

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.

- 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.

On December 2, 2008, Lieutenant Terrance Gibbs of the Philadelphia Police Department signed an affidavit attesting to the following facts regarding his interview of Presley on June 10, 1988.⁹⁴ In his affidavit, Gibbs averred that:

- He never told Presley that either he (Gibbs) or Swainson would compensate him (Presley) with drugs or money if Presley signed an affidavit exonerating Swainson.
- He never threatened or pressured Presley to sign the June 10, 1988 two-page affidavit; Presley signed it 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 him to testify, he would have testified and denied Presley's allegations.
- The prosecutor (Rubino) called Gibbs and informed him that Presley had accused Gibbs of bribery and that Rubino 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.

⁹⁴ Ex. 4.

- 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.

On October 29, 2008, Russell Kolins received a letter from James Brown, Inmate No. CQ3403, SCI Huntingdon, regarding his assault on Presley shortly before Swainson’s preliminary hearing. In his letter, Brown averred that:

- Swainson had absolutely nothing to do with his assault on Presley.
- He assaulted Brown for two reasons:
 - (1) He (Brown) was angry that Presley kept flirting with (or hitting on) a female guard that Brown liked; and
 - (2) He (Brown) assaulted Presley because Presley stole his medication (valium) and not because Presley allegedly stole Brown’s shoes.⁹⁵

IV. Arguments

The purpose of the PCRA Act is to prevent a “fundamentally unfair conviction,” *Commonwealth v. Weinder*, 577 A.2d 1364, 1374 (Pa. Super. 1990), and to “provide an action where persons convicted of crimes they did not commit... may obtain collateral relief.” *Commonwealth v. Carbone*, 707 A.2d 1145, 1148 (Pa. Super. 1998) (citing 42 Pa.C.S.A. § 9542).⁹⁶ Furthermore, the “goal of the Post Conviction Hearing Act is to afford relief to a convict whom the system may have failed.” *Commonwealth v. Robinson*, 496 A.2d 402, 402 (Pa. Super. 1985).

⁹⁵ Ex. 13.

⁹⁶ 42 Pa.C.S.A. § 9542 states in pertinent part: “This subchapter provides for an action by which persons convicted of crimes they did not commit and persons serving illegal sentences may obtain collateral relief.”

These principles apply with equal force to Swainson's case. Not only is Swainson innocent of the crime for which he stands convicted, his "fundamentally unfair conviction" is a direct result of "systemic failures" by Philadelphia County's criminal justice system.

A. PCRA's Statutory Requirements

Swainson must satisfy four general requirements to be eligible for relief under the PCRA Act. *See* 42 Pa. C.S. §9543(a)(1)-(a)(4).⁹⁷

First, Swainson must show that he has been convicted of a crime under the laws of this Commonwealth and is serving a sentence of imprisonment, probation or parole for the crime, awaiting execution of a death sentence for the crime or serving a sentence that must expire before the individual has to commence serving the disputed sentence. *See* 42 Pa. C.S. §9543(a)(1).

Second, Swainson must have a cognizable claim—i.e., Swainson's conviction or sentence must have resulted from one or more of seven categories of errors or violations specified in the PCRA Act. *See* 42 Pa. C.S. §9543(a)(2).

Third, Swainson must show that claims raised have not been previously litigated or waived. If a claim has been finally litigated it cannot be raised again; if it has not been previously litigated, it can be raised at the PCRA level only if the individual can show that the claim has not been waived. *See* 42 Pa. C.S. §9543(a)(3). An issue is previously litigated if the highest court to which the petitioner could have appealed as a matter of right has addressed the issue on its merits. *See* 42 Pa. C.S. § 9544(a); *Commonwealth v.*

⁹⁷ In general, an individual applying for PCRA relief must be able to plead and prove by a preponderance of the evidence the existence of all of the prerequisites.

Perlman, 572 A.2d 2, 4 (Pa. Super. 1990); *Commonwealth v. McFadden*, 587 A.2d 740, 742 (Pa. Super. 1991).

Fourth, Swainson that the failure to litigate could not have been a rational, tactical, or strategic choice by counsel. *See* 42 Pa C.S. § 9543(a)(4).

Besides the foregoing prerequisites, Swainson must also satisfy additional requirements before a PCRA court can claim jurisdiction. *See* 42 Pa. C.S. § 9545(b).

First, any petition under the PCRA, including second or subsequent petitions, must be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(1) the failure to previously raise the claim was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(2) the facts upon which the claim is predicated were unknown to the appellant and could not have been ascertained by the exercise of due diligence; or

(3) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively. *See* 42 Pa. C.S. § 9545(b)(1).

Second, any petition asserting one of the exceptions shall be filed within 60 days of the date the claim could have been raised. *See* 42 Pa. C.S. § 9545(b)(1).

Third, for purposes of the PCRA Act, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United

States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking review.

Fourth, for purposes of the PCRA Act, “government officials” shall not include defense counsel, whether appointed or retained.

In light of the foregoing, current counsel will demonstrate that Swainson’s instant petition satisfies all the aforementioned requirements. Therefore, the Court has jurisdiction to consider and rule on the merits of his new state and federal constitutional claims.

B. Swainson Is Currently Serving a Life-Sentence at SCI-Dallas

Swainson is currently serving a life-sentence for the aforementioned crimes committed in the Commonwealth. The first prerequisite is satisfied. *See* 42 Pa. C.S. §9543(a)(1).

C. Swainson’s Alleges Cognizable Claims of Error

Swainson is raising an allegation of after-discovered evidence (facts) that could not have been obtained prior to or during trial. Said evidence consists of recantation testimony that reveals state and federal constitutional violations that undermined the truth-determining process (including, but not limited to, the presentation of false testimony, prosecutorial misconduct and ineffective assistance of counsel). They ultimately demonstrate that his sentence is illegal. *See* 42 Pa. C.S. §§ 9543(a)(2)(i), 9543(a)(2)(ii) and 9543(a)(2)(vii). The second requirement is satisfied.

D. Swainson's Claims Have Not Been Previously Litigated

The state and federal constitutional claims raised in Swainson's instant PCRA petition have not been previously litigated. The third requirement is satisfied. *See* 42 Pa. C.S. §9543(a)(3).

E. The Court May Entertain Swainson's Current Petition Because Swainson Presents Strong Evidence that a Miscarriage of Justice May Have Occurred

Swainson's current PCRA petition constitutes a second or subsequent petition. The Court may entertain his second or subsequent petition because Swainson "presents a strong prima facie showing that a miscarriage of justice *may* have occurred." *Commonwealth v. Carpenter*, 725 A.2d 154, 160 (Pa. 1999) (emphasis added); *accord Commonwealth v. Lawson*, 549 A.2d 107, 112 (1988). A petitioner makes a prima facie showing "only if he demonstrates that either [a] the proceedings which resulted in his conviction were so unfair that a miscarriage of justice occurred which no civilized society could tolerate, or [b] that he was innocent of the crimes for which he was charged." *Commonwealth v. Szuchon*, 633 A.2d 1098, 1100 (1993).

Swainson satisfies these requirements. First, Presley's recantation proves that Swainson is actually innocent. Second, the Commonwealth's misconduct rendered Swainson's trial so fundamentally unfair that a miscarriage of justice *may* have—and likely did—occur. Indeed, had the Commonwealth disclosed the following exculpatory or impeachment information, there is a reasonable probability that the jury would not have convicted Swainson:

- (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 suggestive photographic show-up;
- (3). The fact that Presley only identified Swainson after the prosecutor and the Commonwealth informed him 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;
- (4). The fact that the prosecutor promised Presley that, if he identified Swainson and testified against Swainson at trial, she would "take care of" his pending Philadelphia County charges and would help Presley obtain a job;
- (5). The fact that neither Swainson nor Terrence Gibbs ever offered to compensate Presley if Presley signed an affidavit exonerating Swainson;
- (6). The fact that the prosecutor learned either before, during, or after Swainson's trial from Terrence Gibbs that Gibbs did not bribe Presley and that Presley's trial testimony accusing Gibbs of bribery was false.
- (7). The fact that Swainson had absolutely nothing to do with James Brown's assault on Presley shortly before Presley testified at Swainson's preliminary hearing.

In short, because the jury was prevented from hearing this exculpatory and impeachment evidence, the Court can have no confidence in the jury's first-degree murder conviction. Consequently, the Court may and must entertain the merits of Swainson's current PCRA petition so it can rectify a grave injustice.

F. Swainson's Instant PCRA Petition is Timely

If a PCRA petition is untimely, a PCRA court has no jurisdiction over the petition. *See Commonwealth v. Murray*, 753 A.2d 201, 202-03 (Pa. 2000). According to 42 Pa. C.S. §9545(b)(1), PCRA petitions must ordinarily be filed within one year of the date the judgment becomes final. The statute, however, provides several exceptions to this rule. 42 Pa. C.S. §9545(b) states:

(b) Time for Filing a Petition.

- (1) Any petition under this subchapter, including a second or subsequent petition shall be filed within one year of the date the judgment becomes final, unless the petitioner proves that
 - (i) *the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the constitutional laws of the Commonwealth or the Constitutional laws of the United States; or*
 - (ii) *the facts upon which the claim is predicated or known to the petitioner could not have been ascertained by the exercise of due diligence...*
- (2) Any petition invoking an exception provided in (1) shall be filed within *sixty (60) days of the date the claim could have been presented.*
- (3) For purposes of this subchapter, a judgment is final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania or the expiration of time for seeking the review.

The “exceptions are triggered by an event that occurs outside the control of the petitioner.” *Commonwealth v. Bennett*, 930 A.2d 1264, 1267 (Pa. 2007). Moreover, the Pennsylvania Supreme Court has repeatedly stated that it is the petitioner’s burden to allege and prove that one of the timeliness exceptions applies. *See Commonwealth v. Beasley*, 741 A.2d 1258, 1261 (Pa. 1999). In short, “the law is clear that neither of the statutory exceptions to the timeliness requirement can begin with a discussion of the merits of a [particular] claim; rather, [petitioner] must begin with a discussion of why the

instant petition was timely filed.” *Commonwealth v. Stokes*, --A.2d--, 2008 WL 4952573, at 2 (Pa., Nov. 21, 2008); *Commonwealth v. Abu-Jamal*, 941 A.2d 1263, 1268 (Pa.2008).

Swainson’s petition is timely because his petition alleges and he proves that Presley’s recantation triggers subsections (b)(1)(i) and (ii).

1. Government Interference: Brady Violations

To trigger subsection (b)(1)(i)’s timeliness exception, petitioner may plead and prove that the Commonwealth violated its *Brady* responsibilities. See *Commonwealth v. Beasley*, 741 A.2d 1258, 1261 (Pa. 1999).⁹⁸ To prevail on a *Brady* claim, a petitioner must demonstrate that “the evidence was favorable to [him], either because it is exculpatory or because it impeaches; the evidence was suppressed by the prosecution, either willfully or inadvertently; and prejudiced ensued.” *Commonwealth v. Burke*, 781 A.2d 1136, 1141 (Pa. 2001). No *Brady* violation occurs where the petitioner knew or could have uncovered the evidence at issue with reasonable diligence. See *Commonwealth v. Johnson*, 863 A.2d 423, 426 (Pa. 2004); *Commonwealth v. Morris*, 822 A.2d 684, 696 (Pa. 2003). Swainson satisfies each requirement.

a. The Commonwealth Failed to Disclose Exculpatory and Impeachment Evidence

Prior to trial, the Commonwealth averred that it had disclosed all *Brady* material to trial counsel.⁹⁹

Despite the Commonwealth’s averments, the Commonwealth failed to disclose the following exculpatory and impeachment evidence pertaining to Paul Presley’s identification of Swainson and initial statements to the Commonwealth:

⁹⁸ See *Brady v. Maryland*, 373 U.S. 83 (1963).

⁹⁹ Ex. 17.

- (1) Presley’s initial statements to the prosecutor and other Commonwealth agents in which Presley informed them that Swainson was not the shooter;
- (2) The fact that Presley’s identification of Swainson was premised on an inherently suggestive photographic show-up and made after the Commonwealth informed 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;
- (3) The fact that Rubino promised Presley that if he identified Swainson and testified against Swainson at trial she would “take care of” Presley’s pending Philadelphia County charges and would help him obtain a job.

b. Due Diligence

Swainson must pled and prove that he could not have obtained Presley’s recantation until October 13, 2008 even through the exercise of due diligence. *Commonwealth v. Stokes*, --A.2d--, 2008 WL 4952573, at 3 (Pa., Nov. 21, 2008); *Commonwealth v. Breakiron*, 781 A.2d 94, 98 (2001). Swainson satisfies this requirement.

Presley’s affidavit could not have been uncovered until Presley finally decided to cooperate with and speak to Swainson’s current defense investigator, Russell Kolins, and undersigned co-counsel (Cooley and Charles) on October 13, 2008. Unlike publicly available documents, which are available to all for review, the information needed to adequately develop and meaningfully present Swainson’s false evidence claim, unduly suggestive line-up claim, *Brady* claims, and due process claims was locked away in the deeper recesses of Presley’s mind—a location that was not accessible to anyone except

Presley himself for more than twenty-years. More importantly, Presley was the gatekeeper to this information and for twenty-years he refused outsiders—like Swainson and his defense team—access to this information. Only after undergoing intensive drug treatment and counseling at the Albert “Bo” Robinson Assessment and Treatment Center and receiving the Lord Jesus Christ into his life was Presley willing and able to unlock the gate and talk candidly about his false testimony at Swainson’s trial.¹⁰⁰

Indeed, when Russell Kolins, Swainson’s current defense investigator, initially tried to locate Presley in 2007, he approached Presley’s mother to inquire whether she knew of Presley’s whereabouts. Presley’s mother initially refused to inform Kolins of Presley’s whereabouts.¹⁰¹ When Kolins went back to Presley’s mother’s residence in New Jersey, Kolins interviewed another family member of Presley who informed Kolins that Presley was in a New Jersey prison.¹⁰²

Kolins eventually located Presley at Bayside State Prison in Leesburg, New Jersey.

Once located, Kolins wrote Presley in November 2007 and asked Presley whether Presley would be willing to talk about his testimony at Swainson’s trial.¹⁰³

On December 12, 2007, in response to Kolins’s letter, Presley sent Kolins a Christmas card, wherein Presley thanked Kolins for the letter, but informed Kolins that he had “some reservations” about discussing his trial testimony and that he did not feel

¹⁰⁰ Exs. 2-3.

¹⁰¹ Ex. 40.

¹⁰² *Id.*

¹⁰³ Ex. 21.

comfortable discussing the issue with Kolins until he spoke with an attorney about possible perjury charges.¹⁰⁴

When Kolins received Presley's December 12, 2007 Christmas Card, Kolins wrote Presley back (on December 14, 2007) and informed Presley that he (Presley) needed to consult with a licensed attorney and that he (Kolins) would be glad to meet with him once he had consulted with an attorney.¹⁰⁵

From December 2007 until October 2008, Presley never contacted Kolins and never informed Kolins that he (Presley) had consulted with an attorney and that he (Presley) finally felt comfortable to discuss his trial testimony.¹⁰⁶

In September 2008, on a last-ditch whim, Kolins contacted Presley at the Albert "Bo" Robinson Assessment and Treatment Center in Trenton, New Jersey and arraigned a meeting with Presley for October 3, 2008.¹⁰⁷

During the October 3, 2008 meeting with Kolins and undersigned counsel (Cooley), Presley explained that he still had "serious reservations" about discussing his trial testimony, but that he was a changed man due to the drug treatment and counseling he was receiving and because he received the Lord Jesus Christ into his life. While Presley spoke openly about his transformation as a human being and his sobriety during the October 3, 2008 meeting, it was not until October 13, 2008 that Presley provided his four-page recantation and tape-recorded statement to Kolins and undersigned counsel.¹⁰⁸

¹⁰⁴ Ex. 40.

¹⁰⁵ Ex. 22.

¹⁰⁶ Ex. 40.

¹⁰⁷ *Id.*

¹⁰⁸ Exs. 2-3.

The abovementioned facts demonstrate that Swainson could not have obtained Presley's recantation any sooner than October 13, 2008. Indeed, Presley made it quite clear in 2007 that he did not wish to discuss his trial testimony with Kolins because Presley was concerned of possible perjury charges. Thus, if Presley did not wish to discuss his trial testimony in 2007, Presley would not have discussed his trial testimony with anyone at an earlier date. More importantly, due diligence does not require the petitioner or his defense investigator to continually harass or hound a trial witness once the trial witness has informed the petitioner or his defense investigator that he or she (the trial witness) does not wish to speak with them about his or her trial testimony.

As Justice Brandeis stated in the now famous words of his dissent in *Olmstead v. United States*, 277 U.S. 438, (1928), when "[t]he makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness... [t]hey conferred, as against the government, *the right to be let alone*-the most comprehensive of rights and the right most valued by civilized men." *Id.* at 478 (Brandeis, J., dissenting) (emphasis added). While Justice Brandies directed his comment toward government action, it is equally applicable to private citizens like Swainson and his defense team. Indeed, under Pennsylvania law, Presley could have filed suit claiming that Swainson and his defense team violated his right to be "left alone" had Swainson's defense team continually harassed Presley about his trial testimony. Specifically, Presley could have filed an "intrusion upon his seclusion" claim. *See DeAngelo v. Fortney*, 515 A.2d 594, 595 (Pa. Super. 1986). This tort is defined at Restatement (Second) of Torts § 652B as follows:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

An actionable intrusion consists of “an intentional interference with [a person’s] interest in solitude or seclusion, either as to his person or his private affairs or concerns....” Restatement (Second) of Torts § 652B, comment a. However, there is “no liability unless the interference with the plaintiff’s seclusion is a substantial one, of a kind that would be offensive to the ordinary reasonable [person], as the result of conduct to which the reasonable [person] would strongly object. Thus, there is no liability for knocking at the plaintiff’s door, or [for] calling him to the telephone on one occasion or even two or three, to demand payment of a debt. *It is only when the telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff, that becomes a substantial burden to his existence, that his privacy is invaded.*” Restatement (Second) of Torts § 652B, comment d (emphasis added); accord *Chicarella v. Passant*, 494 A.2d 1109, 1114 (Pa. Super. 1985) (intrusion must be substantial and highly offensive to ordinary person). Relying on the Restatement standard, had Swainson and his defense team repeatedly “hounded” Presley and accused Presley of falsely testifying at Swainson’s trial, such actions could have easily given rise to a “intrusion upon his seclusion” claim.

Finally, and perhaps most importantly, Swainson *would not* be in the situation he is right now—where he must adequately explain why Presley refused to talk with him (Swainson) and his defense team for twenty years—had the Commonwealth adhered to its *Brady* obligations and disclosed the aforementioned exculpatory and impeachment evidence twenty years ago. As the U.S. Supreme Court recently recognized: “Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has

been disclosed.” *Banks v. Dretke*, 540 U.S. 668, 695 (2004). The *Banks* Court also stressed that a “rule thus declaring ‘prosecutor may hide, defendant must seek,’ is not tenable in a system constitutionally bound to accord defendants due process” and that when “police or prosecutors conceal significant exculpatory or impeaching material in the State’s possession, it is ordinarily incumbent on the State to set the record straight.” *Id.* at 675-76.

c. **Prejudice**

To answer the prejudice inquiry, a PCRA court must determine “whether ‘the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.’” *Strickler v. Greene*, 527 U.S. 263, 290 (1999) (citation omitted); accord *Commonwealth v. Burke*, 781 A.2d at 1141. Prejudice or “materiality” must be assessed “collectively, not item by item.” *Kyles v. Whitley*, 514 U.S. 419, 436 (1995). Relying on this standard, the failure to disclose the aforementioned exculpatory and impeachment evidence prejudiced Swainson.

Presley represented the only Commonwealth witness who witnessed Opher’s shooting and identified Swainson as the shooter. At trial, Presley informed the jury that he identified Swainson after Detective Santiago showed him a seven-man photo line-up on February 12, 1988. Presley also testified that he did not have “any problem” identifying Swainson from the seven-man photo line-up and that he was “sure” Swainson was the shooter when he identified him.¹⁰⁹

The Commonwealth presented witnesses who testified that Swainson frequently visited 5413 Samson Street, but neither of these witnesses implicated Swainson in

¹⁰⁹ NT, Trial, 3/17/89, at 59-60, 133-34.

Opher's murder.¹¹⁰ Likewise, of all the witnesses interviewed by the police shortly after Opher's murder, not one of them implicated Swainson.¹¹¹

The prosecutor's closing arguments accentuated the importance of Presley's testimony. The prosecutor emphasized Detective Santiago's claim that Presley "immediately" identified Swainson's picture when he (Santiago) showed Presley the seven-man photo line-up.¹¹² Furthermore, the prosecutor spent much of her closing argument explaining to the jury why Presley was a credible witness and why it should find Presley's identification of Swainson accurate and reliable.¹¹³

Simply put, Presley's identification represented the *linchpin of the Commonwealth's case*; without Presley's identification the Commonwealth could not have prosecuted Swainson for Opher's murder. Thus, given the critical role Presley played in the Commonwealth's case, it was incumbent upon the Commonwealth to disclose all information that could be used to undermine Presley's testimony and his identification of Swainson. *See Giglio v. United States*, 405 U.S. 150, 154 (1972) ("When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [*Brady's*] general rule."). Had the Commonwealth disclosed the aforementioned exculpatory and impeachment information "there is a reasonable probability... the result of [Swainson's] proceeding

¹¹⁰ 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.

¹¹¹ Exs. 24-43.

¹¹² NT, Trial, 3/19/89, at 65.

¹¹³ NT, Trial, 3/18/89, 50, 52-55, 57-58, 60-62, 64-66, 72-74.

would have been different.” *Commonwealth v. Burke*, 781 A.2d at 1141 (quotations and citations omitted).

First, had trial counsel known that the Commonwealth only showed Presley photographs of Swainson and no one else, trial counsel could have used this information to bolster his arguments during the March 9, 1989 suppression hearing. When trial counsel challenged Presley’s pre-trial photographic identification as being unduly suggestive, the Commonwealth had the burden of establishing that Presley’s “identification testimony” was “free from taint of initial illegality.” *Commonwealth v. Moore*, 633 A.2d 1119, 1125 (Pa. 1993); *Commonwealth v. Wade*, 867 A.2d 547, 556 (Pa. Super. 2005). In ruling on whether the Commonwealth has met its burden, the trial court had to “determine whether there [was] suggestiveness employed” during Presley’s identification of Swainson that “create[d] a very substantial likelihood of irreparable misidentification.” *Id.* (citing *Simmons v. United States*, 390 U.S. 377 (1968); *Neil v. Biggers*, 409 U.S. 188 (1972)); *Commonwealth v. Fowler*, 352 A.2d 17, 19 (Pa. 1976).

During the March 9, 1989 suppression hearing, the Commonwealth argued that Presley’s identification was admissible because Presley “immediately” identified Swainson when he viewed Detective Santiago’s properly administered seven-man photo line-up. Indeed, Detective Santiago explained to the trial judge how he administered the seven-man photo line-up and how Presley “immediately” identified Swainson.¹¹⁴ Trial counsel thoroughly cross-examined Detective Santiago, trying to establish that Detective Santiago’s seven-man photo line-up was unduly suggestive.¹¹⁵ Despite trial counsel’s

¹¹⁴ NT, Suppression Hrg., 3/9/89, at 14-24.

¹¹⁵ NT, Suppression Hrg., 3/9/89, at 24-51.

best efforts, the trial judge denied trial counsel's motion to suppress, finding Presley's identification of Swainson reliable.¹¹⁶ The trial judge's decision to admit Presley's identification was premised on its belief that Presley "immediately" identified Swainson when he viewed a properly conducted seven-man photo line-up.¹¹⁷ Likewise, on direct appeal, the Superior Court refused to grant relief on Swainson's unduly suggestive photographic line-up claim for the very same reason:

The witness, Paul Pressley, was shown a photo array consisting of seven black and white photographs. The photographs were all of black males, with mustaches and beards, in their mid-twenties, casually dressed in a variety of shirts and sweatshirts. Appellant claims that his photo stood out because he was wearing a sweatshirt which had "Philadelphia" across the front and gold jewelry. This evidence does not demonstrate that the identification procedure was so infected by suggestiveness and therefore, it was properly allowed.¹¹⁸

However, had trial counsel and the trial judge known the true circumstances surrounding Presley's identification of Swainson, the trial judge would have suppressed Presley's identification, finding that it was premised on an inherently suggestive identification procedure. Not only was Presley's identification premised on what can best be described as a photographic show-up, it came about only after the Commonwealth informed Presley that Swainson was not only responsible for Opher's death, but for other

¹¹⁶ NT, Trial, 3/16/89, at 6. See *Watkins v. Sowders*, 449 U.S. 341, 347 (1981) ("It is the reliability of identification evidence that primarily determines its admissibility."); *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (holding that "reliability is the linchpin in determining the admissibility of identification testimony").

¹¹⁷ Trial Court's Findings of Facts and Conclusions of Law, 12/15/89.

¹¹⁸ Ex. 18, at 4.

murders as well.¹¹⁹ The United States Supreme Court has recognized the obvious problems associated with such practices:

It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. *This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or If they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime.* Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.

Simmons v. United States, 390 U.S. at 383-84 (emphasis added). Simply put, there is “a substantial likelihood of irreparable misidentification” when an eyewitness is show a

¹¹⁹ On direct appeal, the Superior Court held that “[e]ven if we were to find the photographic identification to be suggestive, [Presley’s] subsequent in-court identification would have been admissible.” Ex. 23, at 4. Citing *Commonwealth v. Wheeler*, 541 A.2d 730 (Pa. 1988), the Superior Court held that there was adequate evidence to establish that Presley “had an independent basis for [his] identification” and therefore his “in-court identification was admissible.” *Id.* Cf. *Commonwealth v. McGaghey*, 507 A.2d 357 (Pa. 1986) (where circumstances demonstrate an independent basis for identification, even impermissibly suggestive pre-trial procedures will not bar subsequent in-court identification); *Commonwealth v. Glover*, 412 A.2d 855 (Pa. 1980) (same). The Superior Court, however, premised this holding on the notion that Presley never told the Commonwealth that Swainson was not the shooter. As evidenced by Presley’s October 13, 2008 statement, *this notion is incorrect*. When the prosecutor and other Commonwealth agents showed Presley several photos of Swainson, Presley told them that Swainson was not the person that he saw shoot and kill Opher. Presley ultimately decided to identify Swainson only after the Commonwealth pressured him and informed him that: (1) Swainson was in fact the shooter; (2) that Swainson was responsible for other murders; and (3) that if Presley identified Swainson, the Commonwealth could possibly get him a job and have any pending criminal charges against him dismissed. Thus, even if Presley had an independent basis for his identification, the trial judge would not have permitted Presley’s identification had it known these facts, particularly the fact that Presley initially told the Commonwealth that Swainson was not the shooter.

series of photos of the same individual and told that: “This is the man.” *Foster v. California*, 394 U.S. 440, 443 (1969) (“An “identification procedure is suggestive where it “[i]n effect ... sa[ys] to the witness ‘This is the man.’ ”).¹²⁰

Had the trial judge suppressed Presley’s identification, the Commonwealth could not have prosecuted Swainson for Opher’s murder. Thus, had the Commonwealth disclosed the circumstances surrounding Presley’s identification, “there is a reasonable probability... the result of [Swainson’s] proceeding would have been different.” *Commonwealth v. Burke*, 781 A.2d at 1141 (quotations and citations omitted).

Second, even if the Presley’s identification would have ultimately been ruled admissible, it is not difficult to see how the Commonwealth’s failure to disclose this information hindered trial counsel’s ability to undermine Presley’s and Detective Santiago’s trial testimony regarding Presley’s identification of Swainson. See *United States v. Bagley*, 473 U.S. 667, 683 (1985) (materiality standard must include consideration of “any adverse effect that the prosecutor’s failure to respond might have had on the preparation or presentation of the defendant’s case.”); *Commonwealth v. Wade*, 867 A.2d at 555-57 (Commonwealth’s nondisclosure of pretrial photographic identification procedure deprived defendant of right to challenge reliability of identifications and warranted mistrial). The undisclosed information, without question, would have significantly undermined—if not completely demolished—Presley’s identification and Detective Santiago’s testimony regarding Presley’s identification.

¹²⁰ *Accord Biggers v. Tennessee*, 390 U.S. 404 (1968) (Douglas, J., dissenting) (“Whatever may be said of lineups, showing a suspect singly to a victim is *pregnant with prejudice*. The message is clear: the police suspect this man. That carries a powerfully suggestive thought.”) (emphasis added); *United States v. Wade*, 388 U.S. 218, 228 (1967) (A “major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification.”).

Consequently, had trial counsel exposed this information during cross-examination, there is a reasonable probability that the outcome of Swainson's proceedings would have been different.

Third, the undisclosed evidence would have undermined Presley's claim that he did not expect to receive any benefits or favors from the Commonwealth.¹²¹ To the contrary, Presley's October 13, 2008 affidavit and audio-taped statement establish that he had an *implicit* agreement with the prosecutor, to wit: that if Presley identified Swainson and testified against Swainson at trial that she (the prosecutor) would see to it that any pending Philadelphia County charges against Presley were dropped and that she would try and find Presley a job where Presley could use his artistic abilities.

The fact that Presley and the prosecutor did not memorialize their agreement in writing is irrelevant because "*Brady* does not require a signed contract between the prosecution and its witnesses." *Commonwealth v. Strong*, 761 A.2d at 1171, 1174 ("the absence of an ironclad contract in exchange for Alexander's testimony is not dispositive."). Rather, the critical issue under *Brady* and its progeny is whether the Commonwealth disclosed all information that would have materially affected the jury's assessment of a certain witness's credibility—particularly an indispensable witness such as Presley. *Id.* at 1172 ("As *Giglio* made clear, due process requires that any potential understanding between the prosecution and a witness be revealed to the jury." (citing *United States v. Giglio*, 405 U.S. 150, 154 (1972)).¹²² Here, Presley "was not just a key

¹²¹ NT, Trial, 3/17/89, at 20.

¹²² As the Pennsylvania Supreme Court has explained:

Impeachment evidence which goes to the credibility of a primary witness against the accused is critical evidence and it is material to the case whether that

witness against [Swainson], but an indispensable one.” *Id.* at 1179 (Castille, J., concurring). Thus, without Presley’s identification and testimony, the Commonwealth did not have a case against Swainson because no other witnesses or physical evidence linked Swainson to Opher’s murder. Consequently, it was critical that the jury be provided with all information that reasonably could have undermined Presley’s credibility and his stated motivations for testifying against Swainson. Moreover, the “contingent” nature of the implicit agreement between Presley and the prosecutor only strengthens Swainson’s claim that this information should have been disclosed to the jury. Indeed, according to Presley, he had to testify in a certain way before the Commonwealth would consider affording him any favors or benefits—i.e., Presley had to identify Swainson as the shooter and Presley had to testify that he signed the June 10, 1988 affidavit because Gibbs and Swainson offered to compensate him. Such a scenario only reinforced Presley’s motivation to testify favorably (although falsely) for the Commonwealth. *See id.* at 1175 (“[T]he fact that there was no binding agreement regarding Alexander’s deal in exchange for his testimony, but rather only a contingency dependent upon the Commonwealth’s satisfaction with the end result, only strengthens Alexander’s motive to testify favorably for the Commonwealth.” *Id.* at 1175; *accord United States v. Bagley*, 473 U.S. at 683 (“The fact that the stake was not guaranteed through a promise or binding contract, but was expressly contingent on the Government’s

evidence is merely a promise or an understanding between the prosecution and the witness. The absence of an ironclad, signed, sealed contract does not conclusively establish that no other information affecting the credibility of the witness exists.

Commonwealth v. Strong, 761 A.2d at 1175.

satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction.”).

Simply put, had the jury been informed of the implicit agreement or understanding between Presley and the prosecutor, there is a reasonable probability that the jury would have disregarded Presley’s testimony and identification and acquitted Swainson of all charges.

Fourth, and perhaps most importantly, trial counsel’s inability to undermine Presley’s and Detective Santiago’s testimony affected the jury’s calculus regarding the reliability and credibility of Presley’s identification.¹²³ Indeed, “the only duty of a jury in cases in which identification evidence has been admitted will often be to assess the reliability of that evidence.” *Watkins v. Sowders*, 449 U.S. 341, 347 (1981). As the Supreme Court acknowledged nearly a half-century ago: “The jury’s estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence[.]” *Napue v. Illinois*, 360 U.S. 264, 269 (1959). To accurately gauge a witness’s credibility, however, the jury must be able to “sort out the reliable from the unreliable evidence.” *Barefoot v. Estelle*, 463 U.S. 880, 901 (1983). A jury, however, can only sort out the reliable evidence from the unreliable evidence when it is provided with the true circumstances regarding a particular event.

¹²³ *Accord See United States v. Scheffer*, 523 U.S. 303, 313 (1998) (citations and internal quotations omitted) (“the fundamental premise of our criminal trial system is that the jury is the lie detector. Determining the weight and credibility of witness testimony, therefore, has long been held to be the part of every case [that] belongs to the jury[.]”); *Barefoot v. Estelle*, 463 U.S. 880, 902 (1983) (“[I]t is a fundamental premise of our entire system of criminal jurisprudence that the purpose of the jury is to sort out the true testimony from the false, the important matters from the unimportant matters[.]”); *United States v. Bailey*, 444 U.S. 394, 414-15 (1980) (“The Anglo-Saxon tradition of criminal justice, embodied in the United States Constitution and in federal statutes, makes jurors the judges of the credibility of testimony offered by witnesses. It is for them, generally, and not for appellate courts, to say that a particular witness spoke the truth or fabricated a cock-and-bull story.”).

In this respect, the Commonwealth was the only party or adversary that knew of the true circumstances sounding Presley's identification and Presley's motivations for testifying against Swainson and it failed to disclose this information to trial counsel or the jury. Had the Commonwealth disclosed the aforementioned exculpatory and impeachment information relating to Presley's identification and his motivation for testifying against Swainson, there is a reasonable probability that the jury would have acquitted Swainson of all charges because it would have given little to no weight to Presley's testimony and identification.

2. After-Discovered Evidence

Subsection (b)(1)(ii) provides that "the facts upon which the claim is predicated were unknown to petitioner and could not have been ascertained by due diligence." 42 Pa.C.S. § 9545(b)(1)(ii). Commonly referred to as the "after-discovered" or "newly-discovered" evidence exception, this exception "does not require a merits analysis of the claim in order for it to qualify as timely and warranting merits review." *Commonwealth v. Lambert*, 884 A.2d 848, 852 (Pa. 2005). Instead, subsection (b)(1)(ii) has two components, which must be alleged and proved: (1) "the facts upon which the claim was predicated were *unknown*";¹²⁴ and (2) "could not have been ascertained by the exercise of *due diligence*." 42 Pa.C.S. § 9545(b)(1)(ii) (emphasis added); *Commonwealth v. Bennett*, 930 A.2d 1264, 1272 (Pa. 2007). If the "petitioner alleges and proves these two

¹²⁴ As noted *infra*, the term "unknown" as it is used in the context of certain claims raised by Swainson is somewhat of a misnomer. For instance, Swainson has known from the very beginning that Presley provided false testimony because Swainson has known from the very beginning that he did not murder Opher nor did he have anything to do with Opher's murder. Thus, because Swainson knew that he did not shot and kill Opher, he knew that Presley's trial testimony was false. However, Swainson could not develop the factual basis of his false evidence claims and thus could not present them in state of federal court because the facts he needed to substantiate his false evidence claims—i.e., Presley's recantation—*were not available* to him until Presley felt comfortable enough to come forward with the truth on October 13, 2008.

components, then the PCRA court has jurisdiction over the claim under this subsection.”
Commonwealth v. Bennett, 930 A.2d at 1272.

Swainson satisfies these two components because his new state and federal constitutional claims are premised on facts that were unknown *or unavailable* to him and could not have been ascertained by the exercise of due diligence.

a. **Facts Unknown or Unavailable to Swainson**

The following facts were unknown to Swainson prior to, during, and after his trial up until October 13, 2008:

- Swainson did not know that the Commonwealth did not show Presley a seven-man photo line-up. Instead, the Commonwealth showed Presley several photos of Swainson and told Presley that: (1) Swainson was the shooter; and that (2) Swainson was responsible for other murders. Thus, Swainson did not know that Presley premised his identification of him on an unduly suggestive photographic show-up.
- Swainson did not know that, after viewing the photos of Swainson, Presley told the Commonwealth that Swainson could not have been the shooter because the shooter was a dark-skinned African-American, whereas Swainson was a light-skinned Jamaican.
- Swainson did not know that the Commonwealth told Presley that it would “take care of” his pending Philadelphia County charges and would help him obtain a job if Presley identified Swainson as the shooter and testified against Swainson at trial.

b. Due Diligence

Swainson incorporates his due diligence argument from § V.F.1.b, *supra*, pp. 39-44.

G. Swainson is Entitled to An Evidentiary Hearing

Presley's recantation implicates credibility issues that can only be adequately gauged by holding an evidentiary hearing. Indeed, Pennsylvania courts have repeatedly required or approved evidentiary resolution of credibility issues relating to alleged recantations. *See Commonwealth v. D'Amato*, 856 A.2d 806, 825 (Pa. 2004); *Commonwealth v. Williams (Roy)*, 732 A.2d 1167, 1180 (Pa. 1999); *Commonwealth v. McCracken*, 659 A.2d 541, 545 (Pa. 1995); *Commonwealth v. Gaddy*, 424 A.2d 1268, 1270 (Pa. 1981); *Commonwealth v. Bernstein*, 455 A.2d 1232, 1234 (Pa. Super. Ct. 1981). The Pennsylvania Supreme Court has acknowledged that "even as to recantations that might otherwise appear dubious, the PCRA court must, in the first instance, assess the credibility and significance of the recantation in light of the evidence as a whole." *Commonwealth v. D'Amato*, 856 A.2d 806, 825 (Pa. 2004). Furthermore, the Court has specifically rejected a per se refusal of post-conviction relief based on recantation evidence, requiring the PCRA court to make a "particularized finding" of the "actual credibility" of such testimony. *Commonwealth v. Williams (Roy)*, 732 A.2d at 1180 (remanding for determination on this issue, recognizing that, "in some instances, such testimony may be believed by the factfinder and thus form a basis for relief").¹²⁵

¹²⁵ The Commonwealth will surely ask the Court not to hold an evidentiary hearing and instead make its credibility determinations from a cold record. If the Commonwealth makes such a request, which it likely will because it has in the past, the Court should decline the Commonwealth's invitation to repeat the error for which two other judges of the Philadelphia Court of Common Pleas were reversed in capital PCRA proceedings—dismissing a recantation claim without conducting an evidentiary hearing to determine the credibility of the Petitioner's

Consequently, Swainson is entitled to an evidentiary hearing so the Court can adequately assess the credibility of Presley's recantation.

H. Swainson's New State and Federal Constitutional Claims

Presley's recantation and Gibbs's affidavit gives rise to several new state and federal constitutional claims. The following state and federal constitutional claims can and will be further developed once the Court holds an evidentiary hearing. Individually and collectively, each state and federal constitutional claim demands that the Court vacate Swainson's conviction and grant him a new trial.

1. After Discovered Evidence Claim

Presley recantation constitutes after-discovered evidence. After-discovered evidence can be the basis for a new trial if: (1) it has been discovered after the trial and could not have been obtained at or prior to the conclusion of the trial by the exercise of reasonable diligence; (2) it is not merely corroborative or cumulative; (3) it will not be used to impeach the credibility of a witness; and (4) it is of such a nature and character that a different verdict would likely result if a new trial is granted. *See Commonwealth v. Williams*, 640 A.2d 1251, 1263 (1994); *Commonwealth v. McCracken*, 659 A.2d 541, 544-45 (Pa. 1995).

a. Presley's Recantation Would Likely Produce a Different Verdict at Retrial

Swainson incorporate his prejudice argument from § V.F.1.c, *supra*, pp. 44-5, as if fully pled hereto.

evidence. *See Commonwealth v. D'Amato*, 856 A.2d at 825; *Commonwealth v. Williams (Roy)*, 732 A.2d at 1180.

As thoroughly explained *supra*, Pressley's recantation is of such a nature and character that a different verdict would likely result if the Court granted Swainson a new trial.

First, Presley is the only eyewitness that placed Swainson at 5413 Samson Street at the time of the shooting on January 17, 1988. Police interviewed several witnesses immediately after the murder, but none of these witnesses identified Swainson as the individual who shot Opher and none of them placed Swainson at or near 5413 Samson Street prior to or near the time of the shooting.¹²⁶ While two of these witnesses—LaTonya Furman and Jacqueline Morsell—insinuated that Swainson sold drugs at the 5413 Samson Street residence, neither of them identified Swainson as the shooter or placed him at the scene.¹²⁷

Second, the Commonwealth did not have an iota of physical evidence linking Swainson to Opher's murder. While crime scene investigators collected numerous items of evidence, not one item could be linked to Swainson—not even the two shotguns collected at the murder scene.¹²⁸

Accordingly, without Presley's testimony and identification, the Commonwealth had no case against Swainson. Thus, if the Court granted Swainson a new trial and Presley testified at the retrial, there is no doubt that the jury would acquit Swainson of all charges. *See Commonwealth v. McCracken*, 659 A.2d at 545 (“the limited evidence connecting Appellant to the crime makes Aldridge's recantation of such nature and character that a different verdict will likely result at a retrial.”).

¹²⁶ Exs. 24-43.

¹²⁷ NT, Trial, 3/16/89, at 41-51 (LaTonya Furman), 86-163 (Jacqueline Morsell).

¹²⁸ Exs. 11, 19, 20.

b. **Presley's Recantation is Not Cumulative, Corroborative, or Impeaching**

Presley's recantation is not cumulative or corroborative for several reasons.

First, Presley's recantation cannot be considered cumulative or corroborative "given the tenuous nature of the circumstantial evidence connecting [Swainson] to the crime and the inability of any other witness to make a positive identification of the perpetrator." *Commonwealth v. McCracken*, 659 A.2d at 545.

Second, Presley is the only Commonwealth witness who identified Swainson as the individual who shot and killed Opher. Likewise, Swainson pled not guilty and claimed his innocence during trial. As the Pennsylvania Supreme Court held in *McCracken*, "where the only Commonwealth witness who identified the perpetrator has recanted his testimony, such evidence can not be considered cumulative or corroborative" where "the defendant claimed that he did not commit the crime in question." *Commonwealth v. McCracken*, 659 A.2d at 545. As a result, Presley's recantation is neither cumulative, corroborative, nor presented simply to impeach a witness's credibility.

c. **Reasonable Diligence**

Swainson incorporates his due diligence argument from § V.F.1.b, *supra*, pp. 39-44, hereto.

As explained *supra*, Swainson could not have obtained Presley's recantation until October 13, 2008.

2. False Evidence Claim

The Commonwealth violated Swainson's state and federal constitutional rights when it knowingly presented Presley's and Detective Santiago's false testimony. *See* U.S. CONST. AMENDS. VI, XIV; PA. CONST., Art. I, §§ 1, 9.

The Commonwealth violates a defendant's state and federal due process rights when it: (1) knowingly presents false testimony; or (2) fails to correct the record when it learns that one of its primary witnesses testified falsely. *See Giglio v. United States*, 405 U.S. at 155; *Napue v. Illinois*, 360 U.S. at 269; *Mooney v. Holohan*, 294 U.S. 103 (1935); *Robinson v. Arvonio*, 27 F.3d 877, 883 (3rd Cir. 1994); *United States v. Biberfeld*, 957 F.2d 98, 102 (3d Cir. 1992). Thus, in order to make out a constitutional violation Swainson must show that: (1) Presley and Detective Santiago committed perjury; (2) the Commonwealth knew or should have known of his perjury; (3) Presley's and Detective Santiago's false testimony went uncorrected; and (4) there is any reasonable likelihood that the false testimony could have affected the jury's verdict. *See Lambert v. Blackwell*, 387 F.3d 210, 242-43 (3rd Cir. 2004).

Swainson satisfies these requirements and is entitled to relief.

a. Presley and Detective Santiago Committed Perjury

A "person is guilty of perjury... if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true." 18 Pa.C.S. § 4902(a). Falsification "is material, regardless of the admissibility of the statement under rules of evidence, if it could have affected the course or outcome of the proceeding." 18 Pa.C.S. § 4902(b).

Presley and Detective Santiago committed perjury. First, Presley and Detective Santiago testified at an official proceeding—i.e., Swainson’s trial. Second, Presley and Detective Santiago testified under oath at Swainson’s trial. Third, Presley and Detective Santiago made several statements that they *knew* were untrue when they made them at Swainson’s trial. The following testimony from Presley and Detective Santiago was false:

- **False Testimony**: That Detective Santiago showed Presley a seven-man photo line-up on February 12, 1988 and that Presley “immediately” and “without a problem” identified Swainson as the individual who shot and killed Opher.¹²⁹
 - **Truth**: Contrary to Presley’s and Detective Santiago’s trial testimony, Presley 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.¹³⁰
- **False Testimony**: That Presley was “certain” Swainson was the shooter and that Presley had “no problem” identifying Swainson when he allegedly viewed the seven-man photo line-up on February 12, 1988.¹³¹

¹²⁹ NT, Trial, 3/17/89, at 19-20.

¹³⁰ Exs. 2-3.

¹³¹ NT, Trial, 3/17/89, at 19, 60, 133, 136, 137.

- **Truth:** Contrary to Presley’s trial testimony, 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. Presley knew “in his heart” that Swainson “was surely not” the shooter because the shooter was a dark-skinned African-American, whereas Swainson was a light-skinned Jamaican.¹³²
- **False Testimony:** That Terrence Gibbs (Swainson’s defense investigator) and Swainson bribed and pressured Presley to sign the June 10, 1988 affidavit wherein Presley averred that he misidentified Swainson as the shooter.¹³³
 - **Truth:** Contrary to Presley’s trial testimony, neither Gibbs nor Swainson ever told Presley that he would be compensated if he signed the June 10, 1988 affidavit. Instead, the prosecutor 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.
- **False Testimony:** That Presley did not have an implicit or explicit agreement with the Commonwealth and that Presley did not *anticipate* receiving any benefits from Commonwealth in exchange for his testimony against Swainson.¹³⁴
 - **Truth:** Contrary to Presley’s trial testimony, Presley believed that he had an *implicit* deal with the prosecutor (Rubino) and the Commonwealth,

¹³² Exs. 2-3.

¹³³ NT, Trial, 3/17/89, at 28-32.

¹³⁴ NT, 3/17/89, at 20, 119.

wherein if he identified Swainson and testified against Swainson at trial, the prosecutor would see to it that any pending criminal charges against him from Philadelphia County would be dropped and that she would try to find Presley a job where he could utilize his artistic abilities.

Fourth, and most importantly, Presley's false statement "could have affected the course or outcome of the proceeding." 18 Pa.C.S. § 4902(b). *See supra*, § V.F.1.c, *supra*, pp. 44-53.

b. The Commonwealth Knew that Presley's and Detective Santiago's Testimony Was False

The Commonwealth knew that Presley's and Detective Santiago's testimony was false.

The Commonwealth only showed Presley pictures of Swainson and no one else.¹³⁵ Thus, the Commonwealth knew that Presley's testimony that he identified Swainson after he viewed a seven-man photo line-up was false. The Commonwealth also knew that Detective Santiago's testimony that he showed Presley a seven-man photo line-up was false.

When Presley reviewed the photos of Swainson, he informed the prosecutor and the other Commonwealth agents present that Swainson was not the shooter. Consequently, the Commonwealth knew that Presley's testimony that he had "no problem" identifying Swainson and that he was "certain" that Swainson was Opher's murderer was false.

The prosecutor and Presley had an implicit understanding that if Presley testified against Swainson and identified Swainson as the shooter at trial that she (the prosecutor)

¹³⁵ Exs. 2-3.

would: (1) try to find him a job where he could utilize his article abilities; and (2) see to it that any pending criminal charges against Presley in Philadelphia County were dropped. Accordingly, the Commonwealth knew that Presley's testimony that he did not expect any favors from the Commonwealth was false.

Presley testified that he signed the June 10, 1988 affidavit because Terrence Gibbs told him that he (Presley) would be compensated if he signed the affidavit exonerating Swainson. According to Presley's recantation, neither Swainson nor Gibbs ever bribed or pressured Presley to sign the affidavit. Instead, the prosecutor told Presley to testify that he signed the affidavit because Gibbs told him that he (Presley) would be compensated by Swainson if he signed the affidavit. Thus, the Commonwealth knew Presley's testimony regarding the bribery allegations were false.

The prosecutor (Rubino), at some point, called Terrence Gibbs and asked Gibbs whether he in fact tried to suborn false testimony from Presley.¹³⁶ Gibbs informed the prosecutor that he did not bribe Presley and that he had never bribed any witness, whereupon the prosecutor replied: "I didn't think so."¹³⁷ If this call occurred before Swainson's trial, the prosecutor knew that Presley's bribery allegations were false.¹³⁸

c. **The False Testimony Went Uncorrected**

The Commonwealth has never corrected Presley's or Detective Santiago's false testimony.

¹³⁶ Ex. 4.

¹³⁷ *Id.*

¹³⁸ If the call occurred after Swainson's trial, the prosecutor knew (when the call occurred) that Presley's bribery allegations were false. At that point, the prosecutor had a duty to correct Presley's false testimony, but it has yet to take any corrective actions.

d. Presley Testimony Was Material

Swainson incorporates § V.F.1.c, supra, pp. 44-53, hereto as if fully pled.

The materiality analysis proceeds differently for *Brady* and *Napue* claims. Whereas a *Brady* violation is material when “there is a reasonable probability that ... the result of the proceeding would have been different,” *United States v. Bagley*, 473 U.S. at 682, a *Napue* violation requires that the conviction be set aside whenever there is “any reasonable likelihood” that the false testimony could “have affected the judgment of the jury.” *Napue v. Illinois*, 360 U.S. at 271; accord *United States v. Bagley*, 473 U.S. at 679 n.9; *Giglio v. United States*, 405 U.S. at 154.¹³⁹

Presley played a indispensable role in the Commonwealth’s case. Indeed, as repeatedly emphasized already, Presley was the *only* Commonwealth witness to observe the shooting. Consequently, there is no doubt that Presley’s and Detective Santiago’s false testimony could have affected—and most likely did affect—the jury’s verdict. As such, Swainson’s conviction must be vacated and a new trial ordered.

3. Unduly Suggestive Line-up Claim

Presley’s recantation supports Swainson’s claim that Presley’s in-court and out-of-court identifications of Swainson were premised on an identification procedure that was so inherently and impermissibly suggestive that it violated his state and federal constitutional rights. See U.S. CONST. AMENDS. VI, XIV; *Simmons v. United States*, 390

¹³⁹ Even “in cases of egregious prosecutorial misconduct, such as the knowing use of perjured testimony, we have required a new trial only when the tainted evidence was material to the case.” *Smith v. Phillips*, 455 U.S. 209, 220 n.10 (1982). Once *Brady* or *Napue* claims are deemed material, however, there is no need for further harmless error analysis under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). See *Kyles v. Whitley*, 514 U.S. at 436.

U.S. 377, 384 (1968); PA. CONST., Art. I, §§ 1, 9. *Commonwealth v. Wade*, 867 A.2d at 555-57.

Swainson is entitled to relief if he demonstrates that the identification procedure was “impermissibly suggestive,” *Neil v. Biggers*, 409 U.S. 188, 197 (1972); accord *Simmons v. United States*, 390 U.S. at 384; *Stovall v. Denno*, 388 U.S. 293 (1967), and if so, whether, under the “totality of the circumstances,” *Simmons v. United States*, 390 U.S. at 383; *Stovall v. Denno*, 388 U.S. at 302, the identification was sufficiently reliable to preclude “a very substantial likelihood of irreparable misidentification,” *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977) (internal quotation marks omitted); *Commonwealth v. Moore*, 633 A.2d 1119, 1125 (Pa. 1993). According to the Pennsylvania Supreme Court:

In making this determination, the court should normally consider *the manner in which the identification procedure was conducted*, the witness’ prior opportunity to observe, the existence of any discrepancies between the witness’ description and the defendant’s appearance, any previous identification, any prior misidentification, *any prior failure of the witness to identify the defendant*, and the lapse of time between the incident and the court identification.

Commonwealth v. Moore, 633 A.2d at 1125-26; accord *Commonwealth v. Fowler*, 352 A.2d 17 (1976).

Swainson satisfies these requirements. Not only did Presley’s identification procedure *lack* “sufficient aspects of reliability,” *Manson v. Brathwaite*, 432 U.S. at 106 (“The admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability.”), because the Commonwealth only showed Presley several photos

of a *single* person—i.e., Swainson,¹⁴⁰ the Commonwealth *explicitly* told Presley that Swainson was “the man.” *Foster v. California*, 394 U.S. at 443 (“An identification procedure is suggestive where it ‘[i]n effect... said to the witness, ‘*This is the man.*’”) (emphasis in original).¹⁴¹ Furthermore, when Presley initially viewed the photos of Swainson, he told the prosecutor and her agents that Swainson was not shooter because the shooter was a dark-skinned African-American, whereas Swainson was a light-skinned Jamaican.¹⁴²

Had the trial judge known these facts, it would have ruled that Presley’s identification of Swainson was inadmissible.¹⁴³ Moreover, even if the trial judge would have admitted Presley’s identification, this information would have bolstered trial

¹⁴⁰ See *Moore v. Illinois*, 434 U.S. 220, 229 (1977) (“Indeed, a one-on-one confrontation generally is thought to present greater risks of mistaken identification than a lineup.”); *Manson v. Brathwaite*, 432 U.S. at 111 (“Indeed, the ALI Model Code of Pre-Arrest Procedure §§160.1 and 160.2 (1975), frowns upon the use of a showup or the display of only a single photograph.”); *Biggers v. Tennessee*, 390 U.S. 404 (1968) (Douglas, J., dissenting) (“Whatever may be said of lineups, showing a suspect singly to a victim is *pregnant with prejudice*. The message is clear: the police suspect this man. That carries a powerfully suggestive thought.”) (emphasis added), *Stovall v. Denno*, 388 U.S. at 302 (“The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned.”).

¹⁴¹ Indeed, Presley only identified Swainson after the Commonwealth pressured him and informed him that: (1) Swainson was in fact the shooter; (2) that Swainson was responsible for other murders; and (3) that if Presley identified Swainson, the Commonwealth could possibly get Presley a job and have any pending criminal charges against him dismissed.

¹⁴² Exs. 2-3.

¹⁴³ The trial judge held a suppression hearing on March 8, 1989. On March 16, 1989, the trial judge ruled that Presley’s identification was admissible. NT, Trial, 3/16/89, at 6. Following Swainson’s conviction and sentencing, the trial judge heard post-trial motions on October 11, 1989, during which trial counsel once again objected to the admission of Presley’s identification. NT, Post-Trial Motions, 10/11/89, at 1-10. On December 15, 1989, the trial judge issued its Findings of Fact and Conclusions of Law regarding trial counsel’s post-trial motions, wherein it denied Swainson’s claim that it committed reversible error by admitting Presley’s identification. On January 11, 1990, the trial judge issues another “opinion” regarding trial counsel’s post-trial motions, wherein it once again refused to grant Swainson a new trial because of Presley’s identification. Ex. 24, at 3-4.

counsel's request for a *Kloiber* instruction informing the jury that Presley's identification must be received with great caution.¹⁴⁴ Furthermore, had the Superior Court had this information it would have granted Swainson a new trial because the Presley's identification procedure violated Swainson's state and federal due process rights.¹⁴⁵

3. *Brady Claims*

Presley's recantation support Swainson's claim that the Commonwealth withheld exculpatory and impeachment evidence, to wit:

- Presley's initial statements to the prosecutor (Rubino) in which he informed her that Swainson was not the shooter;
- The fact that Presley's identification of Swainson was premised upon an inherently suggestive single photo line-up (or show-up); and
- 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. *See* § V.F.1.a, *supra*, pp. 38-39 (discussing in detail the Commonwealth's discovery violations).

Swainson could not have uncovered this information until October 13, 2008. *See* § V.F.1.b, *supra*, pp. 39-44 (discussing Swainson's due diligence).

¹⁴⁴ Trial counsel requested a *Kloiber* instruction immediately before the trial judge instructed the jury. NT, Trial, 3/20/89, at 84. The trial judge denied trial counsel's request. *Id.* at 85. In *Kloiber*, the Pennsylvania Supreme Court stated that

where the witness is not in a position to clearly observe the assailant, or *he is not positive as to identity*, or his positive statements as to identity *are weakened by qualification or by failure to identify defendant on one or more prior occasions*, the accuracy of the identification is so doubtful that the Court should warn the jury that the testimony as to identity must be received with caution.

Commonwealth v. Kloiber, 106 A.2d 820, 826-27 (1954) (emphasis added). Here, Presley surely was not "positive" regarding his identification of Swainson because he initially told the prosecutor and her agents that Swainson was not the shooter.

¹⁴⁵ The Superior Court ruled that the trial judge did not commit reversible error when it admitted Presley's identification of Swainson. Ex. 18, at 3-5.

Individually and collectively, the failure to disclose the aforementioned exculpatory and impeachment evidence prejudiced Swainson and undermines confidence in his conviction. *See* § V.F.1.c, *supra*, pp. 44-53 (discussing prejudice issue).

Consequently, the failure to disclose the aforementioned exculpatory and impeachment evidence violated Swainson's state and federal constitutional rights. *See* U.S. CONST. AMENDS. VI, XIV; PA. CONST., Art. I, §§ 1, 9; *Kyles v. Whitley*, 514 U.S. at 437; *Commonwealth v. Gibson*, 951 A.2d 1110, 1127 (Pa. 2008); *Commonwealth v. Strong*, 761 A.2d 1167 (Pa. 2000); *Commonwealth v. Wade*, 867 A.2d at 555-57.

4. **Ineffective Assistance of Counsel Claim**

Terrence Gibbs's affidavit and James Brown's letter supports Swainson's claim that trial counsel acted ineffectively when he chose not to present Gibbs and Brown as rebuttal witnesses to undermine Presley's claims that: (1) Swainson hired Brown to assault Presley in order to intimidate Presley so Presley would not testify against Swainson at the preliminary hearing; and that (2) Gibbs bribed Presley in order to secure Presley's June 10, 1988 affidavit. *See* U.S. Const. 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).

Ordinarily, to obtain relief pursuant to an ineffectiveness claim, Swainson must establish that: (1) the underlying claim is of arguable merit; (2) counsel's performance lacked a reasonable basis; and (3) counsel's ineffectiveness prejudiced him. *See Commonwealth v. Pierce*, 786 A.2d at 213. However, to prevail on a claim of ineffectiveness for failure to call a witness, Swainson must demonstrate that: (1) the

witness existed; (2) the witness was available; (3) trial counsel was informed of the existence of the witness or should have known of the witness existence; (4) the witness was prepared to cooperate and would have testified on appellant's behalf; and (5) the absence of the testimony prejudiced petitioner. *See Commonwealth v. Malloy*, 856 A.2d 767, 782 (Pa. 2004); *Commonwealth v. Fletcher*, 750 A.2d 261, 275 (2000).

Swainson satisfies these requirements for Gibbs and Brown. First, Gibbs and Brown both existed. Second, trial counsel knew of Gibbs's existence because trial counsel hired Gibbs to interview Presley. Likewise, trial counsel knew of Brown's existence because of Presley's preliminary hearing and trial testimony. Third, Gibbs and Brown were both available and willing to testify on Swainson's behalf. Had trial counsel asked Gibbs to testify, Gibbs would have testified 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.
- He never told Presley that he did not want to interview Presley at his residence. Instead, Presley informed Gibbs that he (Presley) did not want to be interviewed at his residence because Presley did not want to be seen talking to an investigator in his neighborhood.
- 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.
- Trial counsel never contacted Gibbs once Gibbs gave trial counsel Presley's affidavit.
- Had trial counsel asked Gibbs to testify, Gibbs would have testified and denied Presley's bribery allegations.¹⁴⁶

Had trial counsel asked Brown to testify, Brown would have testified that:

- Presley's trial testimony was false.
- Swainson had absolutely nothing to do with his assault on Presley.
- He assaulted Presley for two reasons:
 - (1) He was angry that Presley kept flirting with a female correctional officer that Brown liked; and
 - (2) Presley stole his medication (valium).
- He did not assault Presley because Presley stole his sneakers.¹⁴⁷

The absence of Gibbs's and Brown's testimony prejudiced Swainson. As mentioned *supra*, "the only duty of a jury in cases in which identification evidence has been admitted will often be to assess the reliability of that evidence." *Watkins v. Sowders*, 449 U.S. at 347. Swainson's case is such a case. In effect, the sole issue in Swainson's

¹⁴⁶ Ex. 4.

¹⁴⁷ Ex. 13.

case was whether Presley accurately identified Swainson as the individual who shot and killed Opher. Thus, to adequately assess the reliability of Presley's identification of Swainson, the jury needed to hear all the evidence that either supported or undermined Presley's identification. Gibbs's and Brown's testimony would have completely undermined Presley's identification because it would have established that: (1) Swainson had nothing to do with Brown's assault on Presley; and that (2) Presley in fact signed the June 10, 1988 affidavit on his own free-will and that, at least at some point, Presley truly believed that he misidentified Swainson because the shooter was a dark-skinned African-American, whereas Swainson was a light-skinned Jamaican. Had the jury been privy to Gibbs's and Brown's testimony, there is a reasonable probability that the outcome of Swainson's trial would have been different.

5. Actual Innocence Claim

Presley's recantation, Gibbs's affidavit, and Brown's letter support Swainson's claim that he is actually innocent. *See* U.S. CONST. AMENDS. VI, XIII, XIV; PA. CONST., Art. I, §§ 1, 9. As the Pennsylvania Supreme Court recently noted, "Colorable claims of actual innocence hold a favored place in the law." *See Commonwealth v. Williams*, 594 Pa. 366, 388 (Pa. 2007); *accord Schulp v. Delo*, 513 U.S. 298, 325 (1995) ("concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system."). Although § 9543 does not use the term "actual innocence" in enumerating cognizable claims, the Act specifically states that it is intended to "provide[] for an action by which persons convicted of crimes they did not commit... may obtain collateral relief." 42 Pa.C.S. § 9542; *accord Commonwealth v.*

Abu-Jamal, 833 A.2d 719, 728 (Pa. 2003). Thus, Swainson's actual innocence claim is cognizable under the Act.

The Supreme Court's decision in *Schulp v. Delo*, 513 U.S. 298 (1995), emphasized that a determination of actual innocence must be made "in light of *all* the evidence." *Id.* at 328 (emphasis added); *House v. Bell*, 547 U.S. 518, 538 (2006) ("*Schlup* makes plain that the habeas court must consider 'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial.')" (citation omitted). "[A]ll the evidence," was intended to include categories of evidence not normally considered by judges, including "evidence tenably claimed to have been wrongly excluded or to have become available only after the trial." *Id.* "[A]ll the evidence" also included all forms of evidence, including all reliable evidence "whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Id.* at 324. Moreover, the Court acknowledged that "newly presented evidence" of actual innocence "may indeed call into question the credibility of the witnesses presented at trial," thus requiring that the post-conviction court "make some credibility assessments." *Id.* at 330.

Using *Schlup* and *House* as guides, the Court must consider all the newly discovered evidence presented in Swainson's instant petition: (1) Paul Presley's October 13, 2008 recantation; (2) Terrence Gibbs's December 2, 2008 affidavit; and (3) James Brown's October 28, 2008 letter. In light of this new evidence, "it is more likely than not that no reasonable juror would have found [Swainson] guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. at 327.

6. 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; PA. CONST., Art. I, §§ 1, 9; *Townsend v. Burke*, 334 U.S. 736 (1948); *Commonwealth v. Maxwell*, 421 A.2d 699, 703 (Pa. Super. 1980); *Commonwealth v. Cowan*, 418 A.2d 753 (Pa. Super. 1980); PA. CONST., Art. I, §§ 1, 9.

7. 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 and to a jury verdict based solely upon properly admitted evidence and argument that proves every element of an offense and every element of an aggravating circumstance beyond a reasonable doubt. PA. CONST., Art. I, §§ 1, 9; *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).

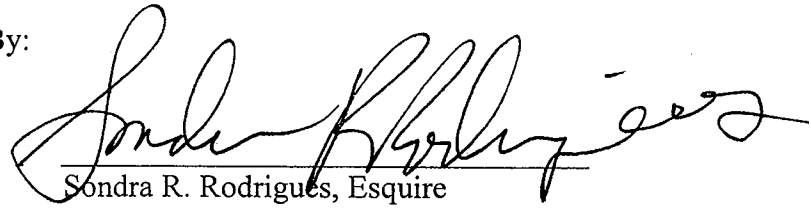
VI. Conclusion

For all of the foregoing reasons, a new trial should be granted. An evidentiary hearing is requested. Counsel reserves the right, pursuant to Pa. R. Crim. Pro. 905(a), to supplement this Memorandum of law and its accompanying Petition should the interests of justice so require.

Respectfully submitted.

Date: 12/11/08

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Exhibits

1. Paul Presley's June 10, 1988 Affidavit
2. Paul Presley's October 13, 2008 Affidavit
3. Transcripts of Paul Presley's October 13, 2008 Interview with Russell Kolins
4. Lt. Terrance Gibbs's November 4, 2008 Affidavit
5. Philadelphia Police Department, Homicide Division, Investigation Interview Record, Andrew Swainson's Statement, January 22, 1988 Statement
6. Philadelphia Police Department, Homicide Division, Investigation Interview Record, Paul Presley's February 12, 1989 Statement
7. Philadelphia Police Department, Homicide Division, Investigation Interview Record, Paul Presley's February 15, 1989 Statement
8. Philadelphia Police Department, Homicide Division, Investigation Interview Record, Paul Presley's February 17, 1989 Statement
9. Commonwealth of Pennsylvania, Search Warrant and Affidavit, Warrant Control No. 14515, Issued January 21, 1988
10. Philadelphia Police Department, Homicide Division, Investigation Interview Record, P/O John Kay's January 21, 1988 Statement
11. City of Philadelphia, Police Department, Laboratory Division, Mobile Crime Scene Service Report, Mobile Lab No. ML #88-36, January 21, 1988
12. Letter from Russell Kolins to James E. Brown, CQ3403, SCI Huntingdon, October 27, 2008
13. Letter from James E. Brown, CQ3403, SCI Huntingdon, to Russell Kolins, October 29, 2008
14. Michael Alexander's Statement to Investigator Edward L. Geigeri, February 19, 1997
15. Philadelphia Police Department, Homicide Division, Investigation Interview Record, Paul Presley's January 17, 1988 Statement
16. Andrew Swainson's Miranda Waiver Form and Statement, March 17, 1988.

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16. Andrew Swainson's Miranda Waiver Form and Statement, March 17, 1988.

17. Philadelphia County District Attorney's Office, Discovery Memorandum to Perry DeMarco, Esquire, May 3, 1988.
18. *Commonwealth v. Swainson*, Superior Court Opinion, Case No. 02733 Philadelphia 1989, June 26, 1990
19. Philadelphia Police Department, Criminalistics Laboratory Report, Lab No. 88-800084, D.C. No. 88-18-3831, February 11, 1988
20. Philadelphia Police Department, Laboratory Division, Mobile Crime Detection Service Report, Mobile Lab. No. ML # 88-36, January 21, 1988
21. Christmas Card from Paul Pressley, Inmate No. 681775, Bayside State Prison, P.O. Box 71, Leesburg, New Jersey 08327, to Russell R. Kolins, 1528 Walnut Street, Suite 1902, Philadelphia, Pennsylvania 19012, December 12, 2007
22. Letter from Russell Kolins, PI, CCDI, to Paul Pressley, Inmate No. 000681775A, Bayside State Prison, P.O. Box F-1, Leesburg, New Jersey, December 14, 2007
23. *Commonwealth v. Swainson*, April Term, 1988, Nos. 3131-3135, Opinion by Judge Sabo, January 11, 1990
24. Philadelphia Police Department, Homicide Division, Investigation Interview Record, Crystal Justice's Statement, January 19, 1988
25. Philadelphia Police Department, Homicide Division, Investigation Interview Record, Crystal Justice's Statement, January 22, 1988
26. Philadelphia Police Department, Homicide Division, Investigation Interview Record, Crystal Justice's Statement, February 6, 1988
27. Philadelphia Police Department, Homicide Division, Investigation Interview Record, Patrolmen Stephen Szynanski's Statement, January 21, 1988
28. Philadelphia Police Department, Homicide Division, Investigation Interview Record, Patrolmen Thomas Campbell's Statement, January 21, 1988
29. Philadelphia Police Department, Homicide Division, Investigation Interview Record, Lt. Edward Nolan's Statement, January 21, 1988
30. Philadelphia Police Department, Homicide Division, Investigation Interview Record, Patrolmen Robert Rouse's Statement, January 21, 1988
31. Philadelphia Police Department, Homicide Division, Investigation Interview Record, Sgt. James Shannon's Statement, January 21, 1988

32. Philadelphia Police Department, Homicide Division, Investigation Interview Record, Patrolmen Elga Peay's Statement, January 21, 1988
33. Philadelphia Police Department, Homicide Division, Investigation Interview Record, Patrolmen John Kay's Statement, January 21, 1988
34. Philadelphia Police Department, Homicide Division, Investigation Interview Record, Brian Brown's Statement, February 7, 1988
35. Philadelphia Police Department, Homicide Division, Investigation Interview Record, LaTanya Furman's Statement, February 7, 1988
36. Philadelphia Police Department, Homicide Division, Investigation Interview Record, Darren Brown's Statement, February 7, 1988
37. Philadelphia Police Department, Homicide Division, Investigation Interview Record, Leroy Furman's Statement, February 7, 1988
38. Philadelphia Police Department, Homicide Division, Investigation Interview Record, Jeffery Green's Statement, January 25, 1988
39. Philadelphia Police Department, Homicide Division, Investigation Interview Record, Edrick Hume's Statement, January 25, 1988
40. Philadelphia Police Department, Homicide Division, Investigation Interview Record, Jimmy Smith's Statement, January 22, 1988
41. Philadelphia Police Department, Homicide Division, Investigation Interview Record, Bonita Dean's Statement, January 22, 1988
42. Philadelphia Police Department, Homicide Division, Investigation Interview Record, Clarence Threlkeld's Statement, January 22, 1988
43. Philadelphia Police Department, Homicide Division, Investigation Interview Record, Ashley Hines's Statement, January 21, 1988
44. Russell Kolins's Affidavit
45. Russell Kolins's CV