

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA)

Respondent-Appellee,)

v.)

QUAWI SMITH)

Petitioner-Appellant.)

CP-51-CR-0406011-2004

The Honorable Peter F. Rogers

Second PCRA Petition and Petition for Writ of Habeas Corpus

1. Petitioner-Appellant, **Quawi Smith**, by and through his appointed counsel, **Craig M. Cooley**, submits his *Second PCRA Petition* and *Petition for Writ of Habeas Corpus*. Smith's request is made in good faith and premised on the following facts and points of authority.

INTRODUCTION

2. **Quawi Smith** ("Smith") stands convicted of shooting and killing Jermaine Daniels on **October 21, 2002** in front of the Chinese store near 58th and Belmar, despite the fact not a single person identified him as the shooter at trial. The Commonwealth's case, therefore, was based entirely on witnesses who made statements incriminating Smith while facing felony charges.
3. For instance, the Commonwealth presented **Kanard Jones**. In April 2003, Detective Timothy Basset attempted to interview Jones, but Jones refused to talk.¹ Jones, notably, was not incarcerated in April 2003. Jones, however, was arrested on drug charges on May 28, 2003 (CP-51-CR-1000131) and then again on June 29, 2003 (CP-51-CR-0808701-2003) and was incarcerated on **July 23, 2003** when he gave a statement to detectives implicating Smith as Jermaine Daniels's shooter.² Jones also identified Smith via a **single-photo show-up**.³ According to his statement, which he gave **while in custody for the drug charges** and after being **interrogated for 15 hours**,⁴ Jones witnessed Jermaine Daniels's shooting and this was how he identified Smith as the shooter.⁵

¹ NT, Trial, 3/28/2006, at 130.

² *Id.* at 25-32, 51-64.

³ *Id.* at 56-57; *see also* NT, Trial, 3/30/2006, at 70 (Detective Timothy Bass admitting to showing Jones a single photograph of Smith).

⁴ *Id.* at 67-68.

⁵ *Id.* at 52-54.

4. Jones did not handwrite his statement; rather, Detective Bass supposedly typed the statement *after* the interview and allegedly had Jones read and sign it. There's a signature on the statement, but Jones's first name is misspelled: his first name is spelled **K-A-N-N-A-R-D** on the statement, but the correct spelling is **K-A-N-A-R-D**.⁶ Likewise, the date of birth on the statement is **February 9, 1985**, but the correct date is **February 19, 1985**.⁷
5. At trial, Jones denied witnessing the shooting.⁸ He also denied signing the statement because he would not have misspelled his name or written the wrong date of birth.⁹ The Commonwealth, though, introduced the July 23, 2003 typewritten statement that Jones supposedly signed as **Commonwealth Exhibit C-1** and used it to impeach him.¹⁰
6. The Commonwealth also presented **Antoine Ford**. Ford, like Jones, gave a statement to police while he had drug charges pending against him.¹¹ According to Ford, on **December 9, 2003**, investigators accosted him in court after a pre-trial hearing for his pending drug charges and took him to Homicide and interrogated him.¹² After his interrogation, Detective Bass handwrote Ford's statement that Ford supposedly reviewed and signed.¹³ Like Jones, Ford said he witnessed the shooting, but unlike Jones, he could not identify Smith as the shooter; he did, however, describe the shooter generally.¹⁴
7. At trial, Ford said the first time he had ever seen Smith was there in the courtroom.¹⁵ Ford also said he could not recall what he told Detective Bass.¹⁶ Ford never identified Smith as the shooter. Like Jones, the Commonwealth impeached Ford with his December 9, 2003 statement (**Commonwealth's Exhibit C-12**).
8. The Commonwealth also presented **Dell Roberson**. Like Kanard Jones, Roberson gave a statement shortly after police arrested him and his co-defendant **Abdule Johnson** for possessing and distributing drugs. Police arrested Roberson (**CP-51-CR-1000142-2003**) on **July 16, 2003** and he gave a statement the very next day on **July 17, 2003** implicating Smith as Jermaine Daniels's shooter. In his statement, which the Commonwealth introduced as **Commonwealth Exhibit C-2**,¹⁷ Roberson said he saw Smith at a friend's house sometime after the murder and that Smith was "acting real weird" and was "real quiet."¹⁸ Roberson and his friend asked Smith what was wrong and Smith said he "just

⁶ NT, Trial, 3/28/2006, at 69.

⁷ *Id.* at 46.

⁸ *Id.* at 25-32.

⁹ *Id.* at 46, 47, 65, 69.

¹⁰ *Id.* at 45.

¹¹ NT, Trial, 3/30/2006, at 31.

¹² *Id.*

¹³ *Id.* at 15, 54.

¹⁴ *Id.* at 21-22.

¹⁵ *Id.* at 11, 28, 29, 30.

¹⁶ *Id.* at 18-26.

¹⁷ NT, 3/28/2006, at 131.

¹⁸ *Id.* at 136.

killed somebody on 59th Street” by shooting him in the head.¹⁹ Roberson’s statement also mentioned an incident sometime after Christmas of 2003 when Smith supposedly pulled a .357 on Roberson and threatened to kill him.²⁰ Lastly, Smith also mentioned a June 2003 shooting he witnessed where Smith supposedly shot five to seven times into **Shawna Lee-Gibbs’s** house and drove away.²¹

9. At trial, while Roberson admitted to reviewing and signing his July 17, 2003 statement, he said his entire statement was untrue. Roberson said police arrested him and **Abdule Johnson** on **July 16, 2003 (CP-51-CR-1000142-2003)**; the police also intended to arrest the mother of his child, **Shawna Lee-Gibbs**, but convinced them otherwise when he said he had information regarding Jermaine Daniel’s murder.²² As Roberson put it at trial: “[Gibbs] was really upset. She was crying a lot. I didn’t want her to get arrested. So, I said what I heard.”²³
10. On **February 11, 2004**, the Commonwealth, not surprisingly, dismissed the drug charges against Roberson, but not his co-defendant, **Abdule Johnson**; Johnson pled guilty to the drug charges on **July 8, 2005** and received a 3 to 6 year prison sentence (**CP-51-CR-1000141-2003**).
11. The Commonwealth also presented **Shawna Lee-Gibbs**, the **mother of Dell Roberson’s children** and **Smith’s aunt**.²⁴ On October 21, 2002, sometime before 9:00 p.m., Gibbs said she saw Smith at the Chinese store and spoke with him briefly.²⁵ Gibbs walked home shortly thereafter; about 10 to 15 minutes later, though, she heard gunshots from her bedroom and saw 3 to 4 men running from the area of the shooting; she could not identify the men.²⁶ After hearing the shots, Gibbs got into her car and drove to the Chinese store to check on Smith.²⁷ Gibbs did not see Smith at the scene; she left shortly thereafter because police began cordoning off the area.²⁸
12. Detective Timothy Bass, curiously, did not interview Gibbs until **July 24, 2003**—more than nine months after the shooting, but a **mere week after police arrested Dell Roberson and Abdule Johnson** for various drug charges.²⁹ Gibbs, in other words, did not communicate with the police between **October 21, 2002** and **July 23, 2003**;³⁰ shortly before her July 24, 2003 interview with Detective Bass, moreover, Gibbs said Detective Bass was “persistent” in wanting to talk with her regarding the shooting.³¹

¹⁹ *Id.*

²⁰ *Id.* at 144.

²¹ *Id.* at 145.

²² *Id.* at 147.

²³ *Id.*; *see also id.* at 157, 158.

²⁴ NT, Trial, 3/28/2006, at 80, 87.

²⁵ *Id.* at 86.

²⁶ *Id.* at 90.

²⁷ *Id.* at 91-92.

²⁸ *Id.* at 93-94.

²⁹ *Id.* at 97, 98, 102.

³⁰ *Id.* at 102.

³¹ *Id.* at 110.

13. In her July 24, 2003 statement, Gibbs said someone fired a bullet into her house in June 2003; she heard several shots, but said only one bullet entered her house; it lodged into the first floor ceiling.³² Although Gibbs had no idea who fired into her house,³³ her testimony paved the way for Dell Roberson's testimony that Smith was the one who shot multiple times at Gibbs's house in June 2003.³⁴
14. Lastly, **Julius Williams**, an eyewitness to the shooting, identified **Kwamin Lester** as the shooter on **October 22, 2002**—the day after the shooting.³⁵ Despite the identification, investigators did not investigate **Kwamin Lester**.³⁶ Moreover, Detective Timothy Bass re-interviewed Williams on **April 8, 2003** solely to have him reconsider his identification of Kwamin Lester; he did this by showing Williams a single photograph of Smith and asking him if Smith was the shooter.³⁷ Williams, not surprisingly, heeded Detective Bass's cue by recanting his identification of Kwamin Lester and identifying Smith as Jermaine Daniels's shooter.³⁸
15. The trial court found Smith guilty of first-degree murder and sentenced him to life without parole.

PROCEDURAL HISTORY

16. On **December 16, 2003** (MC-51-CR-1257441-2003), the Commonwealth charged Smith with capital murder for the **October 21, 2002** shooting death of **Jermaine Daniels**. The Commonwealth agreed not to seek the death penalty if Smith agreed to waive his jury trial right and be tried by the trial court.
17. At trial, **Terry Pugh** and **Gerald Ingram** represented Smith. **David Rudenstein** served as Smith's mitigation counsel and was prepared to assist in Smith's representation at trial, but the trial court barred Rudenstein from assisting Smith because the Commonwealth waived the death penalty.³⁹
18. On **March 26, 2006**, after the bench trial, the trial court found Smith guilty of first-degree murder and PIC. On **May 19, 2006**, the trial court imposed a life sentence for the murder count.
19. Smith timely appealed (1734 EDA 2006), but the Superior Court dismissed his appeal on **August 31, 2006**, because Smith's appellate counsel failed to file a docketing statement. Smith's counsel filed a motion to reinstate the appeal and attached the docketing statement to the motion. On **September 8, 2006**, the Superior Court reinstated Smith's appeal, and Smith filed a timely brief raising one issue:

³² *Id.* at 101-103, 113, 114, 115.

³³ *Id.* at 113.

³⁴ *Id.* at 145.

³⁵ NT, Trial, 3/30/2006, at 62-63, 66.

³⁶ *Id.* at 62, 64, 65.

³⁷ *Id.* at 67-68

³⁸ *Id.* at 69.

³⁹ NT, 3/28/2006, at 33-40.

- a. Did the lower court abuse its discretion in banishing [Smith's] counsel[,] who had been deeply involved with the case from its inception, who had prepared for cross-examination at trial, and who agreed to represent [Smith] at no cost when no countervailing interests outweighed [Smith's] right to choice of counsel.
20. On **March 27, 2009**, the Superior Court affirmed his conviction.
21. Smith did not file a *Petition for Allowance* to the Supreme Court, so his conviction became final on **April 27, 2009**. *See* 42 Pa. C.S. § 9545(b)(3); U.S. Sup. Ct. R. 13(1).
22. On **December 3, 2009**, Smith filed a timely *pro se* PCRA petition raising the following issues:
 - a. Trial counsel was ineffective for failing to challenge a suggestive and tainted identification by Kanard Jones.
 - b. Trial counsel was ineffective for failing to raise a weight of the evidence claim.
 - c. Trial counsel was ineffective for failing to impeach Julius Williams.
 - d. The Commonwealth violated its *Brady* duties by not disclosing evidence regarding Jermaine Daniels.
 - e. Trial counsel was ineffective for failing to adequately investigate his case and develop third-party guilt evidence regarding **Kwami Lester**—the individual Julius William initially identified as Jermaine Daniels's shooter.
 - f. Trial counsel was ineffective for not presenting an alibi defense.
 - g. Trial counsel was ineffective for failing to file a motion to recuse the Honorable Peter F. Rogers as trial judge.
23. Smith's mother, Donna Grundy, retained **Brian J. McMonagle** for \$10,000 to serve as Smith's initial-review PCRA attorney. McMonagle filed an amended PCRA petition on **October 9, 2012**, but his amended petition contained only three claims, one of which was previously litigated on direct appeal:
 - a. Smith received ineffective assistance of counsel because trial counsel never discussed or otherwise informed Smith of his right to testify at trial in his own defense and therefore did not knowingly and intelligently waive this critical constitutional right.
 - b. Smith received ineffective assistance of counsel because trial counsel failed to adequately investigate Julius Williams as a defense witness.

- c. The trial court constructively denied Smith his right to counsel when it barred one of his trial attorneys, David Rudenstein, from participating in Smith’s trial.
24. On **January 16, 2014**, the Court issued its 907 Notice to Smith and **McMonagle**, but neither Smith nor McMonagle filed objections to the Court’s 907 Notice.
 25. On **June 12, 2014**, the Court dismissed Smith’s petition without a hearing.
 26. On **July 7, 2014**, Smith filed a *pro se Notice of Appeal* with the Court (1892 EDA 2014).
 27. On **July 11, 2014**, undersigned counsel was appointed to serve as Smith’s PCRA appellate attorney.
 28. Based on his review of Smith’s case, counsel now files Smith’s second PCRA petition and writ of habeas corpus based on initial-review PCRA counsel’s ineffectiveness.

PCRA STATUTORY REQUIREMENTS

29. Smith must meet the following conditions to be eligible for PCRA relief. *See* 42 Pa. C.S. § 9543(a)(1)-(a)(4).
30. First, Smith must show he has been convicted of a crime under the laws of this Commonwealth and is serving a prison sentence. *See* 42 Pa. C.S. § 9543(a)(1). Smith stands convicted of first-degree murder and is serving a life sentence at SCI-Forest.
31. Second, Smith must present a cognizable claim under 42 Pa. C.S. § 9543(a)(2). Here, Smith alleges state and federal claims that: (1) undermine the truth-determining process; and (2) establish ineffective assistance of counsel. *See* 42 Pa. C.S. §§ 9543(a)(2)(i), 9543(a)(2)(ii); 9543(a)(2)(iii); 9543(a)(2)(iv). Smith’s state and federal claims are:
 - a. First, Brian J. McMonagle provided ineffective assistance of counsel violating Smith’s *federal* due process right to effective assistance of counsel for initial-review post-conviction counsel. U.S. Const. amends. V, VI, XIV.
 - b. Second, Brian J. McMonagle provided ineffective assistance of counsel violating Smith’s *state* rule-based right to effective assistance of counsel for initial-review post-conviction counsel. Pa. Const. art. 1, § 9.⁴⁰
32. Third, Smith must show his claims are not previously litigated or waived. *See* 42 Pa. C.S. §9543(a)(3). Smith’s claims are not previously litigated or waived for the following reasons:

⁴⁰ The Fourteenth Amendment provides in part, “nor shall any State deprive any person of life, liberty, or property, without due process of Law ...” U.S. Const. amend. XIV, § 1. Article 1, Section 9 of the Pennsylvania Constitution states in part, “In all criminal prosecutions the accused ... [cannot] be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land.” Pa. Const. art. 1, § 9. The Pennsylvania Supreme Court has interpreted Article 1, Section 9 as the functional equivalent of the federal Due Process Clause. *See Commonwealth v. Kratsas*, 764 A.2d 20, 27 n. 5 (Pa. 2001); *Commonwealth v. Snyder*, 713 A.2d 596, 600 (Pa. 1998).

- a. All of Smith’s claims focus on McMonagle’s ineffectiveness. Thus, Smith could not have raised McMonagle’s ineffectiveness while McMonagle represented him due to the ban on hybrid representation. *See Commonwealth v. Jette*, 23 A.3d 1032, 1042 (Pa. 2011).
 - b. Once Smith retained McMonagle, Smith could not file a *pro se* PCRA petition raising McMonagle’s ineffectiveness because any *pro se* pleading filed by Smith would have had no impact, as they would have been considered nullities. *See Commonwealth v. Reid*, 642 A.2d 453, 462 (Pa. 1994).
 - c. If Smith filed a second PCRA petition alleging McMonagle’s ineffectiveness, while his first PCRA petition was still pending, his second petition could not have been adjudicated. *See Commonwealth v. Lark*, 746 A.2d 585 (Pa. 2000); *Commonwealth v. Seay*, 814 A.2d 1240 (Pa. Super. 2003).
 - d. Smith is not trained in legal analysis and issue spotting like McMonagle. *See Halbert v. Michigan*, 545 U.S. 605, 617 (2005); *Douglas v. California*, 372 U.S. 353, 357-358 (1963). Thus, he cannot be expected to identify, plead, and argue meritorious ineffectiveness claims. Indeed, if this was the expectation, then Pa. R. Crim. P. 904(A) would be unnecessary. In other words, Smith cannot waive issues that he, himself, cannot spot due to his lack of education and legal training.
33. Fourth, Smith’s conviction became final on **April 27, 2009**. Smith filed the instant petition on **October 6, 2014**, well after the 1-year limitations period. Smith, therefore, must satisfy 42 Pa. C.S. § 9545(b)(1)(ii) and (b)(2).
- a. The new facts are as followed: McMonagle’s inadequate representation. *See infra* (discussing McMonagle’s ineffectiveness).
 - b. Once appointed to Smith’s case on July 11, 2014, counsel diligently reviewed Smith’s transcripts, case file, and pleadings and identified the abovementioned new facts, *i.e.*, McMonagle’s inadequate representation.
 - c. Counsel filed Smith’s *Second PCRA Petition* within sixty days of identifying McMonagle’s errors.

WRIT OF HABEAS CORPUS

34. While the writ of habeas corpus cannot be suspended, absent specific exceptions, *see* Pa. Const. Art. I, § 14 (“[T]he privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it.”); 42 Pa. C.S. § 6501 (same), the PCRA greatly limited its role as it relates to remedying constitutional violations relative to a petitioner’s conviction(s) or sentence(s). According to 42 Pa. C.S. § 9542:

.... The action established in this subchapter shall be the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose that exist when this subchapter takes effect, including habeas corpus and coram nobis.

35. Similarly, according to 42 Pa. C.S. § 6503(b), “Where a person is restrained by virtue of sentence after conviction for a criminal offense, the writ of habeas corpus shall not be available if a remedy may be had by post-conviction hearing proceedings *authorized by law*.” (emphasis added). In other words, “the PCRA subsumes the remedy of habeas corpus with respect to remedies offered under the PCRA and that any petition seeking relief under the PCRA must be filed within one year of final judgment.” *Commonwealth v. Peterkin*, 722 A.2d 638, 640 (Pa. 1998) (“the writ continues to exist only in cases in which there is no remedy under the PCRA.”); accord *Commonwealth v. Chester*, 733 A.2d 1242, 1250 (Pa. 1999) (“[T]he writ of habeas will not lie when other avenues of relief are available.”).
36. Here, if the Court finds Smith cannot pursue PCRA relief because he cannot satisfy Pa. C.S. § 9545(b)(1)(ii) and (b)(2), then he may use the habeas statute to present his initial-review post-conviction counsel ineffectiveness claims. See *Commonwealth v. Judge*, 916 A.2d 511, 518–521 (Pa. 2007) (since PCRA did not provide remedy for appellant’s claim regarding deportation from Canada, which essentially challenged “the continued vitality of his sentence,” claim could be raised in a petition for writ of habeas corpus); *Coady v. Vaughn*, 770 A.2d 287, 290–294 (Pa. 2001) (Castille, J., concurring) (explaining interrelationship of PCRA and traditional habeas corpus).
37. Regardless of whether Smith vindicates his right to effective advocacy via the PCRA or habeas corpus statute, the Commonwealth *must* afford him an opportunity to vindicate his right. This is so because Smith has a state-created *liberty interest* in effective advocacy during his initial-review post-conviction proceedings, see *infra*, that is protected by state and federal due process principles. *Swarthout v. Cooke*, 131 S. Ct. 859, 862 (2011). (“When... a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication[.]”).

CLAIMS FOR RELIEF

I. Initial-Review Post-Conviction Counsel Failed To Adequately Review the Entire Record and Raise Meritorious Ineffective Assistance of Trial Counsel and Appellate Counsel Claims Violating Smith’s State and Federal Due Process and Statutory Rights. U.S. Const. amends. V, VI, XIV, Pa. Const., art. 1, § 9

A. Rules and Case Law

1. Smith Had a State and Federal Due Process Right to a Fundamentally Fair PCRA Proceeding

38. The Fourteenth Amendment’s Due Process Clause provides that no State “shall... deprive any person of life, liberty, or property, without due process of Law[.]” U.S. Const. amend. XIV, § 1. Article 1, Section 9 of the Pennsylvania Constitution states in part, “In all criminal prosecutions the accused ... [cannot] be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land.” Pa. Const. art. 1, § 9. Article 1, Section 9 is the functional equivalent of the Federal Due Process Clause. *See Commonwealth v. Kratsas*, 764 A.2d 20, 27 n. 5 (Pa. 2001).
39. Here, due process requires post-conviction proceedings to be fundamentally fair. *See Pennsylvania v. Finley*, 481 U.S. 551, 556-557 (1987); *Evitts v. Lucey*, 469 U.S. 387, 401 (1985); *Commonwealth v. Haag*, 809 A.2d 271, 283 (Pa. 2002).⁴¹ In other words, “petitioners must be given the opportunity for the presentation of claims at a meaningful time and in a meaningful manner.” *Commonwealth v. Bennett*, 930 A.2d 1264, 1273 (Pa. 2007). Here, to fully develop and meaningfully present his trial and appellate counsel ineffectiveness claims and other claims, Smith needed an “effective” attorney. *See Martinez v. Ryan*, 132 S.Ct. 1309, 1317 (2012) (“To present a claim of ineffective assistance at trial in accordance with the State’s procedures, then, a prisoner likely needs an effective attorney.”).

2. Smith Has a Federal Due Process Right to Effective Assistance of Counsel During His Initial-Review Post-Conviction Proceedings

40. In *Coleman v. Thompson*, the U.S. Supreme Court said the general rule is that “there is no right to counsel in state collateral proceedings.” 501 U.S. 722, 755 (1991). The Supreme Court recognized, though, that there might be an exception to the general rule when “state

⁴¹While States have no constitutional obligation to provide post-conviction review, *see Pennsylvania v. Finley*, 481 U.S. at 557, if a State creates a comprehensive post-conviction process that is “an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,” *Griffin v. Illinois*, 351 U.S. 12, 18 (1956), the procedures used in adjudicating post-conviction petitions “must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.” *Evitts v. Lucey*, 469 US at 393. Here, the post-conviction process is an “integral part” of Pennsylvania’s legal system for adjudicating a defendant’s guilt and innocence because post-conviction represents the first time a defendant can challenge trial counsel’s decision-making and advocacy (or lack thereof). *See Commonwealth v. Holmes*, 79 A.3d 562, 583 (Pa. 2013) (re-affirming *Commonwealth v. Grant*, 813 A.2d 726, 738 (Pa. 2002), which holds that defendant may raise ineffectiveness claims only during PCRA proceedings).

collateral review is the first place a prisoner can present a challenge to his convictions.” *Id.*

41. Here, based on the PCRA and the Pennsylvania Supreme Court’s interpretation of it, Pennsylvania defendants are prohibited from raising trial counsel ineffectiveness claims until PCRA proceedings. *See Commonwealth v. Holmes*, 79 A.3d 562, 583 (Pa. 2013); *Commonwealth v. Grant*, 813 A.2d 726, 738 (Pa. 2002).⁴² Thus, because post-conviction represents the first time a defendant can litigate an entire set of claims, *i.e.*, trial counsel ineffectiveness claims, regarding the “bedrock principle in our justice system,” *Martinez v. Ryan*, 132 S.Ct. at 1317, the U.S. Supreme Court’s decisions in *Douglas v. California*, 372 U.S. 353 (1963) and *Halbert v. Michigan*, 545 U.S. 605 (2005) are controlling.
42. In *Douglas*, the U.S. Supreme Court held that an indigent defendant had a due process and equal protection right to appointed counsel in a first appeal as of right, 372 U.S. at 355-358, even when the appellate court was already required by state law to appoint counsel unless its independent investigation of the record indicated that “such appointment would be of no value to either the defendant or the court.” *Id.* at 354-355. In so holding, the Supreme Court emphasized the “benefit of counsel’s examination into the record, research of the law, and marshalling of arguments,” and the unfairness of providing that benefit only to wealthy defendants. *Id.* at 355-356, 358.
43. In *Halbert*, the defendant was convicted on a *nolo contendere* plea. He then requested appointed counsel to represent him in applying for leave to appeal, but the Michigan courts denied that request. 545 U.S. at 609. The Supreme Court, however, held that the Fourteenth Amendment required “the appointment of counsel for [Michigan] defendants, convicted on their pleas, who [sought] access to first-tier review”—even though such review was discretionary, rather than of right. *Id.* at 610. This holding was based on the Supreme Court’s conclusion that *Douglas* provided “the controlling instruction,” 545 U.S. at 616-617; and that conclusion in turn was based on two factors that correlated to the decisive considerations in both cases:
 - a. First, “in determining how to dispose of an application for leave to appeal, Michigan’s intermediate appellate court looks to the merits of the claims made in the application”; and
 - b. Second, “indigent defendants pursuing first-tier review [*i.e.*, their first available opportunity for review] in the Court of Appeals are generally ill equipped to represent themselves” (in part because they had not already had the benefit of counsel’s investigation, research, or briefing of relevant issues). *Id.* at 617, 618-622.

⁴² In *Commonwealth v. Bomar*, 826 A.2d 831 (Pa. 2003), the Pennsylvania Supreme Court recognized a limited exception to the *Grant* rule: where a defendant raises ineffectiveness claims before the trial court and the trial court creates a record and addresses those issues, an appellate court may address those claims on direct appeal.

44. In short, *Douglas* controls this case because in Pennsylvania PCRA proceedings effectively serve as the first appeal for ineffective-assistance-of-trial-counsel claims. In fact, the need for effective assistance of first-tier review counsel is even greater for ineffective-trial-counsel claims than for record-based “direct appeal” claims because the former typically depend on non-record evidence (such as testimony by trial counsel, or by fact or expert witnesses who were not called at trial) which a first-tier reviewing court cannot uncover on its own, and which usually is impossible for a convicted—and imprisoned—defendant to discover and present to the reviewing court. *See Martinez v. Ryan*, 132 S.Ct. at 1317-1318; *Massaro v. United States*, 538 U.S. 500, 505 (2003).
45. Because Smith had state and federal due process “right to counsel,” he also had a state and federal due process right to effective assistance of counsel. *See Evitts v. Lucey*, 469 U.S. at 396-397. Although *Martinez v. Ryan* did not recognize a due process right to effective post-conviction counsel because of the case’s procedural posture (*i.e.*, a federal habeas case), *Martinez* basically concluded what *Evitts v. Lucey* requires: “To present a claim of ineffective assistance at trial in accordance with the State’s procedures... a prisoner likely needs an effective attorney.” *Martinez v. Ryan*, 132 S.Ct. at 1317.

3. Smith Has a State Rule-Based Right to Effective Assistance of Initial-Review Post-Conviction Counsel; Smith, Therefore, Has a Liberty Interest in Receiving Effective Advocacy That is Protected By State and Federal Due Process Principles

46. Prior to 1966, defendants seeking post-conviction relief relied on common law writs such as *habeas corpus* and *coram nobis*. In 1966, the General Assembly passed the predecessor to the PCRA, the Post-Conviction Hearing Act (“PCHA”). That statute provided a statutory right to counsel for indigent petitioners who requested counsel. *See* 1966, January 25, P.L. (1965) 1580, no. 554, § 12. Shortly thereafter, in *Commonwealth v. Mitchell*, 235 A.2d 148 (Pa. 1967), the Supreme Court impliedly recognized that this right included the right to effective representation. *Id.* at 149 (“Counsel’s ability to frame the issues in a legally meaningful fashion insures the trial court that all relevant considerations will be brought to its attention.”).
47. Following the passage of the 1968 Pennsylvania Constitution, which conferred broad procedural rule-making powers to the Pennsylvania Supreme Court, the Supreme Court replaced the statutory right to collateral review counsel with a rule-based right to counsel. *See Commonwealth v. Adams*, 350 A.2d 820 (Pa. 1976). The Pennsylvania Supreme and Superior Courts consistently recognized that this right entitled petitioners to effective assistance of PCHA counsel. *See Commonwealth v. Albert*, 522 Pa. 331, 561 A.2d 736, 738 (Pa. 1989); *Commonwealth v. Carrier*, 431 A.2d 271 (Pa. 1981); *Commonwealth v. Sangricco*, 415 A.2d 65 (Pa. 1980); *Commonwealth v. Scott*, 366 A.2d 225 (Pa. 1976); *Commonwealth v. Fiero*, 341 A.2d 448 (Pa. 1975); *Commonwealth v. Davis*, 526 A.2d 440 (Pa. Super. 1987); *Commonwealth v. Ollie*, 450 A.2d 1026 (Pa. Super. 1982); *Commonwealth v. Hines*, 430 A.2d 291 (Pa. Super. 1981); *Commonwealth v. Zaborowski*, 423 A.2d 1023 (Pa. Super. 1980); *Commonwealth v. Irons*, 385 A.2d 1004 (Pa. Super. 1978); *Commonwealth v. King*, 384 A.2d 1314 (Pa. Super. 1978).

48. The rule-based right to counsel during initial-review post-conviction proceedings remained after the passage of the PCRA in 1988. Currently, that right is guaranteed by Pa.R.Crim.P. 904, which reads in relevant part: “[W]hen an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, the judge shall appoint counsel to represent the defendant on the defendant's first petition for post-conviction collateral relief.” Pa.R.Crim.P. 904(C). This right extends “throughout the post-conviction collateral proceedings, including any appeal from disposition of the petition for post-conviction collateral relief.” Pa.R.Crim.P. 904(F)(2). Again, Pennsylvania courts routinely recognized the right to effective PCRA counsel. *See Commonwealth v. Jones*, 815 A.2d 598 (Pa. 2002); *Commonwealth v. Albrecht*, 720 A.2d 693 (Pa. 1998); *Commonwealth v. Priovolos*, 715 A.2d 420 (Pa. 1998); *Commonwealth v. Blackwell*, 936 A.2d 497 (Pa. Super. 2007); *Commonwealth v. Perez*, 799 A.2d 848 (Pa. Super. 2002); *Commonwealth v. Powell*, 787 A.2d 1017 (Pa. Super. 2001); *Commonwealth v. Hampton*, 718 A.2d 1250 (Pa. Super. 1998).
49. Smith’s rule-based right to effective advocacy during his initial-review PCRA proceedings qualifies as a *liberty interest* under state and federal due process principles. This is significant because “[w]hen... a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication[.]” *Swarthout v. Cooke*, 131 S. Ct. at 862.

B. The Ineffectiveness Standard

50. To prevail on his PCRA counsel ineffectiveness claim, Smith must demonstrate McMonagle’s advocacy was deficient and his deficient performance prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The deficiency prong is “necessarily linked to the practice and expectations of the legal community: ‘The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (quoting *Strickland v. Washington*, 466 U.S. at 688). Thus, when a court reviews an IAC claim, “the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” *Strickland v. Washington*, 466 U.S. at 688. The prejudice prong requires showing a reasonable probability that, but for counsel’s errors, the proceeding’s results would have been different. A reasonable probability, in other words, “is a probability sufficient to undermine confidence in the outcome.” *Strickland v. Washington*, 466 U.S. at 694.

C. Post-Conviction Standards

1. Post-Conviction Investigation

51. Once appointed or retained, post-conviction counsel must promptly began an independent review and investigation of the client’s case, including obtaining information, research, and discovery necessary to file or amend pleadings and to prepare the case for an evidentiary hearing.

52. Counsel must conduct a thorough and independent investigation into the validity of the underlying criminal trial, sentencing, and, when applicable, appellate proceedings. Counsel's investigation must examine the entire criminal case file for evidence of a substantial denial of state or federal constitutional or statutory rights in the trial level or appellate proceedings.
53. Counsel must seek the assistance of qualified investigators and expert witnesses where necessary for the investigation, preparation, and presentation of the case. To do so, counsel must be knowledgeable of the post-conviction statute and case law to know if either provides funding for investigators and experts.
54. Counsel's investigation must include a thorough review of all available transcripts of the criminal proceedings before he or she was appointed or retained. Counsel must obtain, review, and transcribe any necessary portions of the proceedings that were not already transcribed.
55. Counsel must obtain and review other relevant records and documents, including the complete files of trial and appellate counsel, and, where appropriate, files and records of investigators and experts who worked with trial counsel, the prosecution's case file, and the files of those law enforcement agencies who investigated the case and who assisted the prosecution with its case at trial.
56. Counsel should interview trial and, where applicable, appellate counsel in the criminal case.

2. Asserting Legal Claims

57. Counsel should assert all arguably available claims mindful that legal challenges not raised in a first post-conviction petition will likely be forfeited for purposes of any subsequent state post-conviction or federal habeas proceedings.
58. Counsel should ensure all viable claims are asserted in the post-conviction petition.
59. Counsel should raise every claim in explicit state and federal constitutional terms and including supporting facts to comply with federal habeas exhaustion principles.

D. McMonagle's Performance

1. Deficient Performance

60. McMonagle performed ineffectively by failing to plead the following trial and appellate counsel ineffectiveness claims in his amended PCRA petition:
 - a. Trial counsel was ineffective for failing to file a motion to suppress Kanard Jones's out-of-court photographic show-up identification of Smith.

- b. Trial counsel was ineffective for failing to object at trial to the admission of Kanard Jones's out-of-court photographic show-up identification of Smith
 - c. Trial counsel was ineffective for failing to file a motion to suppress Julius Williams's April 2003 out-of-court photographic show-up identification of Smith.
 - d. Trial counsel was ineffective for failing to object at trial to the admission of Julius Williams's out-of-court photographic show-up identification of Smith
 - e. Trial counsel was ineffective for failing to adequately review Shawwna Lee-Gibbs's and Dell Roberson's police statements and moving to prohibit any mention of the shooting that occurred at Gibbs's house in June 2003.
 - f. Trial counsel was ineffective for failing to object (on relevancy and prejudice grounds) to Shawwna Lee-Gibbs's and Dell Roberson's testimony regarding a shooting that occurred at Gibbs's house in June 2003 and for failing to move for a mistrial.
 - g. Trial counsel was ineffective for failing to investigate Dell Roberson's criminal history and learning about his July 16, 2003 drug arrest (CP-51-CR-1000142-2003; MC-51-CR-0713171-2003) that occurred only a day before he gave his July 17, 2003 statement to Detective Timothy Bass implicating Smith as Jermaine Daniels's shooter.
 - h. Trial counsel was ineffective for failing to investigate Kanard Jones's criminal history and learning about his June 29, 2003 drug arrest (CP-51-CR-0808701-2003; MC-51-CR-0638591-2003) that occurred only weeks before he gave his July 22, 2003 statement to Detective Timothy Bass implicating Smith as Jermaine Daniels's shooter.
 - i. Trial counsel was ineffective for not interviewing or attempting to interview Dell Roberson, Kanard Jones, Julius Williams, or Abdule Johnson before trial.
 - j. Appellate counsel failed to raise a judicial bias claim against the trial court.
 - k. Appellate counsel failed to raise due process/suggestive identification claims regarding Kanard Jones's and Julius Williams out-of-court photographic show-up identification of Smith as Jermaine Daniels's shooter.
61. **McMonagle, who was paid \$10,000 by Donna Gundy, Smith's mother,** was ineffective for:
- a. Failing to hire a handwriting expert to a handwriting expert to examine the signature on Commonwealth's Exhibit C-1—the statement Kanard Jones alleged

signed implicating Smith as the shooter. Or, in the alternative, for failing to request funds to hire a handwriting expert.

- b. Failing to investigate Dell Roberson's trial testimony regarding his 2003 drug arrest by researching the Philadelphia Common Pleas Court and Municipal Court Dockets and identifying a drug arrest on July 16, 2003 that occurred a day before Roberson's July 17, 2003 statement to Detective Timothy Bass implicating Smith as Jermaine Daniels's shooter (CP-51-1000142-2003; MC-51-CR-0713171-2003).
- c. Failing to hire an investigator to locate and interview Dell Roberson, Abdule Johnson, Julius Williams, Kanard Jones, and Shawna Lee-Gibbs Or, in the alternative, failing to request investigative funds to interview these people.
- d. Failing to obtain affidavits from Smith's trial attorneys, Terry Pugh, Gerald Ingram, and David Rudenstein, attesting to the fact that none of them informed Smith of his right to testify in his own defense, and by attaching these affidavits to Smith's amended PCRA petition along with their signed certifications as required by Pa. R. Crim. P. 902(A)(15) and 42 Pa. C.S. § 9545(d)(1).
- e. Failing to object to the PCRA court's 907 notice.
- f. Failing to inform Smith he had a right to object, *pro se*, to the PCRA court's 907 notice.
- g. Failing to inform Smith that, if he (Smith) wished to challenge his (McMonagle's) advocacy, he (Smith) had to do so by raising McMonagle's ineffectiveness in his objections to the 907 Notice, and that the failure not to do so would jeopardize his ability to vindicate his state and federal right to effective assistance of initial-review PCRA counsel.
- h. Failing to obtain and review the pre-trial discovery.
- i. Failing to request the following discovery from the Commonwealth:
 - i. All reports, memos, emails, or notes regarding Julian Williams's April 8, 2003 statement to Detective Timothy Bass where Williams recanted his October 22, 2002 identification of Kwamin Lester and identified Smith as Jermaine Daniels's shooter.
 - ii. The photo or photo array Detective Timothy Bass presented to Julius Williams on April 8, 2003 when he supposedly identified Smith as Jermaine Daniels's shooter.
 - iii. All investigative, incident, arrest, and post-arrest reports regarding Dell Roberson's July 16, 2003 drug arrest:

1. Police Incident Report: 0312055059
 2. Arresting Officer: Ralph Domenic
 3. *Commonwealth v. Dell Roberson*, CP-51-CR-1000142-2003; MC-51-CR-0713171-2003
 4. *Commonwealth v. Abdule Johnson*, CP-51-CR-1000141-2003; MC-51-CR-0713171-2003
- iv. All investigative, incident, arrest, and post-arrest reports regarding Kanard Jones's June 28, 2003 drug arrest:
1. Police Incident Report: 0312049537
 2. Arresting Officer: Patrick Banning
 3. *Commonwealth v. Kanard Jones*, CP-51-CR-0808701-2003; MC-51-CR-0638591-2003
- v. The transcripts of the July 8, 2005 guilty plea colloquy in *Commonwealth v. Abdule Johnson*, CP-51-CR-1000141-2003; MC-51-CR-0713171-2003.
- j. All reports, memos, emails, or notes regarding Shawna Lee-Gibbs's July 24, 2003 statement to Detective Timothy Bass.
- k. All reports (*e.g.*, investigative, incident, arrest, and post-arrest reports), memos, email, or notes regarding the Philadelphia Police Department's efforts to locate and interview Kwamin Lester after Julius Williams identified him as Jermaine Daniels's shooter on October 22, 2002.

2. Prejudice

62. Post-conviction litigation is about developing new facts via investigation or forensic examination. Here, despite being paid \$10,000, McMonagle conducted absolutely no investigation and failed to develop a single new fact relating to Smith's state and federal claims. Thus, McMonagle's deficient performance prejudiced Smith because it prevented Smith from developing new facts to plead and prove his state and federal claims. Only by conducting the abovementioned investigation will current counsel truly know what facts are available to plead and prove Smith's state and federal claims. Consequently, the inability to do so at this point represents *per se* prejudice because Smith must now file a second PCRA petition in order to develop the very facts that should have been developed while he litigated his first PCRA petition.

EXPERT AND INVESTIGATIVE FUNDING

A. Expert Funding

63. The Court has discretion whether to allocate public funds to Smith so he can hire a handwriting expert to evaluate the signature on Commonwealth's Exhibit C-1 and determine whether Kanard Jones actually signed the statement. *See Commonwealth v. Gelormo*, 475 A.2d 765, 768 (Pa. Super. 1984). To warrant such funds, Smith must demonstrate that the expert is "reasonably necessary" to prepare or amend his PCRA petition. *Commonwealth v. Bridges*, 886 A.2d 1127, 1131 (Pa. 2005); *accord Commonwealth v. Howard*, 719 A.2d 233, 241-242 (1998); *Commonwealth v. Bell*, 706 A.2d 855, 862 (Pa. Super. 1998). In other words, Smith must identify a "particularized need" for the expert that relates to "a colorable issue" presented in his PCRA petition. *Commonwealth v. Howard*, 719 A.2d 241-242.
64. Here, after fifteen hours of interrogation by Detective Timothy Bass and others,⁴³ Detective Bass handwrote a statement that alleged summarized Kanard Jones's knowledge of Jermaine Daniel's shooting death. In the statement, Jones identified Smith as Jermaine Daniel's shooter. After typing the statement, Detective Bass allegedly asked Jones to read and review the statement, and if correctly summarized his statement, to sign his name and date of birth. The handwritten statement introduced by the Commonwealth at trial (Commonwealth's Ex. C-1) had a signature and date of birth; the signature and date of birth, however, are wrong; Jones's last name is spelled **K-A-N-N-A-R-D** on the statement, but this is incorrect; the correct spelling is K-A-N-A-R-D.⁴⁴ Likewise, the date of birth on the statement is **February 9, 1985**, but this is wrong; the correct date is February 19, 1985.⁴⁵ At trial, Jones not only denied making the comments summarized in the statement, he denied signing and dating the statement.⁴⁶ The Commonwealth used Jones's statement (Commonwealth's Ex. C-1) for the sole purpose of introducing Jones's alleged out-of-court photographic identification of Smith.
65. Jones represented the only Commonwealth witness who identified Smith as Jermaine Daniels's shooter. Thus, it was imperative to thoroughly vet Jones's statement and identification and the circumstances leading to them. Here, if Jones did not, in fact, sign and date the statement, then someone forged his name; if someone forged his name, then a fact-finder could easily conclude the statement's content is partially or completely fabricated; if partially or completely fabricated, the fact-finder could easily believe Jones did not, in fact, identify Smith as Jermaine Daniels's shooter. Moreover, based on this evidence, the fact-finder could possibly find other statements partially or completely fabricated by the detectives.
66. In short, a handwriting expert has the potential to substantially undermine the Commonwealth's case.

⁴³ NT, Trial, 3/28/2006, at 67-68.

⁴⁴ *Id.* at 69.

⁴⁵ *Id.* at 46.

⁴⁶ *Id.* at 46, 47, 65, 69.

B. Investigative Funding

67. It is in the trial court's sound discretion as to whether it will appoint a PCRA petitioner funds to hire an investigator. *See Commonwealth v. Gelormo*, 475 A.2d 765, 768 (Pa. Super. 1984). To warrant such funds, the petitioner must demonstrate that the investigative assistance is "reasonably necessary" to prepare or amend his PCRA petition. *Commonwealth v. Bridges*, 886 A.2d 1127, 1131 (Pa. 2005); *accord Commonwealth v. Howard*, 553 Pa. 266, 719 A.2d 233, 241-42 (1998); *Commonwealth v. Bell*, 706 A.2d 855, 862 (Pa. Super. 1998). In other words, the PCRA petitioner must identify a "particularized need" for the investigative assistance that relates to "a colorable issue" presented in his PCRA petition. *Commonwealth v. Howard*, 719 A.2d 241-242.
68. As the abovementioned facts demonstrate, a qualified PCRA investigator is "reasonably necessary" to locate and interview **Julius Williams, Kanard Jones, Dell Roberson, Abdule Johnson, and Shawna Lee-Gibbs**. In regards to Williams, Jones, Roberson, and Gibbs, the sequences of events are such that that Smith has a good-faith belief that each witness was coerced or threatened by Detective Bass to implicate Smith as the shooter. *Cf. Commonwealth v. Medina*, 92 A.3d 1210 (Pa. Super. 2014) (*en banc*) (detectives threats to Commonwealth's key witnesses constituted newly-discovered evidence). Interviewing Johnson, on the other hand, can produce evidence corroborating Roberson's trial testimony, i.e., he falsely told the police he knew information about Jermaine Daniels's murder with the hopes of convincing the police not to arrest Shawna Lee-Gibbs.

DISCOVERY

69. Rule 902(E)(1) requires Smith to demonstrate "exceptional circumstances" before receiving discovery. The General Assembly did not define "exceptional circumstances," so the Court must evaluate this standard on a case-by-case basis. *See Commonwealth v. Frey*, 41 A.3d 605, 611 (Pa. Super. 2012). Under Rule 902(E)(1), Smith must "establish... specific ground[s] that... warrant" the requested discovery. *Commonwealth v. Williams*, 732 A.2d 1167, 1175 (Pa. 1999). In other words, his discovery request "must be accompanied by an explanation why the exculpatory information was unavailable to prior counsel and must identify specific documents or items that were not disclosed pre-trial or during the trial proceedings." *Commonwealth v. Williams*, 86 A.3d 771, 789 (2014). Lastly, if the documents requested by Smith "may arguably support" his ineffectiveness claims, he is entitled to discovery. *Commonwealth v. Frey*, 41 A.3d at 613 (granting PCRA discovery where the requested material "may" have "arguably supported" the petitioner's PCRA claims).
70. There are exceptional circumstances for the requested discovery:
- a. All reports, memos, emails, or notes regarding Julian Williams's April 8, 2003 statement to Detective Timothy Bass where Williams recanted his October 22,

2002 identification of Kwamin Lester and identified Smith as Jermaine Daniels's shooter.

- b. The photo or photo array Detective Timothy Bass presented to Julius Williams on April 8, 2003 when he supposedly identified Smith as Jermaine Daniels's shooter.
- c. All investigative, incident, arrest, and post-arrest reports regarding Dell Roberson's July 16, 2003 drug arrest:
 - i. Police Incident Report: 0312055059
 - ii. Arresting Officer: Ralph Domenic
 - iii. *Commonwealth v. Dell Roberson*, CP-51-CR-1000142-2003; MC-51-CR-0713171-2003
 - iv. *Commonwealth v. Abdule Johnson*, CP-51-CR-1000141-2003; MC-51-CR-0713171-2003
- d. All investigative, incident, arrest, and post-arrest reports regarding Kanard Jones's June 28, 2003 drug arrest:
 - i. Police Incident Report: 0312049537
 - ii. Arresting Officer: Patrick Banning
 - iii. *Commonwealth v. Kanard Jones*, CP-51-CR-0808701-2003; MC-51-CR-0638591-2003
- e. The transcripts of the July 8, 2005 guilty plea colloquy in *Commonwealth v. Abdule Johnson*, CP-51-CR-1000141-2003; MC-51-CR-0713171-2003.
- f. All reports, memos, emails, or notes regarding Shawna Lee-Gibbs's July 24, 2003 statement to Detective Timothy Bass.
- g. All reports (*e.g.*, investigative, incident, arrest, and post-arrest reports), memos, email, or notes regarding the Philadelphia Police Department's efforts to locate and interview Kwamin Lester after Julius Williams identified him as Jermaine Daniels's shooter on October 22, 2002.

PRAYER FOR RELIEF

71. **WHEREFORE**, Smith requests the following relief:

- a. A hearing on his discovery request and investigative funds request, and expert funds request.
- b. An order granting the requested discovery pursuant to Pa. R. Crim. P. 902(E).
- c. An order granting reasonable investigative funds.
- d. An order granting reasonable expert funds.
- e. The right to amend his PCRA petition, *see* Pa. R. Crim. P. 905(A), once Smith obtains and reviews the requested discovery.
- f. The right to seek additional discovery if the new facts are developed via investigation or discovery.
- g. The right to seek additional funding if, after reviewing the requested discovery and conducting additional investigation, counsel identifies additional “material” witnesses.
- h. And any other relief the Court deems necessary to protect and vindicate Bueno’s state and federal constitutional rights during his initial-review PCRA proceedings.

Respectfully submitted this the **6th day of October, 2014**.

/s/Craig M. Cooley
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Certificate of Service

On **October 6, 2014**, counsel served the foregoing PCRA petition on the Commonwealth by e-filing the petition with Philadelphia's Electronic Filing System:

**Robin Godfrey
Assistant District Attorney
Post-Conviction Relief Act (PCRA) Unit
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/s/Craig M. Cooley