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**PENNSYLVANIA SUPERIOR COURT**
**EASTERN DISTRICT**

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| **COMMONWEALTH OF PENNSYLVANIA**<br>**Respondent-Appellee,** | ) | |
| **v.** | ) | **1012 EDA 2018**<br>**CP-51-CR-0008855-2008** |
| **YUSEF WASHINGTON**<br>**Petitioner-Appellant.** | ) | |

# Petitioner-Appellant's Opening Brief

**Appeal from the March 15, 2018 Order Dismissing Yusef Washington's PCRA Petition Entered by the Honorable Shelly Robins New of the Philadelphia County Common Pleas Court, Criminal Division, CP-51-CR-0008855-2008**

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## STATEMENT OF JURISDICTION

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

## ORDER OR OTHER DETERMINATION IN QUESTION

Under appeal is the March 15, 2018 order dismissing Yusef Washington's PCRA petition entered by the Honorable Shelly Robins New of the Philadelphia County Common Pleas Court, Criminal Division, CP-51-CR-0008855-2008.[1]

On April 4, 2018, Mr. Washington appealed.[2]

Judge Robins New didn't file an order requesting a 1925(b) statement. Instead, she addressed the claims raised in Mr. Washington's PCRA petition in her March 25, 2019 opinion.[3]

## PROCEDURAL HISTORY

On July 28, 2007, the Commonwealth filed an *Information* charging Yusef Washington with the June 7, 2006 shooting deaths of Charles Carter and Niall Saracini. The Commonwealth had previously filed an *Information* (CP-51-CR-0001048-2007) on February 9, 2007 charging Mr. Washington's co-defendant, Braheem Burke, with similar offenses relating to Carter's and Saracini's deaths. Mr. Washington's case was

[1] Rp. 1. Rp. = Reproduced Record.
[2] Rp. 2.
[3] Rpp. 120-132.

assigned to the Honorable Shelley Robbins New, while Braheem Burke's case was assigned to the Honorable Shelia Woods-Skipper.

In September 2008, a jury convicted Braheem Burke of two counts of third-degree murder and possession of an instrument of a crime but acquitted him of two counts of first-degree murder and multiple counts of aggravated assault and conspiracy. Judge Woods-Skipper sentenced Burke to an aggregate total sentence of 32.5 to 65 years in prison.

On May 13, 2010, a jury convicted Mr. Washington of two counts of first-degree murder, two counts of aggravated assault, conspiracy, and related offenses. On October 22, 2010, Judge Robins New sentenced Mr. Washington to life imprisonment for both murder counts and imposed additional sentences for the other counts.

Mr. Washington appealed (768 EDA 2011), but on October 22, 2012 this Court affirmed, and the Pennsylvania Supreme Court denied his *Petition for Allowance of Appeal* on October 17, 2013 (542 EAL 2012). Mr. Washington didn't seek review from the U.S. Supreme Court, making his conviction final on January 15, 2014.

On April 7, 2014, Mr. Washington filed a timely *pro se* PCRA petition. After retaining counsel (Cooley), Mr. Washington filed his counseled amended PCRA petition

on May 1, 2017,[4] which he supplemented on January 18, 2018 and February 26, 2018.[5]

On March 15, 2018, Judge Robins New dismissed Mr. Washington's PCRA petition.[6]

## ISSUES PRESENTED

Claim #1: Kevin Smith's and Larry's Polk's statements and non-identifications of Mr. Washington either constitute newly-discovered facts or trial counsel failed to identify, interview, and present their observations and non-identifications at Mr. Washington's trial. Either way, Mr. Washington is entitled to a new trial based on Kevin Smith's and Larry Polk's observations and non-identifications. U.S. Const. admts. 6, 8, 14; Pa. Const. art. I, § 8, 9.

Claim #2: Trial counsel was ineffective for failing to develop and present photographic evidence to the jury undermining Eric Carter's unrecorded interrogation statement. U.S. Const. admts. 6, 8, 14; Pa. Const. art. I, § 8, 9.

Claim #3: Trial counsel was ineffective for not requesting a *Kloiber* instruction. U.S. Const. admts. 6, 8, 14; Pa. Const. art. I, § 8, 9

Claim #4: The cumulative impact of trial counsel's errors rendered Mr. Washington's trial fundamentally unfair. U.S. Const. admts. 6, 8, 14; Pa. Const. art. I, § 8, 9

Claim #5: Trial counsel was ineffective for misrepresenting the plea negotiations to Mr. Washington. U.S. Const. admts. 6, 8, 14; Pa. Const. art. I, § 8, 9

Claim #6: The PCRA court erred by not granting an evidentiary hearing. U.S. Const. admts. 6, 8, 14; Pa. Const. art. I, § 8, 9

## STANDARD AND SCOPE OF REVIEW

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

[4] Rpp. 3-99.
[5] Rpp. 100-104, 105-119.
[6] Rp. 1.

factual findings are entitled to deference if supported by the record, but its legal conclusions are reviewed *de novo*. *Commonwealth v. Hawkins*, 894 A.2d 716, 722 (Pa. 2006).

## STATEMENT OF FACTS

### A. Investigation

#### 1. Participants to the Pre-Shooting Scuffle and Shooting

Niall Saracini and Charlie Carter were shot and killed around 12:30 p.m. on June 7, 2006 near the corner of Louden Street and the 4800 block of Warnock Street. Eric Carter, Charlie's brother, was with Niall and Charlie when they were shot and killed and gave a statement to detectives later that afternoon. Detectives didn't audio or videotape the questioning of Eric that preceded his ultimate statement. Eric's statement is typed, three-pages long, and "Eric Carter" is written in cursive at the bottom of each page.[7]

##### a. Eric Carter's statement

According to Eric, around 12 p.m. on June 7, 2006, he, Keith McClain, and Ty were on Louden Street, between 11th Street and Warnock Street, when Rachman Jenkins, Braheem Burke, and Yusef Washington approached them. Rachman and McClain exchanged words before Rachman, Burke, and Mr. Washington walked off. Eric then called Niall and told him "Rachman clowned Keith." While Eric was on the phone with Niall, he (Eric) said Rachman, Burke, and Mr. Washington returned, and

[7] Rpp. 44-46.

Burke sucker punched him (Eric) in the neck. Both groups separated shortly thereafter when a Philadelphia police cruiser drove by them.[8]

Eric and McClain went to Eric's house and told Charlie that Burke had sucker punched Eric. Charlie urged the group to return to the fight scene, so Eric, Charlie, and McClain returned to Louden Street and Warnock Street and saw Rachman, Burke, and Mr. Washington on the east corner of Louden Street and Warnock Street. When Rachman approached them, Eric sucker punched him (Rachman) in the face. "That's when," Eric said, "the shots went off."[9]

Once the gunfire started, Eric said he "dove into Limo's [silver Impala] and then crawled out of the [Impala] and hid under the car [and] that's when [he] saw Yusef and [Burke] shooting[.]" Eric said Mr. Washington and Burke were standing on the east corner of Warnock Street firing. Eric then saw Mr. Washington, Burke, and Rachman run north on Warnock Street. Eric said he, Charlie, Niall, and McClain weren't armed.[10] Detectives showed Eric three different 8-man photo arrays with Mr. Washington's, Burke's, and Rachman's mugshots. Eric supposedly identified all three.[11]

**b. Rasheed Ali's statement**

Detectives identified Limo as Rasheed Ali (aka Rasheed Saleem Wyatte). Rasheed gave a statement the afternoon of the shooting. Detectives didn't audio or

[8] Rpp. 44-45.
[9] Rp. 44.
[10] Rpp. 44-45.
[11] Rp. 44-45.

videotape the questioning of Rasheed that preceded his ultimate statement. Rasheed's statement is handwritten, nine-pages long, and "Rasheed Wyatte" is written in cursive at the bottom of each page.[12]

Accord to Rasheed, he loaned Niall his silver Impala an hour or so before the shooting. Around 12 p.m., he called Niall and told him he needed the Impala back because his (Rasheed's) father needed a ride somewhere. Niall told Rasheed he'd parked the Impala on Louden Street. Rasheed walked east on Louden Street towards 11th Street. When he crossed 11th Street he heard a "few shots," followed by a few second pause, and then he heard eight to ten more shots. Rasheed said he could tell the shots had come from two different guns: one fast, one slow. When he looked east toward Warnock Street, he saw "two guys" standing near the corner of Warnock Street and Louden Street firing at his Impala. After they stopped shooting, Rasheed said the two gunmen ran north on Warnock Street. Rasheed viewed two different 8-man photo arrays and supposedly identified Mr. Washington and Burke as the gunmen.[13]

Detectives brought Keith McClain to Homicide the afternoon of June 7, 2006, but McClain refused to make a statement. Twenty-seven months after the shooting, and shortly before Braheem Burke's trial, McClain returned to Homicide on September 8, 2008 and gave a statement. Detectives didn't audio or videotape the questioning of

[12] Rpp. 47-55.
[13] Rpp. 56-63.

McClain that preceded his ultimate statement. McClain's statement is typed, five-pages long, and "Keith McClain" is printed at the bottom of each page.[14]

McClain said he was with Eric and Niall when he had words with Rachman Jenkins and Braheem Burke. Eric stepped in, but when he did, Burke sucker punched Eric in the neck. McClain said Eric wanted to "swing back" at Burke, but McClain "stopped him." The two groups separated after this altercation.[15] McClain said he, Eric, and Niall went to Eric's house and told Charlie what had happened. The four then returned to Warnock Street and Louden Street. When they neared Warnock Street, McClain saw Rachman and five to six other "dudes" on the corner of Warnock Street and Louden Street. Two of the "dudes" were Mr. Washington and Burke, who were seated on the front porch steps of 4801 Warnock Street. Rachman, McClain said, approached them, and when he did, Eric punched him in the face causing him to fall to the ground. McClain heard gunfire immediately thereafter and said it came from the corner where Mr. Washington, Burke, and the others were congregating. McClain didn't see Rachman with a gun.[16]

McClain ran east on Louden Street towards 10th Street when he heard the gunfire and he heard additional shots as he ran. He said someone chased and fired at him as he ran. According to McClain, as he ran east on Louden Street towards 10th

[14] Rpp. 64-69.
[15] Rpp. 64-69.
[16] Rpp. 64-69.

Street, with his back to the gunmen, he saw Burke on the corner of Warnock Street holding a "black revolver" and pointing it in his direction. McClain suffered a gunshot wound to his left knee but said he didn't seek medical treatment; he simply put peroxide, ace bandages, and band-aids on the wound for three weeks.[17]

McClain said he was unsure who shot at him: "I'm not sure I thought it was Yusef. I know the person had braids and at the time he had braids. Somebody told me [Yusef] cut his head bald." As he ran east on Louden Street towards 10th Street, and with his back towards Warnock Street, McClain said everyone who was on the corner of Warnock Street ran north on Warnock Street towards Rockland Street.[18]

**2. Eyewitnesses to shooting**

Theodore Gant lived at 4807 Warnock Street and he heard gunfire around 12:35 p.m. Gant immediately ran to the window when heard gunfire and saw "a crowd of people outside." He didn't hear anyone arguing before the gunfire, he didn't see anyone fleeing the scene, and he didn't see anyone at the scene with a firearm.[19] Vanessa Grant, Theodore's sister, was in the bathroom of Theodore's house when she heard five gunshots. Vanessa, like her brother, ran to the window and saw Eric Carter go to the driver's side door of the Impala and open it. She then saw "another guy" – Rasheed – open the front passenger's door and bend down before this guy ran around to the front

[17] Rpp. 64-69.
[18] Rpp. 64-69.
[19] Rpp. 70-72.

driver's side door, entered the Impala, and drove off. Once the Impala drove off, Vanessa, like Theodore, saw "the victim" (Charlie Carter) near the barricades on the south side of Louden Street. The victim had been positioned behind the Impala.[20]

Detectives also interviewed Thomas Bunting. Bunting and a co-worker, Joe Ward, had delivered beer and stopped at the Boom Box Deli – located at 4754 North 11th Street – around 12:15 p.m. to deliver beer. When Bunting and Ward arrived, they saw two groups of black men, approximately seven men total, arguing at the corner of 11th Street and Louden Street. Two of the men "squared off" as if they were going to fight, but the one man "sucker punched" the other man, prompting both groups to "split." The group with the man who was sucker punched walked west towards Broad Street ("Broad Street group"). The group with the man who threw the sucker punch walked east on Louden Street towards Warnock Street ("Warnock Street group"). Once at Warnock Street, Bunting said this group "stood on the northeast corner" of Warnock Street and Louden Street. Bunting said one of the men from the Warnock Street group taunted the Broad Street group for fifteen minutes, "yelling for them to come back so they could fight."[21]

Fifteen minutes later, Bunting said the Broad Street group returned, walking towards Warnock Street on Louden Street. As the Broad Street group neared the Warnock Street group, Bunting said "the shooting began." When Bunting heard the

[20] Rpp. 73-74.
[21] Rpp. 75-79.

first shots, he "peeked around the corner" of his beer truck and saw shots being fired in two different directions. He heard about a dozen gunshots but couldn't identify who was shooting. After the shooting, Bunting entered the Boom Box Deli. He didn't see where the Broad Street group and Warnock Street group went after the shooting.[22]

While waiting to be interviewed by detectives at Homicide, Bunting sat next to Eric Carter. During his interview, Bunting said the black male who was sucker punched "resembled" the black man sitting next to him in Homicide. Detectives showed Bunting three different 8-man photo arrays with Mr. Washington's, Burke's, and Rachman's photographs. Bunting recognized Mr. Washington as one of the men in one of the groups, but couldn't say which group or whether Mr. Washington was one of the men firing shots during the shooting. Bunting didn't recognize Burke or Rachman.[23]

### 3. Physical evidence collected

CSI personnel collected eight (8) .9 millimeter FCCs near the cement barrier where Rasheed's Impala had been parked on the south side of Louden Street, seven (7) .380 caliber FCCs near the west corner of Warnock Street and Louden Street, and multiple bullets that presented with characteristics indicative of being shot from a revolver.[24] Inside the Impala CSI personnel recovered three (3) .38/.9 millimeter bullets

[22] Rpp. 75-79.
[23] Rpp. 75-79.
[24] Rpp. 80-81.

fired from two different firearms. Bullet B-4, recovered from the driver's side seat, had a right-twist characteristic and other characteristics indicating it had been fired from a revolver. Bullets B-5 and B-6, recovered from the front driver's side door, had a left-twist characteristic.[25] The Commonwealth's firearms expert said at least three, if not more, guns had been fired during the shooting.[26] The police department also took custody of the Impala and photographed it.[27]

## B. Legal proceedings

### 1. Preliminary hearing

The Commonwealth presented only one witness, Eric Carter, at Mr. Washington's July 15, 2008 preliminary hearing. Eric repeatedly answered "I don't remember" or "I don't know" to the prosecutor's direct-examination questions.[28] During much of Eric's direct-examination, the prosecutor had to lead him. Eric said McClain "had words" with Rachman, Mr. Washington, and Burke near the corner of Louden Street and Warnock Street, but this verbal spat didn't lead to a physical altercation.[29] Eric couldn't recall the substance of or reason for the argument.[30] Eric said he and McClain went to his house after the verbal spat, but quickly returned to Louden Street and Warnock Street with Charlie.[31]

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[25] Rp. 82; NT, 5/11/2011, pp. 192-193.
[26] NT, Trial, 5/11/2010, pp. 201, 202.
[27] Rp. 83.
[28] NT, Prelim. Hrg., 7/18/2008, pp. 14, 16, 22, 23, 26, 31, 32.
[29] *Id.*, p. 18.
[30] *Id.*, pp. 52-53.
[31] *Id.*, pp. 19-21.

Eric said when he, McClain, and Charlie returned to the corner of Louden Street and Warnock Street, Rachman approached him and he (Eric) punched Rachman in the face. Shortly thereafter, but "not right away," Eric heard gun fire.[32] On cross-examination, Eric testified Rachman was within arm's length of him when the gunfire started, but Eric admitted he didn't know what direction the shots were coming from.[33] When the prosecutor asked who started shooting, Eric said, "I don't know."[34] Eric said he didn't see anyone with a firearm before the shooting.[35] Eric also said he ran when the shooting started and dove into Rasheed's Impala.[36]

Eric said he dove into the Impala's front passenger seat and kept his head down. He said the shots stopped a few second later, but he remained in the Impala for a couple of minutes.[37] At Braheem Burke's January 2007 preliminary hearing, Eric testified he hid *under* the Impala, but at Mr. Washington's preliminary hearing, he said he *dove into* the front seat and remained there throughout the shooting.[38] Eric said he heard less than ten shots, but couldn't tell whether the shots had come from more than one firearm.[39] Eric said he exited the front passenger door, and when he did, he didn't say

[32] *Id.*, pp. 24-26.
[33] *Id.*, pp. 67-68.
[34] *Id.*, p. 25.
[35] *Id.*, p. 37.
[36] *Id.*, pp. 22, 28.
[37] *Id.*, pp. 71-73.
[38] *Id.*, pp. 28-29, 77-78.
[39] *Id.*, p. 27.

a word to his wounded brother Charlie, but instead ran to his house and called his mother before returning to the scene to be with Charlie.[40]

The prosecutor showed Eric his June 7, 2006 statement. Eric recognized it and said it accurately reflected most of what he'd told detectives, but said he never told detectives he crawled under the Impala during the shooting. He said he dove into the front seat and remained inside the Impala throughout the shooting.[41] Eric agreed that he'd told detectives he saw Mr. Washington and Burke shooting, but said this aspect of his statement was also false. He said he didn't see Mr. Washington and Burke shooting. Instead, he mentioned their names only because he wanted his interrogation to end so he could go see Charlie at the hospital and because he'd heard people mention their names at the hospital.[42] On cross-examination, Eric confirmed he didn't see who fired a weapon or how many people were firing.[43]

**2. Trial**

**a. Eric Carter's testimony**

Eric Carter testified. He described the first encounter he and McClain had with Rachman, Mr. Washington, and Burke. Eric said Rachman approached McClain and started arguing with McClain. Eric watched at first before he called Niall and told him that Rachman was "clowning" McClain. While he was on the phone with Niall, Burke

[40] *Id.*, pp 29-33.
[41] *Id.*, pp. 41-44.
[42] *Id.*, pp. 44-47.
[43] *Id.*, p. 80.

sucker punched him and did so shortly before a police car drove by. Eric wanted to fight, but McClain told him to "chill."[44]

At this point, Eric and McClain walked west on Louden Street towards 13th Street, while Rachman, Mr. Washington, and Burke walked east on Louden Street toward Warnock Street. Eric and McClain returned to Eric's house on 11th Street and Louden Street and told Charles about the argument and fight.[45] Eric, McClain, and Charlie got into Eric's car to meet up with Niall on Marvine Street. They ultimately met up with Niall near Louden Street and Marvine Street – which is west of 11th Street. Charlie got into Niall's Impala, drove a block east toward Warnock Street, and parked the Impala on the south side of Louden Street near the cement barricades. Eric, McClain, and Niall walked the block or so to Warnock Street. Eric said he wanted to fight, but said none of them had weapons or were armed.[46]

As they approached Warnock Street, Eric said he saw Mr. Washington, Burke, and Rachman on the east corner of Warnock Street and Louden Street. When Rachman saw the Impala, he (Rachman) walked toward the Impala. When Rachman walked past him, Eric sucked punched him in the mouth. Immediately thereafter, Eric heard gunfire. He ran toward the Impala and *hid under* it. He didn't look to see who was shooting or where everyone was running, he just got under the Impala as quickly as

[44] NT, Trial, 5/10/2010, pp. 16-24.
[45] *Id.*, pp. 24-26.
[46] *Id.*, pp. 27-32.

possible. As the shooting continued, Eric crawled out from underneath the Impala, got into the Impala, and positioned himself on the passenger's side floor under the dashboard where he stayed until the shooting stopped.[47]

Eric was unsure how many shots he heard and when the prosecutor asked what he saw during the shooting, he said, "I didn't see nothing. I was in the car."[48] The prosecutor then asked, "[W]hen your brothers were being shot down in the middle of that street, did you look up and see who was shooting?" Eric replied, "No."[49]

When the prosecutor impeached him with his June 7, 2006 statement, Eric admitted he'd told detectives he saw Mr. Washington and Burke shooting,[50] but said he never saw Mr. Washington shooting. Thus, when he identified Mr. Washington on June 7, 2006, he identified him only because he saw him on the east corner of Warnock Street and Louden Street before the shooting, not because he saw him shooting. After the prosecutor impeached Eric with his testimony from Braheem Burke's September 2007 trial, Eric acknowledged he'd previously testified he had "no doubt" he saw Mr. Washington and Burke firing at him and the others the day of the shooting.[51]

[47] NT, 5/10/2010, pp. 32-36.
[48] *Id.*, p. 37.
[49] *Id.*, p. 55.
[50] *Id.*, pp. 56-62.
[51] *Id.*, pp., 67-75.

On cross-examination, Eric again said he didn't see Mr. Washington shooting or with a gun. Mr. Washington, as Eric put it, was just at the scene.[52] Once he heard gunfire, Eric said he immediately dove *under the* Impala without looking to see who was shooting, and once under the Impala, he didn't attempt to see who was shooting, and even if he'd looked or attempted to look, he would've been unable to see who was shooting because he was *under the* Impala.[53]

Eric also said he'd repeatedly told detectives he couldn't see the gunmen because he was *under the* Impala, but said he signed his June 7, 2006 statement because it was obvious to him the detectives wanted to hear a certain narrative from him. Consequently, although he knew this aspect of his statement was false, he still signed his statement because he wanted the questioning to end so he could be with Charlie at the hospital.[54]

**b. Keith McClain's testimony**

Keith McClain testified and corroborated Eric's testimony regarding the events before the shooting. Like Eric, McClain heard gunfire immediately after Eric had punched Rachman. Upon hearing gunfire, McClain said he ran east on Louden Street and didn't see who was shooting. McClain also said he didn't see anyone with a gun.[55]

[52] *Id.*, pp. 81-82.
[53] *Id.*, pp. 90-91.
[54] *Id.*, pp. 91-93.
[55] NT, Trial, 5/11/2010, pp. 24-25.

Regarding his September 8, 2008 statement, where he allegedly identified Mr. Washington and Burke as the gunmen, McClain said he'd told detectives he'd seen Mr. Washington and Burke on the east corner of Warnock Street and Louden Street. However, he said detectives repeatedly tried to phrase his answer to make it sound like he (McClain) was suggesting that they, *i.e.*, Mr. Washington and Burke, were the gunmen, but he never saw either with guns and he never saw who was shooting.[56] McClain also said detectives fabricated the part of his statement where he allegedly said he saw Burke holding a black revolver. The only thing McClain told detectives was that he saw Burke on the corner of Warnock Street and Louden Street.[57]

McClain also objected to the part of his statement where he allegedly said the shooter had braids like Mr. Washington. McClain said he never told the detectives the shooter had braids. He told detectives he *believed* the shooter *may have had* braids and said he never identified Mr. Washington as the gunman based on his braids.[58] McClain said he saw two or three guys on the corner with braids, including Mr. Washington. Of these three men, though, he only knew Mr. Washington, which is why he mentioned Mr. Washington's name to detectives.[59] McClain admitted he told detectives Mr. Washington *may have been* one of the gunmen because of his braids, but told detectives he couldn't identify Mr. Washington because he didn't get an adequate look at the

[56] *Id.*, pp. 44-45.
[57] *Id.*, pp. 48-49.
[58] *Id.*, p. 53.
[59] *Id.*, pp. 61-62.

gunmen.[60] McClain also said, contrary to his statement, he had no idea what direction the gunfire was coming from because when he heard gunfire he took off running east on Louden Street.[61] On cross-examination, McClain again said he never saw Mr. Washington with a gun.[62] McClain also said that while running from the scene a tall black man with braids chased after and was shooting at him, but he didn't get an good view of the man's face.[63]

### c. Rasheed Ali's testimony

Rasheed Ali testified and explained how he'd loaned his Impala to Niall and how he'd called Niall shortly before 12:30 p.m. to get his Impala back. Niall told Rasheed the Impala was parked on Louden Street, so Rasheed walked east on Louden Street. Rasheed spotted the Impala near the barricades on the south side of Louden Street near Warnock Street. As he walked past 11th Street towards the Impala, he saw a group of men on the corner of Warnock Street and Louden Street, but he didn't see Mr. Washington, Burke, or Rachman. When he heard gunfire, which totaled six or seven shots, he ran and was unconcerned with trying to identify the gunman or gunmen.[64] When the prosecutor repeatedly asked if he'd seen people shooting, Rasheed repeatedly said no.[65]

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[60] *Id.*, pp. 82-85.
[61] *Id.*, pp. 58-59.
[62] *Id.*, pp. 86-87.
[63] *Id.*, p. 88.
[64] NT, Trial, 5/5/2010, pp. 170-176.
[65] NT, Trial, 5/6/2010, pp. 8-9.

The prosecutor presented Rasheed with his June 7, 2006 statement. Rasheed said much of the statement was true, but said the part concerning the shooting was untrue. When the prosecutor asked why this part was untrue, Rasheed said when detectives initially questioned him, they'd accused him of being one of the gunmen. The questioning, he said, dragged on for eight hours and it got to the point where he simply wanted to leave Homicide because he didn't want to be wrongly accused of murder and he didn't want detectives contacting his parole officer. Based on these facts, Rasheed said he finally agreed with whatever the detectives "want[ed] to hear" so he could "get out" of Homicide as quickly as possible.[66] Rasheed, however, said the narrative of the shooting presented in his statement came from detectives, not him. According to Rasheed, detectives presented him with multiple scenarios of how they believed the shooting may've occurred and one of the scenarios mentioned Mr. Washington and Burke and this is how their names got incorporated into his statement.[67]

> **[2] We went over some scenarios that they supposed to**
> **[3] have came after they -- or whatever but they came,**
> **[4] and, oh, we know now that you wasn't the shooter;**
> **[5] blah, blah, blah, and all this other stuff like**
> **[6] that.**
> **[7] And they brung some scenarios to me,**
> **[8] and this is when Yusef name was brought up and this**
> **[9] is when Newsy name brought up. It actually was on a**
> **10] statement that I seen from somebody and basically I**
> **11] hustled that statement and put that together and got**
> **12] out of there.** [68]

[66] NT, Trial, 5/5/2010, pp. 205-207.
[67] *Id.*, pp. 207-208.
[68] *Id.*, p. 208.

Rasheed acknowledged he'd testified at Burke's trial that he saw people shooting, but he qualified his testimony by saying it was based on the fact he knew people had to be shooting because he heard multiple gunshots. Put differently, while he didn't see people shooting, he knew people had to be shooting because of the gunfire and this was why he testified the way he did at Burke's trial.[69] Rasheed also said aspects of his testimony at Burke's trial were untrue because he feared if he didn't testify consistent with his June 7, 2006 statement, the District Attorney's Office ("DAO") would come down hard on him regarding the numerous charges pending against him at the time:

> **[19] A Because at that time, September, '08, I**
> **[20] was facing a bunch of charges, you understand. I**
> **[21] was facing a whole lot of charges. And in September**
> **[22] I was fighting a lot of cases.** [70]

When detectives questioned Rasheed in June 2006, he was on parole and had been sentenced to several years in prison for robbery, firearms violations, carjacking, and assault. When he testified at Burke's trial, he was in custody facing attempted murder, drugs, and firearms charges. The Commonwealth, he said, dismissed these charges after he testified against Burke.[71]

Before testifying at Burke's trial, moreover, Rasheed said ADA Conroy had him brought down from "up state" to the DAO. When he met with ADA Conroy before Burke's trial, Rasheed said Conroy didn't explicitly agree to drop or reduce his pending

[69] NT, Trial, 5/6/2010, pp. 10-11.
[70] *Id.*, p. 14.
[71] *Id.*, pp. 30-33.

charges, but he said Conroy "hinted" this was a very real possibility if he testified consistently with his statement:

> [7] **Q** Now, Mr. Conroy who was the D.A. at that
> [8] time you spoke with him; is that correct?
> [9] **A** Right.
> [10] **Q** And not only did you speak with him when
> [11] he asked you those questions in the courtroom, but
> [12] you spoke with him before you went into the
> [13] courtroom; is that right?
> [14] **A** He brung me down from Up State, took me to
> [15] his office.
> [16] **Q** And you told us you were concerned about
> [17] those charges. Mr. Conroy didn't make you any
> [18] promises about your testimony, did he, sir?
> [19] **A** No, he didn't make promises but he made
> [20] some hints.
> [21] **Q** I'm sorry?
> [22] **A** He hinted around stuff, though. [72]

On cross-examination, Rasheed said he never once identified Mr. Washington as one of the gunmen when he'd met with detectives or when he testified at Burke's trial.[73] Rasheed then gave a detailed accounting of what happened during his interrogation. When he first arrived at Homicide, detectives treated him like one of the gunmen. Detectives placed him in a room by himself and came in every so often and asked him questions. Rasheed repeatedly told detectives he didn't see the gunmen, so he had no idea who they were. At one point, he heard his family and lawyer outside the door asking for him, but the detectives told them he wasn't at Homicide. When he asked detectives why he wasn't allowed to leave, detectives told him he knew what had happened and he needed to do the right thing.

[72] *Id.*, p. 15.
[73] *Id.*, pp. 27-29.

Rasheed said detectives eventually handed him a tablet and told him to write down what happened. When detectives refused to believe the aspects of his initial statement regarding the shooting, Rasheed said he fabricated this part of his statement so he could leave Homicide and stay out of trouble with his parole officer. Regarding the photo array with Mr. Washington's photograph, Rasheed said he circled Mr. Washington's photograph only because he recognized him from the neighborhood and he simply wanted to give the detectives what they'd wanted. Rasheed reiterated that once he heard gunfire, his primary concern was to protect himself, not to look around to see who was shooting. Lastly, Rasheed emphasized he didn't want to send an innocent man to prison for the rest of his life for something he didn't do.[74]

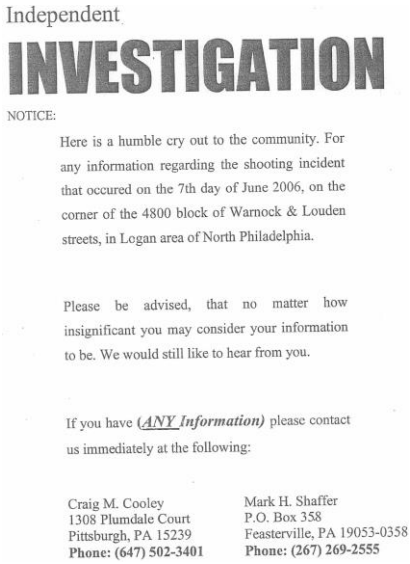
#### d. Prosecutor's closing arguments

During her closing arguments, the prosecutor spent much time trying to persuade the jury that Eric, Rasheed's, and, McClain's statements were credible and truthful.[75]

### 3. Post-conviction

Believing in his innocence, in 2016 Mr. Washington's family posted the following sign around the neighborhood where the shooting had occurred to find witnesses to the June 7, 2006 shooting.

[74] *Id.*, pp. 52-67.
[75] NT, Trial, 5/12/2010, pp. 77-90.



Independent

INVESTIGATION

NOTICE:

Here is a humble cry out to the community. For any information regarding the shooting incident that occured on the 7th day of June 2006, on the corner of the 4800 block of Warnock & Louden streets, in Logan area of North Philadelphia.

Please be advised, that no matter how insignificant you may consider your information to be. We would still like to hear from you.

If you have ***(ANY Information)*** please contact us immediately at the following:

Craig M. Cooley
1308 Plumdale Court
Pittsburgh, PA 15239
**Phone: (647) 502-3401**

Mark H. Shaffer
P.O. Box 358
Feasterville, PA 19053-0358
**Phone: (267) 269-2555**

Two eyewitnesses called investigator Mark Shaffer: Kevin Smith and Larry Polk. Shaffer interviewed Kevin Smith on December 12, 2016. On June 7, 2006, Smith lived at 4816 Warnock Street, only a few houses north of where the shooting occurred. Smith said he had just finished playing basketball in the "early afternoon" and was walking home when he saw Mr. Washington near the corner of Warnock Street. Immediately thereafter, Smith said he heard gunfire and saw an unarmed Mr. Washington run.[76] Smith said he saw two men running from where he heard the shots being fired and one of the men was "Rocky." Smith described Rocky as a black male in his late twenties. Smith said the other man was a black male in his late twenties as well.[77]

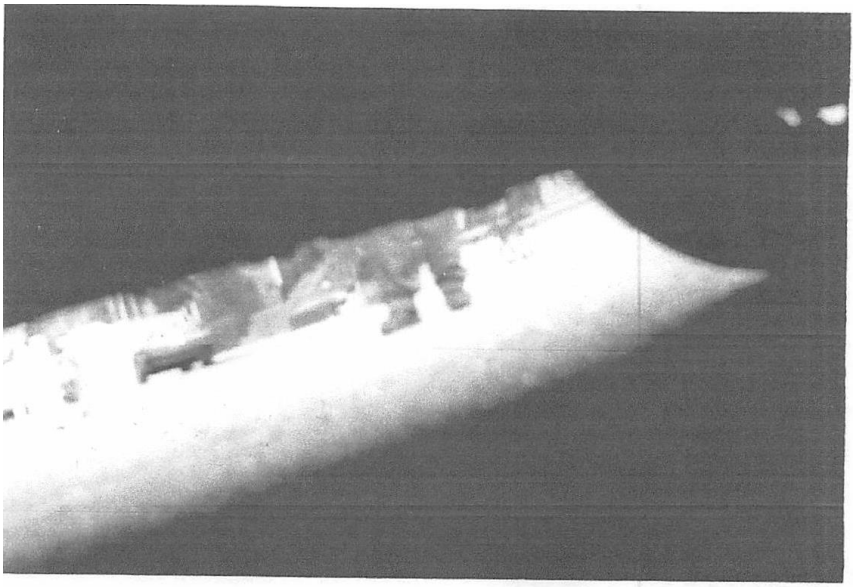
[76] Rp. 84.
[77] Rp. 84.

Shaffer interviewed Larry Polk on December 26, 2016. Polk said he was visiting his grandmother on June 7, 2006. His grandmother lived at 4808 Warnock Street, only a few houses north of where the shooting occurred. Polk said when he went outside to his grandmother's front porch to smoke a cigarette, he saw Mr. Washington across the street. Immediately thereafter, Polk heard gunfire and saw an unarmed Mr. Washington run north on Warnock Street in the opposite direction of the gunfire. Polk said Mr. Washington was unarmed and had nothing in his hands when he saw him running. Polk said he saw two black men run from the "area of the gunshots." He knew the one black male as Rock who was approximately 28-years-old.[78]

Lastly, Eric Carter's statement played a key role at Mr. Washington's trial. At trial, Eric said he crawled under the Impala when the shooting began and then crawled into the Impala. Eric testified, though, he didn't look at the gunmen when he was under the Impala, and even if he'd done so, he would've been unable to identify the gunmen because of where he was positioned under the Impala. The Commonwealth, however, introduced Eric's pre-trial statement where he claimed to have been able to see Mr. Washington and Burke shooting while under the Impala. The Commonwealth then argued during closing arguments that Eric's statement proved he positively identified Mr. Washington as one of the gunmen.

[78] Rp. 85.

To substantiate Eric's *trial testimony* – where he said he wouldn't have been able to see the gunman from under the Impala – Mark Shaffer rented a 2004 Impala, parked it in the exact location where it was parked on June 7, 2006, and then crawled under the Impala and took the following photograph – which accurately depicts his field of vision while under the Impala:



On January 30, 2018, investigator Joe Gill interviewed Keven Smith over the phone (215-452-1115). Smith, at the time, lived at 107 South 4th Street, Darby, Pennsylvania. Smith told Gill the following facts regarding the June 7, 2006 shooting that resulted in Mr. Washington's first-degree murder conviction:

On June 7, 2006, in the early afternoon hours, Smith was headed to his grandmother's house on 4816 Warnock Street. He'd just finished playing basketball at a local playground. He reached the intersection of Louden Street and Warnock Street and turned up Warnock Street. There were at least two, possibly three or four, people

at the corner/intersection. As Smith walked up Warnock Street, he saw Mr. Washington was walking towards him on the same side of the street. Approximately halfway down the block, Smith heard gun shots coming from behind him. He immediately ran to his grandmother's house. When the shots started, Smith observed Mr. Washington turn and run from the above corner/intersection. Mr. Washington was running in front of Smith as he (Smith) crossed Warnock Street to the side of the street his grandmother lived on. They both ran in the opposite direction of the shooting.[79]

After interviewing Smith, Gill handwrote a statement summarizing Smith's observations on June 7, 2006. On February 12, 2018, Gill traveled to 121 East City Avenue in Bala Cynwyd, Pennsylvania for the purposes of meeting with Smith to have Smith review and sign the attached statement. Smith reviewed and signed the statement.[80]

[79] Rpp. 118-119.
[80] Rpp. 118-119.

## ARGUMENTS

**Claim #1: Kevin Smith's and Larry's Polk's statements and non-identifications of Mr. Washington either constitute after-discovered facts or trial counsel failed to identify, interview, and present their observations and non-identifications at Mr. Washington's trial. Either way, Mr. Washington is entitled to a new trial based on Kevin Smith's and Larry Polk's observations and non-identifications. U.S. Const. admts. 6, 8, 14; Pa. Const. art. I, § 8, 9.**

Mr. Washington is entitled to relief under a after-discovered facts argument or trial counsel ineffectiveness argument. Simple logic mandates it has to be either one or the other: (1) trial counsel either failed to adequately investigate the shooting before trial and this is why he didn't locate, interview, subpoena, and present Polk and Smith as critical defense witnesses (IAC claim) or (2) no amount of pre-trial investigation would've resulted in trial counsel locating, interviewing, and subpoenaing Polk and Smith (after-discovered fact claim).

### A. After-discovered facts argument

#### 1. The after-discovered fact case law and facts

After-discovered facts can be the basis for a new trial if: (1) they've been discovered after trial and couldn't have been obtained at or prior to the trial's conclusion by the exercise of reasonable diligence; (2) they're not merely corroborative or cumulative; (3) they won't be used solely to impeach a witness's credibility; and (4) they're of such a nature and character a different verdict would likely result if a new trial is granted. *Commonwealth v. McCracken*, 659 A.2d 541, 544-545 (Pa. 1995).

### a. Diligence component

In terms of the first factor, if trial counsel could've located Polk and Smith before trial based on a reasonable and thorough investigation, then, yes, Mr. Washington isn't entitled to relief under an after-discovered fact theory. In the end, that Polk and Smith came forward shortly after seeing the "Investigation Notice" posted in the neighborhood, and both told counsel and Mr. Washington's PCRA investigators they would've testified at Mr. Washington's trial had they been interviewed and subpoenaed, the claim rings more of an IAC claim than an after-discovered facts claim. Counsel, though, pled both theories to protect and preserve Mr. Washington's after-discovered facts claim in case the PCRA court or this Court viewed the claim more as an after-discovered facts claim than an IAC claim.

### b. Polk's and Smith's observations do much more than corroborate Eric's and McClain's trial testimony

The second factor, *i.e.*, the new facts aren't merely corroborative or cumulative, is critically important here – assuming Mr. Washington's after-discovered facts claim has legs to walk. At trial, Eric Carter's and Keith McClain's testimony created a critical factual dispute. Specifically, both *testified* they only saw Mr. Washington at the corner of Warnock Street and Louden Street immediately before the shooting and neither saw him with a gun or shooting. Moreover, both claimed they told detectives this narrative during their unrecorded interrogations. The prosecutor, though, impeached Eric and McClain with their unrecorded interrogation statements – where both allegedly claimed

they saw Mr. Washington shooting from the corner of Warnock Street and Louden Street.

The factual dispute, consequently, concerned which of these two narratives constituted the truth, *i.e.*, an unarmed Mr. Washington simply standing on the corner observing the fight between Eric and Rahman vs. Mr. Washington shooting in Eric's and McClain's direction once the fight broke out. This is where Polk's and Smith's observations are relevant and exculpatory.

Like Eric and McClain, Polk and Smith both said they saw an unarmed Mr. Washington standing at the corner immediately before the shooting and both saw an unarmed Mr. Washington running north on Warnock Street immediately after the shooting. Moreover, Polk and Smith both said they saw two black men standing in the epicenter of the gunfire, and both identified one of these men as a man named Rock. Three reasonable inferences come from their observations: (1) Mr. Washington wasn't armed, (2) Mr. Washington wasn't one of the gunmen who opened fired, and (3) the two men standing in the epicenter of the gunfire, Rock being one of them, are the gunmen.

Polk's and Smith's observations did much than corroborate Eric's and McClain's trial testimony. The most significant aspect of the observations concerns the two men *standing* in the epicenter of the gunfire. Logic, common sense, and the innate human desire to remain alive generally cause *unarmed* eyewitnesses to immediately flee a shooting scene. They don't stand around, and they surely don't stand or move to the

epicenter of the gunfire. Yet, this is exactly what Polk and Smith saw, *i.e.*, they saw two men standing in the exact location where the gunfire originated.

Based on inferential logic, then, had Polk and Smith testified, a fact-finder could've reasonably concluded Rock and the other man were the gunmen, not Mr. Washington and Braheem Burke. Polk's and Smith's observations, therefore, did something very significant that Eric's and McClain's trial testimony didn't do: they would've provided jurors with two other men who could've – and likely did – commit the shooting that resulted in Charles Carter's and Niall Saracini's deaths.

Furthermore, while Polk's and Smith's observations corroborated parts of Eric's and McClain's trial testimony, based on how Mr. Washington's trial played out, their observations would've done much more. Again, Mr. Washington's trial turned into a "trial by prior statements" because none of the Commonwealth's three key witnesses – Eric, McClain, or Rasheed – identified Mr. Washington as one of the gunmen at trial. Thus, the Commonwealth had to base its case on Eric's, McClain's, and Rasheed's unrecorded interrogation statements, which made credibility the fundamental trial issue.

Smith's and Polk's observations would've enhanced Eric's, McClain's, and Rasheed's *trial* credibility in the following ways:

*First*, because Smith and Polk likely saw the two men responsible for the shooting – and neither were Mr. Washington – this fact, alone, would've told jurors that Eric's, McClain's, and Rasheed's trial testimony very likely represented the truth, not their unrecorded interrogation statements. In other words, if jurors found Smith's and Polk's

observations credible, then Eric's, McClain's, and Rasheed's statements were likely incredible, untrue, and coerced as all three claimed at trial.

*Second*, Smith and Polk both saw what Eric and McClain saw immediately before the shooting, *i.e.*, an unarmed Mr. Washington standing on the corner of Warnock Street and Louden Street. This too would've given jurors additional facts to find Mr. Washington's innocence narrative more credible because four people would've said they saw an unarmed Mr. Washington standing on the corner immediately before the shooting.

**c. Had Polk's and Smith's observations been presented to, they would've likely changed the outcome of Mr. Washington's trial**

Polk's and Smith's observations speak for themselves: both saw Mr. Washington without a gun immediately before and after the shooting and neither saw him shooting. More importantly, they saw two men, one named Rock, standing at the epicenter of the gunfire once the shooting had stopped. Collectively, then, it's reasonably likely jurors would've made these inferences or findings from Polk's and Smith's observations:

*First*, neither Polk nor Smith had a "dog in the fight," so to speak, because neither were friends or relatives of Charles Carter, Niall Saracini, Mr. Washington, or Braheem Burke. Likewise, neither endured lengthy, unrecorded interrogations at the hands of homicide detectives. Based on these facts, jurors would've likely inferred or found that Polk and Smith represented the *most neutral* and *untainted* fact witnesses.

*Second*, because both represented neutral and untainted fact witnesses and both gave similar narratives as to what they saw immediately before and after the shooting, the jury would've likely found their narratives to be the most objective and credible.

*Third*, the jury would've then likely used its credibility determinations of Polk and Smith, as well as Eric's, McClain's, and Rasheed's trial testimony, to conclude that the narratives presented in Eric's, McClain's, and Rasheed's statements were untrue and very likely coerced as all three claimed at trial.

*Fourth*, based on these inferences and findings, it's likely the jury would've acquitted Mr. Washington of all charges because the Commonwealth had failed to prove he was one of the gunmen beyond a reasonable doubt.

**2. The PCRA court's opinion**

The PCRA court correctly points out Mr. Washington didn't explain why Polk's and Smith's observations and statements couldn't have been developed before trial.[81] While the PCRA court is correct regarding this factor, Mr. Washington must address the PCRA court's handling of the other factors because these other factors directly or indirectly impact his IAC claim.

*First*, the PCRA court said Polk's and Smith's observations would've merely been "corroborative or cumulative" of Eric's and McClain's trial testimony.[82] The PCRA court supports this finding by cherry picking a portion of one sentence in Mr.

[81] Rp. 126.
[82] Rp. 126.

Washington's amended PCRA petition, and then misleadingly contorting it in such a way to support the outcome it desired. In his amended PCRA petition, Mr. Washington made the following argument regarding the impact of Polk's and Smith's observations:

> Larry Polk and Kevin Smith are two uninterested and unbiased witnesses and had the jury heard about what they observed and heard the day of the shooting, the jury would have likely returned a different verdict. Polk's and Smith's observations actually corroborate what Eric and McClain testified to at trial, namely that they saw Mr. Washington near the corner of Warnock Street and Louden Street shortly before the shooting began, but neither saw him with a gun.[83]

Read objectively, in its entirety, and in conjunction with the entire after-discovered facts argument, the point being made was straightforward: that Polk's and Smith's observations coincide with Eric's and McClain's trial testimony regarding what they saw immediately *before* the shooting, strongly suggests Polk and Smith saw what they claimed they saw immediately before *and after* the shooting. Thus, if jurors believed what Polk and Smith saw before and after the shooting, and their pre-shooting observations corresponded with Eric's and McClain's observations, jurors would've likely found Eric's and McClain's trial testimony more credible than the narratives presented in their unrecorded interrogation statements. Had jurors found Polk and Smith credible, as well as Eric's and McClain's trial testimony credible, Mr. Washington argued that these findings would've likely resulted in the jury returning a different verdict.

[83] Rpp. 26-27.

The PCRA court, however, didn't consider the overall argument being made based on Polk's and Smith's observations. No, the PCRA court cherry picked a portion of one sentence from the above paragraph to reject this claim:

> Furthermore, [Mr. Washington] has failed to meet either the second or fourth factor of the [after-discovered facts] tests. [Mr. Washington] claimed, "*Polk's and Smith's observations actually corroborate what Eric and McClain testified to at trial*." As such, this would be considered evidence that is merely corroborative or cumulative and not grounds for a new trial.[84]

This manipulative cherry picking at its worst. The PCRA court not only left out the second part of the sentence, it made it appear as if there wasn't even a second part to the sentence when it added a period at the end of the quoted and italicized sentence. The second part of the sentence, *which is separate by a comma*, reads: "namely that they saw Mr. Washington near the corner of Warnock Street and Louden Street shortly before the shooting began, but neither saw him with a gun." The second part, therefore, is critical to the argument regarding Polk's and Smith's credibility. Furthermore, the PCRA court took this half-sentence completely out of context because it refused to consider the entire sentence and how the entire sentence *and* entire paragraph worked in conjunction with Mr. Washington's entire after-discovered facts claim.

*Second*, as mentioned *supra*, pp. 29-31, Polk's and Smith's observations aren't merely corroborative or cumulative. Polk and Smith both said they saw two men, one

[84] Rp. 126.

named Rock, standing at the epicenter of the gunfire once the gunfire had stopped. Eric's and McClain's testimony didn't include these critical and exculpatory facts.

*Third*, the PCRA court claimed Mr. Washington didn't "discuss how this evidence would likely alter the outcome of the trial."[85] This is another finding not supported by the record. Mr. Washington spent an entire page and a half in the after-discovered facts section, and another entire page in the IAC section, explaining how Polk's and Smith's observations would've likely changed the outcome of Mr. Washington's trial.[86]

*Fourth*, the PCRA court said Polk's and Smith's observations wouldn't have changed the outcome of Mr. Washington's trial because "[n]either" Polk nor Smith "stated that [Mr. Washington] did not or could not shoot the victim[s][.]"[87] The PCRA court is wrong. The gist of Polk's and Smith's observations is self-evident, and the jury could've easily – and would've likely – used it to make the abovementioned *inferences* regarding the shooting, *supra*, p. 32, the most important being Mr. Washington and Braheem Burke weren't the gunmen because Rock and another man were standing in the epicenter of the gunfire immediately after the shooting had stopped.

The PCRA court, moreover, ignores the fact Mr. Washington's conviction is based entirely on *inferences* – not direct eyewitness *testimony* identifying him as one of the

[85] Rp. 126.
[86] Rpp. 26-27, 33.
[87] Rp. 126.

gunmen. No one at trial identified Mr. Washington as one of the gunmen, yet Mr. Washington was convicted of two counts of first-degree murder. This is only possible because the jury made *inferences* based on Eric's, McClain's, and Rasheed's unrecorded interrogation statements. In the absence of neutral fact witnesses like Polk and Smith, the jury obviously found the narratives contained in these statements more credible than Eric's, McClain's, and Rasheed's trial testimony.

Consequently, if the Commonwealth can obtain a conviction based on inferences, a PCRA petitioner can surely obtain a new trial on inferences, especially when the inferences are premised on observations made by neutral fact witnesses who haven't been interrogated or tainted by homicide detectives.

**B. Trial counsel ineffectiveness argument**

Mr. Washington has a right to effective trial counsel. *Strickland v. Washington*, 468 U.S. 668, 688 (1984). Trial counsel's purpose is to "test[] the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged." *Martinez v. Ryan*, 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). 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).

To prevail on an IAC claim, Mr. Washington must demonstrate counsel performed deficiently and the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. at 687. The deficiency prong "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to] the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. at 687. The prejudice prong requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome[.]" *Id.* at 694.

This "is not a stringent" standard and is "less demanding than the preponderance standard." *Hall v. Kyler*, 190 F.3d 88, 110 (3d Cir. 1999). The issue is whether it's reasonably probable that, had trial counsel performed effectively, by locating, interviewing, subpoenaing, and presenting Polk and Smith as defense witnesses, "at least one juror's assessment" of the Commonwealth's case "would have been altered" in such a way to conclude the Commonwealth had failed to meet its burden of proving Mr. Washington's guilt beyond a reasonable doubt. *Cone v. Bell*, 556 U.S. 449, 452, 475 (2009); *accord Buck v. Davis*, 137 S.Ct. 759, 776 (2017).

Under state law, a petitioner must show (1) the underlying claim is of arguable merit, (2) trial counsel's action or inaction lacked any objectively reasonable basis designed to effectuate the defendant's interest(s), and (3) prejudice. *Commonwealth v.*

*Pierce*, 527 A.2d 973, 975–976 (Pa. 1987). *Pierce* and *Strickland* are identical: deficient performance and prejudice. *Commonwealth v. Spotz*, 870 A.2d 822, 829 (Pa. 2005).

When assessing whether trial counsel had a "reasonable basis" for a particular act or omission, the question isn't whether there were other courses of action available, but "whether counsel's decision had any basis reasonably designed to effectuate his client's interest." *Commonwealth v. Williams*, 141 A.3d 440, 463 (Pa. 2016). The issue, therefore, is "whether counsel made an informed choice, which at the time the decision was made reasonably could have been considered to advance and protect [the] defendant's interests." *Commonwealth v. Dunbar*, 470 A.2d 74, 77 (Pa. 1983). Trial counsel's action or omission will be considered unreasonable if the petitioner establishes "that an alternative not chosen offered a potential for success substantially greater than the course actually pursued." *Commonwealth v. Howard*, 719 A.2d 233, 237 (Pa. 1998).

**1. This claim has arguable merit because the failure to interview the residents of the 4800 block of Warnock Street prevented trial counsel from locating, interviewing, subpoenaing, and presenting Larry Polk and Kevin Smith at trial, and trial counsel didn't have a reasonable basis for not canvassing the 4800 block of Warnock Street, especially when this type of investigation is commonly performed in homicide cases and Mr. Washington proclaimed his innocence from day one**

If the Court finds that Larry Polk's and Kevin Smith's statements could've been obtained before trial and presented at trial, then trial counsel was ineffective for not effectively investigating Mr. Washington's case and finding these critical fact witnesses.

Trial counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. at 691. The duty to investigate "may include 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). "Unquestionably, investigation is essential to the lawyer's duties as both advisor and advocate. After all, the effectiveness of advocacy is not to be measured solely by what the lawyer does at the trial; without careful preparation, the lawyer cannot fulfill the advocate's role." *Blystone v. Horn*, 664 F.3d 397, 419 (3d Cir. 2011).

The duty to investigate, however, is paramount when the Commonwealth's case is dependent on the credibility of its key witnesses. Here, the Commonwealth tasked the jury with deciding between the unrecorded interrogation statements and trial testimony of Eric Carter, Keith McClain, and Rasheed Ali. Consequently, the jury had to determine which of the two presented as more credible and believable. The Commonwealth forcefully and repeatedly argued that their unrecorded interrogation statements were more credible and represented the truth.

Moreover, the way Mr. Washington's trial played out, *i.e.*, statements vs. testimony, was entirely foreseeable based on Eric's, Rasheed's, and McClain's trial testimony at Braheem Burke's trial. At Burke's trial, Eric, Rasheed, and McClain either hedged on their identifications of Mr. Washington or flat-out refused to identify Mr.

Washington as one of the gunmen because they claimed they didn't or couldn't see the gunmen. It was also foreseeable based on Eric's testimony at Mr. Washington's preliminary hearing, where Eric said he never saw the gunmen, but identified Mr. Washington in his unrecorded interrogation statement because this was what detectives wanted and because he wanted to leave Homicide as soon as possible to be with his dying brother at the hospital. Consequently, had trial counsel obtained and reviewed Burke's trial transcripts, *which he did because he used the Burke testimony during his cross-examinations*, he should've realized Mr. Washington's trial may very well come down to a credibility battle between Eric's, McClain's, and Rasheed's unrecorded statements and trial testimony.

Based on these facts, trial counsel had a duty to pursue avenues of investigation that could've potentially produced evidence calling into question the credibility and veracity of Eric's, Rasheed's, and McClain's unrecorded statements. "[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). "In a case where virtually the only issue is the credibility of the Commonwealth's witness versus that of the defendant, failure to explore *all alternatives available* to assure that the jury heard the testimony of a known witness who might be capable of casting a shadow upon the Commonwealth witness's

truthfulness is ineffective assistance of counsel." *Commonwealth v. McCaskill*, 468 A.2d 472, 477 (Pa. Super. 1983) (emphasis added).

The easiest and most commonsensical way to undermine the credibility and veracity of Eric's, McClain's, and Rasheed's unrecorded statements was to find neutral and unbiased fact witnesses whose narratives of the shooting differed from their unrecorded interrogation statements. This approach represents nothing more than Investigation 101. The easiest and most effective way to do this was to canvass the 4800 block of Warnock Street, namely the part closest to the shooting.

The likelihood of potentially finding neutral fact witnesses was moderately high based on at least three factors trial counsel knew or should've known before trial:

*First*, the shooting occurred at 12:30 p.m., *i.e.*, when the great majority of people are outside enjoying their day.

*Second*, the warm weather made it likely the Warnock Street folks would've been outside on their front porches enjoying the weather, talking with neighbors, or smoking a cigarette when the shooting occurred. A Google maps or Google Earth search of the 4800 block of Warnock Street shows that every house on both sides of the street have roofed front porches where folks can sit outside and enjoy the weather on a sunny summer day.[88]

[88] Rpp. 91-93.

*Third*, according to the neighborhood survey sheets disclosed to trial counsel before trial, responding officers knocked on only six doors on Warnock Street: 4800 Warnock (David Staggers), 4801 (Rachel Wiggins), 4802 (Mary Wright), 4804 (Popp Taylor), 4806 (Susan Smith), and 4807 (Theodore Grant).[89]

Based on these facts, trial counsel should've, at the very least, knocked on several more doors to see if anyone saw anything. Trial counsel didn't and he didn't have a reasonable basis for not doing so. For instance, as Mr. Washington argued in his amended PCRA petition:

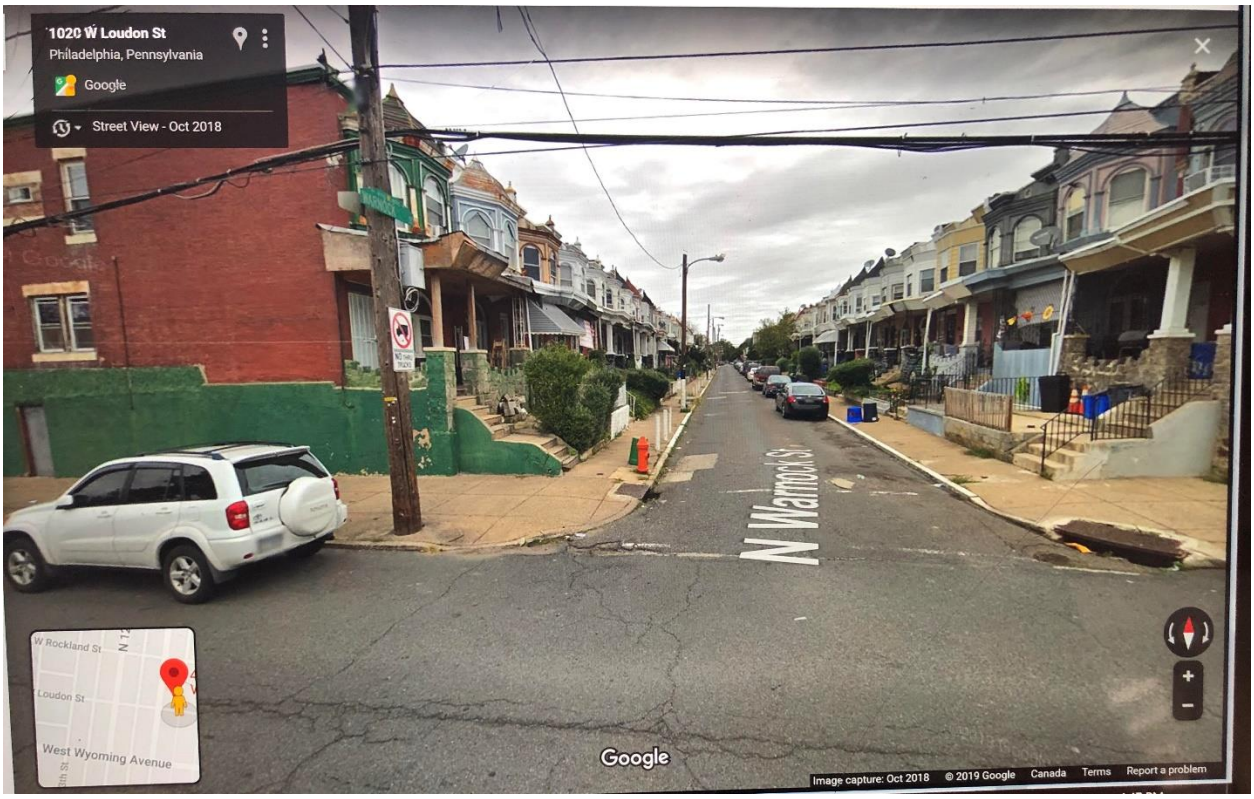
> Trial counsel did not have a reasonable basis for not conducting this type of investigation. [Because] the investigation that preceded trial counsel's decision not to conduct this type of door-to-door investigation was itself unreasonable because based on undersigned counsel's review of the record, trial counsel conducted no pre-trial research or investigation to determine if this type of door-to-door investigation was worthwhile or beneficial.[90]

Put differently, under *Strickland*, the issue isn't whether trial counsel's decision not to canvass the 4800 block of Warnock Street was reasonable. The issue is whether trial counsel's investigation preceding this decision was reasonable. *Wiggins v. Smith*, 539 U.S. 510, 522-523 (2003). If trial counsel conducted no investigation before deciding not to canvass the 4800 block of Warnock Street, his decision not to canvass can't be reasonable, can't be strategic, and isn't "virtually unchallengeable" under *Strickland*.

[89] Rpp. 94-99.
[90] Rp. 32.

*Strickland v. Washington*, 466 U.S. at 690; *Abdul-Salaam v. Sec'y of Pa. Dep't of Corr.*, 895 F.3d 254, 268 (3d Cir. 2018) ("Counsel can make a strategic decision to halt an avenue of investigation if he has completed a foundation of investigation to reach that decision, but decisions not to investigate certain types of evidence cannot be called 'strategic' when counsel fails to seek rudimentary background information.").

Of the three abovementioned facts, the one that should've quickly caught trial counsel's attention is the fact responding officers only knocked on six doors. Below is a Google Maps photograph of the corner of Warnock Street and Louden Street:




There are many more than six house on the 4800 block of Warnock Street. However, as any competent defense attorney and/or investigator will attest, the only way to know if canvassing a neighborhood will be productive is to, in fact, canvass the

neighborhood and find out for yourself. Trial counsel, therefore, couldn't base his decision not to canvass Warnock Street on the neighborhood survey sheets. If he did, his decision was objectively unreasonable because there were many more houses on Warnock Street to knock on, and the only way he could've learned about other potential witnesses to the shooting was to "hit the pavement," so to speak, with his investigator and knock on as many doors as possible.

Counsel and Mr. Washington are hard pressed to see how *not* conducting a door-to-door canvass furthered, benefited, or protected Mr. Washington's interests. Not canvassing Warnock Street simply prevented trial counsel from developing witnesses and facts that could've and would've furthered, benefited, and protected Mr. Washington's interests.

Had trial counsel sent an investigator to the 4800 block of Warnock Street, it's reasonably probable he would've found Larry Polk and Kevin Smith. Likewise, had trial counsel done what Mr. Washington's family did in 2016 and posted signs around the Warnock Street neighborhood asking for eyewitnesses to come forward, it's reasonably probable trial counsel would've found Larry Polk and Kevin Smith.

**2. Trial counsel's deficient performance prejudiced Mr. Washington**

The prejudice issue is straightforward: whether it's reasonably probable that, had trial counsel performed effectively, by locating, interviewing, subpoenaing, and

presenting Polk and Smith, "at least one juror's assessment" of the Commonwealth's case "would have been altered" in such a way to conclude the Commonwealth had failed to meet its burden of proving Mr. Washington's guilt beyond a reasonable doubt. *Cone v. Bell*, 556 U.S. at 452, 475; *accord Buck v. Davis*, 137 S.Ct. at 776. Here, it's reasonably probable that, had Polk and Smith testified, at least one juror would've altered his assessment of the Commonwealth's case in such a way that he would've concluded the Commonwealth failed to prove beyond a reasonable doubt that Mr. Washington was one of the gunmen.

The reasons supporting this conclusion are the same reasons mentioned in the after-discovered facts section, *supra*. pp. 27-36. These reasons, therefore, are incorporated as if fully pled herein. Moreover, Mr. Washington made the following arguments in his amended PCRA petition – which mirror the arguments and logic presented *supra*:

> Again, this case came down to whether the jury found Eric's, Rasheed's, and McClain's statements more credible than their trial testimony. Had Larry Polk and Kevin Smith testified similarly to their statements, their unbiased and neutral observations of Mr. Washington immediately before and after the shooting would have clearly established for the jury that Eric's, Rasheed's, and McClain's statements *regarding the shooting* could not be true and most likely were, in fact, fabricated, just as Eric, Rasheed, and McClain each testified. Polk and Smith's testimony, therefore, would have exonerated Mr. Washington outright, but it also would have significantly undermined the Commonwealth's position regarding the alleged reliability of Eric's, McClain's, and Rasheed's unrecorded statements. Had this occurred, there is a reasonable probability the outcome of Mr. Washington's

> trial would have been different. Mr. Washington, therefore, is entitled to a new trial. If not a new trial at this point, then, at the very least, he is entitled to an evidentiary hearing where Larry Polk and Kevin Smith can testify.[91]

### 3. The PCRA court's opinion

In reading the PCRA court's adjudication of the IAC claim, it's as if the PCRA court didn't read Mr. Washington's PCRA pleadings.

*First*, the PCRA court said Mr. Washington didn't "claim that counsel lacked a reasonable basis for not pursuing th[is] evidence[.]"[92] This finding has no basis in the record because Mr. Washington did, in fact, argue trial counsel didn't have a reasonable basis for not canvassing the 4800 block of Warnock Avenue – and he spent six pages in his amended PCRA petition doing so. At the end of this section, Mr. Washington summarized what he'd just said:

> *Trial counsel did not have a reasonable basis for not conducting this type of investigation*. Likewise, the investigation that preceded trial counsel's decision not to conduct this type of door-to-door investigation was itself unreasonable because based on undersigned counsel's review of the record, trial counsel conducted no pre-trial research or investigation to determine if this type of door-to-door investigation was worthwhile or beneficial.[93]

*Second*, the PCRA court said Mr. Washington "provide[d] no analysis to demonstrate how, if at all, he may have been prejudiced by not pursuing this

[91] Rp. 33.
[92] Rp. 126 (footnote 4).
[93] Rp. 32.

information."[94] This is another finding that's unsupported by the record because Mr. Washington explained how Polk's and Smith's observations would've impacted the jury's assessment of Eric's, McClain's, and Rasheed's trial testimony and statements. He did this in the IAC *and* after-discovered facts sections.[95]

*Third*, the PCRA court said Mr. Washington "[a]t no point" tried "to prove that" Polk and Smith "were available, wanted to come forward and would have been willing to testify."[96] This finding is unsupported by the record because Mr. Washington pled each of these facts.

In his January 18, 2018 supplemental petition, which counsel filed after he'd spoken with Polk and Smith, counsel provided the PCRA court with the "witness certifications" as required by Pa.R.Crim.P. 902(A)(15). Kevin Smith's certification contained the following passage: "Smith will also testify he would have testified at Mr. Washington's trial had trial counsel located him, interviewed him, and subpoenaed him."[97] Larry Polk's certification contained the following passage: "Polk will also testify he would have testified at Mr. Washington's trial had trial counsel located him, interviewed him, and subpoenaed him."[98]

[94] Rp. 126 (footnote 4).
[95] Rpp. 26-27, 33.
[96] Rp. 129.
[97] Rp. 101.
[98] Rp. 101.

*Fifth*, the PCRA court said Mr. Washington didn't "address whether counsel had a strategic decision in not calling [Polk and Smith]."[99] With all due respect to the PCRA court, this statement makes little sense – and for an obvious reason: trial counsel didn't present Polk and Smith because *he didn't know about Polk and Smith* because he didn't adequately investigate the case. If trial counsel didn't know about Polk and Smith due to his own ineffectiveness, he can't possibly have had a strategic reason for not calling them. The issue, as mentioned, is whether trial counsel had a reasonable basis not to canvass the 4800 block of Warnock Street. Trial counsel didn't and therefore his decision not to canvass the area was objectively unreasonable.

*Sixth*, the PCRA court said Mr. Washington didn't "address how… calling" Polk and Smith "would have, with [a] reasonable likelihood, changed the outcome of trial."[100] This is yet another unsupported finding because Mr. Washington repeatedly explained how Polk's and Smith's observations would've impacted the jury's credibility assessments regarding Eric's, McClain's, and Rasheed's trial testimony and statements.

### C. Summary

Larry Polk and Kevin Smith are neutral fact witnesses who saw critical aspects of the shooting. It's reasonably probable that, had they testified at Mr. Washington's trial, their observations would've altered at least one juror's view of the

[99] Rp. 129.
[100] Rp. 129.

Commonwealth's case, and convinced this juror to acquit Mr. Washington because the Commonwealth had failed to prove – beyond a reasonable – he was one of the gunmen.

Trial counsel, unfortunately, didn't find Polk and Smith. He didn't find them because he *never looked* for witnesses like them because neither he nor a defense investigator knocked on a single door on the 4800 block of Warnock Street. Consequently, their observations are either after-discovered facts or evidence of trial counsel's ineffectiveness. The after-discovered facts theory is problematic because there's no evidence suggesting Polk and Smith weren't available to testify on Mr. Washington's behalf. To the contrary, both have said they would've talked with trial counsel and testified on Mr. Washington's behalf had trial counsel asked or subpoenaed them. The IAC theory, therefore, presents the Court with a logical and just path to a new trial. Trial counsel's pre-trial investigation was unreasonable and his deficient investigation prejudiced Mr. Washington because jurors were deprived of Polk's and Smith's relevant and exculpatory observations.

**Claim #2: Trial counsel was ineffective for failing to develop and present photographic evidence to the jury undermining Eric Carter's unrecorded interrogation statement. U.S. Const. admts. 6, 8, 14; Pa. Const. art. I, § 8, 9.**

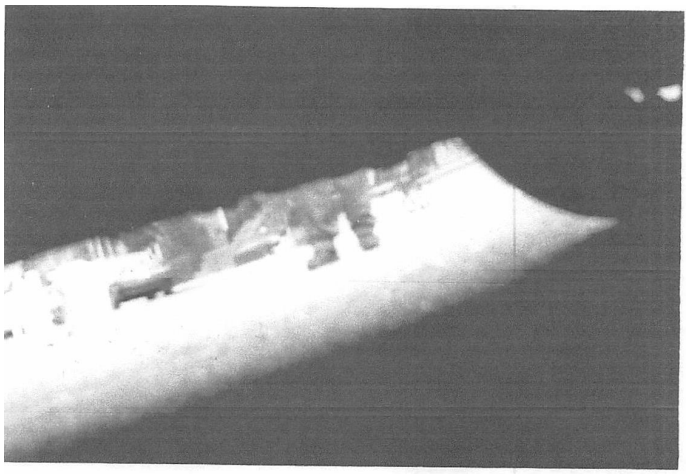
**A. Introduction**

Eric Carter's unrecorded interrogation statement played a key role in Mr. Washington's convictions. At trial, Eric testified he crawled under the Impala when the shooting began and then crawled into the Impala. Eric testified, though, he didn't look at the gunmen when he was under the Impala, and even if he had, he would've been unable to see the gunmen because of where and how he was positioned under the Impala. The Commonwealth, however, introduced his statement where he claimed he had an unobstructed view of the gunmen and he saw Mr. Washington and Braheem Burke shooting.

Counsel's duty to explore all reasonable avenues capable of producing evidence and testimony undermining the credibility of the Commonwealth's witnesses was applicable here as well. *Commonwealth v. Nock*, 606 A.2d at 1382. This is especially true in eyewitness identification cases like this one: "[T]he *only* duty of a jury in cases in which identification evidence has been admitted will often be to assess the reliability of that evidence." *Watkins v. Sowders*, 449 U.S 341, 347-348 (1981) (emphasis in original).

To challenge this damaging aspect of Eric's statement, trial counsel could've – and should've – done what Mark Shaffer did, *i.e.*, rent a 2004 Impala, park it in the exact location where it was parked on June 7, 2006 when the shooting occurred, crawl under the Impala (like Eric claimed he did) with a digital camera, and take photographs

capturing the field of vision one has while under said Impala. Once taken, trial counsel could've – and should've – presented these photographs to the jury to impeach the portion of Eric's statement where he claimed the Impala didn't obstruct his field of vision.



Trial counsel didn't have a reasonable basis for not performing this very limited and easy investigation. One is hard pressed to figure out how not obtaining such a photograph furthered Mr. Washington's interests and defense, especially when obtaining such a photograph represented no risk to Mr. Washington. Trial counsel's investigation, therefore, was objectively unreasonable, which made him unprepared for trial. "Counsel's unreasonable failure to prepare for trial is an abdication of the minimum performance required of defense counsel." *Commonwealth v. Johnson*, 966 A.2d at 535.

### B. The admissibility of demonstrative evidence such as photographs

Photographs are "demonstrative" evidence, which is evidence "tendered for the purpose of rendering other evidence more comprehensible to the trier of fact." *Commonwealth v. Serge*, 837 A.2d 1255, 1261 (Pa. Super. 2003), *aff'd Commonwealth v. Serge*, 896 A.2d 1170 (Pa. 2006). The trial court has substantial discretion regarding the admissibility of demonstrative evidence. *Commonwealth v. Lee*, 662 A.2d 645, 652 (Pa. 1995). Demonstrative evidence "such as photographs, motion pictures, diagrams, and models," however, "have long been permitted to be entered into evidence provided that the demonstrative evidence fairly and accurately represents that which it purports to depict." *Commonwealth v. Serge*, 896 A.2d at 1177.

Photographs, consequently, "should be deemed admissible" as demonstrative evidence if they: (1) are properly authenticated under Pa.R.E. 901 as a fair and accurate representation of the evidence it purports to portray; (2) is relevant under Pa.R.E. 401 and 402; and (3) its probative value isn't outweighed by the danger of unfair prejudice under Pa.R.E. 403. *Commonwealth v. Serge*, 896 A.2d at 1178-1179.

#### 1. Authentication

Pa.R.E. 901(a) provides, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Here, Mr. Washington is the proponent and he's claiming the above photograph accurately depicts one's field of vision while under a 2004 Impala. Consequently, had trial counsel hired a defense

investigator, like Mark Shaffer, to take the above photograph or one like it, the defense investigator could've easily authenticated the photograph(s) by testifying and explaining the steps he took to capture the photograph(s) and stating that the photograph(s) accurately depict his field of vision while under the 2004 Impala.

Yes, Mark Shaffer's positioning under the Impala may not have perfectly coincided with Eric's alleged positioning – assuming he was even able to see what he claimed he saw in his statement. Such precision, however, goes to the photograph's weight, not its admissibility. At retrial, the prosecutor can confront and cross-examine Shaffer regarding the fact he didn't know Eric's exact position,[101] and jurors can use this information to determine how much weight the photograph should be given.

*Commonwealth v. Serge*, 896 A.2d 1170 (Pa. 2006) is an excellent example where demonstrative evidence needn't be one-hundred percent accurate to be admissible. *Serge* dealt with the admissibility of a computer-generated animation ("CGA"), namely a computer-generated reconstruction of an alleged murder that represented the Commonwealth's *theory* of how and why the victim died. Thus, the Commonwealth couldn't prove its CGA version of the alleged murder was one-hundred percent accurate. The trial court, though, admitted the CGA version, holding that exact precision wasn't an "authentication" requirement, and any imprecision with the CGA went to its weight, not admissibility. Moreover, the trial court "instructed the jury" the

[101] Eric's statement doesn't mention his exact position under the Impala.

CGA didn't "represent fact, but the [Commonwealth's] theory… and was meant to demonstrate the [Commonwealth experts'] opinions[.]" *Id.* at 1181.

The defendant appealed, but this Court and the Supreme Court both affirmed. On appeal, the defendant "argue[d] that various depictions within the CGA [were] unsupported by any evidence." *Id.* at 1180. For instance, the defendant argued the "CGA was littered with choices unsupported by either the record or the opinions of Trooper Beach and Dr. Ross." *Id.* The Commonwealth, the defendant argued, took the following "alleged liberties" when creating the CGA:

> (1) depicting the victim as kneeling during one of the gun shots; (2) placing the victim's left arm on the floor during the second shot; (3) the position of [the defendant]; (4) the two-handed grip on the gun by [the defendant]; (5) the combat-style crouch by [the defendant]; and (6) the appearance of a knife in the final scene of the CGA.

*Id.* at 1180.

The defendant also objected to "one image within the CGA" that "show[ed] the victim on her knees before [the defendant] fire[d] the third bullet." *Id.*

The Commonwealth's CGA expert testified that "the poses, although not guaranteed to be 100% accurate, were within the confines of the findings and suggestions" made by the Commonwealth's forensic experts. *Id.* For instance, one forensic expert, Dr. Ross, "*surmised* that the victim was kneeling and facing [the defendant]" based on a wound on the victim's left check. *Id.* at 1181 (emphasis added).

The Supreme Court said one-hundred percent accuracy or exactness wasn't required: "Clearly, reconstruction will not reveal the exact pose of each finger, hair, distances precise to the micrometer, or other minor aspects of the individuals involved." *Id.* at 1181. It's not required because the opponent of the demonstrative evidence can confront and cross-examine the proponent and highlight the "alleged inconsistencies" and "flaws" in the demonstrative evidence, "thereby reducing the credibility the jury might assign to the [demonstrative evidence]." *Id.* Consequently, objections to demonstrative evidence are generally "fodder for cross-examination," not exclusion. *Id.* ("The line of questions presented by [the defendant] highlighted the alleged uncertainty regarding specific facts within the CGA and alerted the jury to the possible lack of credibility of Trooper Beach, Dr. Ross, and, by extension, the CGA.").

Based on *Serge*, the above photograph would be admissible even though Shaffer's positioning under the Impala may not have corresponded exactly with Eric's positioning under the Impala, assuming, again, he was even able to see anything. The photograph, as mentioned, would represent Mr. Washington's *theory* of what Eric's field of vision was like while under the Impala.

**2. Relevance**

All relevant evidence is generally admissible. Pa.R.E. 402. Evidence is relevant if it logically tends to prove or disprove a material fact, make such a fact more or less probable, or support a reasonable inference regarding a material fact's existence. Pa.R.E. 401.

The photograph's purpose would've been straightforward: to give jurors an understanding of what one's field of vision would be like under a 2004 Impala. This purpose was critical to Mr. Washington's defense because to accurately and fairly gauge the reliability of Eric's alleged "under the Impala" identification, jurors needed an idea of what one's field of vision would be like under a 2004 Impala.

Put differently, the photograph would've represented Mr. Washington's "theory" as to what Eric could and couldn't see while under the Impala, and he would've used it to "rebut" the Commonwealth's claim, based on Eric's statement, that Eric had an unobstructed view of the shooting and could perfectly see the gunmen. The photograph, consequently, would've "logically tend[ed] to… disprove a material fact" – and a significantly incriminating one at that. Accordingly, the photograph is relevant under Pa.R.E. 401. *Commonwealth v. Serge*, 896 A.2d at 1182 ("The [CGA's] relevance under Pa.R.E. 401 lay in its clear, concise, and accurate depiction of the Commonwealth's *theory* of the case, which included the *rebuttal* of [the defendant's] self-defense theory, without use of extraneous graphics or information.") (emphasis added)

**3. The probative-prejudice analysis**

Lastly, had trial counsel obtained and moved to present the photograph, the photograph wouldn't have confused or misled the jury, caused undue delay, or been cumulative of other evidence. Pa.R.E. 403. *Serge*, again, is on point. Despite the Commonwealth's admission that the CGA represented nothing more than its "theory" of the alleged murder, and the Commonwealth had no way of knowing whether its

"theory" was one-hundred percent accurate, the Supreme Court said this uncertainty didn't prejudice the defendant, mislead the jury, or confuse the jury.

### C. Prejudice

Trial counsel's deficient performance prejudiced Mr. Washington. Had trial counsel obtained these types of photographs, and used them when he cross-examined Eric, it's reasonably probable the jury would've found Eric's unrecorded interrogation statement implausible. Stated differently, it's reasonably probable these types of photographs would've changed the jury's credibility and weight assessments of Eric's unrecorded interrogation statement and trial testimony, and it's reasonably probable the jury would've found Eric's trial testimony more credible. Had the jury found Eric's trial testimony more credible, it's reasonably probable the jury would've used this determination to find Rasheed's and McClain's trial testimony more credible.

In the end, had trial counsel impeached Eric's unrecorded interrogation statement with photographs like the one incorporated above, it's reasonably probable at least one juror would've altered his assessment of the Commonwealth's case to the point where he had reasonable doubts about whether Mr. Washington was one of the gunmen.

### D. The PCRA court's opinion

The PCRA court rejected this claim. It said Mr. Washington provided no evidence the photograph "accurately represent[ed]" Eric's "viewpoint [under the Impala]… during the shooting."[102] It also said Mr. Washington used a "viewpoint… favorable" to his "argument without confirming it to be accurate."[103] Likewise, it said the photograph was "extremely speculative, as would any photograph taken by an investigator hired by counsel."[104] The PCRA court is wrong.

*First*, if the PCRA court's analysis is correct, *Serge* and the authentication cases it relied on must be incorrect and therefore overruled. *Serge*, however, was correctly decided, and it makes clear Mr. Washington needn't know Eric's exact location under the Impala. The Commonwealth's CGA reconstruction was premised on nothing more than the prosecutor's *theory* of how and why the victim died. More precisely, and to use the PCRA court's own words, how could the prosecutor in *Serge* know whether his CGA reconstruction "accurately represented" the *exact way* in which the victim died – which is what the prosecutor claimed the CGA represented. The prosecutor couldn't, and the Supreme Court acknowledged as much in its opinion, but this didn't stop the Supreme Court – or this Court – from finding the CGA reconstruction admissible.

[102] Rp. 129.
[103] Rp. 129.
[104] Rp. 129.

*Second*, the PCRA court's finding unreasonably assumes the truth of Eric's statement, which is the exact item of evidence the photograph attempts to undermine. At trial, more importantly, Eric said he never looked at who was shooting while he was under the Impala, meaning there's no "viewpoint" to confirm or deny. Additionally, Eric's statement contains no information regarding his exact whereabouts under the Impala. His statement reads: "I dove into [Rasheed's] car and then crawled out of the car and hid under the car that's when I saw Yusef and [Braheem Burke] shooting and they ran."[105]

*Third*, counsel is dismayed, extremely irritated, and flabbergasted by the PCRA court's final comment, where it claims – with no evidence whatsoever – all photographs taken by defense investigators are "extremely speculative." This is akin to counsel making this type of outlandish argument against the PCRA court: because the PCRA court was a longtime prosecutor before she became a trial judge, her pre-trial and PCRA decisions are "extremely" biased in favor of the Commonwealth. The absurdity of this argument, like the absurdity of the PCRA court's comment, speaks for itself.

The photograph isn't "extremely speculative" and there are many defense investigators who do great work developing objective and neutral facts for their clients *and the courts*. To claim otherwise, and to call their work product speculative, is unprofessional and juvenile. Also, it turns our adversarial process of criminal justice on

[105] Rpp. 44-45.

its head, as it presupposes one of the two litigants is incapable of developing objective, accurate, and neutral facts, and for no other reason than that he or she has the word "defendant" stamped before his or her name in every pleading.

The PCRA court must be reminded by this Court not to make such biased, unsupported, and outlandish findings or comments.

**<u>Claim #3</u>: Trial counsel was ineffective for not requesting a *Kloiber* instruction. U.S. Const. admts. 6, 8, 14; Pa. Const. art. I, § 8, 9.**

**A. Introduction**

At trial, Eric, Rasheed, and McClain each testified they didn't see the gunmen – either because they were hiding in or under a car or running away from the shooting – and therefore all three said they didn't identify Mr. Washington as one of the gunmen. In their unrecorded statements, however, all three allegedly identified Mr. Washington. The Commonwealth presented their statements and hammered home the fact each allegedly identified Mr. Washington. All three, however, testified the identification portions of their statements were false and coerced.

The Commonwealth, therefore, presented three identifications of Mr. Washington *in court*. During her closing arguments, the prosecutor spent much time trying to persuade the jury that their unrecorded interrogation statements were credible and truthful.[106] Based on these facts, Mr. Washington was entitled to a *Kloiber* instruction informing the jury it had to view the three *in-court* identifications with caution because of Eric's, McClain's, and Rasheed's failure and/or refusal to identify Mr. Washington during their trial testimony.

Under *Commonwealth v. Kloiber*, 106 A.2d 820 (Pa. 1954), "*in-court* identification evidence must be received with caution if the witness in *his testimony*… was not positive as to the identity of the defendant. Furthermore, any positive evidence of identity is

[106] NT, Trial, 5/12/2010, pp. 77-90.

weakened by qualifications, hedging, or inconsistencies in the witness's testimony and must be received with caution." *Commonwealth v. Sanders*, 42 A.3d 325, 334 (Pa. Super. 2014) (emphasis added). Likewise, if the eyewitness was "not in a position to clearly observe the assailant" or "fail[ed] to identify the defendant on one or more prior occasions," the trial court must "warn the jury" that the identification "must be received with caution." *Commonwealth v. Kloiber*, 106 A.3d at 827; *accord Commonwealth v. Reid*, 99 A.3d 470, 523 (Pa. 2014).

Trial counsel never requested a *Kloiber* instruction and didn't have a reasonable basis for not requesting one. Moreover, asking for a *Kloiber* instruction involved no risk to Mr. Washington, but not asking for an instruction didn't further Mr. Washington's interests or defense. Likewise, trial counsel's ineffectiveness prejudiced Mr. Washington. Had jurors been required to scrutinize the in-court identifications, it's reasonably probable at least one juror's view of one, two, or all three identifications would've been altered to such a point where he or she would've had reasonable doubt whether Mr. Washington was one of the gunmen.

### B. The PCRA court's opinion

The PCRA court denied this claim and its reasoning for denying the claim, again, is unfounded. According to the PCRA court, Eric's, Rasheed's, and McClain's trial testimony – where each said they didn't or couldn't see the gunmen and they didn't identify Mr. Washington – didn't constitute non-identifications. No, from the PCRA court's perspective, their trial testimony constituted a "refusal to cooperate," not an

inability to observe: "[Mr. Washington] is using [Eric's, Rasheed's, and McClain's] refusal to cooperate in court as if it is the same as a physical ability to observe, which it unequivocally is not."[107]

The PCRA court is wrong and its "non-cooperation" finding has no basis in the record. Eric, Rasheed, and McClain fully cooperated at trial by answering all questions presented to them. Yes, all three refused to endorse or confirm the portions of their statements regarding their alleged identifications of Mr. Washington, but their refusals to endorse or confirm can't form the foundation of a "non-cooperation" finding. This is especially true when all three *explained why they didn't or couldn't see* the gunmen.

Had all three simply said, "I refuse to answer that question," when asked about the alleged identifications in their statements, then, yes, the PCRA court's "non-cooperation" finding might have merit. But this didn't happen because all three gave detailed explanations regarding why they didn't or couldn't see the gunmen and why they signed statements containing false information, *i.e.*, detective coerced them and wouldn't let them leave Homicide until they signed the statements.

Consequently, because all three told jurors they couldn't or didn't see the gunmen and they didn't identify Mr. Washington as one of the gunmen, a *Kloiber* instruction should've been requested, granted, and given. The PCRA court, therefore, is wrong, trial counsel was ineffective, and his ineffectiveness prejudiced Mr. Washington.

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[107] Rp. 130.

**<u>Claim #4</u>: The cumulative impact of trial counsel's errors rendered Mr. Washington's trial fundamentally unfair. U.S. Const. admts. 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, 319 (Pa. 2011). A "bald averment of cumulative prejudice does not constitute a claim." *Id.* The petitioner, therefore, must "set[] forth a specific, reasoned, and legally and factually supported argument for [his cumulative prejudice] claim." *Id.* The collective impact of trial counsel's numerous errors speaks for itself.

The Commonwealth's case rested solely on how jurors viewed and weighed the credibility of Eric's, Rasheed's, and McClain's trial testimony and unrecord statements. Trial counsel, though, failed to present readily available evidence and testimony that would've cast substantial doubt on, if not entirely undermined, the credibility of their unrecorded statements. Likewise, trial counsel failed to request a jury instruction requiring jurors to view the in-court identifications – which were allegedly made in their unrecorded statements – with caution. The collective prejudicial impact of these missteps and oversights is gigantic and rendered Mr. Washington's trial fundamentally unfair. In other words, had trial counsel (1) presented Larry Polk and Kevin Smith, (2) presented photographs taken from under a rented Impala, and (3) requested a *Kloiber* instruction, it's reasonably probable the trial's outcome would've been different.

**<u>Claim #5</u>: Trial counsel was ineffective for misrepresenting the plea negotiations to Mr. Washington. U.S. Const. admts. 6, 8, 14; Pa. Const. art. I, § 8, 9.**

On May 3, 2010, two days before the Commonwealth presented its first witness, trial counsel informed Mr. Washington the Commonwealth had presented him with the following plea offer: the Commonwealth would drop the first-degree murder charges in exchange for Mr. Washington pleading guilty to two counts of third-degree murder. The plea, however, was an open plea with no set term of years regarding the two counts of third-degree murder, but the Commonwealth agreed not to seek a mandatory life sentence.[108]

Upon hearing the Commonwealth's plea offer, Mr. Washington asked trial counsel to make the following counter-offer: Mr. Washington would agree to plead guilty if the Commonwealth agreed to make a joint request (with trial counsel) to the Court that his sentences for the two third-degree murder counts run concurrently, not consecutively. Trial counsel told Mr. Washington he'd relayed the counteroffer to the prosecutor who told him she'd "check with her supervisor" to see if the Commonwealth would agree to these terms. On the first day of testimony, Mr. Washington asked trial counsel whether the Commonwealth had accepted his counteroffer. According to Mr. Washington, trial counsel told him the prosecutor had checked with her supervisor and the Commonwealth wasn't willing to negotiate the

[108] NT, Trial, 5/11/2010, pp. 111-112.

terms of their initial plea offer. Trial counsel's statement made Mr. Washington believe the Commonwealth rejected his counteroffer.

Immediately before the Commonwealth presented its first witness, however, the prosecutor described the plea discussions much differently than trial counsel. The prosecutor said the following, which prompted trial counsel to ask for an (unrecorded) sidebar:

**MS. FAIRMAN: We made a tentative offer to the defendant and we have not pursued it because I have spoken with counsel and he has said that it's not worth pursuing with my supervisor.**

**MR. GIAMPIETRO: Judge, I would like to talk to her outside for a second.**

**THE COURT: Okay. Go right ahead.** [109]

Based on the prosecutor's statements, trial counsel misrepresented the plea negotiations with Mr. Washington. Trial counsel's misrepresentation deprived Mr. Washington of considering and accepting the Commonwealth initial plea offer or new counteroffer if one was presented to counsel.

When a defendant rejects a plea in reliance upon the counsel's misadvice or misrepresentation, the plea's validity "depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). To establish prejudice, in other words, Mr. Washington "must show

[109] NT, Trial, 5/5/2010, p. 5.

the outcome of the plea process would have been different with competent advice." *Lafler v. Cooper*, 566 U.S. 156, 163 (2012). More specifically, Mr. Washington "must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Id.*

To meet this standard, Mr. Washington argued he was entitled to an evidentiary hearing where trial counsel and the prosecutor can testify. The PCRA court, however, summarily dismissed his PCRA petition without a hearing. The PCRA court, consequently, erred because this claim wasn't clearly refuted by the record. *Infra*, pp. 69-70 (Claim #6).

**<u>Claim #6</u>: The PCRA court erred by not granting an evidentiary hearing. U.S. Const. admts. 6, 8, 14; Pa. Const. art. I, § 8, 9**

If the Court finds the record insufficient to adjudicate Mr. Washington's trial counsel ineffectiveness claims, the Court should remand for an evidentiary hearing where Mr. Washington, Kevin Smith, Larry Polk, 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 a PCRA petition "raises material issues of fact." Pa.R.Crim.P. 908(A)(2); *accord Commonwealth v. Williams*, 732 A.2d 1167, 1189-1190 (Pa. 1999). A hearing can't be denied unless the PCRA court is "certain" Mr. Washington's petition lacks "total" merit. *Commonwealth v. Bennett*, 462 A.2d 772, 773 (Pa. Super. 1983). 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.*

In terms of his first claim regarding Kevin Smith's and Larry Polk's statements, their statements created material issues of disputed fact regarding the guilt-innocence issue. Both said they saw two other men at the epicenter of the gunfire and neither of these men were Mr. Washington. Ditto regarding the claim based on Mark Shaffer's "under the Impala" photograph. The photograph created a material issue of disputed fact, namely whether Eric Carter's unrecorded statement was credibility and believable. Lastly, the prosecutor's statement at the beginning of trial created a material issue of disputed fact regarding the plea process, whether Mr. Washington received competent advice from trial counsel, and whether trial counsel misrepresented the plea negotiations to Mr. Washington.

## CONCLUSION

WHEREFORE, Mr. Washington respectfully requests the following relief:

1. An order granting a new trial based on trial counsel's ineffectiveness and/or Larry Polk's and Kevin Smith's after-discovered statements.

2. An order remanding hi case back to the PCRA court for an evidentiary hearing.

3. Any other relief the Court deems necessary and just to protect his right to fundamentally fair PCRA proceedings.

Respectfully submitted this the **23rd day** of **July, 2019**.

***/s/Craig M. Cooley***
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## CERTIFCATE OF COMPLIANCE

Counsel certifies Mr. Washington's opening brief contains over 14,000 – 15,200 to be exact. Counsel filed a motion requesting the Court to accept Mr. Washington's brief despite the excess words.

## CERTIFICATE OF SERVICE

On July 23, 2019, counsel served Mr. Washington's opening brief on the Commonwealth by e-filing the petition with PAC-file.