

Swainson is currently serving a sentence of life imprisonment for his first-degree murder conviction, a concurrent term of five to ten years on the conspiracy conviction, and two-and-a-half to five years on the weapons conviction in the Commonwealth of Pennsylvania and resides at the State Correctional Institution in Dallas, Pennsylvania (SCI-Dallas).

SCI-Dallas's Superintendent is Jerome Walsh.

II. Statement with Respect to Exhaustion

The legal and factual basis of all claims presented in the instant *Petition for Writ of Habeas Corpus* have been fairly presented to the Pennsylvania state courts, including the Westmoreland County Common Pleas Court and the Pennsylvania Superior Court.

Pursuant to a Pennsylvania Supreme Court Order, an individual convicted of a crime in Pennsylvania need not lodge a discretionary appeal to that court in order to exhaust direct appeal rights; appeal to the Superior Court will suffice. *See In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, No. 218 Judicial Administration Docket No. 1 (Pa. May 9, 2000). Thus, Kunco did not have to fairly present his federal claims to the Pennsylvania Supreme Court to exhaust his state remedies.

III. Statement with Respect to the Adequacy of Pennsylvania's Procedural Default Rules

Pennsylvania's default rules are inadequate to prevent the Court from substantively considering the merits of any federal claims that the Pennsylvania state courts may have deemed defaulted or untimely.

IV. Factual and Procedural History

A. Stanley Opher's Murder

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.¹ Officer Rouse radioed his discovery to the police department, and asked Opher what happened. Opher responded, “They shot me in my back.”²

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. During his investigation, Officer Rouse noticed an open door at 5413 Samson Street, but did not see anyone in the immediate area. Officer 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.³

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.⁴

Officer Lawrence Hawrylak of the Mobile Crime Detection Unit recovered two shotguns from the crime scene – the first recovered by Officer Rouse, the second was a sawed-off shotgun that was found 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

¹ N.T. 3/16/89, at 28-29.

² *Id.* at 29-30.

³ *Id.* at 30-34.

⁴ *Id.* at 41-45.

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.⁵

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 from their initial location before they were photographed. He also testified that he was unable to lift any prints from either shotgun.⁶

B. Paul Presley's Identification, Swainson's Arrest, and Paul Presley's Trial Testimony

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

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.⁷

1. Paul Presley's Arrest

Philadelphia Police Officers arrested Presley immediately after Opher was shot as Presley was fleeing from the scene.⁸

Presley was bleeding from his hand and had large amounts of blood on his overcoat.⁹

⁵ *Id.* at 73-75.

⁶ *Id.* at 77-84.

⁷ 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. *See Memo of Law*, Exs. 5, 16. The Exhibits are those attached to Swainson's *Memorandum of Law in Support of Second Petition for Post-Conviction Relief Pursuant to 42 Pa. C.S. § 9543* filed on December 11, 2008

⁸ Exs. 8-10, 15.

⁹ Ex. 9.

Police charged Presley with aggravated assault, simple assault, reckless endangering of another person, criminal conspiracy, and weapons violations.¹⁰

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.¹¹ 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.¹²
- 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.¹³
- Immediately after the second man shot Opher, a third man walked out of the house, pointed a rifle at Presley, and told him to turn around and run.
- Presley, 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 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.¹⁴
- 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.

¹⁰ *Id.*

¹¹ N.T. 3/17/89, at 4-6.

¹² *Id.*

¹³ *Id.* at 7-9. As discussed *infra*, Presley identified the second man (with the sawed-off shotgun) as Swainson.

¹⁴ *Id.* 9-18.

- 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.¹⁵ Presley *never* described the shooter as a light-skinned Jamaican.

Presley said that the “Jamaicans” ran the drug house.¹⁶

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

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

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.¹⁷

On January 22, 1988, Detective Santiago questioned Swainson at the Homicide Division after he *Mirandized* him.¹⁸

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.¹⁹

Swainson denied involvement in Opher’s murder and proclaimed his innocence.²⁰

Swainson said that he lived with his parents in New York but that he came to Philadelphia to take care of the drug house.²¹

Swainson consented to being fingerprinted and to having his picture taken.²²

Swainson left the Homicide Division after being fingerprinted and photographed.

¹⁵ Ex. 6.

¹⁶ *Id.*

¹⁷ NT, Suppression Hrg., 3/9/89, at 15.

¹⁸ *Id.* at 14-15; Ex. 5.

¹⁹ *Id.* at 15-16.

²⁰ *Id.* at 16-18.

²¹ *Id.* at 17.

²² *Id.* at 18.

3. Detective Santiago's February 12, 1988 Photo Line-up with Paul Presley

On February 12, 1988, Detective Santiago interviewed Presley at the Homicide Division.²³

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 and white photos of African-American males with beards or mustaches and all were supposedly in their mid-twenties.²⁴ 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 hat, the big ones."²⁵

While Presley recognized Swainson as the shooter, he said he had never met or seen Swainson before.²⁶

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.²⁷

4. Swainson's Arrest

Based on Presley's alleged identification of Swainson, Detective Santiago obtained an arrest warrant for Swainson on February 12, 1988.²⁸

On March 17, 1988, the police arrested Swainson in New York City.²⁹

²³ Ex. 6.

²⁴ NT, Suppression Hrg., 3/9/89, at 19-20; Ex. 6.

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

²⁶ Ex. 6.

²⁷ *Id.* at 24.

²⁸ *Id.* at 18.

²⁹ Ex. 16.

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.³⁰

5. Paul Presley's April 1989 Preliminary Hearing Testimony

On April 14, 1989, 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.³¹

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

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

After the interview, Presley signed a two-page affidavit containing 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.
- Presley admitted that his statement to Gibbs was truthful and that he gave his statement on his own free will.³²

7. Paul Presley's February 15, 1989 Statement to Detective Santiago

On February 15, 1989, shortly before Swainson's trial, Detective Santiago re-interviewed Presley.³³ During the interview, Presley made the following statements:

³⁰ *Id.*

³¹ 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.

³² Ex. 1.

- 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 (Presley) 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.³⁴
- 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.
- 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. Paul Presley's February 17, 1989 Statement to Detective Santiago

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.

³³ Ex. 6.

³⁴ Ex. 7.

- 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.³⁵

9. Paul Presley’s Trial Testimony

Presley testified at Swainson’s trial on March 17, 1989.³⁶

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 Stanley 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.³⁷

Presley arrived at 5413 Sansom Street at approximately 3:00 a.m.³⁸

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.³⁹

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.

³⁵ Ex. 8.

³⁶ NT, Trial, 3/17/89, at 3-139.

³⁷ 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.

³⁸ *Id.* at 4-6.

³⁹ *Id.*

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 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.⁴⁰

Presley testified that immediately after the second man shot Opher, a third man walked out of the house, pointed a rifle at Presley, and told Presley to turn around and run.⁴¹

Presley, 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.⁴²

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).⁴³

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.⁴⁴

When Presley told the police about the shooting, the police ordered him to the ground, took him into custody, and charged him with assault.⁴⁵

⁴⁰ *Id.* at 7-9.

⁴¹ *Id.* at 9-10.

⁴² *Id.* 9-18.

⁴³ *Id.* at 7-8.

⁴⁴ *Id.* at 9.

⁴⁵ *Id.* at 18.

b. Paul Presley's Identification of Swainson

Presley testified that he gave a statement to police shortly after his arrest on January 17, 1988.⁴⁶

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.⁴⁷

Presley never mentioned that the shooter was a light-skinned Jamaican.⁴⁸

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*.⁴⁹

Presley testified that he picked Swainson's picture and identified him as the individual who shot Opher.⁵⁰

Presley testified he had "no doubt" and was "certain" Swainson was the shooter and that he did not have "any problem" picking Swainson's photograph.⁵¹

c. Paul 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.⁵²

Presley said he knew that Swainson was the shooter when he testified at the preliminary hearing and that he could have identified Swainson as the shooter at the preliminary hearing.⁵³

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

⁴⁶ Ex. 8.

⁴⁷ NT, Trial, 3/17/89, at 19.

⁴⁸ *Id.* at 19-20.

⁴⁹ *Id.*

⁵⁰ *Id.* at 19-20, 59-60, 125-27, 136-37.

⁵¹ *Id.* at 19, 33, 60, 136-137.

⁵² *Id.* at 65-68, 78, 87-88.

⁵³ *Id.* at 24-27.

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.⁵⁴

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.⁵⁵

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.⁵⁶

Presley testified that instead of identifying Swainson as the shooter at the preliminary hearing, he told the trial judge that he was uncertain whether Swainson was the shooter because the shooter had a much darker complexion than Swainson.⁵⁷

Presley testified that his preliminary hearing testimony was false and that he lied when he told the judge that he was uncertain whether Swainson was the shooter.⁵⁸

d. Paul Presley's Explanation Regarding the June 10, 1988 Affidavit

Presley explained to the jury why he signed the June 10, 1988 two-page affidavit in which he told Terrance Gibbs, Swainson's defense investigator, that Swainson could not have

⁵⁴ *Id.* at 24.

⁵⁵ *Id.* at 25.

⁵⁶ *Id.* at 25-26.

⁵⁷ *Id.* at 26.

⁵⁸ *Id.* at 27, 69-73.

been the shooter because the shooter was a dark-skinned African-American, whereas Swainson was a light-skinned Jamaican.⁵⁹

Presley testified that the information in the two-page affidavit was false and that he only signed the affidavit because: (1) he felt threatened by Gibbs; and (2) Gibbs told him that he (Presley) would be compensated by Swainson if he signed the affidavit and testified that Swainson was not the shooter.⁶⁰

In terms of feeling threatened, Presley testified that:

- Gibbs staked out his residence for several days looking for him.⁶¹
- Gibbs refused to identify himself when he initially called his home and spoke with Presley's girlfriend.⁶²
- When Presley called Gibbs, Gibbs refused to identify himself.⁶³
- 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.⁶⁴

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.⁶⁵
- 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.⁶⁶

⁵⁹ Ex. 1.

⁶⁰ NT, Trial, 3/17/89, at 30-31.

⁶¹ *Id.* at 28-30.

⁶² *Id.* at 27-28.

⁶³ *Id.* at 30.

⁶⁴ *Id.* at 30.

⁶⁵ *Id.* at 91, 134-35, 137-38.

⁶⁶ *Id.* at 28-32, 137-38.

e. Paul 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.⁶⁷

C. Detective Santiago's Trial Testimony

Detective Santiago testified he interviewed Presley on February 12, 1988 and prepared a seven-man photo line-up for Presley to view.⁶⁸

Detective Santiago testified that Presley identified Swainson "without any hesitation" once he viewed the photo line-up.⁶⁹

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.⁷⁰

D. The 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.⁷¹
- Presley did not ask for any form of consideration and the Commonwealth did not promise Presley anything in return for his testimony against Swainson.⁷²
- Presley chose to testify because he did not want Swainson to "escape justice."⁷³
- Swainson attempted to bribe Presley in jail by asking Presley not to testify against him.⁷⁴

⁶⁷ *Id.* at 20, 119.

⁶⁸ NT, Trial, 3/17/89, at 173.

⁶⁹ *Id.*

⁷⁰ *Id.* at 201.

⁷¹ NT, Trial, 3/19/89, at 52.

⁷² *Id.* at 54.

⁷³ *Id.* at 55.

⁷⁴ *Id.* at 56, 66.

- Swainson was responsible for James Brown's assault on Presley because Swainson was trying to send Presley a "message."⁷⁵
- Presley identification of Swainson is legitimate and accurate because Presley picked it out of a properly administered seven-man photo line-up.⁷⁶
- 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.⁷⁷

E. 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."⁷⁸

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.⁷⁹

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.⁸⁰

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.⁸¹ The trial judge denied trial counsel's requests for a new trial.⁸²

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.⁸³

⁷⁵ *Id.* at 57-58.

⁷⁶ *Id.* at 61, 63.

⁷⁷ *Id.* at 65.

⁷⁸ NT, Trial, 3/21/89, at 2.

⁷⁹ *Id.* at 4-5.

⁸⁰ *Id.* at 8-9.

⁸¹ NT, Post-Trial Motions, 10/11/89, at 3-4, 5-10, 14-15.

⁸² *Id.* at 43-44.

F. Post-Conviction Proceedings

1. Initial Appellate Review, Post-Conviction, and Federal Habeas Proceedings

Swainson has taken the following steps in an attempt to obtain relief from his convictions and sentences, to wit:

Direct Appeal: Trial counsel withdrew, and David Belmont, filed a notice of appeal on Swainson's behalf with the Pennsylvania Superior Court on October 24, 1989.

Counsel raised the following four issues on direct appeal:

(1) Swainson argued that trial counsel was ineffective under state and federal law for failing to present alibi witnesses.

(2) Swainson argued that the trial judge violated his state and federal due process rights when he refused to suppress Presley's photographic identification.

(3) Swainson argued that the trial judge violated his state and federal due process right when he did not grant a mistrial when a witness testified that Swainson's nickname was "Blood" and that Swainson earned this nickname because he supposedly killed people.

(4) Swainson argued that his state and federal due process rights were violated when the trial judge failed to give a "Kloiber" jury instruction, *see Commonwealth v. Kloiber*, 106 A.2d 820 (Pa. 1954), informing the jury of the weakness of eyewitness identification.

On June 26, 1990, the Pennsylvania Superior Court affirmed the trial judge's findings in an unpublished opinion. On February 5, 1991, the Pennsylvania Supreme Court denied allocatur.

Post-Conviction Proceedings: On January 12, 1993, Swainson filed a motion pursuant to 42 Pa. Cons. Stat. § 9541, raising the following issues. While his First PCRA Motion was pending, Swainson filed petition for Writ of Habeas Corpus with this Court on February 24, 1993. Due to this habeas proceeding, the PCRA court dismissed his First PCRA

⁸³ NT, Sentencing Hrg., 10/13/89, at 28-29.

Motion *without* prejudice on March 18, 1993. On July 15, 1993, this Court dismissed the habeas petition for failure to exhaust state remedies.

On August 3, 1993, Swainson filed a new PCRA petition, which was amended to include three claims of prosecutorial misconduct and six claims of ineffective assistance of counsel:

- (1) Did the prosecutor commit misconduct by implying to the jury that Swainson did not have character evidence available and that he may have a prior criminal record?
- (2) Did the prosecutor commit misconduct by eliciting hearsay testimony to prove Swainson's motive for the killing?
- (3) Did the prosecutor fail to disclose a witness statement to trial counsel that constituted misconduct, thereby denying Swainson a fair trial; (4) did trial counsel fail to present character testimony?
- (5) Did trial counsel fail to present alibi witnesses during the trial?
- (6) Did trial counsel fail to withdraw the alibi defense after learning that there were problems with that defense?
- (7) Did trial counsel fail to object to hearsay evidence or file a motion in limine to exclude it?
- (8) Did trial counsel fail to present the testimony of a defense investigator to rebut the testimony of the eyewitnesses?
- (9) Did appellate counsel fail to challenge trial counsel's ineffectiveness for the issues set forth above?

On August 6, 1997, the PCRA court denied relief. Swainson timely appealed to the Pennsylvania Superior Court, raising two new issues: (1) whether the trial court denied him an impartial evidentiary hearing on his post-conviction claims; and (2) whether the case should be remanded for an evidentiary hearing for further exculpatory evidence. On August 6, 1997, the PCRA Court dismissed his PCRA petition and denied relief. Swainson appealed to the Superior Court, which denied his appeal on July 13, 1998. On December 30, 1998, the Pennsylvania

Supreme Court denied allocatur.

Federal Habeas Proceedings: On December 20, 1999, Swainson filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Shortly thereafter, Samuel C. Stretton entered his appearance on Swainson's behalf and on June 14, 2000, filed an amended pleading, and on December 19, 2000, filed a supplemental pleading raising the following federal claims:

(1) the trial court erred in not granting a mistrial when the Commonwealth witness said Petitioner's nickname "Blood" was given to him because of his stories "about bodies and other stuff," which purportedly referred to Petitioner killing other people;

(2) Trial counsel and counsel on direct appeal were ineffective for failure to present a defense which included alibi witnesses, and the defense investigator who would allegedly refute the prosecution's eyewitness' statement that he was offered compensation if he refused to testify;

(3) The trial court erred in not charging the jury that the identification should be received with care and caution;

(4)(a) Trial counsel and counsel on direct appeal were ineffective for not presenting or preserving the issue as to character witnesses' testimony concerning Petitioner's reputation in the community; (b) the assistant District Attorney erred in implying Petitioner did not have character witnesses available and by implying Petitioner had a prior criminal record; (c) trial counsel and counsel on direct appeal were ineffective for not objecting to or preserving the issue in 4(b);

(5)(a) The prosecution erred in eliciting purportedly impermissible hearsay testimony from witnesses as to what the decedent said about Petitioner and the decedent's comments on motives for the crime; (b) trial counsel and counsel on direct appeal were ineffective for not objecting and preserving the issue in 5(a);

(6)(a) The prosecution failed to properly disclose a witness statement to trial counsel prior to trial, thereby denying Petitioner a fair trial; (b) trial counsel and appellate counsel were ineffective for not objecting or preserving the issue in 6(a);

(7) Trial counsel was ineffective for not calling two police witnesses who could have refuted the testimony of Mr. Presley; direct appellate counsel and PCRA counsel erred and were ineffective for not properly preserving this issue;

(8) The assistant district attorney erred on commenting on Petitioner's failure to testify and present a defense and further erred in misleading the jury on Mr. Presley's prior record; trial counsel, appellate counsel, and PCRA counsel were

ineffective for not objecting or preserving these issues.⁸⁴

In accordance with 28 U.S.C. § 636(b)(1)(B) and Local Rule of Civil Procedure 72.1, the District Court referred the Petition to United States Magistrate Judge Charles B. Smith (Magistrate Judge) for a report and recommendation. On July 17, 2001, the Magistrate Judge filed a report and recommendation (Report) recommending that Swainson's Petition be denied in all respects. On February 19, 2002, the District Court affirmed the Magistrate Judge's recommendation and dismissed Swainson's Petition. *See Swainson v. Varner*, 2002 WL 241024 (Feb. 19, 2002, E.D.Pa.).⁸⁵

DNA Testing Pursuant to 42 Pa. C.S.A. § 9543.1: In April 2004, Swainson sought DNA testing pursuant to 42 Pa. C.S.A. §9543.1. On March 14, 2006, the PCRA judge entered a summary order denying Swainson's DNA testing petition. On July 13, 2006, the PCRA judge entered a written opinion explaining his dismissal. On October 23, 2007, the Pennsylvania Superior Court affirmed.

2. Current Post-Conviction Proceedings

a. Russell Kolins Agrees to Provide *Pro Bono* Services

In 2005, Swainson contacted Russell Kolins, an experience criminal defense investigator from Philadelphia, inquiring whether he would provide pro bono investigative assistance by trying to locate and interview Paul Presley.

Kolins ultimately agreed to provide pro bono investigative assistance.

In early 2007, Kolins spoke with Presley's mother to see if she knew of Presley's whereabouts; she refused to inform him of Presley's whereabouts.⁸⁶ When Kolins went to

⁸⁴ Swainson's *Amended Federal Habeas Petition* is attach hereto as Exhibit 48.

⁸⁵ The District Court's *Memorandum* is attached hereto as Exhibit 49.

⁸⁶ Ex. 44.

Presley's mother's residence in New Jersey shortly thereafter, Kolins interviewed another family member who informed him that Presley was in a New Jersey prison.⁸⁷

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

Once located, Kolins met with Presley at Bayside State Prison in New Jersey on October 11, 2007.⁸⁸ During this meeting, Presley refused to talk about his testimony with Kolins, telling him he did not and would not feel comfortable talking about his testimony until he spoke with an attorney.⁸⁹

In November 2007, Kolins sent Presley a letter regarding their initial meeting on October.⁹⁰

On December 12, 2007, in response to Kolins's letter, Presley sent Kolins a Christmas card, wherein Presley thanked Kolins for his letter, but informed Kolins that he had "some reservations" about discussing his trial testimony and that he did not feel comfortable discussing his testimony until he spoke with an attorney.⁹¹

When Kolins received Presley's December 12, 2007 Christmas card, he wrote Presley back on December 14, 2007 and informed him that he (Presley) needed to consult with an attorney and that he (Kolins) would be glad to meet with him once he had consulted with an attorney.⁹²

⁸⁷ *Id.*

⁸⁸

⁸⁹ *Id.* at Ex. 44, at ¶10.

⁹⁰ Ex. 44.

⁹¹ Ex. 21.

⁹² Ex. 22.

From December 2007 until October 2008, Presley never contacted Kolins and never informed him that he had consulted with an attorney or that he finally felt comfortable to discuss his trial testimony.⁹³

b. Paul Presley's October 3, 2008 Interview

In September 2008, in a last ditch effort, Kolins contacted Presley at the Albert "Bo" Robinson Assessment and Treatment Center in Trenton, New Jersey and arranged a meeting with Presley for October 3, 2008.⁹⁴

During the October 3, 2008 meeting with Kolins, Presley explained 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.⁹⁵

c. Paul Presley's October 13, 2008 Interview and Recantation

On October 13, 2008, Kolins interviewed Presley at the Albert "Bo" Robinson Assessment and Treatment Center in Trenton, New Jersey.

During Presley's October 13, 2008 interview, Presley provided Kolins with (1) a four-page handwritten statement wherein he recants his trial testimony and identification of Swainson;⁹⁶ and (2) an audio-taped statement wherein Presley recants his trial testimony and identification of Swainson.⁹⁷ In both statements, Presley averred that:

⁹³ Ex. 44.

⁹⁴ *Id.*

⁹⁵ Exs. 2-3.

⁹⁶ Ex. 2.

⁹⁷ Ex. 3.

- Contrary to his trial testimony, he never picked Swainson out of a seven-man photo line-up. Instead, the prosecutor (Judy Rubino) and other Commonwealth agents (from the Philadelphia County District Attorney's Office and the Philadelphia Police Department) showed him 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. When Presley viewed the photos of Swainson, he told the prosecutor that Swainson *was not the shooter*. Presley said the prosecutor and her agents told him he had to identify Swainson as the shooter.
- Contrary to his trial testimony, Presley knew “in his heart” Swainson “was surely not” the shooter because the shooter was a dark-skinned African-American, while Swainson was a light-skinned Jamaican.
- Contrary to his trial testimony, neither Terrence Gibbs (Swainson defense investigator at trial) nor Swainson ever told him he would be compensated if he signed the June 10, 1988 affidavit exonerating Swainson. Instead, the prosecutor (Rubino) told Presley before trial that he had to testify he signed the affidavit because Gibbs and Swainson threatened him, and told him he would be compensated for doing so, and that the statements in the affidavit were false.
- Contrary to his trial testimony, he believed he had an *implicit* agreement with the prosecutor and the Commonwealth, wherein if he identified Swainson and testified against him at trial, the prosecutor would (1) drop any pending charges against him from Philadelphia County and (2) find him a job where he could utilize his artistic abilities. The Commonwealth dismissed the charges pending against Presley relating to Stanley Opher's death, as well as other pending criminal charges.

d. Lieutenant Terrance Gibbs' December 2, 2008 Affidavit

On December 2, 2008, Lieutenant Terrance Gibbs, Swainson's former defense investigator and currently of the Philadelphia Police Department, signed an affidavit attesting to the following facts regarding his interview of Presley on June 10, 1988:

- He never told Presley that either he (Gibbs) or Swainson would compensate him with drugs or money if he (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 on Swainson's behalf to rebut Presley's allegation that he (Gibbs) offered to compensate Presley if he (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 Presley had accused him (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 cannot 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.⁹⁸

e. James Brown's October 29, 2008 Letter

On October 29, 2008, 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 the following:

- 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.⁹⁹

f. Swainson's Second PCRA Petition

Based on Presley's recantation, Lieutenant Gibbs's affidavit, and Brown's letter, Swainson filed a timely newly-discovered PCRA petition on December 11, 2008, raising numerous federal constitutional claims including the failure to disclose exculpatory and impeachment evidence, *see Brady v. Maryland*, 373 U.S. 83 (1963); *Banks v. Dretke*, 540 U.S. 668, 695 (2004), the knowing presentation of false evidence, *see United States v. Giglio*, 405 U.S. 150, 154 (1972), presenting unduly suggestive identification evidence, *see Manson v. Brathwaite*, 432 U.S. 98, 116 (1977), the right to present a meaningful defense, *see California v.*

⁹⁸ Ex. 4.

⁹⁹ Ex. 13.

Trombetta, 467 U.S. 479, 485 (1984), ineffective assistance of counsel, *see Strickland v. Washington*, 466 U.S. 668, 686 (1984), the failure to present valid and reliable evidence that proved Swainson's guilt beyond a reasonable doubt, *see Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000), that Swainson's conviction and sentences are based upon a misapprehension of material fact, *see Townsend v. Burke*, 334 U.S. 736 (1948), and an actual innocence claim. *See House v. Bell*, 547 U.S. 518, 538 (2006).

Swainson also requested an evidentiary hearing and post-conviction discovery based on the after-discovered evidence. In terms of discovery, Swainson requested access to the Philadelphia District Attorney's Office case file because Presley's recantation provided good cause and exceptional circumstances to believe that the district attorney's case file contained exculpatory information bolstering the credibility of Presley's recantation and his claim that the Commonwealth knowingly presented false testimony and provided him benefits. In terms of an evidentiary hearing, Swainson requested one so the PCRA court could make factual findings regarding Paul Presley's recantation, Lieutenant Gibbs's affidavit, and James Brown's statement, as well as to determine whether the Commonwealth suppressed exculpatory evidence, committed misconduct, and had the affirmative duty to "set the record" straight.

(1). The PCRA Court's Opinion

The PCRA court summarily denied relief without holding a hearing or granting Swainson's discovery request. In its May 14, 2010 opinion, the PCRA court concluded that Presley's recantation "was not a new fact and was not therefore newly discovered evidence." Ex. 46, at 4. According to the PCRA court, Presley's October 13, 2008 recantation represented third recantation: "This new recantation was his third recantation, following his preliminary hearing recantation and his recantation to Mr. Gibbs. The jury was well aware that Mr. Presley was a

serial recantor. Despite this, the jury chose to accept his trial testimony in reaching the verdict it did.” *Id.*

The PCRA court also concluded that Swainson failed to diligently develop the facts presented in Presley’s affidavit: “[E]ven if we were to accept that this third recantation was a newly discovered fact, Appellant failed to demonstrate why his claim could not have reasonably been discovered earlier.” *Id.* Instead of forcing the Commonwealth to rectify Presley’s false testimony, the PCRA court concluded that Swainson had the burden of locating Presley to see if he wished to recant his testimony: “[I]n neither of his two prior PCRA matters did he claim that he sought to locate Mr. Presley to determine whether he again wanted to recant.” *Id.* at 4-5.

(2). The Superior Court’s Opinion

On direct appeal, Swainson raised the very same federal claims as he did in his PCRA petition, and argued that the PCRA court’s diligence determination was premised on state and federal law. In particular, Swainson argued that federal due process principles mandate that Swainson could “reasonably rely” on the Commonwealth’s assertion that it adhered to its *Brady* obligations prior to trial and that Presley testified truthfully. *See Strickler v. Greene*, 527 U.S. 263, 283 n.23 (1999). More importantly, federal law mandates that *the Commonwealth* must “set the record straight” when it “conceal[s] significant exculpatory or impeaching material” in its possession. *Banks v. Dretke*, 540 U.S. 668, 695 (2004). In other words, if the PCRA court concluded that the Commonwealth did in fact “conceal significant exculpatory or impeaching material,” by suppressing the information mentioned in Pressley’s recantation, such a finding would obviate any requirement on Swainson’s part to diligently pursue Pressley’s recantation following his trial and conviction, and instead place the burden of *diligently* setting the record straight squarely with the Commonwealth. Thus, to answer the diligence question, which is

directly related to whether the state courts had jurisdiction to consider Swainson's newly-discovered evidence PCRA petition, it had to determine whether Swainson's *Brady* claims were meritorious.

On December 2, 2011, the Superior Court affirmed the dismissal of Swainson's newly-discovered evidence petition as untimely, holding that Swainson "failed to exercise due diligence in obtaining" Pressley's recantation, Lt. Gibbs' affidavit, and Brown's letter. Ex. 47, at 7 ("Appellant waited 14 years after his judgment of sentence became final to conduct his investigation of Presley, Gibbs, and Brown... Appellant has displayed an utter lack of diligence in the matter of Paul Presley's testimony, and cannot raise it as an exception to the time limits of the PCRA."). The Superior Court, however, did not address or adjudicate the merits Swainson's underlying *Brady* claims to determine if they were meritorious, and if so, how such a finding would have affected the determination of *who* had the duty to diligently set the record straight.

Claim One

Andrew Swainson's conviction is invalid because the newly-discovered evidence, particularly Paul Presley's recantation, establishes that Swainson is actually innocent of Stanley Opher's murder and his continued incarceration violates clearly-established due process and cruel and unusual punishment principles. U.S. Const. Amends. VIII & XIV.

Supporting Facts

The matters set forth in all other sections of this Petition are repeated and re-alleged as if set forth entirely herein.

In his recantation, Presley said he repeatedly told the prosecutor and investigators that Swainson was *not* the shooter because the shooter was a dark-skinned African-American, whereas Swainson is a light-skinned Jamaican.

Presley's statements to the prosecutor and investigators demonstrate, beyond clear and convincing evidence, that Swainson is innocent of Opher's murder.

Lt. Terrance Gibb's affidavit substantiate Presley's recantation that neither Swainson nor Lt. Gibbs bribed Presley prior to the preliminary hearing and that Presley's initial June 10, 1988 affidavit was true and accurate.¹⁰⁰

James E. Brown's October 29, 2008 letter to Russell Kolins also substantiates Presley's recantation that he did not believe Swainson had anything to do with Brown's assault against him shortly before the preliminary hearing.¹⁰¹

Individually and collectively, Presley's recantation, Lt. Gibb's affidavit, and James Brown's letter demonstrates, beyond clear and convincing evidence, that Swainson is innocent of Opher's murder.

¹⁰⁰ Ex. 4.

¹⁰¹ Ex. 13.

Swainson's conviction must be vacated and a new trial ordered.

Claim Two

Andrew Swainson's conviction is invalid under clearly-established federal due process principles because the Commonwealth presented knowingly false evidence and there is a reasonable likelihood the false evidence may affected the jury's decision to conviction Swainson. U.S. Const. Amends. VI & XIV.

Supporting Facts

The matters set forth in all other sections of this Petition are repeated and re-alleged as if set forth entirely herein.

Paul Presley's recantation demonstrates that he (Presley) and Detective Santiago knowingly presented false evidence.

Presley and Detective Santiago testified at an official proceeding, i.e., Swainson's trial.

Presley and Detective Santiago testified under oath at Swainson's trial.

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.¹⁰²
 - **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.¹⁰³

¹⁰² NT, Trial, 3/17/89, at 19-20.

¹⁰³ Exs. 2-3.

- **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, 1988.¹⁰⁴
 - **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.¹⁰⁵
- **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.¹⁰⁶
 - **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.¹⁰⁷
 - **Truth**: Contrary to Presley’s trial testimony, Presley believed that he had an *implicit* deal with the prosecutor (Rubino) and the Commonwealth, 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.

The prosecutor (Rubino) knew that Presley’s and Detective Santiago’s testimony was false.

Neither prosecutor (Rubino) nor the Philadelphia District Attorney’s Office has ever corrected Presley’s or Detective Santiago’s false testimony.

¹⁰⁴ NT, Trial, 3/17/89, at 19, 60, 133, 136, 137.

¹⁰⁵ Exs. 2-3.

¹⁰⁶ NT, Trial, 3/17/89, at 28-32.

¹⁰⁷ NT, 3/17/89, at 20, 119.

There is a reasonable likelihood that Presley's and Detective Santiago's false testimony may have impacted the jury's decision to convict 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.¹⁰⁸

The Commonwealth presented witnesses who testified that Swainson frequently visited 5413 Samson Street, but neither of these witnesses implicated Swainson in Opher's murder.¹⁰⁹ Likewise, of all the witnesses interviewed by the police shortly after Opher's murder, not one implicated Swainson.¹¹⁰

The prosecutor's closing arguments accentuated the importance of Presley's testimony, as well as emphasizing Detective Santiago's claim that Presley "immediately" identified Swainson's picture when he (Santiago) showed Presley a seven-man photo line-up.¹¹¹ 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.¹¹²

¹⁰⁸ NT, Trial, 3/17/89, at 59-60, 133-34.

¹⁰⁹ 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.

¹¹⁰ Exs. 24-43.

¹¹¹ NT, Trial, 3/19/89, at 65.

¹¹² NT, Trial, 3/18/89, 50, 52-55, 57-58, 60-62, 64-66, 72-74.

Presley's identification, in other words, represented the *linchpin* of the Commonwealth's case, and, as a result, there is a reasonable likelihood that Presley's and Detective's Santiago's false testimony may have affected the jury's decision to convict Swainson.

Swainson's conviction must be vacated and a new trial ordered.

Claim Three

Andrew Swainson's conviction is invalid under clearly-established federal due process principles because the Commonwealth failed to disclose material evidence that exculpated Swainson and impeached its key witnesses, Paul Presley and Detective Santiago, and the failure to disclose the material evidence substantially and injuriously prejudiced Swainson by preventing him from presenting a meaningful defense, impeaching Presley and Detective Santiago, and introducing exculpatory evidence establishing his innocence and raising reasonable doubt. U.S. Const. Amends. VI & XIV.

Supporting Facts

The matters set forth in all other sections of this Petition are repeated and re-alleged as if set forth entirely herein.

Prior to trial, the Commonwealth averred that it had disclosed all *Brady* material to trial counsel.¹¹³

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 statement to the Commonwealth:

- Presley's initial statements to the prosecutor and other Commonwealth agents in which Presley informed them that Swainson was not the shooter;
- 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;
- 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.

¹¹³ Ex. 17.

Presley's recantation could not have been uncovered until Presley finally decided to cooperate with and speak to Swainson's current defense investigator, Russell Kolins, and undersigned counsel (Cooley) on October 13, 2008.

Unlike publicly available documents, which are available for all to review, the information needed to adequately develop and meaningfully present Swainson's federal 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 fourteen years after Swainson's conviction became final. More importantly, Presley was the gatekeeper of this information and for twenty-years he refused outsiders – like Swainson and his defense team – access to this information.

According to Presley's recantation, 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 he willing and able to talk candidly about his false testimony at Swainson's trial.¹¹⁴ Presley specifically stated he would not have spoken with Swainson or anyone representing Swainson any earlier than when he did in October 2008.

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.¹¹⁵ 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.¹¹⁶

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

¹¹⁴ Exs. 2-3.

¹¹⁵ Ex. 40.

¹¹⁶ *Id.*

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.¹¹⁷

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 comfortable discussing the issue with Kolins until he spoke with an attorney about possible perjury charges.¹¹⁸

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.¹¹⁹

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.¹²⁰

In September 2008, in a last-ditch effort, 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, 2008.¹²¹

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

¹¹⁷ Ex. 21.

¹¹⁸ Ex. 40.

¹¹⁹ Ex. 22.

¹²⁰ Ex. 40.

¹²¹ *Id.*

until October 13, 2008 that Presley provided his four-page recantation and tape-recorded statement to Kolins and undersigned counsel (Cooley).¹²²

These facts demonstrate that Swainson could not have obtained Presley's recantation any sooner than October 13, 2008.¹²³ 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.

Indeed, under Pennsylvania law, Presley could have sued Swainson and his defense team for "intrusion upon his seclusion," *DeAngelo v. Fortney*, 515 A.2d 594, 595 (Pa. Super. 1986), if Swainson and his defense team continually harassed him about his trial testimony. The "intrusion upon his seclusion" 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.¹²⁴

¹²² Exs. 2-3.

¹²³ Swainson's primary federal due process argument is that the Commonwealth, and not Swainson, had to act *diligently* by setting the record straight regarding Presley's and Detective Santiago's false testimony and correcting the false testimony.

¹²⁴ 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

The Commonwealth's refusal and/or failure to disclose the material evidence substantially and injuriously prejudiced Swainson by preventing trial counsel from presenting a meaningful defense.

First, had trial counsel known the extent of the Commonwealth's misconduct, the trial judge would have surely dismissed the indicted against Swainson because Presley's identification is a by-product of flagrant prosecutorial misconduct and because Presley told the prosecutors and other investigators that Swainson was not the individual who shot and killed Opher.

Second, during the March 9, 1989 suppression hearing, Detective Santiago explained how he administered the seven-man photo array and how Presley "immediately" identified Swainson.¹²⁵ Trial counsel thoroughly cross-examined Detective Santiago, trying to establish that the seven-man photo array was unduly suggestive.¹²⁶ Despite trial counsel's best efforts, the trial judge denied his motion to suppress, finding Presley's identification reliable.¹²⁷ 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 array.¹²⁸ Had trial counsel and the trial judge known the facts contained in Presley's recantation, the trial judge would have suppressed Presley's identification under state and federal law.¹²⁹

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 him of falsely testifying at Swainson's trial, such actions could have easily given rise to a "intrusion upon his seclusion" claim.

¹²⁵ NT, Suppression Hrg., 3/9/89, at 14-24.

¹²⁶ NT, Suppression Hrg., 3/9/89, at 24-51.

¹²⁷ NT, Trial, 3/16/89, at 6.

¹²⁸ Trial Court's Findings of Facts and Conclusions of Law, 12/15/89.

¹²⁹ On direct appeal, the Pennsylvania Superior Court refused to grant relief on Swainson's unduly suggestive photo array claim for the very same reason as the trial judge:

Had the trial judge suppressed Presley's identification, the Commonwealth could not have prosecuted Swainson for Opher's murder.

Third, the Commonwealth's misconduct prevented trial counsel from presenting a meaningful defense by relying on this information to exonerate Swainson and to impeach Presley's and Detective Santiago's credibility. The undisclosed evidence exonerated Swainson because Presley repeatedly told the prosecutor and investigators that Swainson was not the shooter because the shooter was a dark-skinned African-American, whereas Swainson is a light-skinned Jamaican. The undisclosed evidence also destroyed the reliability and credibility Presley's identification, his claim that he did not expect to receive benefits or favors from the Commonwealth, and his claim that Lt. Gibbs and Swainson bribed and pressured him to sign his

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.

Ex. 18, at 4. Similarly, 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 recantation, *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, 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.

pre-trial affidavit exonerating Swainson.¹³⁰ Similarly, the undisclosed evidence destroyed Detective's Santiago's testimony regarding his alleged seven-person photo array and Presley's "immediate" identification. Had the Commonwealth disclosed the 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.

Swainson's conviction must be vacated and a new trial ordered.

¹³⁰ NT, Trial, 3/17/89, at 20.

Claim Four

Andrew Swainson's conviction is invalid under clearly-established due process principles because the Commonwealth introduced Paul Pressley's identification testimony and his identification is premised on an unduly suggestive identification process. U.S. Const. Amends. VI & XIV.

Supporting Facts

The matters set forth in all other sections of this Petition are repeated and re-alleged as if set forth entirely herein.

Based on Presley's recantation, the identification procedure used by investigators and the prosecutor to procure Presley's identification of Swainson was – to put it mildly – impermissibly suggestive, and under the totality of the circumstances, his identification was *not* sufficiently reliable to preclude a very substantial likelihood of irreparable misidentification.

Presley never *independently* identified Swainson as Opher's shooter. In fact, he repeatedly told the prosecutor and the Commonwealth that Swainson was *not* Opher's shooter. Presley's so-called identification was a product of gross prosecutorial and law enforcement misconduct.

Swainson's conviction must be vacated and a new trial ordered.

Claim Five

Andrew Swainson's conviction is invalid under clearly-established due process, effective assistance of counsel, and meaningful defense principles because trial counsel failed to develop significant exculpatory and impeachment evidence and trial counsel's failure substantially and injuriously prejudiced Swainson. U.S. Const. Amends. VI & XIV.

Supporting Facts

The matters set forth in all other sections of this Petition are repeated and re-alleged as if set forth entirely herein.

The Commonwealth premised its case on Paul Presley's identification and testimony. In the late 1980s, when Swainson was prosecuted, the objective professional standard or expectation for criminal defense attorneys was to develop and introduce all impeachment evidence impacting the credibility of a witness like Presley because undermining Presley's credibility meant the difference between an acquittal and a guilty verdict.

Trial counsel failed to introduce significant and easily obtainable impeachment evidence undermining Presley's credibility, particularly evidence from Terrance Gibbs and James Brown.

Terrance Gibbs

On June 10, 1988, Terrance Gibbs, a long-time Philadelphia police officer and Swainson's defense investigator, interviewed Presley. After the interview, Presley signed a two-page affidavit containing the following statements and admissions:

- 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.

- Presley admitted that his statement to Gibbs was truthful and that he gave his statement of his own free will.¹³¹

At trial, Presley testified that Terrance Gibbs threatened and bribed him to sign the affidavit.¹³² In terms of feeling threatened, Presley testified that:

- Gibbs staked out his residence for several days looking for him.¹³³
- Gibbs refused to identify himself when he initially called his home and spoke with Presley's girlfriend.¹³⁴
- When Presley called Gibbs, Gibbs refused to identify himself.¹³⁵
- When Gibbs met with him on June 10, 1988, he told him that he did not want to interview him at his home but that he wanted to take him for a drive so the two of them could discuss Swainson's case.¹³⁶

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.¹³⁷
- 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.¹³⁸

Trial counsel (Perry DeMarco) never presented Terrance Gibbs at trial to impeach Presley's allegations and to bolster the reliability and legitimacy of his pre-trial affidavit exonerating Swainson.

A reasonable and competent trial attorney would have presented Gibbs at trial to impeach Presley's allegations.

¹³¹ Ex. 1.

¹³² NT, Trial, 3/17/89, at 30-31.

¹³³ *Id.* at 28-30.

¹³⁴ *Id.* at 27-28.

¹³⁵ *Id.* at 30.

¹³⁶ *Id.* at 30.

¹³⁷ *Id.* at 91, 134-35, 137-38.

¹³⁸ *Id.* at 28-32, 137-38.

Trial counsel did not put Gibbs on the stand to rebut Presley's "bribery" claims and trial counsel did not have a strategic or tactical reason for not doing so.

Undersigned counsel (Cooley) interviewed Gibbs on December 2, 2008. At the time, Gibbs was again working for the Philadelphia Police Department as a Lieutenant in the Office of Professional Responsibility and Internal Affairs. Lt. Gibbs provided an affidavit attesting to the following facts regarding his interview of Presley on June 10, 1988:

- He never told Presley that either he (Gibbs) or Swainson would compensate him with drugs or money if he (Presley) signed an affidavit exonerating Swainson.
- He never threatened or pressured Presley to sign the June 10, 1988 two-page affidavit; Presley signed it freely and voluntarily.
- Perry DeMarco, Swainson's trial counsel, never asked Gibbs to testify on Swainson's behalf to rebut Presley's allegation that he offered to compensate Presley if he 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 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 cannot 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.¹³⁹

Had trial counsel presented Gibbs at trial, the jury would have learned the aforementioned facts.

¹³⁹ Ex. 4.

James Brown

At trial, Presley testified that his preliminary hearing testimony claiming that he could *not* identify Swainson as the shooter was false.¹⁴⁰ When asked to explain his false testimony, Presley said the following.

Presley said he was incarcerated prior to Swainson's preliminary hearing and two days before he was scheduled to testify an inmate named James Brown struck him in the head with a wooden bench breaking his jaw.¹⁴¹

Presley said he believed Swainson hired Brown to assault him in order to intimidate him from testifying at the preliminary hearing. Presley said he felt his safety would have been jeopardized had he identified Swainson as the shooter at the preliminary hearing – and that this was why he did not identify Swainson as the shooter at the preliminary hearing.¹⁴² Instead, Presley told the trial judge he was uncertain whether Swainson was the shooter because the shooter had a much darker complexion than Swainson.¹⁴³

A reasonably competent attorney would have interviewed Brown prior to trial to determine whether Presley's "intimidation" claim was credible or true.

Trial counsel did not interview Brown and he did not have a strategic or tactical reason not to interview Brown.

On October 29, 2008, 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 the following:

- Swainson had absolutely nothing to do with his assault on Presley.

¹⁴⁰ *Id.* at 65-68, 78, 87-88.

¹⁴¹ *Id.* at 24.

¹⁴² *Id.* at 25-26.

¹⁴³ *Id.* at 26.

- 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.¹⁴⁴

Prejudice

Individually and collectively, trial counsel's failure to develop and present the aforementioned facts by Lt. Gibbs and Brown substantially prejudiced Swainson undermining all confidence in his conviction.

Individually and collectively, the failure to develop and present this evidence prevented trial counsel from fully exposing the incredibility of Presley's "bribery" and "intimidation" allegations, which in turn prevented trial counsel from meaningfully arguing that Presley's July 1988 affidavit – wherein he exonerates Swainson – was true and credible and constituted reasonable doubt.

Had trial counsel developed and presented this evidence there is a reasonable probability that the jury would not have convicted Swainson.

Swainson's conviction must be vacated and a new trial ordered.

¹⁴⁴ Ex. 13.

Claim Six

Andrew Swainson's conviction is invalid under clearly-established due process principles because the state courts did not provide him a full and fair hearing on his federal claims and the limited post-conviction procedures afforded to him were fundamentally inadequate at fully and fairly developing the factual basis of his federal claims and fundamentally inadequate at vindicating his limited liberty interests under 42 Pa. C.S. §§ 9545(b)(1)(i)-(ii), and, as a result, the state courts did not have the requisite facts to adequately consider and adjudicate his federal claims. U.S. Const. Amends. VI & XIV.

Supporting Facts

The matters set forth in all other sections of this Petition are repeated and re-alleged as if set forth entirely herein.

Swainson sought full factual development in state court regarding his federal claims. He requested discovery and a full and fair evidentiary hearing.

The state courts denied his discovery request and did not provide him a full and fair evidentiary hearing regarding his federal claims.

The state courts denied Swainson relief even though his federal claims were not fully developed factually.

The state courts' actions violated Swainson's clearly-established due process rights.

Similarly, pursuant to the Pennsylvania Post-Conviction Relief Act, Swainson had a limited liberty interest in obtaining post-conviction relief based on government interference and newly-discovered evidence. *See* 42 Pa. C.S. §§ 9545(b)(1)(i)-(ii).

Swainson had the burden of pleading and proving that the Commonwealth violated its *Brady* responsibilities, and that he suffered prejudice based on these violations. *See Commonwealth v. Beasley*, 741 A.2d 1258, 1261 (Pa. 1999).

Likewise, pursuant to § 9545(b)(1)(i), Swainson had the burden of demonstrating that the newly-discovered evidence is of such a nature and character that a different verdict would likely result if a new trial is granted.

To adequately vindicate his limited liberty interest Swainson needed access to procedural mechanisms that allowed him to meet his burden of factually substantiating Presley's allegations of government misconduct and interference.¹⁴⁵

To factually substantiate Presley's allegations – and adequately vindicate his liberty interest under §§ 9545(b)(1)(i)-(ii) – Swainson needed adequate discovery and a full and fair evidentiary hearing. Both procedures are available to prisoners under the Pennsylvania Rules of Criminal Procedure. *See* Pa. R. Crim. P. 907(1) (prisoners are entitled to an evidentiary hearing when there are material issues of fact in dispute); Pa. R. Crim. P. 902(E)(1) (prisoners are entitled to post-conviction discovery when there are exceptional circumstances).

Swainson was also entitled to an evidentiary hearing pursuant to state law. *See Commonwealth v. D'Amato*, 856 A.2d 806, 825 (Pa. 2004).

Rules 907(1) and 902(E)(1), like § 9545(b)(1)(i)-(ii) and state law, afforded Swainson limited liberty interests that were entitled to due process protection and could not be arbitrarily abrogated by the state courts.

¹⁴⁵ Indeed, if fact development substantiated Presley's allegations that the Commonwealth withheld materially exculpatory evidence, Swainson would not only be able to establish that the Commonwealth had the burden of setting the record straight (i.e., he would resolve the diligence issue in his favor), but also that the Commonwealth's misconduct warranted relief as a matter of law.

Discovery was warranted in Swainson's case because there were exceptional circumstances, namely, that the state courts could not adequately assess the credibility of Presley's allegations and Swainson's federal claims without first reviewing the contents of the District Attorney's and Police Department's case files.

A full and fair evidentiary hearing was also warranted because Presley's recantation created significant issues of material fact regarding the Commonwealth's pre- and post-trial conduct and whether violated Swainson's clearly-established federal due process rights.

Without adequate discovery and a full and fair evidentiary hearing, Swainson had no way of meeting his burden pursuant to §§ 9545(b)(1)(i)-(ii) or fully developing his federal claims, and, thus, no way of adequately vindicating the substantive rights provided to him under these two subsections.

The failure to provide discovery and a full and fair evidentiary hearing violated Swainson's clearly-established federal due process rights because the procedures afforded to him (or lack thereof) were fundamentally inadequate to vindicate the substantive rights provided to him by §§ 9545(b)(1)(i)-(ii).

Swainson is entitled to relief, namely a full and fair evidentiary hearing before this Court as well as discovery pursuant to Rule 6.¹⁴⁶

¹⁴⁶ Swainson intends to file a timely discovery motion shortly after his instant habeas petition is filed.

Prayer for Relief

WHEREFORE, Swainson requests the Court to issue the following relief:

1. To order the Commonwealth-Respondent to answer Swainson's petition pursuant to Rule 5(a) of the Rules Governing Section 2254 Cases ("The respondent is not required to answer the petition unless a judge so orders.");
2. To allow Swainson to "submit a reply to the respondent's answer or other pleading within a time fix by" the Court pursuant to Rule 5(e) of the Rules Governing Section 2254 Cases;
3. To hold a full and fair evidentiary hearing pursuant to Rule 8 of the Rules Governing Section 2254 Cases;
4. To grant Swainson's discovery Pursuant to Rule 6 of the Rules Governing Section 2254 Cases;
5. To enter any orders that are necessary and just to protect Swainson's clearly-established right to have the merits of his federal claims decided by a federal court; and
6. To issue a writ of habeas corpus, vacating Swainson's convictions and ordering the Commonwealth to retry him in a reasonable time period;

Respectfully submitted this the 13th day of January 2012.

/s/ Sondra Rodrigues
Sondra R. Rodrigues, Esq.
2 Penn Center Plaza, Suite 200
Philadelphia, PA 19102
215-271 - 0989

/s/ Craig M. Cooley
Craig M. Cooley, Esq.
Staff Attorney
Innocence Project
40 Worth Street, Suite 701
New York, New York 10013
212-364-5361

Signed and Date under Penalty of Perjury: January 13, 2012

Federal Habeas 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.
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. Andrew Swainson's Certification, November 19, 2008
46. *Commonwealth v. Andrew Swainson*, CP-51-CR-0431311-1988, Opinion Denying PCRA Relief, Filed May 14, 2010
47. *Commonwealth v. Andrew Swainson*, 1597 EDA 2010, Opinion Affirming Denial of PCRA Relief, Filed December 2, 2011
48. *Andrew Swainson v. Ben Varner, et al.*, Amended Federal Habeas Corpus Petition of Andrew Swainson, Filed December 19, 2000

49. *Andrew Swainson v. Ben Varner, et al.*, Memorandum Dismissing Habeas Petition, Filed February 19, 2002
50. *Commonwealth v. Andrew Swainson*, CP-51-CR-0431311-1988, Second PCRA Petition, Filed December 11, 2008
51. *Commonwealth v. Andrew Swainson*, CP-51-CR-0431311-1988, Memorandum of Law in Support of Second Petition For Post-Conviction Relief Pursuant to 42 Pa.C.S. § 9543, filed December 11, 2008
52. *Commonwealth v. Andrew Swainson*, CP-51-CR-0431311-1988, Reply to the Commonwealth's Letter Brief in Opposition to Petitioner's Second Petition For Post-Conviction Relief, Filed March 2010
53. *Commonwealth v. Andrew Swainson*, Case No. 1597 EDA 2010, Brief For Appellant, Filed April 01, 2011
54. *Commonwealth v. Andrew Swainson*, Case No. 1597 EDA 2010, Appellant's Reply Brief, Filed August 10, 2011

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ANDREW SWAINSON)	
Petitioner,)	
)	
v.)	Case Number: _____
)	
JEROME WALSH, WARDEN)	
Defendant)	
)	
)	

Certificate of Service

Undersigned counsel certify, under penalty of perjury, that they mailed via standard mail a true and accurate copy of Swainson's *Petition For Writ of Habeas Corpus* to the following parties on January 14, 2011:

PHILADELPHIA DISTRICT ATTORNEY'S OFFICE
CHIEF, FEDERAL LITIGATION
3 SOUTH PENN SQUARE
PHILADELPHIA, PA 19107

/s/ Craig M. Cooley
Craig M. Cooley

Date: January 14, 2012