UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

STANLEY GREEN **Petitioner-Plaintiff,** **v.** **BARRY SMITH,** Warden **DISTRICT ATTORNEY'S OFFICE** **Defendant-Respondent.**	)	**2:18-cv-04734-PBT**

Amended 2254 Petition

INTRODUCTION

The criminal justice system failed Stanley Green at every turn. At trial, he presented substantial evidence he acted in self-defense when he fired at Jamel Martin on April 30, 2008. The trial court, though, unconstitutionally lowered the Commonwealth's burden, making it easier for the Commonwealth to prove malice, which is the distinguishing element between murder and manslaughter, and harder for Mr. Green to prove he acted in self-defense – be it reasonable or unreasonable self-defense. Reasonable (or justifiable) self-defense warranted an acquittal on the murder count, while unreasonable self-defense would've only resulted in a manslaughter conviction, not a murder conviction.

The trial court lowered the Commonwealth's burden by giving an incorrect and unconstitutional hypothetical that, according to the trial court, properly demonstrated how jurors must conceive of and apply reasonable doubt. The improper hypothetical made it all but certain the jury would convict Mr. Green of murder. Thus, the trial court let down Mr. Green in a profound way.

Mr. Green, though, had trial counsel because he didn't represent himself. Consequently, he had a fundamental right to effective counsel. Effective trial counsel must timely object to improper jury instructions or hypotheticals used to explain a critical legal concept like reasonable doubt. Trial counsel, therefore, should've objected to the trial court's improper reasonable doubt hypothetical, had it stricken, and had the jury instructed to disregard the improper hypothetical because it didn't accurately explain and apply reasonable doubt. Had jurors not heard the improper reasonable doubt hypothetical, but instead heard a proper explanation and application of the reasonable doubt standard, it's reasonably probable at least one juror would've had reasonable doubt regarding the murder count. Thus, trial counsel also let down Mr. Green in a profound way.

Under state law, the first time a defendant can vindicate his right to effective trial counsel is during his initial-review PCRA proceedings. Consequently, to vindicate his effective trial counsel right, the defendant must have effective counsel during his initial-review PCRA proceedings who can identify all substantial trial counsel ineffectiveness claims. Mr. Green didn't receive effective representation because his initial-review

PCRA attorney, *i.e.*, undersigned counsel, failed to raise the substantial trial counsel ineffectiveness claim mentioned above regarding trial counsel's failure to object to the trial court's improper reasonable doubt hypothetical.[1] Thus, initial-review PCRA counsel also let down Mr. Green in a profound way.

Due to trial counsel's and initial-review PCRA counsel's ineffectiveness, the state courts never adjudicated the reasonable doubt or substantial trial counsel effectiveness claims on the merits. Though Mr. Green's substantial trial counsel ineffectiveness claim is technically defaulted, he can overcome this default and obtain *de novo* review of his substantial trial counsel ineffectiveness claim under *Martinez v. Ryan*, 566 U.S. 1 (2012).

Under *de novo* review, Mr. Green is entitled to a writ of habeas corpus. Collectively, three significant state court actors, each of whom were tasked with protecting different fundamental rights afforded to Mr. Green, didn't do their jobs as set forth by the Federal Constitution. The state criminal justice system, therefore, malfunctioned in way warranting federal habeas relief. Mr. Green, therefore, respectfully requests that the Court grant him a writ of habeas corpus, that it order his immediate release, and that it order the Commonwealth to retry him within 180 days if it intends to retry him.

[1] Yes, undersigned counsel is raising his own ineffectiveness regarding his representation of Mr. Green during his initial-review PCRA proceedings. Counsel simply missed the substantial reasonable doubt claim – and he isn't afraid to admit he made a mistake. Mr. Green can't afford an attorney, so counsel agreed to represent him *pro bono* because counsel knows his case so well, especially the reasonable doubt and trial counsel ineffectiveness claims.

PROCEDURAL HISTORY

On July 31, 2008, the Commonwealth charged Stanley Green with murder, felon in possession of a firearm, possessing a firearm without a license ("VUFA"), carrying a firearm in public, and possession of an instrument of crime ("PIC").[2] The charges stemmed from the April 30, 2008 shooting that claimed Jameil Martin's life. On December 10, 2009, Mr. Green pled not guilty and proceeded to a jury trial before the Honorable Renee Cardwell Hughes.[3] Michael Wallace represented Mr. Green. On December 18, 2009, a jury convicted Mr. Green of third-degree murder, VUFA, carrying a firearm in public, and PIC. On January 27, 2010, the trial court issued the following sentences:

> Third-degree murder: 15 to 30 years in prison;
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> VUFA: 2½ to 5 years in prison (consecutive to his third-degree murder sentence);
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> Carrying weapon in public: 2 to 4 years in prison (concurrent)
>
> PIC: 2 to 4 years in prison (concurrent).

Mr. Green appealed (365 EDA), but the Pennsylvania Superior Court affirmed on April 11, 2011,[4] and the Pennsylvania Supreme Court denied his *Petition for Allowance of Appeal* ("PAA") on November 14, 2011 (271 EAL 2011).[5] Mr. Green didn't seek

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[2] Rpp. 14-15. Undersigned counsel filed a Reproduced Record with Mr. Green's amended 2254 petition. The cites will be Rp. ___ for a single page reference and Rpp. ___ for a multiple page reference.
[3] Rpp. 14-15.
[4] Rpp. 18-30.
[5] Rp. 31.

review to the U.S. Supreme Court, making his conviction final on February 14, 2012. 42 Pa. C.S. § 9545(b)(3).

On November 6, 2012, Mr. Green filed a timely *pro se* PCRA petition. On November 19, 2013, Mr. Green was appointed initial-review PCRA counsel. On November 16, 2014, Mr. Green filed an amended PCRA petition,[6] which he supplemented on April 4, 2016.[7] On April 10, 2017, the PCRA court dismissed Mr. Green's petition without a hearing.[8] On April 12, 2017, Mr. Green appealed.[9] On August 31, 2017, the PCRA court entered its opinion.[10] On August 29, 2018, the Pennsylvania Superior Court affirmed the dismissal of Mr. Green's PCRA petition.[11] On September 27, 2018, Mr. Green filed a PAA with the Pennsylvania Supreme Court, which was the denied on March 11, 2019.

On November 1, 2018, four months before the Pennsylvania Supreme Court denied Mr. Green's PAA and eight months before AEDPA's one-year limitations period expired, Mr. Green filed a *pro se* federal habeas petition.[12] On May 21, 2019, undersigned counsel entered his appearance on Mr. Green's behalf.

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[6] Rpp. 32-64.
[7] Rpp. 80-94.
[8] Rp. 1.
[9] Rpp. 2-3.
[10] Rpp 4-13.
[11] Rpp. 114-130.
[12] E.C.F., Doc. 1.

STATEMENT OF FACTS

A. Stanley Green's self-defense narrative

On April 22, 2008, Mr. Green and his good friend, Shareef Brown, were hanging out near Jasper Street in Philadelphia when two men approached Shareef and asked to speak with him.[13] After the conversation, Shareef told Mr. Green he owed the men money, but did not have the money.[14]

The next day, April 23rd, Jameil Martin and the two men who had confronted Shareef the previous day attacked Mr. Green as he left his apartment that morning. Martin told Mr. Green that Shareef owed him money and this was why they attacked him.[15]

Mr. Green said his roommate, Howard Terrell Taylor ("Terrell"), heard the fight. When Mr. Green returned to the apartment, Terrell asked why the men had attacked him.[16] After talking with Terrell, Mr. Green went to the corner grocery store (Reyes Grocery). While there, Odaly Santana told Mr. Green he had witnessed the fight and asked him why Martin and the two men attacked him.[17]

A few days later, on April 26, 2008, Mr. Green went to Knock Outs, a bar on D and Allegheny Streets, to play pool. On his way home, Martin and one of the men who

[13] NT, Trial, 12/16/2009, p. 157.
[14] *Id.*
[15] *Id.*, pp. 153-154, 158-159.
[16] *Id.*, p. 159.
[17] *Id.*, p. 159.

attacked him on April 23rd accosted him near F and Cornwall Streets.[18] Martin asked Mr. Green if he knew Shareef's whereabouts, but Mr. Green refused to answer him, so Martin shot Mr. Green in his groin.[19] When Mr. Green fell to the pavement, Martin instructed him to "empty his fucking pockets," which Mr. Green did by throwing his money and weed at Martin.[20] Martin then told Mr. Green, "[T]ell Shareef when I see him, it is about his ass, if he ain't got my money."[21]

Martin and his cohort fled the scene. Mr. Green called his friend, Victor Sheet, who helped him hailed a cab home.[22] Once home, Terrell carried Mr. Green from the cab into their apartment, where Mr. Green told Terrell about the shooting.[23] Terrell offered to take Mr. Green to the hospital, but Mr. Green declined because he was scared.[24]

Mr. Green did not leave his apartment for the next three days, until April 29th.[25] On April 29th, Mr. Green's friend, Sheranna, gave him crutches to use because he could barely walk.[26] After receiving the crutches, Mr. Green went to Shareef's house where

[18] *Id.*, p. 160.
[19] *Id.*, p. 161.
[20] *Id.*
[21] *Id.*, pp. 161-162.
[22] *Id.*, p. 162.
[23] *Id.*, pp. 162, 163.
[24] *Id.*, p. 164.
[25] *Id.*, p. 165.
[26] *Id.*, p. 166.

Shareef told him the word on the street was that his (Green's) safety was in jeopardy.[27] Shareef, therefore, gave Mr. Green a gun for his protection.[28]

On April 30th, around 11:30 a.m., as Mr. Green walked to Reyes Grocery, Chris Howard ("Howard") accosted him and accused him of selling drugs on his (Howard's) street.[29] Mr. Green denied the accusation. As Mr. Green and Howard walked up Jasper Street, Terrell joined the conversation. Minutes later Mr. Green saw Martin and one of his cohorts approaching the group, *i.e.*, him, Howard, and Terrell.[30]

When Mr. Green saw Martin, his heart raced, especially after Martin yelled, "So you mother fuckers think it is a game. I'm going to make an example of one of you mother fuckers."[31] Mr. Green had his crutches, making him vulnerable, but he was armed with the firearm Shareef gave him. Martin walked up to Mr. Green with his hands in the front pocket of his (Martin's) hooded sweatshirt, causing Mr. Green to back up.[32] Once face-to-face with Mr. Green, Martin reached for his firearm, prompting Mr. Green to pull his firearm from his hip and start shooting.[33] Mr. Green dropped one of his crutches before firing. He used the other crutch to support himself.[34]

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[27] *Id.*, pp. 166-167.
[28] *Id.*, p. 167.
[29] *Id.*, p. 168.
[30] *Id.*, pp. 168-169.
[31] *Id.*, p. 170.
[32] *Id.*, p. 171.
[33] *Id.*, p. 172.
[34] *Id.*, p. 173.

Mr. Green denied chasing Martin.[35] After the shooting, Mr. Green put the firearm away, picked up his one crutch, and walked down Jasper Street. As he walked, he ditched both crutches in front of his apartment (2816 Jasper Street) because he could not turn around quickly enough to see if somebody was pursuing him with a firarm.[36]

As he walked away, Mr. Green saw Martin's cohort grab Martin's firearm and flee the scene by turning the corner at Jasper Street and Hart Lane.[37] Mr. Green eventually got on a SEPTA bus on Frankford Street, three blocks from the scene.[38] When police entered the bus, Mr. Green immediately said, "I'm the person you are looking for."[39] Once arrested, police recovered a Hi-Point 380 semi-automatic handgun from Mr. Green.[40]

The investigation produced two witnesses who corroborated key aspects of Mr. Green's testimony: Odaly Santana and Trisha Colon. Detective Lucke interviewed Odaly Santana the day of the shooting. Detective Venson, the lead investigator, summarized Lucke's interview:

> [Santana] works at the corner store at Hart Lane & Jasper St… At approx. 12:45 PM Santana heard arguing outside the store and then gunshots. Santana put his head out the door and heard two or three more gunshots and then saw [Green]… with his left hand stretched out pointing… a gun at Martin. Martin was running towards Santana to get away from [Green]. Martin ran in the door and was stumbling

[35] *Id.*
[36] *Id.*, p. 174.
[37] *Id.*, p. 175.
[38] *Id.*, p. 176.
[39] *Id.*, p. 177.
[40] Rp. 96.

> towards Santana to get away from the male. Martin ran in the door and was stumbling and then ran four more houses down the street and then fell to the pavement. Santana went to help Martin and saw [Green] again limping and trying to run and [Green] turned and looked at Santana twice and continued to [walk away].[41]

Detective Scally interviewed Colon the day of the shooting. Detective Venson, the lead investigator, summarized Scally's interview:

> [Colon] was sitting on the front steps of an abandoned house on Hart Lane between Jasper and Ruth Sts. When she heard gunshots and saw some guys running and when they reached her she started running too. She stopped at Ruth & Hart Lane and observed a big male coming down Hart Lane towards Ruth St. Colon observed that the male appeared to have a gun in his hand and then she observed… [Green] looking around and walking fast with a bulge in his waist band like he had a gun too. [Green] walked to Somerset & Kensington Ave. and got on a Septa bus.[42]

B. The Commonwealth's homicide narrative

The Commonwealth attempted to prove (1) Mr. Green acted with specific intent when he shot and killed Martin, making him guilty of first-degree murder, and (2) if he did not act with specific intent, his actions still constituted malice, making him guilty of third-degree murder.

[41] Rp. 96.
[42] Rpp. 96-97.

1. Chris Howard

Chris Howard is Martin's cousin and drug-dealing associate.[43] When Martin died, Howard said a piece of him also died.[44] Howard conceded he confronted Mr. Green on April 3oth and told him he (Green) was not permitted to sell drugs on Jasper Street and the surrounding area because that was his (Howard's) drug turf.[45] Howard also admitted his tone was a "little violent," that he got a "little upset" during the confrontation, and that Mr. Green had crutches when he accosted him.[46]

After confronting him, Mr. Green walked to his (Green's) apartment. Although Mr. Green never threatened Howard, Howard assumed Mr. Green went to retrieve a firearm, prompting Howard to call Mr. Green's roommate, Terrell Taylor, and voice his concerns about Mr. Green retrieving a firearm.[47]

Howard said Mr. Green quickly returned to the street. Terrell came out to the street shortly thereafter.[48] At this point, Howard said Mr. Green pulled a firearm on him.[49] Immediately thereafter, Howard said he saw Martin and Emmett (LNU) drive by.[50] According to Howard, when Mr. Green saw Martin drive by, he (Green) began pacing and huffing and puffing.[51]

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[43] NT, Trial, 12/10/2009, pp. 10, 126.
[44] *Id.*, p. 170.
[45] *Id.*, p. 126.
[46] *Id.*, pp. 73, 74, 81.
[47] *Id.*, pp. 82, 141.
[48] *Id.*, pp. 83-84.
[49] *Id.*, pp. 85, 144.
[50] *Id.*, pp. 86, 89-90.
[51] *Id.*, pp. 87, 89.

Howard said Martin and Emmett parked and walked toward him (Howard), Mr. Green, and Terrell.[52] Howard said he did not see a firearm in Martin's hands.[53] He conceded, though, Martin had a hoody on and his hands were in the hoody's front pocket.[54] As Martin approached, Howard said Martin told Mr. Green "there ain't going to be no trapping out here," meaning Mr. Green was prohibited from selling drugs on Jasper Street and the surrounding area.[55] Immediately after saying this, Howard said Martin removed a cell phone from his hoody's front pocket and placed it to his ear, prompting Mr. Green to open fire on Martin.[56] Howard said Martin quickly turned and ran. Mr. Green chased Martin and continued shooting.[57]

On cross-examination, Howard admitted his May 2, 2008 statement did not correspond to his testimony, particularly his claim that Mr. Green chased Martin.[58] In his statement, Howard said Mr. Green could not chase Martin because Mr. Green had his crutches.[59] Howard admitted this part of his statement deviated from his testimony where he said Mr. Green did not have crutches when he returned with his gun.[60] Howard also could not explain how Martin's cell phone–the one he supposedly

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[52] *Id.*, pp. 93, 94, 95.
[53] *Id.*, p. 100.
[54] *Id.*, pp. 100, 147.
[55] *Id.*, p. 100.
[56] *Id.*, pp. 101, 150, 173.
[57] *Id.*, p. 107.
[58] *Id.*, p. 154; *see also* Rpp. 105-108.
[59] Rpp. 105-108.
[60] NT, Trial, 12/10/2009, pp. 152-153, 155.

removed from his front pocket–was not recovered at the scene or on Martin's person during the autopsy.[61]

2. Howard Terrell Taylor

Terrell allowed Mr. Green to stay with him at his 2816 Jasper Street apartment in April 2008. According to Terrell, Chris Howard called him on April 30th, complaining that Mr. Green was selling drugs on his turf.[62] Terrell went outside to diffuse the situation between Howard and Mr. Green.[63] Once outside, he saw Mr. Green and Howard arguing and saw Mr. Green with a firearm.[64]

Terrell went back into his apartment, put jeans on, and went back outside to "mediate" the situation.[65] Before heading back outside, Terrell asked his live-in girlfriend, Mildred Amanda Mumford, to stand by the front door and watch his back.[66] When Terrell went back outside, he said Mr. Green appeared calmer and less agitated.[67]

Moments later, though, Terrell saw Martin and another man named "Smut" walking toward them.[68] Martin walked up to Mr. Green and said, "You better not be

[61] *Id.*, p. 172.
[62] *Id.*, p. 184.
[63] *Id.*, p. 186.
[64] *Id.*, p. 190.
[65] *Id.*, p. 192.
[66] *Id.*, p. 192.
[67] *Id.*, p. 200.
[68] *Id.*, p. 204.

trapping."[69] Martin had his hands in his front pocket when he confronted Mr. Green, but Terrell said Martin did not confront Mr. Green in a threatening manner.[70]

Terrell said Mr. Green's demeanor changed when he (Green) saw Martin; he grew more "agitated" and "restless."[71] Terrell said Martin never removed a cell phone from his front pocket.[72] Instead, after Martin confronted Mr. Green, he (Terrell), Howard, Martin, and Mr. Green talked for a minute or so before Mr. Green opened fire on Martin.[73] Although he never mentioned it in his April 30th statement,[74] Terrell testified that after Mr. Green fired, Martin ran, and Mr. Green chased him and shot three more times.[75]

On cross-examination, Terrell said immediately after the shooting, his girlfriend, Amanda, received a call from Hakim Harold, Martin's cousin. Hakim threatened to kill Amanda, Terrell, and everyone in their apartment.[76] According to Terrell, Hakim told Amanda, "Get the kids out of the house and everybody in that house is getting it."[77] When Amanda called back and asked Hakim want he had meant, Hakim said, "I don't care who is in that house, it's going down."[78] Terrell interpreted Hakin's statement to

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[69] *Id.*, p. 210.
[70] *Id.*, pp. 210, 213.
[71] *Id.*, pp. 213-214.
[72] *Id.*, pp. 214, 272.
[73] *Id.*, pp. 214, 227.
[74] Rpp. 109-113.
[75] NT, Trial, 12/10/2009, p. 221.
[76] *Id.*, pp. 231-237.
[77] Rp. 110.
[78] Rp. 110.

mean, "That [Hakim] was going to shoot everybody that came in or out [of] the house."[79] Terrell also admitted Hakim had confronted him the day before, April 29th, and threatened him and his family if he did not stop Mr. Green from dealing drugs on Jasper Street.[80]

Terrell also said Mr. Green was shot in the groin on April 26th.[81] Terrell said he helped Mr. Green out of a cab and carried him into their apartment where he tried providing medical treatment to Mr. Green's gunshot wound.[82] Terrell also said, "The next day [Mr. Green] told me he had an altercation with his cousin and them, and got shot over there, something that they got caught up into."[83]

3. Mildred Amanda Mumford

On April 30th, Amanda said Terrell received a call from Howard. Terrell answered and said, "Okay, give me a second."[84] Terrell jumped out of bed and ran out the door. Amanda followed and saw him talking with Howard and Mr. Green.[85] Terrell then came back inside, put pants on, and went back outside.[86] Amanda stood in the front door the entire time because Terrell had asked her to watch his back.[87]

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[79] Rp. 110.
[80] NT, Trial, 12/10/2009, pp. 196-197, 234-235.
[81] *Id.*, pp. 275-276.
[82] *Id.*, p. 277.
[83] *Id.*, p. 295.
[84] NT, Trial, 12/15/2009, p. 27.
[85] *Id.*, p. 27.
[86] *Id.*, pp. 28, 60.
[87] *Id.*, p. 28.

Amanda heard Terrell, Howard, and Mr. Green's discussion. Mr. Green looked "upset," Howard a "little terrified."[88] Terrell told Howard that Mr. Green was not selling drugs on Jasper Street.[89] Terrell, Mr. Green, and Howard spoke for 10 to 15 minutes before Martin and another man approached the group. Martin got face-to-face with Mr. Green and told him not to sell drugs on Jasper Street.[90]

Amanda described the sequence of events: "I was in the door and the two guys walked up. Jameil had his hands in his pockets. He told [Mr. Green]… he didn't want to catch him on the corner. [Mr. Green] backed up, pulled the gun out, [and] started shooting. I screamed for Terrell to come, but I couldn't see him."[91] Amanda did not see Martin remove a cell phone from his front pocket before Mr. Green opened fire.[92]

Amanda discussed Hakim's threatening phone call and said she knew Martin and Hakim were cousins.[93] She also said her and Terrell moved out of the neighborhood shortly thereafter because, as she put it, "I didn't want my children to be on that block no more."[94] On cross-examination, Amanda said Mr. Green fired all his shots in succession. He did not chase Martin.[95] Amanda also mentioned Mr. Green being shot in the groin on April 26th.[96]

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[88] *Id.*, p. 32.
[89] *Id.*, pp. 33, 63-64.
[90] *Id.*, pp. 34, 35, 37, 61-62, 71.
[91] *Id.*, p. 38.
[92] *Id.*, p. 73.
[93] *Id.*, pp. 77-78.
[94] *Id.*, p. 86.
[95] *Id.*, p. 87.
[96] *Id.*, pp. 65-66.

4. Dr. Gary Collins

The Commonwealth presented Dr. Gray Collins to discuss the autopsy report prepared, written, and certified by Dr. Bennett Preston.[97] Dr. Collins did not perform or participate in Martin's autopsy, nor did he consult with Dr. Preston,[98] but said he reviewed the autopsy photographs and Dr. Preston's autopsy report.[99]

Dr. Collins's focused his testimony on the two perforating wounds tracts in Martin's upper right arm. According to Dr. Collins, these wounds appeared to be defensive wounds:

> Prosecutor: Can you describe for the members of the jury what, if any, significance you attribute to those wounds?
>
> Dr. Collins: Okay. Well… it took me a little while to figure out, but Dr. Preston described that the injuries could have been consistent with a defensive injury.
>
> And so a defense injury is a wound or an injury that somebody sustains when they are trying to prevent themselves from being harmed. And, it took me a little while to figure out what he meant. But le met use Mike [Wallace] as an example.
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> …
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> So, when a defensive posture – he's raised his arm to prevent himself from being shot. So, it is quite possible that these injuries, the graze one to the arm, the penetrating to this arm, were acquired or… receive[d]… in an attempt to shield his face or his chest from being shot.
>
> …
>
> Prosecutor: And these are the wounds that you have described as being the defensive wounds.

[97] NT, Trial, 12/16/2009, p. 53. Dr. Preston's autopsy report can be found at Rpp. 65-71.
[98] *Id.*, p. 91.
[99] *Id.*, pp. 53, 91.

> Dr. Collins: Correct.
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> Prosecutor: If I told you that Mr. Martin was initially facing a shooter and was fired at, and then turned and ran, and while running actually… didn't completely fall but initially fell down and was able to right himself and get up and ran, and then made a left turn and run approximately six houses and then four houses on Philadelphia city streets, where he then collapsed and was dying, that he was shot from behind while he was doing that – while he was running that he was shot from behind, and also potentially that he was shot while he was running or falling, are the findings that were observed on his body consistent with that scenario?
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> Dr. Collins: Yes, they are.
>
> Prosecutor: And, additionally, that he was trying albeit ineffectively, to block some of the shots; is that consistent?
>
> Dr. Collins: Yes, it is.[100]

C. Charge conference and jury instructions

At the charge conference, the trial court agreed to give two different instructions regarding manslaughter: (1) unreasonable belief self-defense; and (2) serious provocation. The trial court explained her reasoning for giving both instructions:

> [*Commonwealth v. Cain*, 484 Pa. 240 (1979) stands for the dominant position]. And the dominant position is that the Supreme Court feels that clearly the legislature saw these two as separate defenses, serious provocation versus unreasonable belief that self-defense was justified. It does not see them as the same. And so it does become a fact driven issue. And the only time that I would not give it is when it is just absolutely devoid.

[100] *Id.*, pp. 80-81, 84, 89.

> So, on this case, this record, I can't say that. Now… if Stanley Green's testimony had not linked the earlier shooting to Jamiel [sic] Martin, I wouldn't have to give it. I could just give unreasonable self-defense… that the circumstances as they happened on the day in question, whether he was right or was, was the self-defense.[101]

Michael Wallace, Mr. Green's attorney, agreed and mentioned *Commonwealth v. McCusker*, 292 A.2d 286 (Pa. 1972), for the principle that serious provocation can be formed based on a "series of incidents[.]"[102] The trial court agreed:

> And I do agree with you, Mike. The thing about *McCusker*, *McCusker* says we have an argument today, we have a physical fight tomorrow, we [have] another argument the day after that, but the killing doesn't occur until… two or three days later.
>
> So, what *McCusker* talks about is that it doesn't necessarily have to be one event that blows up in your face. So, I call it a slow burn for me. For me, *McCusker* is like the slow burn theory. There are a series of indignations.[103]

The trial court also instructed the jury on malice:

> It is important to understand that any degree of murder requires the element of malice. Manslaughter does not require malice. A person who kills must act with malice to be guilty of any degree of murder.
>
> Now, malice has a special legal meaning. It does not mean simply hatred or spite or ill will. Malice is a shorthand way of referring to a mental state of mind, and it is a mental state that the law regards as being bad enough to make a killing a murder.
>
> …

[101] NT, Trial, 12/17/2009, pp. 7-8.
[102] *Id.*, p. 11.
[103] *Id.*, pp. 11-12.

> For third degree murder a killing is with malice if the perpetrator's actions show a want and willful disregard of an unjustified and extremely high risk that the person's conduct would result in death or serious bodily injury to another human being.
>
> In this form of malice… the Commonwealth must prove that the perpetrator took the action while consciously, knowingly disregarding the most serious risk the perpetrator was creating, and by the disregard of that risk, the perpetrator demonstrated an extreme indifference to the value of human life.
>
> Manslaughter only exists if there is no malice.[104]

The trial court gave the following instruction for third-degree murder:

> First, that Jamiel [sic] Martin is dead.
>
> Second, that Stanley Green killed him.
>
> And, third, that Stanley Green did so with malice.[105]

The trial court explained the difference between third-degree murder and voluntary manslaughter. Voluntary manslaughter "is a form of homicide in which there is no malice."[106] The trial court also explained malice can be eliminated "when a perpetrator kills in the heat of passion following serious provocation or kills for an unreasonable mistaken belief that circumstances exist that justify that conduct."[107]

[104] *Id.*, pp. 154-156.
[105] *Id.*, p. 159.
[106] *Id.*, p. 160.
[107] *Id.*, pp. 160-161.

In terms of serious provocation, the trial court identified two components: one objective (sudden passion) and one subjective (intense passion). Before defining these terms, the trial court explained that a "perpetrator's passion results from serious provocation if it results from the conduct or from a series of events that are sufficient to excite an intense passion in a reasonable person."[108] The trial court then explained that "intense passion" turned on Mr. Green's "actual mental and emotional state,"[109] while "sudden passion" turned on how a "reasonable" person would respond under the "exact same circumstances."[110] The trial court then said:

> You may find malice and murder only if you are satisfied beyond a reasonable doubt that Stanley Green was not acting under a sudden and intense passion which resulted from a serious provocation by Jamiel [sic] Martin.[111]

The trial court explained the concept of serious provocation:

> Now, the law recognizes that a series of related event**s** can lead to a sudden passion and amount to serious provocation. The test is whether a reasonable person confronted with the same series of events would become so impassioned that they would be incapable of cool reflection.[112]

Regarding reasonable doubt, besides explaining its legal significance and definition, the trial court told the jury it would be "helpful to think about" reasonable doubt "in this way":

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[108] *Id.*, p. 162.
[109] *Id.*, p. 162.
[110] *Id.*, p. 162.
[111] *Id.*, p. 162.
[112] *Id.*, pp. 162-163.

Now, Ladies and Gentlemen, I think it is helpful to think about reasonable doubt in this way. I know, because I was fortunate to speak with each one of you, that each one of you has somebody in your life that you love. Each one of you has what we call in my family a precious one. It could be a child, a significant other, a spouse, a cousin, doesn't matter, a sibling, but each one of you loves somebody deeply.

If you were told by that loved ones physician that the loved one had a life-threatening condition, very likely, Ladies and Gentlemen, you are going to get a second opinion, you are probably going to get a third opinion.

If you are like me, you are going to go through your -- I use the old fashion world rolodex. But you are going to go through the contact list in your phone. You are going to call everybody you know about – who got some knowledge about medicine.

What do you know? Tell me about this illness. Tell me what the protocols are for it. How do we best treat it? Who is the best doc in town? What do you know? You might do internet research. You do a ton of stuff.

But at some point the question will be called. Do I go forward with the medical procedure for my loved one?

Let's say it is surgery, which we all think is a big deal. Do I go forward?

If you go forward, it is not because you have moved beyond all doubt. There are no guaranties in life. If you go forward, it is because you have moved beyond a reasonable doubt.

Ladies and Gentlemen, a reasonable doubt must be a real doubt. It is not a doubt that is imagined or manufactured to avoid carrying out an unpleasant responsibility. I told you,

> I'm not asking you to do something easy. I'm asking you to do something hard.[113]

D. Jury questions and verdict

After deliberating for a day, the jury returned with this question: "Could you please restate… the law surrounding malice and provocation."[114] The trial court re-read the malice and provocation instructions.[115]

The jury convicted Mr. Green of third-degree murder.

E. Post-conviction

In his *Amended PCRA Petition*, Mr. Green alleged trial counsel was ineffective for failing to retain a forensic pathologist to rebut the Commonwealth's claim that Mr. Green shot Martin while Martin's arms were in the air in a defensive and defenseless posture.[116] To bolster his ineffectiveness claim, undersigned counsel retained Dr. Jonathan Arden to review the autopsy photographs, autopsy report, and Dr. Collins's trial testimony.

On March 3, 2016, after reviewing the material, Dr. Arden provided counsel an affidavit with the following findings and conclusion.[117] *First*, Dr. Arden said it was "unreasonable" for Dr. Preston to opine or conclude that a particular gunshot wound

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[113] *Id.*, pp. 132-134.
[114] NT, Trial, 12/18/2009, p. 10.
[115] *Id.*, p. 19.
[116] Rpp. 60-61.
[117] Rpp. 91-94.

to Martin's right arm was, in fact, a defensive wound based solely on the autopsy report's findings. Dr. Arden stated:

> … [I]t is generally accepted in the forensic pathology community that the findings recorded in an autopsy report were directly observed or were laboratory test results. The opinions and conclusions presented in an autopsy report are based on the autopsy findings and laboratory studies, but may also incorporate background data derived from an investigation; one salient example is that the investigation provides the circumstances surrounding death, which are necessary to making the determination of the manner of death. However, as a forensic pathologist I do not speculate on, or independently try to re-create, the circumstances of death, including how the victim acted or reacted during the events.
>
> … Based on my education, training, and experience relating to gunshot wounds, it is unreasonable to opine or conclude that a particular gunshot wound to a victim's arm is, in fact, a defensive wound based solely on the autopsy findings. Such a conclusion, in my experience, is based on assumptions about the victim's positioning, posturing, and movement before, during, and after the shooting. Given that the forensic pathologist conducting the autopsy did not witness the shooting, he or she cannot possibly know the victim's position, posture, or movement at the time of a particular gunshot wound. Speculation as to the circumstances surrounding the shooting should be absent from the autopsy report…[.][118]

Second, contrary to Dr. Preston's autopsy findings, Dr. Arden "would not and could not characterize the two gunshot wounds to Mr. Martin's right arm as defense

[118] Rp. 92 (¶¶ 10(a)(i) & (ii)).

wounds, nor could [he] express such an opinion to a reasonable degree of medical certainty."[119]

Third, Dr. Arden said "the appearances of the gunshot wounds to the right arm of Mr. Martin as depicted in the autopsy photographs are inconsistent with the descriptions of those wounds in the autopsy report. The descriptions in the autopsy report are not corroborated by the photographs, and in [his] opinion, the autopsy report is not credible or accurate in this regard. In fact, the gunshot wound to the front of the arm is decidedly not suggestive of having been incurred in a defensive posture. The other gunshot wound to the arm may be consistent with a defensive maneuver, but is definitely consistent with many other scenarios, as well."[120]

Fourth, Dr. Arden said he "cannot state–with a reasonable degree of medical certainty–that the two gunshot wounds to Mr. Martin's right arm are consistent with him raising his right arm up in a defensive posture to protect him from the bullets, irrespective of whether any eyewitnesses to the shooting described him making such a motion with his right arm."[121]

Fifth, Dr. Arden said "[i]f none of the eyewitnesses to the shooting described Mr. Martin as raising his right hand to defend himself, then [any] hypothetical would be irrelevant and unnecessary, effectively precluding any usefulness of posing it." Dr.

[119] Rp. 93 (¶ 10(b)(ii)).
[120] Rp. 93 (¶ 10(b)(iii)).
[121] Rp. 93 (¶ 10(c)).

Arden added that he "could not opine–with a reasonable degree of medical certainty–that the two gunshot wounds to Mr. Martin's right arm are consistent with him raising his right arm in a defensive posture."[122]

Sixth, Dr. Arden also said he available to consult with trial counsel in 2008 and 2009 and could have testified at Mr. Green's 2009 trial.

AEDPA REQUIREMENTS

A. Timeliness

Under 28 U.S.C. § 2244(d)(1)(A), once a state prisoner's conviction and sentence become final, he has one-year to file his 2254 petition. *Jimenez v. Quarterman*, 555 U.S. 113, 114 (2009). A state conviction and sentence become final "when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994).

Under 28 U.S.C. § 2244(d)(2), if a defendant "properly filed" his initial-review post-conviction petition within one-year of his conviction becoming final, the one-year limitations period is tolled. Tolling "provides both litigants and States with an opportunity to resolve objections at the state level, potentially obviating the need for a litigant to resort to federal court." *Wall v. Kholi*, 131 S.Ct. 1278, 1288 (2011). A timely

[122] Rp. 94 (¶ 10 (c)(ii)).

filed PCRA petition is considered "properly filed" under § 2244(d)(2). *Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005).

AEDPA's one-year limitation period is "tolled only while state courts review the application," meaning if a post-conviction petitioner files a certiorari petition with the U.S. Supreme Court after the state courts have rejected the federal claims in his initial-review post-conviction petition, the time between the certiorari petition's filing and denial isn't tolled because the U.S. Supreme Court isn't a "state court." *Lawrence v. Florida*, 549 U.S. 327, 332 (2007).

B. Substantive review under AEDPA

Substantive review under AEDPA is generally very deferential to the state court's legal conclusions and factual findings. AEDPA's requirements reflect a "presumption that state courts know and follow the law," *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002); *accord Burt v. Titlow*, 571 U.S. 12, 18-19 (2013), and AEDPA "is designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). AEDPA, therefore, demands that "state-court decisions be given the benefit of the doubt[.]" *Felkner v. Jackson*, 562 U.S. 594, 598 (2011). In short, AEDPA "create[d] an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings." *Uttecht v. Brown*, 551 U.S. 1, 10 (2007).

This is all true, but there's a significant caveat. AEDPA deference only applies when the state courts have "adjudicated" the petitioner's federal claim(s) "on the merits." 28 U.S.C. § 2254(d)(1) & (2). For instance, a federal court's § 2254(d)(1) review "is limited to the record that was before the state court that adjudicated the prisoner's claim on the merits." *Greene v. Fisher*, 565 U.S. 34, 38 (2011); *Cullen v. Pinholster*, 563 U.S. 170, 181-182 (2011). An "unreasonable application" of a clearly-established U.S. Supreme Court principle must be "objectively unreasonable," not merely wrong; even "clear error" won't suffice. *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003); *White v. Woodall*, 572 U.S. 415, 419-420, (2014); *Cavazos v. Smith*, 565 U.S. 1, 2 (2011). Thus, if the state court's rejection of a federal claim was "reasonable," AEDPA relief is unwarranted. *Hardy v. Cross*, 565 U.S. 65, 72 (2011).

A state court's rejection of a federal claim "on the merits" is reasonable "so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. at 101 (quotations and citation omitted). Stated differently, the petitioner "must show that the state court's ruling… was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103.

Here, however, Mr. Green didn't present his substantial trial counsel ineffectiveness claim regarding the improper reasonable doubt hypothetical to the PCRA court – the lone fact-finding court in the state court system – due to initial-review PCRA counsel's ineffectiveness. *Infra*, pp. 33-50 (Claim #1) The state courts,

therefore, didn't and couldn't "adjudicate" his substantial trial counsel ineffectiveness claim "on the merits." In these situations, *Martinez v. Ryan*, 566 U.S. 1 (2012) is applicable, and gives the Court the authority to review Mr. Green's defaulted trial counsel ineffectiveness claim *de novo*.

C. *Martinez v. Ryan*

Federal habeas courts reviewing state court convictions won't consider a federal claim a state court refused to hear based on an adequate and independent state procedural ground. *Beard v. Kindler*, 558 U.S. 53, 55 (2009). A state prisoner may be able to overcome this bar, however, if he can establish "cause" to excuse the default and demonstrate he suffered actual prejudice as a result of the default. *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977). An attorney error, generally, won't qualify as "cause" to excuse a procedural default unless the error amounted to constitutionally ineffective assistance of counsel. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). Because a prisoner doesn't have a federal constitutional right to counsel during state post-conviction proceedings, ineffective assistance in those proceedings can't qualify as cause to excuse a procedural default. *Coleman* v. *Thompson*, 501 U.S. 722, 754 (1991).

In *Martinez* v. *Ryan*, 566 U.S. 1 (2012) and *Trevino* v. *Thaler*, 569 U.S. 413 (2013), however, the Supreme Court announced a narrow exception to *Coleman*'s general rule. That exception treats ineffective assistance by a prisoner's initial-review state post-conviction counsel as cause to overcome the default of a single claim, *i.e.*, a trial counsel ineffectiveness claim, in a single context, *i.e.*, where the State requires a defendant to

bring his ineffectiveness claim in state post-conviction proceedings rather than on direct appeal.

Specifically, *Martinez* held a procedural default won't bar federal review of a substantial trial counsel ineffectiveness claim if the default is the result of initial-review PCRA counsel's ineffectiveness. *Martinez v. Ryan*, 566 U.S. at 17. Thus, the *Martinez* exception is available when the petitioner can show (1) his procedurally defaulted trial counsel ineffectiveness claim has "some merit" and (2) his initial-review PCRA counsel was ineffective. *Workman v. Superintendent Albion SCI*, 908 F.3d 896, 903 (3d Cir. 2018); *accord Cox v. Horn*, 757 F.3d 113, 124 (3d Cir. 2014).

To demonstrate his trial counsel ineffectiveness claim has "some merit," a petitioner must "show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Id.* at 903. This is different than *Strickland* prejudice, meaning "in considering whether [a petitioner's trial counsel ineffectiveness] claim is substantial, [the Court is] guided by the two-part *Strickland* analysis, but [it] remain[s] mindful that the 'substantiality' inquiry 'does not require full consideration of the factual or legal bases adduced in support of the claims." *Preston v. Superintendent Graterford* SCI, 902 F.3d 365, 377 (3d Cir. 2018) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)).

Strickland has two prongs, *i.e.*, "performance" and "prejudice." The "performance" prong refers to *Strickland's* requirement that "counsel's representation fell below an objective standard of reasonableness." The "prejudice" prong refers to the requirement that a petitioner show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687-688, 694 (1984).

In applying this standard to initial-review PCRA counsel, our Court of Appeals recently said:

> For [a petitioner] to show that his state post-conviction counsel's deficient performance caused prejudice under *Strickland*, he must show that his state post-conviction counsel *could have obtained* a different result had he presented the now-defaulted ineffective-assistance-of-trial-counsel claim. In other words, he must prove the merits of his underlying ineffective-assistance-of-trial-counsel claim in order to excuse the procedural default of that claim and obtain consideration on the merits. At this stage, what is important is that the underlying ineffective-assistance-of-trial-counsel claim is *"substantial," not that a petitioner has, in fact, been "prejudiced"* by trial counsel's deficient performance under *Strickland*.

Workman v. Superintendent Albion SCI, 908 F.3d at 904 (emphasis added); *see also Brown v. Brown*, 847 F.3d 502, 513 (7th Cir. 2017); *Detrich v. Ryan*, 740 F.3d 1237, 1245-1246 (9th Cir. 2013). If the petitioner satisfies *Martinez*, and overcomes the procedural default, the Court's review is *de novo* because the state courts didn't adjudicate the claim on the merits. *Id.* at 908; *Bey v. Superintendent Greene SCI*, 856 F.3d 230, 236 (3d Cir. 2017).

TIMELINESS, EXHAUSTION, AND FAIR PRESENTATION AS THEY RELATE TO MR. GREEN'S 2254 PETITION

Mr. Green's federal habeas petition is timely.

Mr. Green's conviction became final on February 14, 2012. He timely and properly filed his *pro se* PCRA petition on November 6, 2012, which stopped AEDPA's one-year clock, 28 U.S.C. § 2244(d)(2), meaning Mr. Green only consumed 266 days of the 365 days allotted to him under AEDPA.

On August 29, 2018, the Pennsylvania Superior Court affirmed the dismissal of Mr. Green's PCRA petition.[123] On September 27, 2018, Mr. Green filed a timely PAA with the Pennsylvania Supreme Court, which continued tolling AEDPA's one-year clock. On November 1, 2018, while his PAA was still pending, Mr. Green filed his *pro se* federal habeas petition. His federal petition, consequently, is timely because Mr. Green still had nearly one hundred days left under AEDPA's one-year clock.

On March 11, 2019, the Pennsylvania Supreme Court denied Mr. Green's PAA, but the denial is irrelevant for timeliness purposes because Mr. Green already had a timely filed federal habeas petition pending by March 11, 2019.

[123] Rpp. 114-130.

AEDPA'S APPLICATION TO MR. GREEN'S FEDERAL CLAIMS

Claim #1: Trial counsel was ineffective for failing to object to the trial court's reasonable doubt instruction and the improper hypothetical the trial court presented to the jury to explain how the reasonable doubt standard must be applied to the facts in Mr. Green's case. U.S. Const. admts. 6, 8, 14.

Mr. Green raised this claim in his *pro se* 2254 petition.[124] Thus, there are no *Mayle v. Felix*, 545 U.S. 644 (2005) relation back issues. Mr. Green's counseled amended 2254 petition merely fleshes out and articulates the legal arguments underlying his substantial trial counsel ineffectiveness claim regarding the improper reasonable doubt hypothetical. Mr. Green also highlighted PCRA counsel's ineffectiveness for not timely and properly raising this substantial trial counsel ineffectiveness claim before the PCRA court:

(b) If you did not exhaust your state remedies on Ground One, explain why: PCRA counsel's ineffectiveness for failing to discover vo and assert trial counsel's ineffective in failing to object to, be cognizant of, assert, preserve and raise on direct the unconstitutionality of any of the foregoing instructions. [125]

A. The unconstitutional reasonable doubt hypothetical

The trial court described reasonable doubt, but besides explaining its legal significance and definition, the trial court told the jury it would be "helpful to think about" reasonable doubt "in this way":

> Now, Ladies and Gentlemen, I think it is helpful to think about reasonable doubt in this way. I know, because I was fortunate to speak with each one of you, that each one of you has somebody in your life that you love. Each one of you has what we call in my family a precious one. It could

[124] E.C.F. #1, pp. 5-6.
[125] E.C.F. #1, p. 6.

be a child, a significant other, a spouse, a cousin, doesn't matter, a sibling, but each one of you loves somebody deeply.

If you were told by that loved ones physician that the loved one had a life-threatening condition, very likely, Ladies and Gentlemen, you are going to get a second opinion, you are probably going to get a third opinion.

If you are like me, you are going to go through your -- I use the old fashion world rolodex. But you are going to go through the contact list in your phone. You are going to call everybody you know about – who got some knowledge about medicine.

What do you know? Tell me about this illness. Tell me what the protocols are for it. How do we best treat it? Who is the best doc in town? What do you know? You might do internet research. You do a ton of stuff.

But at some point the question will be called. Do I go forward with the medical procedure for my loved one?

Let's say it is surgery, which we all think is a big deal. Do I go forward?

If you go forward, it is not because you have moved beyond all doubt. There are no guaranties in life. If you go forward, it is because you have moved beyond a reasonable doubt.

Ladies and Gentlemen, a reasonable doubt must be a real doubt. It is not a doubt that is imagined or manufactured to avoid carrying out an unpleasant responsibility. I told you, I'm not asking you to do something easy. I'm asking you to do something hard.[126]

[126] NT, Trial, 12/18/2009, pp. 132-134.

The trial court's hypothetical violated Mr. Green's federal constitutional rights. This prosecution-friendly instruction relieved the Commonwealth of its heavy burden of proof and invaded the province of each juror to apply the standard consistent with his or her own life experiences and values. The trial court's instruction, specifically, unfairly prejudiced Mr. Green in at least two ways.

First, the trial court used a situation – a life-threatening illness of a child or other loved one for which only one treatment existed – where, of course, any reasonable person would authorize moving forward and accept the risk. If the only option to save your child or loved one was the "medical procedure" mentioned by the trial court, who among us wouldn't proceed to take that last chance to save our child? The trial court, therefore, presented this choice to the jury: (1) saving your child's life by disregarding all instinctual doubts about said "medical procedural" and moving forward with the "medical procedure"; or (2) watching your child die.

The trial court, consequently, equated the decision to move forward and authorize the "medical procedure" with resolving doubts about Mr. Green's guilt and moving forward to convict. This made it exceedingly easy for a juror to resolve – or simply ignore altogether – whatever reasonable hesitations he or she harbored about Mr. Green's guilt regarding each count: "I, the juror, am doing the right thing by moving forward, overcoming my doubts and convicting, just like I would do if my child were dying." In the end, the trial court's improper hypothetical made a murder conviction a foregone conclusion.

Thus, the trial court's hypothetical injected an unacceptable level of concern, urgency, and graveness and thereby raised the threshold for what constitutes reasonable doubt. By requiring for acquittal, a doubt so strong and substantia that it would prevent a mother from authorizing a "medical procedural" to save her child's life, the trial court relieved the Commonwealth of its high burden to prove guilt for each count beyond a reasonable doubt.

In *Cage v. Louisiana*, 498 U.S. 39 (1990), the Supreme Court held that the use of the words "substantial" and "grave" in the trial court's description of reasonable doubt unconstitutionally lowered the prosecution's burden of proof and "suggested a higher degree of doubt than was required for acquittal under the reasonable-doubt standard." *Id.* at 41. This is because "[a] reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause. *Id.* at 40.

It's no different in Mr. Green's case. There's no difference between using an improper *example* in the definition that requires a substantial doubt, as the trial court did here, and using an equally improper *definition* requiring a substantial doubt, as the Supreme Court and other federal courts have routinely condemned. Using the example of a dying child, in fact, is far more stark and memorable than using the mere words "substantial" or "grave" because it forces each juror to place him or herself in the most dire of circumstances and then forces them to answer this question, "What would you do?" To excuse the highly improper and graphic image the trial court created, by relying

on the mere words she used elsewhere in her charge, would ignore decades of social science research that teaches us that images are far more powerful than words.

Second, the trial court's instruction omitted critical aspects of the governing standard – which commands an acquittal if the juror "pauses" or "hesitates" before acting in a matter of the highest importance. The trial court's instruction, however, focused solely on whether the juror "refrains from acting" in this situation. Refraining to act on one's gut or instinctual feelings of doubt, unfairly favored the prosecution during jury deliberations because jurors were instructed to not act upon their legitimate, acquittal-worthy doubts and hesitations.

The governing standard calls for an acquittal based solely on whether the juror "hesitates," even if that juror would ultimately overcome his or her hesitation and move forward with the decision. *Commonwealth v. Stokes*, 615 A.2d 704, 710 (Pa. 1992) (approving instruction that specifically authorizes acquittal where juror "hesitate[s] [to] seriously consider as to whether he or she should do a certain thing before finally acting"). In other words, "hesitation" – by itself – is enough under to raise a reasonable doubt. *Commonwealth v. Weiner*, 101 Pa.Super. 295, 1930 Pa.Super. LEXIS 125 (1930) (hesitation by itself sufficient to constitute reasonable doubt); *Commonwealth v. Baker*, 93 Pa.Super. 360, 363, 1928 Pa.Super. LEXIS 338 (1928) ("The state of mind described by the phrase 'reasonable doubt' is one of indecision or hesitation to reach the conclusion of guilt, and necessarily implies that the juror may be unable to give 'some proper reason

for entertaining' it; reasonable doubt may exist without his being able to formulate any reason for it.").

The trial court's instruction prevented jurors from applying the more accurate, constitutionally sound, and fairer "hesitation" aspect of the governing standard and directed them to rely exclusively on the more prosecution-friendly "refrain-from-acting" aspect. Put differently, "moving beyond" one's doubts, as the trial court's hypothetical hammered home, isn't the standard. To a juror, hesitating first, even if he or she were later inclined to move forward, is enough under the prevailing standard to vote for acquittal. The parent of the dying child might have doubts about authorizing the "medical procedural" the trial court repeatedly mentioned because of his or her hesitation about the medical procedure's safety or efficacy. Under the law, though, the parent's initial doubt regarding the "medical procedure" constitutes reasonable doubt, even if the parent ultimately "moves forward" and authorizes the medical procedure. In other words, if a juror initially has real doubts about any of the criminal counts charged against the defendant, this initial doubt is sufficient to acquit the defendant of those counts where the doubt is anchored.

The jury is presumed to follow the court's instructions. *Commonwealth v. Tedford*, 960 A.2d 1, 3 7 (Pa. 2008). Therefore, no legitimate argument can be made that the trial court was just improvising with some insignificant example of what constitutes a reasonable doubt that no juror would realistically take to heart. Likewise, the trial court's motives, however well-intentioned, don't control this question. *United States v.*

Moses, 756 F.2d 329, 333 (4th Cir. 1985) ("added confusion is often created by these well-intentioned judicial efforts" to define reasonable doubt).

In the end, requirement that a criminal conviction be based upon proof beyond a reasonable doubt "plays a vital role in the American scheme of criminal procedure" and as "a prime instrument for reducing the risk of convictions resting on factual error." *In re Winsh*ip, 397 U.S. 358, 363-364 (1970). "It is a principle of particular importance where the evidence of guilt can fairly be questioned." *Brooks v. Gilmore*, No. 15-5659, 2017 U.S. Dist. LEXIS 127703, at *1-2 (E.D. Pa. Aug. 11, 2017).

An instruction violates due process where jurors could've interpreted it to allow conviction based on any "degree of proof below" the reasonable doubt standard. *Cage v. Louisiana*, 498 U.S. at 41. This is true not only in cases of misdefinition, but also where a correct definition is in some way muddled or distorted by additional language or an ill-advised hypothetical regarding a dying a child. *Whitney v. Horn*, 280 F.3d 240, 256 (3d Cir. 2002); *United States v. Gordon*, 290 F.3d 539 (3d Cir. 2002). While judges are afforded substantial discretion in how to instruct juries, they can't exercise their discretion in a way that distorts the controlling legal principles.

On August 11, 2017, in *Brooks v. Gilmore*, No. 15-5659, 2017 U.S. Dist. LEXIS 127703, a district court judge of this District examined a nearly identical reasonable doubt hypothetical presented by the same trial court (Renee Cardwell Hughes) in another murder case. In *Brooks v. Gilmore*, 2017 U.S. Dist. LEXIS 127703 (E.D. Pa. Aug. 11, 2017). Here's the instruction Judge Hughes gave in *Brooks*:

> It's helpful to think about reasonable doubt in this manner. Let's say, and I know that each one of you does have someone that you love very much, a spouse, a significant other, a child, a grandchild. Each one of you has someone in your life who's absolutely precious to you. If you were told by your precious one's physician that they had a life-threatening condition and that the only known protocol or the best protocol for that condition was an experimental surgery, you' re very likely going to ask for a second opinion. You may even ask for a third opinion. You're probably going to research the condition, research the protocol. What's the surgery about? How does it work? You're going to do everything you can to get as much information as you can. You're going to call everybody you know in medicine: What do you know? What have you heard? Tell me where to go. But at some point the question will be called. If you go forward, it's not because you have moved beyond all doubt. There are no guarantees. If you go forward, it is because you have moved beyond all reasonable doubt.

Brooks v. Gilmore, 2017 U.S. Dist. LEXIS 127703, at *7-8.

Here's how the district court assessed the hypothetical in *Brooks*:

> In a case involving a "life threatening" condition affecting someone "absolutely precious" to a juror, where there is only one "known protocol" or "best protocol," what level of doubt would need to exist before a juror would deny them a chance at life? Necessarily, one would need profound, if not overwhelming, doubt to deny a loved one their only or best opportunity for cure. But this is problematic because the

> Supreme Court has held that elevating the level of doubt a juror must have before acquittal is required violates the Due Process Clause. In *Cage v. Louisiana*, after the trial court had defined reasonable doubt as "grave uncertainty" and "substantial" doubt, the Supreme Court ordered a new trial. In doing so, the Court observed: "It is plain to us that the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." 498 U.S. at 41.

Id., at *9.

It's true Judge Hughes didn't use the specific words found objectionable in *Cage*. This is irrelevant, though, because Judge Hughes communicated the same concepts by means of a powerful and emotionally charged metaphor. "Objectively speaking, any person of decency and morals would strive to put aside doubt when faced with a single life-saving option for a loved one." *Id.*, at *10.

Compounding the problem, is the fact Judge Hughes structured the hypothetical in terms of the jury proceeding to take action on behalf of their family member, twice using the phrase "if you go forward[.]" The district court in *Brooks* found this language unconstitutional:

> The Supreme Court has made clear, however, that a charge on reasonable doubt should be expressed "in terms of the kind of doubt that would make a person hesitate to act rather than the kind on which he would be willing to act." *Holland v. United States*, 348 U.S. 121, 140, 75 S. Ct. 127, 99 L. Ed. 150, 1954-2 C.B. 215 (1954) (citation omitted). In the context of an otherwise sufficient charge, such error would not amount to a constitutional violation. But taken in combination with the trial court's hypothetical here, which would require an excessively high degree of doubt to reach

> an acquittal, the deficiency of the charge is clear. Whereas the concept of reasonable doubt is grounded in a hesitation to act, here the court's example posited a situation creating strong motivation to act. Given the issues involved, the court's hypothetical was structured in a way that would encourage the jury to *resolve* any doubt. In this respect, the issue here is quite similar to that in *Monk v. Zelez*, 901 F.2d 885 (10th Cir 1990). In *Monk*, where the Tenth Circuit ultimately granted a new trial before a military tribunal, the court faulted both the use of the word "substantial" in the reasonable doubt charge and the use of language couched in terms of "willingness to act." *Id.* at 890 (citing *Holland*). Even more significantly, *Monk* was one of the circuit court decisions that the Supreme Court cited with approval in *Cage*.

Id., at *10-11.

Personalizing the reasonable doubt standard, moreover, dilutes the protection it's intended to provide. As *Brooks* recognized:

> A prudent person called upon to act in an important business or family matter would certainly gravely weigh the often neatly balanced considerations and risks trending in both directions. But, in making and acting on a judgment after so doing, such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment. Human experience, unfortunately, is to the contrary.

Id., at *12.

This insight applies with particular force where the personal situation the jury is told to use as a benchmark is a potentially life or death "medical procedure" for a loved one. Viewed from one perspective, the responsibility implicit in Judge Hughes's hypothetical has a fiduciary overtone. *Id.*

Part of Judge Hughes's instruction was correct, but this doesn't end the inquiry because a charge must be considered in its entirety. *Whitney v. Horn*, 280 F.3d at 256. While part of Judge Hughes's instruction may've been correct, the charge's centerpiece was the *hypothetical*. After giving one portion of the standard instruction, Judge Hughes quickly turned to the unconstitutional hypothetical, specifically instructing the jurors: "Now, Ladies and Gentlemen, I think it is helpful to think about reasonable doubt in this way."[127]

The district court concluded Judge Hughes presented the hypothetical as a model for understanding and conceptualizing reasonable doubt. Moreover, the hypothetical wasn't mitigated by any further definition or explanation. The hypothetical's centrality to the entire charge illustrates why it didn't matter that Judge Hughes didn't use the precise language prohibited by *Cage*. It's also why the initially accurate instruction didn't render the entire reasonable doubt instruction constitutional: the jury was instructed to consider the trial court's example as a *proper* exposition of the reasonable doubt standard – but it wasn't a proper or accurate explanation.

A nearly identical situation occurred in *United States v. Pinkney*, 551 F.2d 1241, 1244 (D.C. Cir. 1976), where an otherwise sound statement regarding the reasonable doubt standard was accompanied by a lengthy hypothetical that both overstated the degree of uncertainty required to find reasonable doubt and potentially trivialized the

[127] NT, Trial, 12/17/2009, p. 132.

seriousness of the decision. As here, trial counsel in *Pinkney* didn't object, but on appeal the D.C. Circuit found plain error and ordered a new trial. In doing so, the Court of Appeals recognized the power of examples in the minds of jurors: "[I]t is likely that the jurors might have given undue weight to such a graphic example, which because of its length and nonlegal character might have been more easily comprehended and remembered than the standard instruction, resonat(ing) in the jury room as a standard of their function and responsibility." *Id.* at 1245.

B. Trial counsel was ineffective for not objecting to the trial court's incomplete reasonable doubt instruction and improper reasonable doubt hypothetical

The standard for evaluating this claim is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, Mr. Green must show trial counsel's deficient performance prejudiced him. *Id.* at 688, 694. Prejudice is established where, but for the effect of trial counsel's errors, there's a reasonable probability at least one juror would've had a reasonable doubt with respect to the defendant's guilt. *Hinton v. Alabama*, 571 U.S. 263, 275-776 (2014); *Strickland v. Washington*, 466 U.S. at 695.

1. Deficient performance

Courts have routinely held that failure to object to an improper jury instruction can constitute deficient performance, *Everett v. Beard*, 290 F.3d 500, 514-515 (3d Cir. 2002) (collecting cases), resulting in prejudice. *Thomas v. Varner*, 428 F.3d 491, 501 (3d. Cir. 2005); *Carpenter v. Vaughn*, 296 F.3d 138, 158 (3d Cir. 2002). In *Brooks*, for instance, the district court said, "Given the central importance of reasonable doubt in the

protection of a defendant's rights, counsel's silence through the reasonable doubt charge constituted *Strickland* deficiency." *Brooks v. Gilmore*, 2017 U.S. Dist. LEXIS 127703, at *16.

Moreover, objecting was quite easy and exposed Mr. Green to no potential harm. Not objecting, though, all but guaranteed a conviction because the incomplete reasonable doubt instruction and defective hypothetical raised the reasonable doubt standard to an insurmountable benchmark. *Brook is* again instructive:

> Because reasonable doubt is such a fundamental principle, particularly where the defendant does not testify, and the nature of the court's hypothetical was so instinctively problematic, it is difficult to fathom how any criminal defense lawyer could fail to object. The objection required was not exotic but straightforward: all counsel had to convey was that the court's hypothetical did not accurately communicate the standard for reasonable doubt, and would elevate the degree of doubt necessary for acquittal.

Id., at *17.

Thus, there was no strategic reason for trial counsel not to have objected.

Furthermore, even if trial counsel believed Judge Hughes wouldn't have sustained his objection, trial counsel was still ineffective because "[e]ffective trial counsel preserves claims to be considered on appeal and in federal habeas proceedings." *Martinez v. Ryan*, 566 U.S. 1, 12 (2012). Defense counsel, in other words, "have an obligation to preserve their clients' rights under the Constitution, and objections are routinely made in trial courts even in the face of adverse precedent from intermediate appellate courts[.]" *Brooks v. Gilmore*, 2017 U.S. Dist. LEXIS 127703, at *18.

The Third Circuit has emphasized that the "contemporaneous objection rule," *see United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239 (1940), plays a valuable corrective role: "[A] timely objection allows the trial court and the prosecutor to reconsider and perhaps change their course of conduct while still possible. If the defendant is successful, he avoids prejudicial error. Even if he is convicted, his timely objection delineates the points that may be appealed[.]" *Gov't of Virgin Islands v. Forte*, 806 F.2d 73, 75-76 (3d Cir. 1986).

2. Prejudice

Trial counsel's deficient performance prejudiced Mr. Green. In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the Supreme Court held any error in defining reasonable doubt is "structural"– meaning prejudice is presumed. *Id.* at 281. The Supreme Court, however, recently held that in the context of a *Strickland* claim, not every structural error can be presumed prejudicial, *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), meaning the defendant must prove prejudice.

A court engaging in collateral review must conclude there's a "reasonable probability that at least one juror," *Wiggins v. Smith*, 539 U.S. 510, 537 (2003), would've reached anything less than a "subjective state of certitude of the facts in issue," *In re Winship*, 397 U.S. at 364, had the trial court properly explained reasonable doubt thanks to a timely objection from trial counsel. The Supreme Court recently reaffirmed this principle in another *Strickland* decision, with Chief Justice Roberts identifying the prejudice inquiry as whether there's a "reasonable probability that… at least one juror

would have harbored a reasonable doubt," *Buck v. Davis*, 137 S.Ct. 759, 776 (2017), had the trial court properly explained the reasonable doubt standard.

Here, it's reasonably probable at least one juror would've acquitted Mr. Green of murder – or had acquittal-worthy doubts whether the Commonwealth proved the malice element beyond a reasonable doubt – had trial counsel forced Judge Hughes to strike the improper hypothetical and correctly explain the reasonable doubt standard.

This case came down to two competing narratives: Mr. Green said he acted in self-defense, while the Commonwealth argued he killed Jameil Martin with malice. The Commonwealth's witnesses provided inconsistent testimony regarding whether Martin had something in his hand when Mr. Green fired, while Mr. Green testified Martin had shot him in the leg two days before the fatal shooting and he reached into his front pocket and pulled a gun on him immediately before he (Green) fired.

Mr. Green, therefore, could've reasonably and realistically been acquitted outright or convicted of manslaughter based on serious provocation or unreasonable self-defense had trial counsel timely objected and had jurors properly instructed regarding reasonable doubt. Consequently, it's reasonably probable at least one juror would've harbored acquittal-worthy doubt regarding the malice element in the third-degree murder count had the jury been properly instructed regarding the reasonable doubt standard.

C. There is no state court adjudication of this claim because initial-review PCRA counsel ineffectively and prejudicially failed to raise the substantial trial counsel ineffectiveness claim before the PCRA court

Mr. Green didn't raise this substantial trial counsel ineffectiveness claim in his *pro se* PCRA petition, nor did initial-review PCRA counsel raise this substantial claim in Mr. Green's counseled amended PCRA petition. Initial-review PCRA counsel, therefore, was ineffective for failing to raise this substantial trial counsel ineffectiveness claim.

The PCRA court dismissed Mr. Green's PCRA petition on April 10, 2017. Mr. Green filed notice of appeal shortly thereafter.

On August 11, 2017, *Brooks* was decided.

Under the Pennsylvania's appellate rules, because Mr. Green and PCRA counsel didn't raise this claim before the PCRA court, Mr. Green couldn't raise it on appeal before the Pennsylvania Superior Court. Pa.R.A.P. 302; *Commonwealth v. Romberger*, 378 A.2d 283, 286 (Pa. 1977) ("It is a fundamental doctrine in this jurisdiction that where an issue is cognizable in a given proceeding and is not raised it is waived and will not be considered on a review of that proceeding."). However, because the reasonable doubt instruction and hypothetical in *Brooks* were nearly identical to the reasonable doubt instruction and hypothetical here, counsel threw a last second Hail Mary by briefing and arguing this claim in Mr. Green's opening brief to the Superior Court.

Specifically, counsel packaged the trial counsel ineffectiveness claim into a PCRA counsel ineffectiveness claim:

> Appointed PCRA counsel was ineffective for failing to raise a meritorious trial counsel ineffectiveness claim for failing to object to the trial court's reasonable doubt instruction. U.S. Const. Admts. 6, 8, 14; Pa. Const. art. I, §§ 8, 9.[128]

Under state law, Mr. Green had a state statutory right to effective PCRA counsel. *Commonwealth v. Bennett*, 930 A.2d 1264, 1273–1274 (Pa. 2007). By not raising this claim, as mentioned, PCRA counsel was prejudicially ineffective. PCRA counsel, moreover, didn't have a strategic reason for not raising this claim before the PCRA court. PCRA counsel, like trial counsel, has a duty to preserve claims for PCRA appeal and federal habeas proceedings – should the defendant wish to pursue federal habeas relief.

As suspected, the Superior Court held Mr. Green waived this claim because he didn't raise it before the PCRA court. Rp. 119 ("Green raises this claim for the first time on appeal. He did not make such a claim in any of his filings before the PCRA court. He has therefore waived it.").

With no state court adjudication of Mr. Green's substantial trial counsel ineffectiveness claim, this Court must review this claim *de novo* under *Martinez*. Under *de novo* review, Mr. Green is entitled to habeas relief. *Brooks* is again instructive because the district court in *Brooks* had to review the reasonable doubt claim under AEDPA

[128] Rp. 167.

because the state courts had adjudicated the claim on the merits. Despite having to apply AEPDA's tremendous deference, the district court still granted habeas relief.

Consequently, if this type of reasonable doubt claim warrants relief under AEDPA's deferential standard, it surely warrants relief when reviewed *de novo* under *Martinez*.

Mr. Green, therefore, is entitled to a writ of habeas corpus.

D. Evidentiary hearing request – if needed

To the extent the Court believes further testimony is needed to establish relief on this claim, Mr. Green requests an evidentiary hearing. Mr. Green, though, believes no hearing is needed because trial counsel can't possibly provide a *legitimate* strategic reason for not objecting to an unconstitutional reasonable doubt instruction.

Undersigned counsel represented Mr. Green during his PCRA proceedings, and readily admits he missed this legitimate and substantial reasonable doubt claim. Counsel obviously reviewed the trial transcripts, including Judge Hughes's reasonable doubt instruction and hypothetical, but he simply got his reasonable doubt analysis wrong. Counsel, therefore, didn't raise this claim in Mr. Green's amended PCRA petition because of ignorance, not some sort of strategic decision.

CONCLUSION

WHEREFORE, Mr. Green respectfully requests that the Court grant him a writ of habeas corpus because trial counsel's ineffectiveness permitted the jury to answer the guilt-innocence question based on an incorrect and unconstitutional understanding of the reasonable doubt standard.

Respectfully submitted this the 7th day of August, 2019.

/s/Craig M. Cooley
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CERTIFICATE OF SERVICE

On August 7, 2019, counsel e-filed this pleading via the MD of PA's e-filing system. Once e-filed, the Commonwealth received an email notification of the filing and a PDF copy of the pleading.