

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
CRIMINAL DIVISION

RECEIVED

DEC 11 2008

COMMONWEALTH OF PENNSYLVANIA)
Plaintiff-Respondent)

PCRA UNIT

v.)

CP-51-CR0431311-1988

ANDREW SWAINSON)
Defendant-Petitioner)

Charges: 1st Degree Murder;
Possession of an Instrument
of Crime

**MEMORANDUM OF LAW IN SUPPORT OF SECOND PETITION FOR POST-
CONVICTION RELIEF PURSUANT TO 42 Pa. C.S. § 9543.**

Petitioner, Andrew Swainson, hereby submits his Memorandum of Law in Support of His Motion for Post Conviction Relief Pursuant to 42 Pa. C.S.A. § 9541. The motion is presented in good faith and premised on the following facts and points of authority as well as the supporting exhibits affixed hereto.

I. Introduction

Andrew Swainson is currently serving a life sentence at Dallas State Correctional Institute for the January 17, 1988 shooting death of Stanley Opher. Swainson has claimed his innocence since March 17, 1988—the day Philadelphia police officers arrested him. Recently obtained after-discovered evidence from the Commonwealth's star witness—Paul Pressley—and Swainson's defense investigator—Terrance Gibbs—supports Swainson's long proclaimed innocence claim. Consequently, Swainson files this subsequent PCRA petition, pursuant to 42 Pa. Con. Stat. § 9543, so that the Court will hold an evidentiary hearing, vacate his conviction, and grant him a new trial.

Swainson's conviction is premised entirely on a single eyewitness named Paul Pressley, who claimed that he identified Swainson as the shooter on February 12, 1988 when Detective Manuel Santiago showed him a seven-man photo line-up.¹

At trial, Presley identified Swainson as the shooter and said he was "certain" that Swainson was the shooter. Presley also discussed Detective Santiago's seven-man photo line-up and informed the jury that he identified Swainson as the shooter at the police station on February 12, 1988. Thus, Presley premised his in-court identification of Swainson on his out-of-court identification of Swainson—i.e., the seven-man photo line-up allegedly conducted by Detective Santiago.

At trial, Presley also explained why he signed a June 10, 1988 affidavit,² which he gave to Swainson's defense investigator, Terrance Gibbs.³ In the signed two-page affidavit, Presley admitted that his identification of Swainson was incorrect. According to Presley, the shooter was a dark-skinned African-American, while Swainson was a light skinned Jamaican. As a result, Presley knew Swainson could not be the shooter.⁴

At trial, however, Presley testified that his statements to Gibbs and those memorialized in the signed affidavit were false. When the prosecutor, Judy Rubino, asked Presley why he signed an affidavit that contained false statements, Presley testified that he signed the affidavit because Gibbs promised him that he (Gibbs) and Swainson would compensate him if he signed the affidavit and testified at trial that Swainson was

¹ No physical evidence or additional eyewitnesses linked Swainson to Opher's murder.

² Presley's two-page affidavit is attached hereto as Exhibit 1.

³ Prior to becoming a defense investigator, Terrance Gibbs served as a Philadelphia Police Officer. Ex. 4.

⁴ Ex. 1.

not the shooter. Presley also testified that Gibbs pressured him to sign the affidavit, even though the affidavit contained false statements.

Finally, Presley testified that he did not *expect* to obtain any benefits from the Commonwealth because there was no *implicit* or explicit agreement between him and the Commonwealth to testify against Swainson. Presley told the jury that he was testifying on his own free will.

Detective Santiago corroborated Presley's testimony when he described how he prepared the seven-man photo line-up and how Presley identified Swainson "immediately" and "without hesitation."⁵

Detective Santiago also corroborated Presley's testimony regarding the June 10, 1988 affidavit that Presley signed.

Finally, Detective Santiago denied offering any benefits or leniency to Presley in exchange for Presley's testimony against Swainson.

The Commonwealth's closing arguments demonstrated the significance of Presley's testimony. The prosecutor (Rubino) spent much of her argument explaining why Presley's identification was accurate and why Presley was a credible witness. She emphasized Detective Santiago's testimony that he prepared and showed Presley a seven-man photo line-up and that Presley "immediately" and "without hesitation" identified Swainson as the shooter. Likewise, she claimed that the Commonwealth did not *implicitly* or explicitly offer any benefits or leniency to Presley in exchange for his testimony against Swainson.

⁵ Detective Santiago also testified in great detail about his alleged seven-man photo line-up at the suppression hearing on March 9, 1989. *See* NT, Suppression Hrg., 3/9/89, at 1-60.

The jury placed great emphasis on Presley's testimony because during deliberations, the jury sent the following note to the trial judge: "Your honor, may we see the testimony of Paul Presley." The jury ultimately convicted Swainson of first-degree murder, criminal conspiracy, and possession of an instrument of crime. Thus, it is safe to assume that Presley's and Santiago's testimony affected the jury's guilt-innocence decision. Specifically, their testimony affected the jury's calculus regarding how much weight and credibility it should accord not only to their testimony, but to the testimony of other Commonwealth witnesses. Indeed, Presley and Detective Santiago led the jury to believe that Presley premised his in-court identification of Swainson on a properly administered seven-man photo line-up. Likewise, Presley's testimony led the jury to believe that he signed the June 10, 1988 two-page affidavit because Gibbs told Presley that Swainson and he (Gibbs) would compensate Pressley if he signed the affidavit. Finally, Presley's and Detective Santiago's testimony led the jury to believe that Presley did not *expect* to receive any benefits or leniency from the Commonwealth in exchange for his testimony against Swainson.

Newly or after-discovered evidence proves that Presley's and Detective Santiago's testimony is *false* and that the Commonwealth knowingly used this false testimony to procure a first-degree murder conviction against Swainson. The newly or after-discovered evidence is: (1) an October 13, 2008 four-page handwritten statement and an audio-taped statement from Pressley;⁶ and (2) a November 4, 2008 affidavit from Terrance Gibbs.⁷

In his affidavit, Presley recanted the following aspects of his trial testimony:

⁶ Presley's October 13, 2008 statement is attached hereto as Exhibit 2.

⁷ Lt. Gibbs's November 4, 2008 affidavit is attached hereto as Exhibit 4.

- Contrary to Presley's trial testimony, he never picked Swainson out of a seven-man photo line-up. Instead, the prosecutor (Rubino) and other Commonwealth agents (from the Philadelphia County District Attorney's Office and the Philadelphia Police Department) showed Presley several photos of only one person—Andrew Swainson—and told Presley that: (1) Swainson was the individual who shot and killed Opher; (2) Swainson was a “notorious” drug kingpin; and that (3) Swainson was responsible for other murders, as well. When Presley viewed the photos of Swainson, Presley told the prosecutor that Swainson *was not the shooter*. Presley said that the prosecutor and her agents in effect told him that he had to identify Swainson as the shooter.
- Contrary to Presley's trial testimony, Presley knew “in his heart” that Swainson “was surely not” the shooter because the shooter was a dark-skinned African-American, while Swainson was a light-skinned Jamaican.
- Contrary to Presley's trial testimony, neither Terrence Gibbs (the defense investigator) nor Swainson ever told Presley that he would be compensated if he signed the June 10, 1988 affidavit that exonerated Swainson. Instead, the prosecutor (Rubino) told Presley before trial that he had to testify that he signed the affidavit because Gibbs and Swainson told him that he would be compensated for doing so and that the statements in the affidavit were false.
- Contrary to Presley's trial testimony, he believed that he had an *implicit* agreement with the prosecutor and the Commonwealth, wherein if he identified Swainson and testified against Swainson at trial, the prosecutor would: (1) see to

it that any pending criminal charges against him from Philadelphia County would be dropped; and (2) find him a job where he could utilize his artistic abilities.

In Gibbs's affidavit, Gibbs stated that:

- He never told Presley that either he (Gibbs) or Swainson would compensate Presley with drugs or money if Presley signed the affidavit exonerating Swainson.
- He never threatened or pressured Presley to sign the June 10, 1988 two-page affidavit; Presley signed the affidavit on his own free-will.
- Perry DeMarco, Swainson's trial counsel, never asked Gibbs to testify to rebut Presley's allegation that he (Gibbs) offered to compensate Presley if Presley signed the affidavit exonerating Swainson. Had DeMarco asked Gibbs to testify, Gibbs would have testified and denied Presley's allegations.
- The prosecutor (Rubino) called Gibbs and informed him that Presley had accused him of bribery and that she wanted to know if Presley's allegations were true. Gibbs told the prosecutor that Presley's allegations were false. Gibbs can not remember whether the prosecutor called him before, during, or after Swainson's trial.
- The Philadelphia Police Department did not arrest Gibbs for bribery and the Philadelphia District Attorney's Office did not prosecute Gibbs for bribery or suborning perjured testimony.

Presley's recantation and Gibb's affidavit "present[] a strong prima facie showing that a miscarriage of justice may have occurred." *Commonwealth v. Hawkins*, 953 A.2d 1248, 1253 (Pa. 2008). Consequently, Swainson is entitled to file a subsequent PCRA petition requesting: (1) an evidentiary hearing so he can further develop his new state and

federal constitutional claims; (2) a new trial; and (3) such relief as is just and proper under the particular facts and circumstances of this case. *See Commonwealth v. Carpenter*, 555 Pa. 434, 725 A.2d 154, 160 (Pa. 1999). Indeed, Presley's recantation and Gibb's affidavit gives rise to several new state and federal constitutional claims that could not have been raised and litigated earlier by the exercise of due diligence:

After-discovered Evidence Claim: Presley's recantation is not "merely corroborative or cumulative," it is not "directed solely to impeach" Presley's or Detective Santiago's testimony, and it "is of such nature and character that a different verdict will likely result if a new trial is granted." *Commonwealth v. Wilson*, 649 A.2d 435, 448 (Pa. 1994) (citations omitted); *accord Commonwealth v. McCracken*, 540 A.2d 541, 545 (Pa. 1995); PA. CONST., Art. I, §§ 1, 9.

False Evidence Claim: Presley's recantation supports Swainson's claim that the Commonwealth knowingly used false evidence to convict him and that the Commonwealth has yet to take any corrective actions to remedy the prejudicial impact of the false testimony. Presley was the *only* Commonwealth witness to observe Opher's shooting. Consequently, there is no doubt that Presley's false testimony, as well as Detective Santiago's false testimony, could have affected—and most likely did affect—the jury's verdict. As such, Presley's and Detective Santiago's false testimony violated Swainson's state and federal due process rights. *See* U.S. CONST. AMENDS. VI, XIV; *Napue v. Illinois*, 360 U.S. 264, 271 (1959); PA. CONST., Art. I, §§ 1, 9.

Unduly Suggestive Line-up Claim: Presley's recantation supports Swainson's claim that Presley's identification of Swainson was premised on an identification procedure that was so inherently and impermissibly suggestive that it violated his state

and federal constitutional rights. U.S. CONST. AMENDS. VI, XIV; *Neil v. Biggers*, 409 U.S. 188 (1972); *Simmons v. United States*, 390 U.S. 377, 384 (1968); PA. CONST., Art. I, §§ 1, 9; *Commonwealth v. Martin*, 393 A.2d 23, 26 (Pa. 1978); *Commonwealth v. Wade*, 867 A.2d 547, 555-57 (Pa. Super. 2005).

Brady Claims: Presley's recantation supports Swainson's claim that the Commonwealth failed to disclose exculpatory and impeachment evidence, to wit: (1) Presley's initial statements to the prosecutor in which he informed her that Swainson was not the shooter; (2) the fact that Presley's identification of Swainson was premised upon an inherently and impermissibly suggestive photographic show-up; and (3) the fact that the prosecutor promised Presley that, if he identified Swainson and testified against him at trial, she would "take care of" his pending Philadelphia County charges and would help him obtain a job. The Commonwealth's failure to disclose this exculpatory and impeachment evidence undermines confidence in Swainson's verdict. *See* U.S. CONST. AMENDS. VI, XIV; *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); PA. CONST., Art. I, §§ 1, 9; *Commonwealth v. Gibson*, 951 A.2d 1110, 1127 (Pa. 2008); *Commonwealth v. Wade*, 867 A.2d 547, 555-57 (Pa. Super. 2005).

Ineffective Assistance of Counsel Claim: Gibbs's affidavit supports Swainson's claim that trial counsel acted ineffectively when he chose not to present Gibbs as a rebuttal witness to undermine Presley's claim that Gibbs bribed him in order to secure Presley's June 10, 1988 affidavit. This claim is of arguable merit; trial counsel's performance lacked a reasonable basis; and counsel's ineffectiveness prejudiced Swainson. U.S. CONST. AMENDS. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 686

(1984); PA. CONST., Art. I, §§ 1, 9; *Commonwealth v. Pierce*, 786 A.2d 203, 213 (2001); *Commonwealth v. Basemore*, 744 A.2d 717, 738 n. 23 (Pa. 2000).

Actual Innocence Claim: Presley's and Detective Santiago's false testimony violated Swainson's state and federal due process rights because it ultimately led to the conviction of an innocent person. *See Herrera v. Collins*, 506 U.S. 390 (1993); PA. CONST., Art. I, §§ 1, 9, 13.

Material Misapprehension of Fact Claim: Presley's recantation also gives rise to a state and federal due process claim that Swainson's conviction and sentences are based upon a misapprehension of fact material. *See U.S. CONST. AMENDS. VI, XIV; Townsend v. Burke*, 334 U.S. 736 (1948); PA. CONST., Art. I, §§ 1, 9; *Commonwealth v. Maxwell*, 421 A.2d 699, 703 (Pa. Super. 1980); *Commonwealth v. Cowan*, 418 A.2d 753 (Pa. Super. 1980).

Reasonable Doubt Claim: Swainson's guilt and sentencing verdicts, which are based upon Presley's and Detective Santiago's specious testimony, violates Swainson's state and federal constitutional rights to an impartial jury, a fair trial, and to a jury verdict based solely upon properly admitted evidence and argument that proves every element of an offense. *See U.S. CONST. AMENDS. VI, XIV; Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000); *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); PA. CONST., Art. I, §§ 1, 9.

It is beyond reproach that "the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence." *Miller v. Pate*, 386 U.S. 1, 7 (1967). The "government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them." *Mesarosh v. Untied*

States, 352 U.S. 1, 14 (1956). Swainson’s first-degree murder conviction implicates these fundamental constitutional principles. Simply put, Swainson’s conviction is premised on false testimony from the Commonwealth’s star eyewitness—Paul Pressley—and its lead detective—Detective Manuel Santiago. Their testimony “has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity.” *Id.* If the Court “has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.” *Id.* Swainson’s conviction is tainted with false testimony that the jury undoubtedly relied on during its guilt-phase deliberations. As a result, there can be no other just result than to accord him, at the very least, an evidentiary hearing or, and at the very best, a new trial.

II. Statement of Facts

A. The Incident

At 3:45 a.m. on January 17, 1988, Philadelphia Police Officer Robert Rouse saw Stanley Opher lying face down on the curb in the 5400 block of Sansom Street. As he approached Opher, who was moaning and crying for help, he saw a large gunshot wound to his lower back and noticed blood gushing out of the wound.⁸ Officer Rouse radioed his discovery to the police department, and asked Opher what happened. Opher responded, “They shot me in my back.”⁹

When police and paramedics arrived at the scene, paramedics transported him to the hospital, while Officer Rouse stayed at the scene and continued his investigation.

⁸ N.T. 3/16/89, at 28-29.

⁹ *Id.* at 29-30.

During his investigation, Officer Rouse noticed an open door at 5413 Samson Street, but did not see anyone in the immediate area. Office Rouse also noticed a bolt-action shotgun stuck in the snow with a blue tote bag attached to it. He contacted his supervisors to collect the property and weapon.¹⁰

Sometime before Office Rouse discovered Opher, a man named Brian Brown came across his body. During the early morning hours of January 17, 1988, Brown and some friends—Latonya Furman and Leroy Furman—drove up and down the 5400 block of Sansom Street looking to buy drugs. Brown eventually parked the car and went to purchase some drugs; when he returned, he said he saw a man who appeared to have been shot or stabbed asking for help. Brown and his friends immediately left the area, drove approximately one block, and notified the police of their discovery.¹¹

Officer Lawrence Hawrylak of the Mobile Crime Detection Unit recovered two shotguns from the crime scene—one was a sawed-off shotgun that had been under the front bumper of a Lincoln Continental parked nearby. When he cleared the bolt-action shotgun, which was stuck in the snow, he retrieved three shotgun shells from the chamber and two from the magazine; he also recovered a discharged shell from the sawed-off shotgun. His Unit also recovered the blue tote bag and a watch with a broken band.¹²

Officer Hawrylak identified bloodstains in the snow where Opher's body and the watch had been discovered. At trial, Officer Hawrylak conceded that crime scene photos indicated that the bolt-action shotgun and tote bag may have been improperly moved

¹⁰ *Id.* at 30-34.

¹¹ *Id.* at 41-45.

¹² *Id.* at 73-75.

from their initial location before they were photographed. He also testified that he was unable to lift any prints from either shotgun.¹³

B. Paul Presley's Identification and Trial Testimony

The Commonwealth presented only one person who implicated Swainson in Opher's murder: Paul Rodgers Pressley.

While the Commonwealth presented two witnesses to establish that Swainson was affiliated with the "drug house" where Opher was killed (5413 Samson Street), neither of these witnesses placed Swainson at or near the murder scene when Opher was murdered.¹⁴

1. Paul Presley's Arrest

Philadelphia Police Officers arrested Presley immediately after Opher was shot as Presley was fleeing from the scene.¹⁵

Presley was bleeding from his hand and had large amounts of blood on his overcoat.¹⁶

Police charged Presley with aggravated assault, simple assault, reckless endangering of another person, criminal conspiracy, and weapons violations.¹⁷

¹³ *Id.* at 77-84.

¹⁴ NT, Trial, 3/16/89, at 41-51 (LaTonya Furman), 86-163 (Jacqueline Morsell). Indeed, when Detective Santiago interviewed Swainson on January 22, 1988 and March 17, 1988, Swainson himself conceded that he frequently visited the house, but he denied all involvement in Opher's murder. Exs. 5, 16.

¹⁵ Exs. 8-10, 15.

¹⁶ Ex. 9.

¹⁷ *Id.*

Police interviewed Presley after his arrest; Presley denied shooting Opher and explained the circumstances surrounding the shooting:

- Presley arrived at 5413 Sansom Street at approximately 3:00 a.m.¹⁸ He said he was familiar with the 5413 Sansom Street drug house because he had previously purchased drugs at that location; Presley said that those who wanted to purchase drugs would be allowed to enter, and once inside they waited until they received their drugs.¹⁹
- When Presley reached the 5400 block of Sansom, he said he saw people down the street and grew scared that an undercover cop might be watching the house. Presley said he briefly hesitated, but eventually walked to 5413 Sansom. When he arrived, Presley walked onto the porch and knocked on the door. When the door opened, a man (Presley did not recognize, but who was later identified as Opher) ran out; a (second) man with a sawed-off shotgun quickly followed Opher out the door and shot him.²⁰
- Immediately after the second man shot Opher, a third man walked out of the house, pointed a rifle at Pressley, and told him to turn around and run.
- Pressley, *who did not recognize either man*, refused to leave, and instead, hit the rifle's barrel out of the way and began to struggle with the third man. As he struggled with the third man, Presley said the second man grabbed him by the collar and pulled him down the steps to the pavement. The third man then

¹⁸ N.T. 3/17/89, at 4-6.

¹⁹ *Id.*

²⁰ *Id.* at 7-9. As discussed *infra*, Presley identified the second man (with the sawed-off shotgun) as Swainson.

said, “I should shoot you,” but immediately after this he (the third man) and the second man (the shooter) fled the scene, both heading in different directions—one toward 54th Street and the other toward 55th Street.²¹

- Presley fled the scene as well, but as he ran from the scene, he noticed a shotgun and a blue tote bag on the sidewalk. Presley said he stopped, looked in the bag, and saw that it contained wrapped packets (i.e., drug paraphernalia). Presley did not take the tote bag, but instead ran until he got to 55th Street where he turned the corner and jumped onto a ledge on someone’s property. At that point, the police arrived.
- When Presley told the police about the shooting, the police ordered him to the ground, took him into custody, and charged him with assault.

Presley said he did not know or recognize the shooter; he said the shooter was wearing an orange-brown coat and a big dark hat. Presley said the other man was wearing a dark hooded coat.²² Presley *never* described the shooter as a light-skinned Jamaican.

Presley said that the “Jamaicans” ran the drug house.²³

The police did not show Presley any photos of possible suspects at this time.

2. Detective Santiago’s January 22, 1988 Interview with Swainson

²¹ *Id.* 9-18.

²² Ex. 6.

²³ *Id.*

According to Detective Santiago, the police had information that 5413 Sansom Street was a drug house and that Opher worked at the house and sold drugs for Swainson.²⁴

On January 22, 1988, Detective Santiago questioned Swainson at the Homicide Division after he Mirandized him.²⁵

Detective Santiago said that Swainson was not under arrest and that Swainson was free to end the questioning at any time and leave.

Swainson stayed, cooperated with Detective Santiago, and gave a statement.²⁶

Swainson denied involvement in Opher's murder and proclaimed his innocence.²⁷

Swainson said that he lived with his parents in New York but that he came to Philadelphia to take care of the drug house.²⁸

Swainson consented to being fingerprinted and to having his picture taken.²⁹

Swainson left the Homicide Division after being fingerprinted and photographed.

3. **Detective Santiago's February 12, 1989 Photo Line-up with Presley**

On February 12, 1988, Detective Santiago interviewed Presley at the Homicide Division.³⁰

²⁴ NT, Suppression Hrg., 3/9/89, at 15.

²⁵ *Id.* at 14-15. Detective Santiago's report regarding his January 22, 1988 interview with Swainson is attached hereto as Exhibit 5.

²⁶ *Id.* at 15-16.

²⁷ *Id.* at 16-18.

²⁸ *Id.* at 17.

²⁹ *Id.* at 18.

³⁰ Ex. 6.

After Presley recounted the circumstances surrounding Opher's murder, Detective Santiago allegedly showed Presley a seven-man photo line-up and asked Presley if he recognized anyone. All seven pictures were black-n-whites of African-American males with beards or mustaches and all were supposedly in their mid-twenties.³¹ One of the photos was Swainson.

Presley allegedly viewed the seven photos and when he saw Swainson's photo he allegedly said: "Yes, this photo—is the guy that did the shooting, he had a leather apple had, the big ones."³²

While Presley recognized Swainson as the shooter, he said he had never met or seen Swainson before.³³

At the March 9, 1989 suppression hearing, Detective Santiago corroborated Presley's February 12, 1988 statement when he testified that he showed Presley a seven-man photo line-up and that Presley identified Swainson photo as the individual who shot and killed Opher.³⁴

4. Swainson's Arrest

Based on Presley's alleged identification of Swainson, Detective Santiago obtained an arrest warrant for Swainson on February 12, 1988.³⁵

On March 17, 1988, the police arrested Swainson in New York City.³⁶

³¹ NT, Suppression Hrg., 3/9/89, at 19-20; Ex. 6.

³² Ex. 6; NT, Suppression Hrg., 3/9/89, at 20-25.

³³ Ex. 6.

³⁴ *Id.* at 24.

³⁵ *Id.* at 18.

When Detective Santiago interrogated Swainson regarding Opher's murder, Swainson reiterated what he told Detective Santiago on January 22, 1988—i.e., that he did not shot and kill Opher and that he did not have anything to do with Opher's murder.³⁷

5. **Presley's April 1989 Preliminary Hearing Testimony**

On April 14, 1988, Presley testified at Swainson's preliminary hearing.

Contrary to Detective Santiago's February 12, 1988 report, wherein Presley allegedly identified Swainson as the shooter, Presley testified that he was unsure whether Swainson was the shooter because Swainson was a light-skinned Jamaican, while the shooter was a dark-skinned African American.³⁸

6. **Presley's June 10, 1988 Signed Affidavit**

On June 10, 1988, Terrance Gibbs, Swainson's defense investigator, interviewed Pressley.

After the interview, Presley signed a two-page affidavit that contained the following statements:

- Presley admitted that Swainson was not the individual who shot and killed Opher.
- Presley admitted that the individual who shot Opher was a "much darker" African-American than Swainson.
- Presley admitted that his previous identification of Swainson was incorrect.

³⁶ Ex. 16.

³⁷ *Id.*

³⁸ NT, Trial, 3/17/89, at 67-68, 71, 76 (Presley testifying at trial that he did not identify Swainson as the shooter when he testified at the preliminary hearing in April 1988). Undersigned counsel have been unable to obtain the transcripts from Swainson's preliminary hearing.

- Presley admitted that his statement to Gibbs was truthful and that he gave his statement on his own free will.³⁹

7. Presley's February 15, 1989 Statement

On February 15, 1989, shortly before Swainson's trial, Detective Santiago re-interviewed Pressley.⁴⁰ During the interview, Presley made the following statements:

- Contrary to Presley's preliminary hearing testimony, wherein Presley testified that he was unsure whether Swainson was the shooter, Presley stated that he was—in fact—certain that Swainson was the shooter when he testified at Swainson's preliminary hearing. Presley stated that he (falsely) testified that he was unsure whether Swainson was the shooter because he feared for his safety. Presley stated that two days before he was scheduled to testify at Swainson's preliminary hearing, a fellow inmate named James Brown approached him from behind as he (Pressley) watched television and smacked a wooden table off the side of his face. The impact fractured Presley's jaw. Presley stated that he believed Swainson had something to do with the attack and that Swainson was trying to intimidate him so Presley would not testify against him at the preliminary hearing. Instead of not testifying, Presley stated that he hedged his identification so as not to completely incriminate Swainson.⁴¹
- Presley stated that his February 12, 1988 statement to Detective Santiago, in which he supposedly identified Swainson as the shooter after allegedly examining a seven-man photo line-up, was true.

³⁹ Ex. 1.

⁴⁰ Ex. 6.

⁴¹ Detective Santiago's February 15, 1989 report summarizing Presley's statement is attached hereto as Exhibit 7.

- Presley stated that the statement he gave to Terrance Gibbs on June 10, 1988 was false. Presley stated that he only signed the two-page affidavit after Gibbs told him that Swainson would compensate him (Presley) if Presley agreed to sign the affidavit exonerating Swainson.

8. Presley's February 17, 1989 Statement

On February 17, 1989, Detective Santiago interviewed Presley once again.

During the interview, Presley made several additional statements that mirrored the statements he made two days earlier on February 15, 1989:

- Presley stated that the information contained in the June 10, 1988 two-page affidavit was false.
- Presley stated that he signed the June 10, 1988 affidavit—exonerating Swainson—because he felt threatened by Gibbs and because Gibbs told him that he would be compensated by Swainson if Presley signed the affidavit.
- Presley stated that when he saw Swainson in prison before trial, Swainson told him that he (Presley) would be compensated with drugs and/or money if Presley testified that Swainson was not the shooter.
- Presley also explained why he falsely testified at the preliminary hearing—i.e., he felt that his safety was in jeopardy after James Brown attacked him in prison two days before he was scheduled to testify at Swainson's preliminary hearing.⁴²

9. Presley's Trial Testimony

Presley testified at Swainson's trial on March 17, 1989.⁴³

⁴² Detective Santiago's February 17, 1989 report summarizing Presley's statement is attached hereto as Exhibit 8.

⁴³ NT, Trial, 3/17/89, at 3-139.

Presley testified regarding several critical issues: (1) the circumstances surrounding Opher's death; (2) Presley's identification of Swainson as the individual who shot and killed Opher; (3) Presley's reasons for not identifying Swainson as the shooter when he testified at Swainson's preliminary hearing in April 1988; (4) Presley's reasons for signing the June 18, 1988 two-page affidavit that exonerated Swainson; and (5) Presley's reasons for testifying on the Commonwealth's behalf at Swainson.

(a). **Circumstances Surrounding Opher's Death**

Presley recounted the circumstances surrounding Opher's death. His description of the events at trial paralleled his initial statement on January 17, 1988 statement.⁴⁴

Presley arrived at 5413 Sansom Street at approximately 3:00 a.m.⁴⁵

Presley was familiar with the 5413 Sansom Street drug house because he had previously purchased drugs at that location; Presley said that those who wanted to purchase drugs would be allowed to enter, and once inside they waited until they received their drugs.⁴⁶

When Presley reached the 5400 block of Sansom, he said he saw people down the street and grew scared that an undercover cop might be watching the house. Presley said he briefly hesitated, but eventually walked to 5413 Sansom.

When Presley arrived, Presley walked onto the porch and knocked on the door; when the door opened, a man (who Presley did not recognize, but who was later

⁴⁴ For clarity's sake, Presley's description of the events at trial will be summarized even though they are nearly identical to his initial statement on January 17, 1988, which is recounted *supra*, § II.B.1 at pp. 12-15.

⁴⁵ *Id.* at 4-6.

⁴⁶ *Id.*

identified as Opher) ran out of the door; a (second) man with a sawed-off shotgun quickly followed Opher out the door and shot him.⁴⁷

Presley testified that immediately after the second man shot Opher, a third man walked out of the house, pointed a rifle at Pressley, and told Presley to turn around and run.⁴⁸

Pressley, who did not recognize this man, refused to leave, and instead, hit the rifle's barrel out of the way and began to struggle with him. As Presley struggled with the third man, Presley said the second man grabbed Presley by the collar and pulled him down the steps to the pavement. The third man then told Presley, "I should shoot you," but immediately after this he (the third man) and the second man (the shooter) fled the scene, both heading in different directions—one toward 54th Street and the other toward 55th Street.⁴⁹

Presley fled the scene as well, but as he ran from the scene, he noticed a shotgun and a blue tote bag on the sidewalk. Presley said he stopped, looked in the bag, and saw that it contained wrapped packets (i.e., drug paraphernalia).⁵⁰

Presley ran until he got to 55th Street where he turned the corner and jumped onto a ledge on someone's property. At that point, the police arrived.⁵¹

⁴⁷ *Id.* at 7-9.

⁴⁸ *Id.* at 9-10.

⁴⁹ *Id.* 9-18.

⁵⁰ *Id.* at 7-8.

⁵¹ *Id.* at 9.

When Presley told the police about the shooting, the police ordered him to the ground, took him into custody, and charged him with assault.⁵²

(b). **Presley's Identification of Swainson**

Presley testified that he gave a statement to police shortly after his arrest on January 17, 1988.⁵³

Presley testified that he denied shooting Opher and that he told the police that the shooter was wearing a black leather hat, a tan or orange colored heavy coat.⁵⁴

Presley never mentioned that the shooter was a light-skinned Jamaican.⁵⁵

Presley testified that on February 12, 1988 he met with Detective Manuel Santiago at the Homicide Division and that Detective Santiago showed *him a seven-man photo line-up*.⁵⁶

Presley testified that he picked Swainson's picture and identified Swainson as the individual who shot Opher.⁵⁷

Presley testified that he was "certain" that Swainson was the shooter and that he did not have "any problem" picking Swainson's photograph.⁵⁸

Presley testified that there was "no doubt" in his mind that Swainson murdered Opher.⁵⁹

⁵² *Id.* at 18.

⁵³ Presley's January 17, 1988 statement is attached hereto as Exhibit 8.

⁵⁴ NT, Trial, 3/17/89, at 19.

⁵⁵ *Id.* at 19-20.

⁵⁶ *Id.*

⁵⁷ *Id.* at 19-20, 59-60, 125-27, 136-37.

⁵⁸ *Id.* at 19, 60, 136.

(c). **Presley's Explanation as to Why He Refused to Definitively Identify Swainson as the Shooter at the Preliminary Hearing**

Presley testified that his preliminary hearing testimony was false.⁶⁰

Presley testified that he knew that Swainson was the shooter when Presley testified at the preliminary hearing and that he could have identified Swainson as the shooter at the preliminary hearing.⁶¹

Presley testified that he was incarcerated prior to Swainson's preliminary hearing and that two days before he was scheduled to testify at Swainson's preliminary hearing an inmate named James Brown assaulted him by striking him in the head with a wooden bench as Presley watched television. Presley testified that he received a broken jaw and several stitches as a result of the attack.⁶²

Presley testified that prison officials told him that Brown assaulted him because Brown accused Presley of stealing Brown's "sneakers." Presley denied stealing Brown's sneakers because Presley already had four pairs of sneakers.⁶³

Presley testified that he believed that Swainson had something to do with Brown's assault on him and that this was why Presley refused to identify Swainson as the shooter at the preliminary hearing. Presley testified that he felt his safety would have been jeopardized had he identified Swainson as the shooter at the preliminary hearing.⁶⁴

⁵⁹ *Id.* at 33, 137.

⁶⁰ *Id.* at 65-68, 78, 87-88.

⁶¹ *Id.* at 24-27.

⁶² *Id.* at 24.

⁶³ *Id.* at 25.

⁶⁴ *Id.* at 25-26.

- Gibbs refused to identify himself when he initially called his home and spoke with Presley's girlfriend.⁷⁰
- When Presley called Gibbs, Gibbs refused to identify himself.⁷¹
- When Gibbs met with Presley on June 10, 1988, Gibbs told Presley that he did not want to interview Presley at his home but that he wanted to take Presley for a drive so the two of them could discuss Swainson's case.⁷²

In terms of compensation, Presley testified:

- That when he saw Swainson in prison prior to the preliminary hearing, Swainson approached Presley and told Presley that if he testified that Swainson was not the shooter that Swainson would "compensate" or "take care of" Presley.⁷³
- That when Gibbs interviewed Presley on June 10, 1988, Gibbs informed Presley that Swainson would compensate Presley if Presley signed the affidavit and testified at trial that Swainson was not the shooter.⁷⁴

(e). **Presley's Reasons for Testifying for the Commonwealth**

Presley testified that he *did not expect* to receive any benefits from the Commonwealth because the Commonwealth did not offer him any kind of arrangement, promise, or deal in exchange for his testimony against Swainson.⁷⁵

⁷⁰ *Id.* at 27-28.

⁷¹ *Id.* at 30.

⁷² *Id.* at 30.

⁷³ *Id.* at 91, 134-35, 137-38.

⁷⁴ *Id.* at 28-32, 137-38.

C. Detective Santiago's Trial Testimony

Detective Santiago testified that he interviewed Presley on February 12, 1988 and prepared a seven-man photo line-up for Presley to view.⁷⁶

Detective Santiago testified that Presley identified Swainson "without any hesitation" once he viewed the photo line-up.⁷⁷

Detective Santiago testified that he (Santiago) never made any promises to Presley and that Presley never asked for any favors or benefits in return for his identification of Swainson and testimony against Swainson.⁷⁸

D. Commonwealth's Closing Arguments

In her closing argument to the jury, the prosecutor emphasized the following points:

- Presley had nothing to gain by testifying against Swainson.⁷⁹
- Presley did not ask for any form of consideration and the Commonwealth did not promise Presley anything in return for his testimony against Swainson.⁸⁰
- Presley chose to testify because he did not want Swainson to "escape justice."⁸¹

⁷⁵ *Id.* at 20, 119.

⁷⁶ NT, Trial, 3/17/89, at 173.

⁷⁷ *Id.*

⁷⁸ *Id.* at 201.

⁷⁹ NT, Trial, 3/19/89, at 52.

⁸⁰ *Id.* at 54.

⁸¹ *Id.* at 55.

- Swainson attempted to bribe Presley in jail by asking Presley not to testify against him.⁸²
- Swainson was responsible James Brown's assault on Presley because Swainson was trying to send Presley a "message."⁸³
- Presley identification of Swainson is legitimate and accurate because Presley picked it out of a properly administered seven-man photo line-up.⁸⁴
- Detective Santiago's testimony corroborated Presley's identification, in that Santiago testified that Presley identified Swainson's picture "immediately" when Presley viewed the seven-man photo line-up.⁸⁵

D. The Verdict and Sentencing

On March 21, 1989, while the jury was deliberating, the jury sent the following note to the trial judge: "Your honor, may we see the testimony of Paul Presley."⁸⁶

The trial judge refused to provide the jury with a copy of the transcripts, but told the jury that it would, if necessary, have Presley's entire testimony read back to the jury.⁸⁷

⁸² *Id.* at 56, 66.

⁸³ *Id.* at 57-58.

⁸⁴ *Id.* at 61, 63.

⁸⁵ *Id.* at 65.

⁸⁶ NT, Trial, 3/21/89, at 2.

⁸⁷ *Id.* at 4-5.

Presley's entire testimony was *not* read back to the jury.

The jury found Swainson guilty of: (1) first-degree murder; (2) criminal conspiracy; and (3) possession of an instrument of a crime.⁸⁸

On October 11, 1989, the trial judge heard post-trial motions. During the hearing, trial counsel argued that the trial judge erred when it admitted Presley's out-of-court identification.⁸⁹ The trial judge denied trial counsel's requests for a new trial.⁹⁰

On October 13, 1989, the trial judge sentenced Swainson to life imprisonment on the murder bill, a concurrent term of five to ten years on the conspiracy bill, and two and one-half to five years on the weapons count.⁹¹

III. Post-Conviction Developments

On October 13, 2008, Russell Kolins, Swainson's current defense investigator, interviewed Paul Presley at the Albert "Bo" Robinson Assessment and Treatment Center in Trenton, New Jersey.

During Presley's October 13, 2008 interview, Presley provided Kolins: (1) a four-page handwritten statement wherein he recants his trial testimony and identification of

⁸⁸ *Id.* at 8-9.

⁸⁹ NT, Post-Trial Motions, 10/11/89, at 3-4, 5-10, 14-15.

⁹⁰ *Id.* at 43-44.

⁹¹ NT, Sentencing Hrg., 10/13/89, at 28-29.

Swainson,⁹² and (2) an audio-taped statement wherein Presley recants his trial testimony and identification of Swainson.⁹³ In both statements, Presley averred that:

- Contrary to Presley’s trial testimony, he never picked Swainson out of a seven-man photo line-up. Instead, the prosecutor (Rubino) and other Commonwealth agents (from the Philadelphia County District Attorney’s Office and the Philadelphia Police Department) showed Presley several photos of only one person—Andrew Swainson—and told Presley that: (1) Swainson was the individual who shot and killed Opher; (2) Swainson was a “notorious” drug kingpin; and that (3) Swainson was responsible for other murders, as well. When Presley viewed the photos of Swainson, Presley told the prosecutor that Swainson *was not the shooter*. Presley said that the prosecutor and her agents in effect told him that he had to identify Swainson as the shooter.
- Contrary to Presley’s trial testimony, Presley knew “in his heart” that Swainson “was surely not” the shooter because the shooter was a dark-skinned African-American, while Swainson was a light-skinned Jamaican.
- Contrary to Presley’s trial testimony, neither Terrence Gibbs (the defense investigator) nor Swainson ever told Presley that he would be compensated if he signed the June 10, 1988 affidavit that exonerated Swainson. Instead, the prosecutor (Rubino) told Presley before trial that he had to testify that he signed the affidavit because Gibbs and Swainson told him that he would be compensated for doing so and that the statements in the affidavit were false.

⁹² Ex. 2.

⁹³ Ex. 3.

