Mr. Dixon testified, the Commonwealth could not have mentioned and impeached him with his 2008 PWID conviction.

To "sustain a claim that counsel was ineffective for failing to advise the [defendant] of his rights in this regard, the [defendant] must demonstrate either that counsel interfered with his right to testify, or that counsel gave specific advice so unreasonable as to vitiate a knowing and intelligent decision

[119] Rpp. 96-103.

to testify on his own behalf." *Commonwealth v. Nieves*, 746 A.2d at 1104 (citations omitted).

According to Mr. Dixon's affidavit, trial counsel misconstrued the prior conviction/impeachment case law. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 134 S.Ct. 1081, 1089 (2014). Stated differently, trial counsel's failure to prepare for trial, *i.e.*, to know Mr. Dixon's prior convictions and whether they could be used as impeachment evidence, is "an abdication of the minimum performance required of defense counsel." *Commonwealth v. Brooks*, 839 A.2d at 248 (quoting *Commonwealth v. Perry*, 644 A.2d at 709).

Commonwealth v. Nieves, 746 A.2d 1102 (Pa. 2000) is on point. In *Nieves*, the defendant informed trial counsel of his desire to testify. Trial counsel advised the defendant not to testify because, if he did, the Commonwealth could introduce his prior drug trafficking and firearms convictions to impeach him. Based on trial counsel's advice, the defendant did not testify. Trial counsel's advice, however, was incorrect, rendering the defendant's waiver of his right to testify unknowing and unintelligent:

> Trial counsel confirmed that Appellant desired to testify and that he advised Appellant not to testify because he could be impeached by his criminal record. We agree with Appellant that such advice was clearly unreasonable as it is well-established that evidence of prior convictions can only be introduced for the purpose of impeaching the credibility of a witness if the conviction was for an offense involving dishonesty or false statement. *Commonwealth v. Randall*, 515 Pa. 410, 528 A.2d 1326 (Pa. 1987). Appellant's convictions of drug trafficking and firearms offenses did not involve dishonesty or false statements and therefore would not have been admissible to impeach his credibility. As the common pleas court credited Appellant's testimony that his decision not to testify was based solely on this erroneous advice, such decision cannot be deemed knowing or intelligent. The right of an accused to testify on his own behalf is a fundamental tenet of American jurisprudence and is explicitly guaranteed by Article I, Section 9 of the Pennsylvania Constitution.... The decision to forgo such a significant right in a capital case cannot be based on mistaken guidance.

Id. at 1104-1105.

Trial counsel's erroneous advice prejudiced Mr. Dixon.

Had Mr. Dixon testified, he would have: (1) denied Lomax's allegations, *i.e.*, he never purchased a cell phone from Pinkney, he never jumped Pinkney, he never had a conversation with his mother where his mother told him Pinkney threatened her with a gun, and he never had a conversation with

Lomax, let alone a conversation with her where he told her he wanted to kill Pinkney; (2) denied shooting Pinkney on April 27, 2011 because he was at home - 622 Spruce Street - with Ima Francis and their two sons at the time of the shooting; and (3) denied he was trying to flee the area and evade the police.

Again, the Commonwealth's case against Mr. Dixon rested substantially on Collins's and Gressom's *questionable* identifications. By denying he was the gunman and informing the jury of his whereabouts at the time of the shooting, Mr. Dixon's testimony would have corroborated Ima Francis's alibi testimony and vice versa. The combination of Mr. Dixon's and Ima Francis's alibi testimony would have further undermined two already questionable identifications.

The same can be said about Mr. Dixon's testimony rebutting Lomax's testimony. Sonya Dixon would have corroborated Mr. Dixon's testimony – and vice versa - that none of Lomax's testimony was truthful. The combination of Mr. Dixon's and Sonya Dixon's testimony would have thoroughly discredited Lomax's testimony, which was questionable to begin with.

In the end, had Mr. Dixon testified, it is reasonably probable "at least one juror would have harbored a reasonable doubt," *Buck v. Davis*, 137 S.Ct. at 776, regarding the Commonwealth's first-degree murder count.

Mr. Dixon, therefore, is entitled to a new trial.

B. The PCRA court's findings

In rejecting this claim, the PCRA court *first* focused on the fact Mr. Dixon "was fully colloquied as to whether or not he wanted to testify." The PCRA court added, "[The colloquy] is on the record and the Defendant was under oath and the Defendant is presumed to tell the truth when he is under oath."[120] This finding, however, is irrelevant to Mr. Dixon's ineffectiveness claim. Of course he was colloquied – that's not the issue. The issue is whether he knowingly and intelligently waived his right to testify when the trial court colloquied him. According to Mr. Dixon, his waiver is unknowing and unintelligent because trial counsel misstated the law regarding prior convictions and impeachment and trial counsel's misstatement was the primary reason why he did not testify.

[120] Rp. 18 (NT, PCRA Hrg., 9/29/2017, p. 12).

Next, and more importantly, despite not holding an evidentiary hearing, the PCRA court made credibility findings regarding the averments in Mr. Dixon's affidavit and trial counsel's stewardship. The PCRA court found:

> Secondly, Mr. Mozenter has been a Trial Attorney... probably over forty years. It strains credulity to ask this Court to believe that Mr. Mozenter would ever have said a P.W.I.D. conviction can be used against [Mr. Dixon] because that is first year law school or maybe first year being a lawyer kind of knowledge and Mr. Mozenter is a seasoned Attorney. So besides the fact that the Defendant was fully colloquied, his argument is incredible. So, therefore, that issue has no merit.[121]

The PCRA court made three implicit findings here: (1) Mr. Dixon's claim that trial counsel incorrectly advised him about his PWID conviction was incredible, and therefore fabricated, because (2) trial counsel was such an experienced and "seasoned" attorney and (3) experienced and "seasoned" attorneys do not make such obvious mistakes. These findings, however, are not supported by the record.

Mr. Dixon does not dispute that the "findings of a postconviction court, which *hears evidence* and passes on the credibility of *witnesses*, should be given great deference."

---

[121] Rpp. 18-19 (NT, PCRA Hrg., 9/27/2017, pp. 12-13).

Commonwealth v. Jones, 912 A.2d 268, 293 (Pa. 2006) (emphasis added). Mr. Dixon also does not dispute the principle that if the PCRA court's credibility determinations "are supported by the record, they are binding on the reviewing court." *Commonwealth v. White*, 421, 734 A.2d 374, 381 (Pa. 1999).

Here, however, the PCRA court did *not* "hear evidence" or "witnesses" because it did not hold an evidentiary hearing where Mr. Dixon could present "evidence" and "witnesses," including himself and trial counsel. Thus, there is no "record" to support the PCRA court's credibility findings regarding the averments made in Mr. Dixon's affidavit in connection with trial counsel's advice not to testify based on his PWID conviction.

Moreover, the PCRA court essentially vouched for trial counsel's stewardship in Mr. Dixon's case, by merely referring to trial counsel's forty years of legal experience. In other words, by not holding an evidentiary hearing, the PCRA court could not make case-specific findings regarding trial counsel's stewardship in Mr. Dixon's case, and instead had to rely on the global concept of *experience* to find trial counsel's stewardship reasonable.

Mr. Dixon does not dispute trial counsel's years of experience, but relying on an attorney's years of experience to answer a specific question regarding a specific case, is clearly unreasonable and an abuse of discretion. In other words, the PCRA court could not simply assume, based on trial counsel's experience, that trial counsel correctly advised Mr. Dixon regarding his PWID conviction. To make findings regarding trial counsel's stewardship *in Mr. Dixon's case*, therefore, the PCRA court had to hold an evidentiary hearing where Mr. Dixon and trial counsel could have testified.

This Court, therefore, owes no deference to the PCRA court's so-called findings regarding the credibility of Mr. Dixon's averments and the reasonableness or correctness of trial counsel's stewardship and advice.

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

"[C]umulative prejudice from individual claims may be properly assessed in the aggregate when the individual claims have failed due to lack of prejudice[.]" *Commonwealth v. Hutchinson*, 25 A.3d 277, 318 (Pa. 2011). However, "an appellant who claims cumulative prejudice [must set] forth a specific, reasoned, and legally and factually supported argument for the claim." *Id.* at 319.

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

First, to assess prejudice, the Court must examine the strength of the Commonwealth's case. Here, Collins, Gressom, and Lomax each had significant credibility problems for one reason or another and the jury's protracted deliberations and double-digit number of questions make this self-evident. If the Commonwealth's case was overwhelming, it would not have taken the jury four (4) days of deliberations and ten (10) questions to determine if Mr. Dixon was the gunman.

Second, because the Commonwealth's case was far from overwhelming, the jury had it doubts about Mr. Dixon's guilt, as evidenced by its lengthy deliberations and numerous questions.

Third, it is reasonably probable at least one juror would have harbored reasonable doubt regarding the Commonwealth's first-degree murder count had trial counsel provided the jury with a modicum of evidence undermining the Commonwealth's case and bolstering Mr. Dixon's innocence claim. Sonya Dixon's and Mr. Dixon's testimony would have undermined the Commonwealth's case by rebutting and challenging every aspect of Lomax's testimony. Ima Frances's and Mr. Dixon's alibi testimony would have killed two birds with one stone; it would have undermined Collins's and Gressom's identifications and bolstered Mr. Dixon's innocence claim. Consequently, had

Ima Frances, Sonya Dixon, and Mr. Dixon testified, it is reasonably probable at least one juror would have harbored reasonable doubt regarding the Commonwealth's first-degree murder count.

Mr. Dixon, consequently, is entitled to a new trial.

Claim #5: If the Court finds the record insufficient to engage in meaningful appellate review of Mr. Dixon's trial counsel ineffectiveness claims, it should remand Mr. Dixon's case to the PCRA court with instructions to hold an evidentiary hearing where Mr. Dixon, Ima Francis, Sonya Dixon, and trial counsel can testify and the PCRA court can make the types of findings and conclusions necessary for meaningful appellate review. U.S. Const. amdts. 5, 6, 8, 14; Pa. Const. art. I, § 8, 9.

If the Court finds the record insufficient to adjudicate Mr. Dixon's trial counsel ineffectiveness claims, the Court should remand for an evidentiary hearing where Mr. Dixon, Ima Francis, Sonya Dixon, and trial counsel can testify. *Commonwealth v. In*, 2010 Pa. Super. LEXIS 3579 at *11 (2010) ("Instantly, given the complexity of the claims raised and the dearth of a record below, we are unable to engage in a meaningful appellate review. Specifically, the PCRA court failed to conduct an evidentiary hearing on Appellant's ineffectiveness claims and render necessary factual findings. We therefore cannot assess trial counsel's tactical reasons for withholding objections. As a result, we must vacate the PCRA court's order dismissing Appellant's PCRA petition and remand the matter to the PCRA court to conduct an evidentiary hearing to address fully the claims identified above.").

The PCRA court "shall order a hearing" when the PCRA petition "raises material issues of fact." Pa.R.Crim.P. 908(A)(2). A hearing cannot be denied unless the Court is "certain" Mr. Dixon's PCRA petition lacks "total" merit. *Commonwealth v. Bennett*, 462 A.2d 772, 773 (Pa. Super. 1983); *accord Commonwealth v. Rhodes*, 416 A.2d 1031, 1035-1036 (Pa. Super. 1979). Even in "borderline cases Petitioners are to be given every conceivable legitimate benefit in the disposition of their claims for an evidentiary hearing." *Commonwealth v. Pulling*, 470 A.2d 170, 173 (Pa. Super. 1983). Thus, an "evidentiary hearing should... be conducted where the record does not clearly refute the claim of an accused that his plea was unlawfully induced." *Id.*

Mr. Dixon's PCRA petition satisfied this standard. Based on his, Ima Francis's, and Sonya Dixon's affidavits, along with trial counsel's inability to remember anything about Mr. Dixon's case, Mr. Dixon's PCRA petition raises material issues of fact. For instance, whether Mr. Dixon told trial counsel about Ima Francis and Sonya Dixon or whether trial counsel incorrectly advised Mr. Dixon he could be impeached with his PWID conviction.

CONCLUSION

WHEREFORE, based on the foregoing facts and authorities, Mr. Dixon respectfully requests this Court to vacate his convictions based on trial counsel's ineffectiveness or in the alternative remand the matter to the PCRA court with instructions to hold an evidentiary hearing where Mr. Dixon, Ima Francis, Sonya Dixon, and trial counsel can testify.

Respectfully submitted this the 16th day of June, 2018.

/s/Craig M. Cooley
COOLEY LAW OFFICE
1308 Plumdale Court
Pittsburgh, PA 15239
412-607-9346 (cell)
919-228-6333 (office)
919-287-2531(fax)
craig.m.cooley@gmail.com
www.pa-criminal-appeals.com

CERTIFICATE OF SERVICE

On June 16, 2018, counsel e-filed Mr. Dixon's opening brief via PAC-File. The Commonwealth received email notification of the filing along with a PDF copy of Mr. Dixon's opening brief.

CERTIFICATION OF COMPLIANCE

Pursuant to Pa.R.A.P. 2135(d), counsel certifies Mr. Dixon's brief does not exceeds 14,000 words.