IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	
Respondent,	)	
v.	)	**CP-02-CR-0017707-2003**
AJAMU RASHEEN LUNSFORD	)	
Defendant-Petitioner	)	

Amended PCRA Petition

1. Pursuant to Pa. R. Crim. P., 905(A), petitioner, Ajamu R. Lunsford, by and through appointed counsel, Craig M. Cooley, files his *Amended PCRA Petition*. Lunsford's amended petition is presented in good faith and based on the following facts and points of authorities.

INTRODUCTION

2. Lunsford stands convicted of aggravated assault, VUFA, and two REAP counts; his convictions are premised solely on Darryl Terry's and Jassenia Caraballo's out-of-court photographic identifications made six days after the shooting that prompted this prosecution. Lunsford claimed his innocence when arrested, at trial, at sentencing, and continues to do so today.

3. Lunsford's innocence claim is not unreasonable because eyewitness testimony is inherently unreliable and the leading cause of wrongful convictions. Indeed, nearly 75% of the three-hundred plus DNA exonerations involve at least one misidentification.[1] The Court acknowledged this unreliability before issuing its verdict.[2]

4. Prior to and at trial, Lunsford had a Sixth Amendment right to effective assistance of counsel; he did not receive this right for the following reasons:

   a. First, a primary reason why eyewitness evidence has played a prominent role in so many wrongful convictions is the suggestive nature of many line-up and photo

[1] http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited March 4, 2014).
[2] NT, Second Trial, 09/19/2007, at 152-156.

array procedures. To protect against unduly suggestive photo array procedures, however, trial counsel can request a suppression hearing under state, *see* Pa. R. Crim. P. 581, or federal law, *see Neil v. Biggers*, 409 US 188 (1972). Here, despite the fact there was ample evidence regarding the suggestiveness and unreliability of the photo array and photographic identifications, trial counsel did not request a suppression hearing, guaranteeing the fact-finder would learn of and be able to consider these unreliable identifications.

b. Second, in eyewitness cases, "the only duty" of the fact-finder "will often be to assess the reliability of [the eyewitness] evidence." *Watkins v. Sowders*, 449 U.S. 341, 347 (1981). To ensure the fact-finder adequately assesses the identification's reliability, however, requires trial counsel to develop and present all evidence affecting the reliability of not only the identification, but also the credibility of the individual making the identification. Here, despite the fact there was readily available evidence to undermine the reliability of both identifications and both witnesses' credibility, trial counsel either failed to develop this evidence, or developed it, but failed to present it to the fact-finder once developed.

5. Trial counsel's advocacy fell below professional norms and prejudiced Lunsford. This is evident from the Court's comments prior to issuing its verdict, where it conceded that Darryl and Caraballo presented with serious credibility issues: "There are some serious credibility questions presented by this evidence."[3] Thus, had trial counsel developed and presented all the readily available evidence regarding Darryl's and Caraballo's identifications and credibility, there is a reasonable probability the Court would have acquitted Lunsford of all charges.

6. Thus, Lunsford is entitled to relief in the form of a new trial where he can present all relevant evidence regarding Darryl's and Caraballo's identifications and credibility.

SUMMARY OF FACTS

A. The Shooting

7. On June 5, 2003, sometime after 9 p.m., Darryl Terry, Sr. ("Darryl") was shot three times in the 900 block of Woodlow Street near the Greenway and Cherry Court Apartments.[4]

8. Darryl owned a food truck that sold food and soft drinks to the Woodlow Street community. He parked and operated his food truck on Woodlow Street and had done so for several years.[5]

9. Shortly before 9 p.m., Jassenia Caraballo ("Caraballo"), Darryl's fiancé, allegedly drove to the food truck to close it for the night. When she pulled into the Greenway

[3] NT, Second Trial, 09/19/2007, at 154.
[4] NT, Second Trial, 09/17/2007, at 7.
[5] NT, Second Trial, 09/17/2007, at 32.

Apartments parking lot, she parked near the food truck. An employee was inside the food truck when she arrived.[6] When she parked, she said a man she had never seen before supposedly hollered at her from across the parking lot saying he knew her. The man then supposedly walked to her SUV, stood by the driver's side door, and asked her for a kiss. Caraballo said when she laughed and blew him off, the man walked away.[7] The brief encounter was supposedly so upsetting she called Darryl, who was at home with his two children–Darryl Jr. and Davon. Darryl told her to pick him up so he could confront the man.[8]

10. When Caraballo picked up Darryl and the kids, Darryl immediately drove back the Greenway Apartments. Carraballo supposedly spotted the man standing amongst a group of people in the Cherry Court parking lot–the parking lot directly across the street from Darryl's food truck.[9] There were forty to fifty people in the Cherry parking lot when Darryl sped into the parking lot, hurriedly parked his SUV, opened the driver's side door, and exited a few feet before confronting the man.[10]

11. The man angrily denied saying anything to Caraballo.[11] Feeling threatened and concerned about his children's safety, Darryl walked away, toward his truck, but as he was about to re-enter his truck, the man pulled a gun and fired several times, hitting him three times and his SUV twice.[12]

12. The shooter, like everyone else, fled. Darryl, Caraballo, and Darryl Jr. all said the shooter fled in a car, but each described a different car.[13]

13. Once shot, Darryl ran across the street to a light pole. When Caraballo ran to his side, she tried calling 911, but was too disoriented and frantic.[14] Instead, Shayisha Woods, a resident of the community, called emergency personnel who arrived shortly thereafter.[15]

14. Darryl survived the shooting, but spent fourteen days in Allegheny General Hospital (AGH).

[6] NT, First Trial, 07/19/2006, at 12.
[7] NT, Second Trial, 09/17/2007, at 35-37.
[8] NT, Second Trial, 09/17/2007, at 38-39.
[9] NT, Second Trial, 09/17/2007, at 39; NT, Second Trial, 09/18/2007, at 40.
[10] NT, First Trial, 07/19/2006, at 83; NT, Second Trial, 09/17/2007, at 52, 53; NT, Second Trial, 09/18/2007, at 38.
[11] NT, Second Trial, 09/17/2007, at 43; NT, Second Trial, 09/18/2007, at 43, 45.
[12]NT, Second Trial, 09/17/2007, at 43-44; NT, Second Trial, 09/18/2007, at 45-46.
[13] *See infra*, ¶¶ 89 (a-f).
[14] NT, First Trial, 07/19/2006, at 25-26; NT, Second Trial, 09/17/2007, at 47.
[15] NT, First Trial, 07/19/2006, at 26; NT, Second Trial, 09/17/2007, at 47.

B. The Investigation and Identifications

15. Despite the fact forty to fifty people witnessed the shooting, police interviewed only two witnesses: **Caraballo** and **Darryl Jr**.[16] Moreover, there are no reports indicating the police tried to interview witnesses, but the witnesses refused to talk.

    a. The police, remarkably, failed to even interview Darryl.[17]

    b. Police interviewed **Shayisha Woods**,[18] but Woods only witnessed two men arguing in the Cherry Court parking lot shortly before the shooting; she did *not* witness the shooting.[19]

    c. Furthermore, someone was working in the food truck when the first incident between Caraballo and the man supposedly occurred, as well as when the shooting occurred. We know this because Caraballo said so at trial and Woods said the reason she did not see the shooting was because she was ordering food from the food truck at the time of the shooting.[20] Investigators, however, never interviewed the worker to determine if Caraballo's version of events was true.

    d. Additionally, during her police interview, Caraballo said the people in the parking lot who witnessed the shooting told her the shooter's name was Jamu.[21] The police, however, never interviewed any of the witnesses who allegedly implicated Jamu.

16. When the police interviewed Caraballo and 11-year-old Darryl Jr. after the shooting, their descriptions of the shooter did not match.[22]

17. Based on the non-interviewed witnesses' hearsay statements to Caraballo implicating a man named Jamu, the police zeroed in on **Amaju Lunsford**. On June 11, 2003, six days after the shooting, Detective Canofari and Hitchings visited AGH and supposedly

[16] Exs. 1-3. Of course, this is premised on the assumption the Commonwealth disclosed every investigative report and/or witness statement collected the night of the shooting or during the post-shooting investigation. To be honest, two witness statements from an attempted murder investigation seems awful low, especially when there were so many people in the parking lot at the time of the shooting. Tellingly, at Lunsford's first trial, Detective Canofari said he and Detective Hitchings "spoke with a couple people [at the Cherry Court parking lot] concerning the incident." NT, First Trial, 07/20/2006, at 122. He then said, "Other detectives went to Allegheny General Hospital to speak with family members. Detective Williams went over and I believe Detective Braddock was there." *Id*. The only statements disclosed to trial counsel were those of **Caraballo, Darryl Terry, Jr.,** and **Woods**. Caraballo and Terry, Jr. are family members presumably interviewed by Detectives Williams and Braddock; that leaves Woods who was interviewed at the Cherry Court parking lot. According to Detective Canofari's testimony, however, Woods cannot be the only person interviewed at the Cherry Court parking lot because he said they (Canofari and Hitchings) interviewed a "couple people."

[17] NT, Second Trial, 09/17/2007, at 26-27.

[18] Ex. 10.

[19] NT, First Trial, 07/19/2006, at 86; NT, Second Trial, 09/18/2007, at 24.

[20] NT, First Trial, 07/19/2006, at 79.

[21] Exs. 1-2.

[22] *See infra*, ¶¶ 89 (a-f).

showed a six-man photo array to Darryl and Carraballo that included Lunsford's photo. Darryl and Carraballo supposedly picked photo #3–**Lunsford's photo**–and initialed it.[23]

18. Based on Darryl's and Caraballo's photographic identifications, the police issued an arrest warrant for Lunsford; he was ultimately arrested in October 2003.

19. At the November 25, 2003 preliminary hearing, Darryl testified under oath and for the first time gave his version of events regarding the shooting and the alleged six-man photo array.

    a. In terms of describing the shooter, his description of the shooter and his getaway car did not match Caraballo's and Darryl Jr.'s descriptions.[24]

    b. In terms of the alleged photo array, Darryl admitted detectives did not show him an array of photos, but instead showed him only two photos of the same man–Lunsford :

> Mr. Fenner: Tell me the number of photographs in the photo array that you saw.
>
> [Objection made, but overruled]
>
> Mr. Fenner: Two sets of how many each?
>
> Darryl: I just remember seeing two photos. I don't remember how many sets were involved. I just remember two photos.
>
> Mr. Fenner: Two photos of the same guy?
>
> Darryl: Yes.[25]

20. Despite the significant inconsistencies between Darryl, Caraballo, and Darryl Jr., and Darryl's statement regarding the photographic show-up, Lunsford was held over for attempted murder, aggravated assault, VUFA, and REAP charges.[26]

21. Once in custody, the police never had Darryl or Caraballo view a live line-up that included Lunsford.

[23] Ex. 4.
[24] *See infra*, ¶¶ 89 (a-f).
[25] NT, Prelim. Hrg., 11/25/2003, at 15. The preliminary hearing transcripts are attached hereto as Exhibit 5.
[26] NT, Preliminary Hrg., 11/25/2003, at 15-17.

C. First Trial

22. Lunsford went to trial in July 2006. Patrick Thomassey represented him. Lunsford waived his jury trial right and chose to be tried by the Honorable David Cashman.

23. Despite the significant discrepancies between Darryl's, Carraballo's, and Darryl Jr.'s descriptions of the shooter, and Darryl's preliminary hearing testimony, Thomassey did not file a motion to suppress their out-of-court photographic identifications.

24. The Commonwealth premised its case on Darryl's and Carraballo's out-of-court photographic identifications, as well as Darryl Jr.'s in-court identification. Their testimony, though, revealed the significant discrepancies regarding their descriptions of the shooter.[27]

25. The Commonwealth:

    a. Presented no witnesses or evidence to corroborate Carraballo's version of events that ultimately prompted her to call Darryl.

    b. Presented no witnesses or evidence connecting the weapon used to shoot Darryl to Lunsford.

    c. Presented no witnesses or evidence linking Lunsford to the getaway vehicle.

    d. Presented no witnesses who identified Lunsford as the shooter, other than Darryl and Caraballo.

26. Thomassey presented Tia Martin as a quasi-alibi witness.

    a. On the evening of June 5, 2003, Martin (an MSW social worker with Children's Hospital), received a call from her (then) boyfriend Andre Cain, asking to pick him up at the Cherry Court apartments.[28] Cain was with Lunsford at a cookout in the Cherry Court parking lot.[29]

    b. Martin could not recall the exact time she arrived at the Cherry Court parking lot, but when she did, she parked near the front entrance.[30] Moments after parking, an SUV pulled into the parking lot,[31] stopped abruptly and parked "almost

[27] *See infra*, ¶¶ 89 (a-f).
[28] NT, First Trial, 07/20/2006, at 143.
[29] NT, First Trial, 07/20/2006, at 144.
[30] NT, First Trial, 07/20/2006, at 148.
[31] NT, First Trial, 07/20/2006, at 164.

sideways."[32] A man exited the SUV "and ran into the middle of the crowd" and began "arguing with somebody."[33] Martin did not know the content of their argument, but said both men yelled at one another.[34]

c. When Lunsford and Cain approached Martin's car immediately thereafter, Lunsford suggested they leave because something was going to happen.[35]

d. Martin said Lunsford had on a white shirt, blue jeans, and boots,[36] which differed with the Darryl's, Caraballo's, and Darryl Jr.'s descriptions.[37]

e. Martin and Cain got into her car and drove down (or south on) Woodlow Street, while Lunsford walked in the opposite direction, up (or north on) Woodlow Street away from the men arguing.[38] Shortly after exiting the Cherry Court parking lot, she heard three to four gun shots.[39] When she heard the gun shots, she turned and saw Lunsford walking north on Woodlow Street.[40]

f. Martin did not see Lunsford arguing with anyone in the parking lot and said he was not the shooter.[41]

27. Thomassey did not present Andre Cain to corroborate Tia Martin's testimony.

28. After Martin testified, Lunsford took the stand, but shortly into his testimony, Judge Cashman declared a mistrial trial because Lunsford's wife allegedly made a derogatory comment to Darryl in the courtroom.[42]

D. Second Trial

29. In September 2007, the Commonwealth retried Lunsford. Thomassey represented Lunsford. Lunsford waived his right to a jury trial, choosing instead to be tried by the Honorable Jeffery A. Manning.

30. Again, despite the significant discrepancies between Darryl's, Carraballo's, and Darryl Jr.'s descriptions of the shooter, Darryl's preliminary hearing testimony, and the inconsistent testimony at the first trial, Thomassey did not request a suppression hearing pursuant to Pa. R. Crim. P. 581.

[32] NT, First Trial, 07/20/2006, at 149.
[33] NT, First Trial, 07/20/2006, at 144.
[34] NT, First Trial, 07/20/2006, at 152.
[35] NT, First Trial, 07/20/2006, at 145, 152, 153.
[36] NT, First Trial, 07/20/2006, at 145, 158.
[37] *See infra*, ¶¶ 89 (a-f).
[38] NT, First Trial, 07/20/2006, at 145, 153
[39] NT, First Trial, 07/20/2006, at 154.
[40] NT, First Trial, 07/20/2006, at 146, 153.
[41] NT, First Trial, 07/20/2006, at 154, 158.
[42] NT, First Trial, 07/20/2006, at 177.

31. The Commonwealth presented similar evidence and witnesses as the first trial, except Darryl Jr. did not testify, and Shayisha Woods said she was now unsure whether Darryl was arguing with Lunsford shortly before the shooting:

> I seen [Lunsford] earlier that day. There was two males at Cherry Court arguing. I never went to the argument. I stayed at the store. I ordered my things. I heard gunshots and I ran like everybody else. The court was crowded. There was a lot of people in the court.
>
> …
>
> No. I never described [Lunsford]. The girl that I was with described him… No. I never – I never described him. The female I was with she described him to the police."
>
> …
>
> There were a lot of mails in that court. I don't know who was in that court.
>
> …
>
> I'm not sure who was in the court.[43]

32. Detective Canofari's testimony corresponded with his first trial testimony, particularly his testimony regarding the six-man photo array he allegedly presented to Darryl and Caraballo on June 11, 2003 at AGH.[44]

33. Carraballo and Darryl stuck to their descriptions of the shooter and identifications of Lunsford, but like the first trial, their descriptions did not match.[45]

34. Like the first trial the Commonwealth:

    a. Presented no witnesses or evifdence to corroborate Carraballo's version of events that ultimately prompted her to call Darryl.

    b. Presented no witnesses or evidence connecting the gun used to shoot Darryl to Lunsford.

    c. Presented no witnesses or evidence linking Lunsford to the getaway vehicle.

    d. Presented no witnesses who identified Lunsford as the shooter, beside Darryl and Caraballo.

35. Tia Martin testified again and her testimony mirrored her first trial testimony.[46]

36. Like the first trial, Lunsford testified, but this time he completed his testimony.

[43] NT, Second Trial, 09/18/2007, at 24, 28, 29, 31.
[44] NT, Second Trial, 09/17/2007, at 22-23.
[45] *See infra*, ¶¶ 89 (a-f).
[46] NT, Second Trial, 09/18/2007, at 70-92.

a. Lunsford proclaimed his innocence and rejected Caraballo's version of events that ultimately led to the shooting.[47]

b. Unlike Caraballo's description of the shooter–5'10" or 5'11", 180 lbs, with a chipped tooth–Lunsford is 6'2", 220 lbs, and has no chipped teeth.[48] Likewise, Lunsford said he cannot drink alcohol for medical reasons; if he does, he suffers seizures.[49]

c. Lunsford said he and Andre Cain arrived at the Cherry Court cookout around 8 p.m. on June 5, 2003.[50]

d. Lunsford did not know Caraballo, but he saw her in the Cherry Court parking lot that night selling ecstasy to people at the cookout.[51] When one of the men she gave ecstasy to refused to pay her, she became "hysterical" and threatened the man.[52] She left, but before she did, she said she would be back.[53]

e. Fifteen minutes later, Lunsford saw Caraballo's "truck" race into the Cherry Court parking lot and come "to a rough stop."[54] Darryl exited the truck and began arguing with the man who stiffed Caraballo: "They were arguing. I heard cussing, words that let you know that people weren't playing."[55]

f. Lunsford cannot recall when exactly Martin arrived at Cherry Court, but it was before Darryl and Caraballo returned and confronted the man who stiffed Caraballo. He knew this because once Darryl and the man began arguing, he urged Cain and Martin to leave because he felt something was going to happened because drugs were involved.[56]

g. Lunsford did not leave with Martin and Cain because they were headed in opposite directions. He walked north on Woodlow toward his sister's residence, while Martin and Cain drove south on Woodlow toward Greenway Middle School.[57]

h. Lunsford heard shots as he started walking north on Woodlow.[58]

[47] NT, Second Trial, 09/18/2007, at 106-111, 113.
[48] NT, Second Trial, 09/18/2007, at 102, 103, 104.
[49] NT, Second Trial, 09/18/2007, at 119,
[50] NT, Second Trial, 09/18/2007, at 106.
[51] NT, Second Trial, 09/18/2007, at 107.
[52] NT, Second Trial, 09/18/2007, at 108.
[53] NT, Second Trial, 09/18/2007, at 109.
[54] NT, Second Trial, 09/18/2007, at 110.
[55] NT, Second Trial, 09/18/2007, at 111.
[56] NT, Second Trial, 09/18/2007, at 110, 111, 121.
[57] NT, Second Trial, 09/18/2007, at 124, 125.
[58] NT, Second Trial, 09/18/2007, at 125.

37. At trial, Thomassey failed to do the following:

a. Present Andre Cain to corroborate Martin's and Lunsford's testimony. Indeed, when the prosecutor cross-examined Lunsford, she emphasized Cain's absence, undermining his and Martin's testimony.[59]

b. Introduce the following evidence highlighting the suggestiveness and unreliability of the Darryl's and Caraballo's photographic identification:

i. Darryl's *sworn* preliminary hearing testimony where he said detectives showed him only two photos of the same man–Lunsford.

ii. The fact Caraballo described the shooter as having a chipped tooth, but Darryl did not;

iii. The fact Caraballo and Darryl described two different getaway cars in their initial statements and at the first trial.

38. During closing arguments, Thomassey emphasized the following points:

a. The Commonwealth presented no witnesses or evidence to corroborate Caraballo's version of events: "There is absolutely no corroboration whatsoever."[60] As Thomassey put it: "[Caraballo] got beat on her dope and she was calling up her old man to come up there and straighten it out, and that's exactly what happened."[61]

b. Caraballo's and Darryl's identifications were unreliable:

> Why is there such a wide gap… between these two people who identified the assailant?
>
> …
>
> If ever there was a case with reasonable doubt when it comes to identification this is it. This is it, Your Honor.[62]

39. When the Commonwealth closed, it took thirteen (13) pages of transcript to explain why Darryl's and Carraballo's identifications were reliable and accurate.[63]

40. In handing down its verdict, the Court said: "This case is essentially what one would call in the law an eyewitness identification case."[64]

[59] NT, Second Trial, 09/18/2007, at 128.
[60] NT, Second Trial, 09/18/2007, at 135.
[61] NT, Second Trial, 09/18/2007, at 133.
[62] NT, Second Trial, 09/18/2007, at 136, 138.
[63] NT, Second Trial, 09/18/2007, at 138-151.
[64] NT, Second Trial, 09/18/2007, at 152.

41. The "grave and serious differences" between Darryl's and Carraballo's descriptions of the shooter concerned the Court; for instance, the Court mentioned the "enormous discrepancies in clothing differences."[65]

42. The Court also "struggled" with Darryl's and Caraballo's credibility. For instance, in referring to alleged reason why Darryl returned to the Cherry Court parking lot, the Court said: "There are some serious credibility questions presented by this evidence."[66]

43. In the end, though, the Court relied on the five factors enunciated in *Neil v. Biggers*, 409 U.S. 188 (1972), and *Manson v. Brathwaite*, 432 U.S. 98 (1977):

    a. The witness's opportunity to view the criminal at the time of the crime;

    b. His or her degree of attention;

    c. The accuracy of the prior description of the criminal;

    d. The level of certainty demonstrated at the confrontation; and

    e. Length of time between the crime and identification.[67]

44. In applying the factors, the Court said "there appears to be little or no question as to the positiveness of the identification."[68] It also mentioned the "immediacy" of Darryl's and Caraballo's identification.[69]

45. Although troubled by the inconsistent descriptions, the Court ultimately found Darryl's and Caraballo's identifications reliable enough to prove beyond a reasonable doubt that Lunsford was the shooter and to convict him of aggravated assault, VUFA, and two counts of REAP:

> The descriptions given to the police may be troubling and problematic… as to whether or not it creates reasonable doubt. The issue here… [is] whether or not the Commonwealth's eyewitness identification testimony was sufficient to establish the defendant's guilt beyond a reasonable doubt. I am satisfied that it does.[70]

[65] NT, Second Trial, 09/18/2007, at 154, 155.
[66] NT, Second Trial, 09/18/2007, at 154.
[67] NT, Second Trial, 09/18/2007, at 152-153.
[68] NT, Second Trial, 09/18/2007, at 154.
[69] NT, Second Trial, 09/18/2007, at 155.
[70] NT, Second Trial, 09/18/2007, at 156. The Court acquitted Lunsford of attempted murder.

F. Sentencing

46. On February 5, 2008, Lunsford had his sentencing hearing. After Ivy Edwards (Lunsford's mother) and Cindy Lester (Lunsford's wife) testified on his behalf, Lunsford spoke and proclaimed his innocence: "I know what I'm being found guilty of, but I'm a victim, too. **I didn't do this**."[71]

47. The Court issued the following consecutive sentences:

    a. Count Two (Aggravated Assault): 120 to 240 months

    b. Count Three (Carry Firearm Without A License): 36 to 72 months

    c. Counts Four and Five (REAP): 12 to 24 months[72]

G. Post-Sentencing and Direct Appeal

48. On August 17, 2010, before filing his opening brief to the Superior Court, Lunsford filed a *pro se* PCRA petition raising the following ineffectiveness claims:

    a. Trial counsel prejudiced him by failing to file a motion to suppress Darryl Terry's and the other victims' photo identifications because the procedures used to procure these identifications were improper and unduly suggestive.

    b. Trial counsel prejudiced him by failing to request the Commonwealth witnesses be sequestered to prevent them from shaping their testimony.

    c. Trial counsel prejudiced him by failing to impeach critical Commonwealth witnesses with prior inconsistent statements.

    d. Trial counsel prejudiced him by failing to correct or object to false and misleading testimony presented by Commonwealth witnesses.

    e. Trial counsel prejudiced him by failing to present Darryl Terry, Jr. as a rebuttal witness.

    f. Trial counsel prejudiced him by failing to adequately investigate the identification procedures used to procure Darryl Terry's and Caraballo's identifications.

    g. Trial counsel prejudiced him by failing to present readily available exculpatory evidence to the fact-finder.

[71] NT, Sentencing Hrg., 02/08/2008, at 17.
[72] NT, Sentencing Hrg., 02/08/2008, at 19-20.

49. On October 2, 2012, after a series of mishaps by Lunsford's first appellate attorney, Scott Coffey, Lunsford's second appellate attorney, filed his opening brief (1918 WDA 2011) to the Superior Court raising the following issues;

    h. Lunsford's aggravated assault, VUFA, and REAP convictions were against the weight of the evidence.

    i. The Court erred when he refused to grant a mistrial after the Commonwealth told the jury that Shayisha Woods would not be testifying as expected because "she's afraid to be here today."

    j. The Court erred in denying Lunsford's PSM because: (1) his aggregate sentence of 15 to 30 years was excessive; (2) his VUFA sentence was excessive; (3) the Court failed to state adequate reasons on the record for imposing the aforementioned excessive sentences; and (d) the Court failed to consider § 9721(B)'s factors.

50. On June 25, 2013, the Superior Court rejected all three claims.[73] On June 26, 2013, Lunsford filed a *Petition For Allowance* (PFA) with the Pennsylvania Supreme Court (304 WAL 2013), but Coffey discontinued the *PFA* on August 2, 2013.

H. PCRA Proceedings

51. When Lunsford discontinued his *PFA* on August 2, 2013, his conviction became final on August 26, 2013, when his opportunity for seeking discretionary review expired. *See Caspari v. Bohlen*, 510 U. S. 383, 390 (1994); *Griffith v. Kentucky*, 479 U. S. 314, 321, n. 6 (1987); 42 Pa.C.S. § 9545(b)(3).

52. Pursuant to 42 Pa. C.S. § 9545(b)(1), Lunsford had one year from August 26, 2013–or until August 26, 2014–to file a PCRA petition. On August 14, 2013, two weeks *before* his conviction became final, Lunsford filed a *pro se* PCRA petition, raising the following claims [which are paraphrased for brevity]:

    a. Appellate counsel was ineffective for failing to raise a meritorious prosecutorial misconduct claim relating to the Commonwealth's failure to correct Darryl Terry's false and misleading testimony.

    b. Trial counsel was ineffective for:

        i. Failing to impeach Darryl Terry with his preliminary hearing testimony;

        ii. Failing to file a motion to suppress Darryl Terry's and Jassenia Caraballo's out-of-court photographic identifications;

[73] Ex. 6.

iii. Failing to request that the Commonwealth's witnesses be sequestered to prevent them from tailoring their testimony to one another's.

iv. Failing to impeach Darryl Terry and Jassenia Caraballo with their inconsistent statements regarding the vehicle the shooter fled the scene in.

v. Failing to present a police fabrication defense based on the alleged two-man photographic show-up presented to Darryl Terry and Jassenia Caraballo at Allegheny General Hospital.

c. Appellate counsel was ineffective for failing to raise the abovementioned ineffectiveness claims on direct appeal.

53. On September 13, 2013, the Court appointed counsel to represent Lunsford.

54. Since his appointment, counsel has reviewed the record and investigated the case. On February 4, 2014, counsel obtained an affidavit from Andre Cain, in which Cain averred the following:

> My name is Andre M. Cain
>
> On June 5, 2003 it was around 7:30 pm to 8:30 pm I went with Ajamu to Greeway Apartments to attend Ajamu friends [sic] cook out [sic] when we got there, I didn't want to stay because there were around 50 people whom I didn't know I called my girlfriend, Tia Martin to come and take me home. When she arrived she parked in the entrance of the court, while Tia and I were talking, a van pulled up into the court someone jumped out and started to argue with several men. Ajamu walked up to Tia and I and said we all should leave he told me he would call me later, he then walked up the hill way from where they were arguing, as we were exiting the Court I heard several shots. Ajamu wasn't in the area where the shooting occurred, he had left. I would have testified if Patrick Thomassey had called me.

55. Cain's affidavit is attached hereto as Exhibit 7.

STATUTORY ARGUMENTS

A. The PCRA's Statutory Requirements

56. Lunsford must meet the following conditions to be eligible for PCRA relief. *See* 42 Pa. C.S. § 9543(a)(1)-(a)(4).

a. First, Lunsford 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).

b. Second, Lunsford must present a cognizable claim under 42 Pa. C.S. § 9543(a)(2).

c. Third, Lunsford must show his claims are previously litigated or waived. *See* 42 Pa. C.S. §9543(a)(3).

57. Lastly, because Lunsford developed new facts, *i.e*., Cain's affidavit, he must show he exercised due diligence in developing these facts, *see* 42 Pa. C.S. § 9545(b)(1)(ii), and that he filed his PCRA petition or amended petition within sixty days of developing these new facts. *See* 42 Pa. C.S. § 9545(b)(2).

B. Application of Facts to Statutory Requirement

58. Lunsford is serving a lengthy prison sentence at SCI-Pittsburgh. *See* 42 Pa. C.S. §9543(a)(1).

59. Lunsford alleges state and federal claims that: (1) undermine the truth-determining process; (2) establish ineffective assistance of counsel; and (3) demonstrate his sentence is illegal. *See* 42 Pa. C.S. §§ 9543(a)(2)(i), 9543(a)(2)(ii) and 9543(a)(2)(vii).

60. Lunsford's state and federal claims have not been previously litigated or waived. *See* 42 Pa. C.S. §9543(a)(3).

61. Lunsford filed his amended PCRA petition on March 10, 2014, satisfying the sixty-day rule regarding newly-discovered facts. *See* 42 Pa. C.S. § 9545(b)(2).

CLAIMS FOR RELIEF

A. Trial Counsel's Performance Fell Below Professional Norms Because He Failed To Develop and Present Readily Available Impeachment and Exculpatory Evidence And His Deficient Performance Prejudiced Lunsford By Undermining Confidence In An Already Less Than Confident Verdict. U.S. Const. Amends. VI, VII, XIV; Pa. Const. Art. I, §§ 1, 9

62. Lunsford had a right to effective trial representation. *See* U.S. Const. Amend. VI; *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012) ("The right to the effective assistance of counsel at trial is a bedrock principle in our justice system."). This right is "fundamental" because it "assures the fairness, and thus the legitimacy, of our adversary process." *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986). Trial counsel's purpose is to "test[] the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged." *Id*. at 1317. The right to effective representation, consequently, is "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984). Trial counsel, as a result, "has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, 468

U.S. 668, 688 (1984). Consequently, unless a defendant receives effective representation, "a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan*, 446 U.S. 330, 343 (1980).

63. To prevail on an ineffectiveness claim, Lunsford must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced him. *See Strickland v. Washington*, 466 U.S. at 687. The deficiency prong "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. This 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.

64. The prejudice prong requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S at 694.[74]

65. Here, Thomassey's representation was not only objectively unreasonable, it removes any confidence the Court had in the convictions when it issued its verdict.

66. Thomassey's advocacy fell below professional norms for the following reasons:

    a. First, Thomassey failed to present Andre Cain who would have corroborated Lunsford's and Martin's trial testimony.

    b. Second, Thomassey failed to file a motion to suppress Darryl's and Caraballo's out-of-court photographic identifications.

    c. Third, Thomassey failed to investigate, develop, and present evidence regarding Caraballo's criminal history.

    d. Fourth, Thomassey failed to impeach Lunsford and Detective Canofari with Lunsford's sworn preliminary hearing testimony where he admitted Detective Canofari showed him only two pictures of the same man.

[74] The Pennsylvania Supreme Court has interpreted *Strickland* and articulated its own three-factor test to determine whether counsel rendered ineffective assistance. To obtain IAC relief, the defendant must show: (1) the underlying legal claim is of arguable merit; (2) counsel's action or inaction lacked any objectively reasonable basis designed to effectuate his client's interest; and (3) prejudice, to the effect that there was a reasonable probability of a different outcome at trial if not for counsel's error. *See Commonwealth v. Pierce*, 527 A.2d 973, 975–976 (Pa. 1987). Counsel's strategy will be considered unreasonable if the petitioner establishes "that an alternative not chosen offered a potential for success substantially greater than the course actually pursued." *Commonwealth v. Howard*, 719 A.2d 233, 237 (1998).

67. Individually and collectively, these failures undermine confidence in an already less than confident verdict issued by the Court. Had the Court been made aware of this evidence, there is a reasonable probability it would have acquitted Lunsford of all charges.

68. Lastly, none of Lunsford's ineffectiveness claims are waived or previously litigated because PCRA proceedings represent the first time a defendant can challenge trial counsel's advocacy. *See Commonwealth v. Grant*, 813 A.2d 726, 738 (Pa. 2002).

1. Trial Counsel's Failure To Interview, Subpoena, and Present Andre Cain As An Alibi Witness Was Objectively Unreasonable And Prejudiced Lunsford Because Cain's Testimony Corroborated Lunsford's and Martin's Testimony That Lunsford Was Not The Shooter

a. Failure To Present A Witness

69. To obtain relief on an IAC claim where trial counsel failed to present a witness, Lunsford must establish: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew, or should have known, of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the witness's testimony was so prejudicial as to have denied him a fair trial. *See Commonwealth v. Sneed*, 45 A.3d 1096, 1108-1109 (Pa. 2012). Lunsford satisfies this standard.

b. Application of Facts to Law

70. First, Cain "existed" in September 2007 when the Commonwealth retried Lunsford.[75]

71. Second, although Cain was serving a federal prison sentence in September 2007, he was "available" to testify on Lunsford's behalf. Indeed, the prosecutor objected when Thomassey said he could not present Cain as a quasi-alibi witness because he was in federal prison: "Your Honor, objection to that. They could get [Cain] here if they wanted to."[76] The prosecutor was right: Thomassey could have easily used the Compulsory Process Clauses of the Sixth Amendment and Pennsylvania Constitution to make certain the Bureau of Federal Prisons produced Cain for Lunsford's trial. *See* U.S. Const. Amend. VI; Pa. Const., Art. 1, § 9.

72. Third, Thomassey knew of Cain and his importance to Lunsford's defense.

73. Fourth, had Thomassey asked, Cain would have testified on Lunsford's behalf.[77]

[75] Ex. 7.
[76] NT, Second Trial, 09/18/2007, at 128.
[77] Ex. 7.

74. Fifth, had Cain testified, there is a reasonable probability the outcome of Lunsford's trial would have been different, *i.e.*, there is a reasonable probability the Court would have acquitted Lunsford of all charges:

a. The Commonwealth's case was premised entirely on eyewitness identification. Lunsford's defense, therefore, was mistaken identity. To bolster his defense, Thomassey presented Tia Martin, who was with Lunsford and Cain immediately before the shooting and knew he was not the shooter because: (1) she saw Lunsford walking away from the Cherry Court parking lot, up Woodlow Street, when she heard the shots; and (2) Lunsford's clothing–white t-shirt, blue jeans, and Timberline boots–did not match the shooter's description.

b. Lunsford corroborated Martin's testimony, but his corroboration was greatly minimized because he was the defendant. A veteran trial attorney, like Thomassey, should have known this and developed "independent" corroboration, like Cain's testimony. While Cain and Lunsford's were friends, had Cain corroborated Martin's testimony, his testimony would have had a greater impact on the fact-finder because now two people corroborated Martin's testimony, including an "independent" witness who had no motive to lie or desire to subject himself to potential perjury charges.

c. More importantly, Cain's testimony would have undermined Darryl's and Caraballo's already questionable identifications. This is where Thomassey's ineffectiveness proved most damning. The Court, keep in mind, struggled with the identification evidence,[78] mentioning the "grave and serious" differences between Darryl's and Caraballo's descriptions and finding them "troubling and problematic."[79] Thus, the Court made clear that, had it been presented additional evidence calling into question Darryl's and Caraballo's identifications and credibility, it might very well have found their identifications unreliable and acquitted Lunsford of all charges.

75. Thomassey had no reasonable strategic reasons for not subpoenaing Cain and having him testify on Lunsford's behalf.

76. Lunsford is entitled to a new trial where he can present Cain's testimony.

2. Trial Counsel's Failure To File A Suppression Motion To Exclude Darryl's And Caraballo's Out-of-Court Photographic Identifications Prejudiced Lunsford Because, Had A Suppression Motion Been Filed, Their Out-of-Court Photographic Identifications Would Have Been Excluded And No Independent Basis Existed For Their In-Court Identifications.

77. Thomassey acted objectively unreasonable when he did not file a motion to suppress Darryl's and Caraballo's out-of-court photographic identifications. There was ample

[78] NT, Second Trial, 09/18/2007, at 152-156.
[79] NT, Second Trial, 09/18/2007, at 154, 155, 156.

evidence in the record before Lunsford's second trial to make a meritorious suppression motion. This evidence included: (1) Caraballo's, Darryl's, and Darryl Jr.'s descriptions of the shooter; (2) Darryl's preliminary hearing testimony; (3) Caraballo's, Darryl's, and Darryl Jr.'s first trial testimony; (4) Detective Canofari's first trial testimony; and (5) Tia Martin's first trial testimony. The evidence of unreliability would have been even stronger had Thomassey interviewed Andre Cain before the second trial.

78. Thomassey had no strategic reason for not filing a suppression motion. Moreover, Lunsford could not have been harmed had Thomassey filed a suppression motion; however, by not filing a motion, it guaranteed that Darryl's and Caraballo's out-of-court photographic identifications would play a significant role in the Commonwealth's case, and as Justice Brennan once wrote, "[T]here is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" *Waktins v. Sowders*, 449 U.S. at 352 (quoting ELIZABETH LOFTUS, EYEWITNESS Testimony 19 (1979)) (emphasis in original). Thus, the ease with which Thomassey could have requested a suppression hearing, and the damaging evidence such a hearing would have prevented the fact-finder from considering, proves Thomassey's decision not to file a suppression motion cannot be considered strategic. *Cf. Rompilla v. Beard*, 545 U.S. 374, 389-390 (2005) ("The unreasonableness of attempting no more than [counsel] did was heightened by the easy availability of the file at the trial courthouse, and the great risk that testimony about a similar violent crime would hamstring counsel's chosen defense of residual doubt.")

79. Thomassey's deficient performance prejudiced Lunsford: there is a reasonable probability that, had he filed a suppression motion, Darryl's and Caraballo's out-of-court photographic identifications would have been excluded; had this occurred, there is a reasonable probability the outcome of Lunsford's trial would have been different because there was no independent basis of their identifications that would have allowed the Commonwealth to introduce their in-court identifications. With no identification evidence or testimony, the Commonwealth's case would have crumbled.

a. The Admissibility of Out-of-Court Photographic Identifications

80. Lunsford is entitled to relief if he demonstrates that Detectives Canofari and Hitching's photographic identification procedure was "impermissibly suggestive," *Neil v. Biggers*, 409 U.S. at 197; *accord Simmons v. United States*, 390 U.S. 377, 384 (1968); *Stovall v. Denno*, 388 U.S. 293 (1967), and if so, whether, under the "totality of the circumstances," *Simmons v. United States*, 390 U.S. at 383; *Stovall v. Denno*, 388 U.S. at 302, the identification was unreliable, *i.e.*, there is a "very substantial likelihood" Darryl and Caraballo misidentified Lunsford. *Manson v. Brathwaite*, 432 U.S. at 116. The U.S. Supreme Court has instructed courts to consider the following five factors when assessing the reliability of an identification produced as a result of an impermissibly suggestive line-up: (1) the witness's opportunity to view the criminal at the time of the crime; (2) his or her degree of attention; (3) the accuracy of the prior

description of the criminal; (4) their level of certainty demonstrated at the confrontation; and (5) the length of time between the crime and identification. *See Neil v. Biggers*, 409 U.S. at 199-200; *Manson v. Brathwaite*, 432 U.S. at 114.

81. In short, "reliability is the linchpin in determining the admissibility of identification testimony[.]" *Manson v. Brathwaite*, 432 U.S. at 114; *Perry v. New Hampshire*, 132 S. Ct. 716, 724-725 (2012); *Watkins v. Sowders*, 449 U.S. at 347 ("It is the reliability of identification evidence that primarily determines its admissibility[.]"). As a result, an out-of-court photographic identification will not be suppressed "unless… the identification procedure was so infected by suggestiveness as to give rise to a substantial likelihood of irreparable misidentification.'" *Commonwealth v. Pierce*, 786 A.2d 203, 209 (Pa. 2001). Likewise, suppression is only available if state action produced the suggestive out-of-court identification. *See Perry v. New Hampshire*, 132 S.Ct. at 721; *Commonwealth v. Sanders*, 42 A.3d 325, 330 (Pa. Super. 2012).

b. Application of Facts to Law

(1). The Photographic Identification Was Impermissibly Suggestive

82. After the shooting, Detectives Canofari and Hitchings went to AGH and supposedly showed Darryl and Carraballo a six-man photo array with Lunsford's photo.[80] After viewing the photo array, Darryl and Carraballo supposedly picked photo #3–**Lunsford's photo**–and initialed it. Although Darryl and Carraballo were both one-hundred percent certain of their identifications, there is ample evidence in the record indicating their identifications are by-products of an unduly suggestive photo array.

83. To begin with, counsel's use of the word "supposedly" is based on Darryl's preliminary hearing testimony where he said Detectives Canofari and Hitchings showed him only two photos of the same guy–Lunsford:

> Mr. Fenner: Tell me the number of photographs in the photo array that you saw.
>
> [Objection made, but overruled]
>
> Mr. Fenner: Two sets of how many each?
>
> Darryl: I just remember seeing two photos. I don't remember how many sets were involved. I just remember two photos.
>
> Mr. Fenner: Two photos of the same guy?
>
> Darryl: Yes.[81]

[80] Ex. 4; NT, First Trial, 07/19/2006, at 123-126; NT, Second Trial, 09/17/2007, at 20-21.
[81] NT, Prelim. Hrg., 11/25/2003, at 15.

84. A photographic show-up is "a clearly suggestive procedure" that Pennsylvania courts "deplore." *Commonwealth v. Bradford*, 451 A.2d 1035, 1036 (Pa. Super. 1982). Moreover, researchers have found that "false identifications are more numerous for showups [compared to photo arrays] when an innocent suspect resembles the perpetrator." *See* Nancy Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 LAW & HUM. BEHAV. 523, 523 (2003) (conducting meta-analysis).[82] Experts believe the main problem with show-ups is that—compared to photo arrays—"they fail to provide a safeguard against witnesses with poor memories or those inclined to guess, because every mistaken identification in a showup will point to the suspect. In essence, showups make it easier to make mistakes." *State v. Henderson*, 27 A.3d at 903 (citing various social science articles).

85. Next, assuming Darryl's *sworn* preliminary hearing testimony is incorrect, and Detectives Canofari and Hitchings in fact showed him and Carraballo a six-man photo array, the manner in which they presented the photo-array makes it unduly suggestive for the following reasons:

a. First, Detectives Canofari and Hitchings failed to conduct a double-blind photo array; meaning, as lead detectives, they knew Lunsford was the primary suspect when they showed the photo array to Darryl and Caraballo.[83] This increased the likelihood they–consciously or unconsciously–directed Darryl's and Caraballo's attention toward Lunsford's photo. *See* Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Line-ups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 775-78 (1995); *United States v. Wade*, 388 U.S. 218, 229 (1967); *Moore v. Illinois*, 434 U.S. 220, 224 (1977) ("Persons who conduct the identification procedure may suggest, intentionally or unintentionally, that they expect the witness to identify the accused.").[84] To combat this problem, they should have used a double-blind procedure, in which the individual conducting the photo array does not know the primary suspect's identity. *See* Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 289 (2003).[85]

[82] Counsel cites numerous social science articles in Lunsford's amended petition. To save paper (and several trees), counsel did not attached these articles to the amended petition. However, to ensure these facts are before the Court, he incorporates hereto the facts, data, and conclusions of each article as if fully pled. Should the Court need a copy of an article or several articles, counsel will surely provide the Court with a courtesy copy or copies.

[83] NT, First Trial, 07/20/2006, at 123-124.

[84] Experimental psychologists describe this as "investigator bias," which is present when "a line-up administrator knows the suspect's identity and, as a result, intentionally or unintentionally sends cues to an eyewitness that unfairly enhance the likelihood that the witness will identify the suspect." Mark R. Phillps et al., *Double-Blind Photoarray Administration as a Safeguard Against Investigator Bias*, 84 J. APPLIED PSYCH. 940, 941 (1999).

[85] The National Institute of Justice noted that a "double-blind" procedure "helps ensure not only that the case investigator does not unintentionally influence the witness but also that there can be no arguments later (e.g., at trial) that the witness's selection or statements at the line-up were influenced by the case investigator." NAT'L INST. OF JUST., EYEWITNESS EVIDENCE: A TRAINER'S MANUAL FOR LAW ENFORCEMENT 42 (2003) (hereinafter NIJ 2003 Report).

b. Second, Detectives Canofari and Hitchings presented all six photos simultaneously, rather than sequentially (or one at a time) to Darryl and Caraballo.[86] Simultaneous presentations produce more misidentifications due to a phenomenon called "relative judgment," which occurs when the eyewitness views all photos collectively and then selects the person that most resembles the perpetrator, regardless of whether that person is, in fact, the perpetrator. *See* Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459 (2001).

c. Third, before viewing the photo array, Detectives Canofari and Hitchings failed to instruct Darryl and Caraballo that the suspect may or may not be in the photo array. Instead, they did the opposite; before visiting AGH, Detective Canofari telephoned Caraballo and said they had a photo of the suspect, and he wanted her and Darryl to view a photo array to determine if they could identify the suspect.[87] Pre-lineup instructions help reduce relative judgment. Thus, "without an appropriate warning, witnesses may misidentify innocent suspects who look more like the perpetrator than other lineup members." *State v. Henderson*, 27 A. 3d 872, 897 (N.J. 2011). Social science data supports this conclusion. In two significant studies, for instance, scientists found that telling witnesses in advance that the suspect may not be present in the lineup, and that they need not make a choice, led to more reliable identifications in target-absent lineups. *See* Nancy Mehrkens Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 LAW & HUM. BEHAV. 283, 285-86, 294 (1997); Steven E. Clark, *A Reexamination of the Effects of Biased Lineup Instructions in Eyewitness Identification*, 29 LAW & HUM. BEHAV. 395, 418-20 (2005). In one experiment, 45% more people chose innocent fillers in target-absent lineups when administrators failed to warn that the suspect may not be there. *See* Roy S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. APPLIED PSYCHOL. 482, 485 (1981).

d. Fourth, according to Detective Canofari, Darryl and Caraballo were both in the hospital room when the other viewed the photo array:

> The family was in the room. We did them separately, Darryl and Jassenia, just those two people in the room at any one time, provided them with the photo array consisting of six photo from the BCI and had them look and determine if the person was in there that shot Mr. Terry.[88]

[86] NT, First Trial, 07/20/2006, at 126.
[87] NT, First Trial, 07/20/2006, at 123-124.
[88] NT, First Trial, 07/20/2006, at 124.

e. These circumstances increased the risk Darryl and Carraballo may have–consciously or unconsciously–affected each other's decision as to whom they identified, as well as their confidence level.

f. Fifth, after selecting photograph #3 (Lunsford's photo), Detectives Canofari and Hitchings told Caraballo the suspect's name and that she correctly identified the suspect: "I didn't know his name until after I picked him out of the lineup."[89] This type of confirmatory or post-identification feedback can manipulate a witness's memory and level of certainty:

> Confirmatory or post-identification feedback… occurs when police signal to eyewitnesses that they correctly identified the suspect. That confirmation can reduce doubt and engender a false sense of confidence in a witness. Feedback can also falsely enhance a witness' recollection of the quality of his or her view of an event.

State v. Henderson, 27 A.3d at 899.

g. A meta-analysis of twenty studies encompassing 2,400 identifications found that witnesses who received feedback "expressed significantly more… confidence in their decision compared with participants who received no feedback." Amy Bradfield Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859, 863 (2006). The analysis also revealed that "those who receive a simple post-identification confirmation regarding the accuracy of their identification significantly inflate their reports to suggest better witnessing conditions at the time of the crime, stronger memory at the time of the lineup, and sharper memory abilities in general." *Id*. at 864-865; *see also* Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360 (1998).

h. Sixth, Detectives Canofari and Hitchings failed to select fillers who generally fit the witnesses' description of the shooter. Here, Darryl, Caraballo, and Darryl Jr. described the shooter as being a light-skinned African-American, but only three of the six men in the photo array are light-skinned African-Americans; the other three are dark skinned African-Americans.[90] Thus, instead of choosing between one of six men, now all they had to do was choose between one of three men, increasing the likelihood they would identify Lunsford, but not because he was in fact the shooter, but because he resembled the shooter. *See* Gary L. Wells et al., *On the Selection of Distractors for Eyewitness Line-ups*, 78 J. APPLIED PSCYH. 835 (1993). Moreover, a biased photo array may inflate a witness's confidence in the identification because their selection process seemed easy. *See* David F. Ross

[89] NT, First Trial, 07/19/2006, at 29.
[90] Ex. 8.

et al., *When Accurate and Inaccurate Eyewitnesses Look the Same: A Limitation of the `Pop-Out' Effect and the 10- to 12-Second Rule*, 21 APPLIED COGNITIVE PSYCHOL. 677, 687 (2007); Gary L. Wells & Amy L. Bradfield, *Measuring the Goodness of Lineups: Parameter Estimation, Question Effects, and Limits to the Mock Witness Paradigm*, 13 APPLIED COGNITIVE PSYCHOL. S27, S30 (1999).

i. Individually and collectively, these facts prove the six-man photo array conducted at AGH was "impermissibly suggestive." *Neil v. Biggers*, 409 U.S. at 197.

(2). Before Lunsford's Second Trial, There Were Sufficient Indicia of Unreliability To Prove There Was a Substantial Likelihood Darryl and Caraballo Misidentified Lunsford

86. After reviewing the police reports, preliminary hearing transcripts, and first trial transcripts, a reasonably competent trial attorney would have identified several factors calling into question the reliability/accuracy of Darryl's and Caraballo's out-of-court photographic identifications. Based on these factors, therefore, there was a "substantial likelihood" Darryl and Caraballo misidentified Lunsford. *Manson v. Brathwaite*, 432 U.S. at 116, which would have prompted a reasonably competent attorney to file a motion prohibiting admission of their unreliable photographic identifications.

87. First, Darryl and Caraballo did not have an adequate opportunity to view the shooter for the following reasons:

a. It was dark when Caraballo supposedly first encountered the man in the parking lot near the food truck, as well as when Darryl first encountered the shooter.[91]

b. Caraballo's first encounter with the man was brief, as was Darryl's encounter with the shooter.[92] While "there is no minimum time required to make an accurate identification, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure." *State v. Henderson*, 27 A.3d at 905; *see also* Colin G. Tredoux et al., *Eyewitness Identification*, *in* 1 ENCYCLOPEDIA OF APPLIED PSYCHOLOGY 875, 877 (Charles Spielberger ed., 2004).

c. Caraballo and the man were strangers.[93] The "primary concern expressed in cases discussing the problems with eyewitness identification relates to a witness observing and subsequently identifying a stranger... The accuracy of identification testimony is nevertheless much higher when matching a visual observation of a suspect to an already existing memory, as opposed to the identification of a stranger, where all relevant features must be mentally recorded from scratch." *Moss v. Hofbauer*, 286 F.3d 851, 862 (6th Cir. 2002); *accord United States v.*

[91] NT, First Trial, 07/19/2006, at 11, 43.
[92] NT, First Trial, 07/19/2006, at 14-16, 19-21, 93-98; NT, Prelim. Hrg., 11/23/2003, at 11-12.
[93] NT, First Trial, 07/19/2006, at 15, 16, 32, 43.

Wade, 388 U.S. at 228 ("The identification of strangers is proverbially untrustworthy.").

88. Second, Caraballo's and Darryl's attention to the shooter's characteristic were significantly impaired because they were both under significant stress when they supposedly confronted the shooter. Social science research has repeatedly demonstrated as a person's stress level increases, his or her ability to capture and retain details of an event or person decreases. *See, e.g.*, Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 LAW & HUM. BEHAV. 687, 687, 699 (2004); Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INT'L J.L. & PSYCHIATRY 265 (2004).

    a. Caraballo repeatedly said her first encounter with the man made her "nervous," "scared," and "hysterical" (*i.e.*, very stressed out).[94]

    b. Darryl said when he exited his SUV, he immediately confronted the man and had a heated argument with him;[95] so heated, Caraballo urged him to walk away out of fear the man may harm him and the children.[96]

    c. Darryl was shot three times, causing him to spend fourteen days at AGH.[97]

89. Third, Darryl and Caraballo both described the shooter, but their descriptions differed as to key characteristics:

    a. Caraballo said the shooter had a chipped tooth,[98] but neither Darryl nor Darryl Jr. mentioned a chipped tooth.[99] More critically, though, Lunsford did not have a chipped tooth.[100]

    b. Caraballo said the shooter sped off in a gold-colored vehicle,[101] while Darryl described the vehicle as a grey Dodge[102] and Darryl Jr. described it as a silver, 4-door, Chevy.[103]

    c. Caraballo said the shooter had on a red ball cap,[104] but Darryl never mentioned a red ball cap.[105]

[94] NT, First Trial, 07/19/2006, at 15, 16, 38.
[95] NT, First Trial, 07/19/2006, at 19, 21, 57, 97.
[96] NT, First Trial, 07/19/2006, at 21, 57,
[97] NT, First Trial, 07/19/2006, at 103.
[98] Ex. 1; NT, First Trial, 07/19/2006, at 38; NT, Second Trial, 09/17/2007, at 57, 59.
[99] NT, Second Trial, 09/18/2007, at 63.
[100] NT, Second Trial, 09/19/2007, at 104.
[101] Exs. 1-2; NT, First Trial, 07/19/2006, at 40.
[102] NT, First Trial, 07/19/2006, at 101, 115.
[103] Ex. 3; NT, First Trial, 07/19/2006, at 63.
[104] Exs. 1-2; NT, First Trial, 07/19/2006, at 34; NT, Second Trial, 09/17/2007, at 57.
[105] NT, First Trial, 07/19/2006, at 110.

d. Caraballo said the shooter had on a red and white checkered shirt,[106] but Darryl said the shooter had on a dark-shirt,[107] while Darryl Jr. described a red plaid shirt.[108]

e. Darryl said the shooter had hazel eyes,[109] but Darryl Jr. described the shooter's eyes as green or blue.[110]

f. Seventh, Caraballo and Darryl, Jr. described the shooter as being 5'10" to 5'11", but Lunsford is 6'2".[111]

90. Fourth, the time between the shooting and Caraballo's and Darryl's photographic identification was six days (June 5, 2003 to June 11, 2003), decreasing the likelihood of an accurate identification. *See* Kenneth A. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. EXPERIMENTAL PSYCHOL: APPLIED 139, 142 (2008). In other words, "the more time that passes, the greater the possibility that a witness's memory of a perpetrator will weaken." *State v. Henderson*, 27 A.3d at 907 (citing numerous social science studies).

91. Fifth, and perhaps most importantly, Tia Martin and Andre Cain both said they were at the Cherry Court parking lot when the shooting occurred, and both said Lunsford was *not* the shooter.[112] Indeed, what better evidence is there to prove that a photographic identification is incorrect (*i.e.*, "very substantial likelihood" of a misidentification), than to present witnesses to shooting who say the man identified via the photographic array is not, in fact, the shooter.

a. Thomassey knew of Martin's statement and could have used it to bolster a motion to suppress.

b. Likewise, Thomassey knew Cain could corroborate Lunsford's and Martin's version of events, but he did not interview Cain before trial; had he done so, Cain would have told him Lunsford was not the shooter.[113]

92. Individually and collective, these factors demonstrate there is a "substantial likelihood" Darryl and Caraballo misidentified Lunsford, *Manson v. Brathwaite*, 432 U.S. at 116, meaning their out-of-court photographic identifications would have been excluded.

[106] Exs. 1-2.
[107] NT, First Trial, 07/19/2006, at 109.
[108] Ex. 3.
[109] NT, Prelim. Hrg., 11/25/2003, at 13.
[110] Ex. 3; NT, First Trial, 07/19/2006, at 74.
[111] NT, Second Trial, 09/18/2007, at 102.
[112] NT, First Trial, 07/20/2006, at 141-146; Ex. 7.
[113] Ex. 7.

(3). There Was No Independent Basis For Darryl's And Caraballo's Identifications, Meaning Their In-Court Identifications Were Not Admissible

93. An unduly suggestive out-of-court photographic identification does not necessarily bar an in-court identification by the same witness. The in-court identification will be admissible if, under the totality of the circumstances, there is an independent basis for the witness's identification. *See Commonwealth v. Pierce*, 786 A.2d. at 209. The critical question, here, is not whether eyewitness's identification is reliable, but whether the reliability of the eyewitness's identification is a by-product of his or her own memory or the suggestive identification procedures employed by the Commonwealth. *See Commonwealth v. Moye*, 836 A.2d 973, 976 (Pa. Super. 2003).

94. The factors to consider when determining whether an independent basis exits are the same factors the Court must consider when determining whether the out-of-court identification exhibits sufficient indicia of reliability to be admitted. *See Commonwealth v. Pierce*, 786 A.2d at 210; *see also Neil v. Biggers*, 409 U.S. at 199-200; *Manson v. Brathwaite*, 432 U.S. at 114.

95. With this being the case, there can be no independent basis because, as Lunsford already demonstrated, *see supra*, ¶¶ 86-92, when the Court reviews these five factors it is obvious that: (1) Caraballo and Darryl did not have an adequate opportunity to view the shooter because it was dark and Caraballo's first (alleged) encounter with the man was very brief, as was Darryl's confrontation with the man; (2) Caraballo's and Darryl's degree of attention was significantly impaired because Caraballo was hysterical, while Darryl was angry and in excruciating pain after being shot three times; (3) Caraballo's and Darryl's descriptions of the shooter did not match regarding key characteristics; and (4) the six day gap between the shooting and their identifications undermined the reliability of their identifications.

(4). The Certainty Factor is No Longer a Legitimate Factor

96. The only factor weighing in the Commonwealth's favor is the level of certainty factor: Darryl and Caraballo both expressed one-hundred percent certainty regarding their identifications.[114] While the Court may consider this factor, Lunsford would simply put out social science research has rendered this factor useless; confidence, in other words, is not a reliable indicator of accuracy. *See, e.g.*, Brian L. Cutler & Steven D. Penrod, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 94-96 (1995); Amy L. Bradford & Gary L. Wells, *The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five Biggers Criteria*, 24 LAW & HUM. BEHAV. 581, 590-592 (2000); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV.

[114] NT, Second Trial, 09/18/2007, at 9, 54.

603, 622-623 (1998); A. Elizabeth Luus & Gary L. Wells, *Eyewitness Identification Confidence, in* ADULT EYEWITNESS TESTIMONY, 348-361 (David F. Ross et al., eds. 1994); Brian L. Cutler et al., *The Reliability of Eyewitness Identification: The Role of System and Estimator Variables*, 11 LAW & HUM. BEHAV. 233, 236 (1987); Roy S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. APPLIED PSYCHOL. 482, 488 (1981); Kenneth A. Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship*, 4 LAW & HUM. BEHAV. 243, 258 (1980).

97. Not only is the certainty factor the least reliable *Biggers* factor, but it is also the one most likely to taint the fact-finder's deliberations. *See, e.g.*, Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL. PUB. POL. & L. 817, 830 (1995); A. Elizabeth Luus & Gary L. Wells, *Eyewitness Identification Confidence, in* ADULT EYEWITNESS TESTIMONY, 348 (David F. Ross et al., eds. 1994); R.C.L. Lindsay et al., *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. APPLIED PSYCHOL. 79, 80-82 (1981).[115]

98. By the time a fact-finder assesses a witness's confidence, the level of confidence may be inflated by numerous externalities, such as repeated questions and coaching stemming from witness preparation either by law enforcement or the prosecutor[s]. *See* Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL. PUB. POL. & L. 817, 830 (1995).

99. Lastly, the certainty factor, like the other four *Biggers* factors, is not immune from the tainting effects of a suggestive identification procedure, particularly a photographic show-up; thus, the *Biggers* analysis is not sufficiently independent of the threshold issue of suggestiveness. *See, e.g.*, Wells, at 631; Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231, 264-270 (2000).

100. Based on this research, several courts have acknowledged the voluminous social science research and concluded, like the Utah Supreme Court, that the *Biggers* test is "based on assumptions that are flatly contradicted by well-respected and essentially unchallenged empirical studies." *State v. Long*, 721 P.2d 483, 491 (Utah 1986). More importantly, state courts have specifically criticized the certainty factor. *See, e.g., Brodes v. State*, 614 S.E.2d 766, 770

[115] The U.S. Supreme Court has even recognized that "despite its inherent unreliability, much eyewitness identification evidence has a powerful impact on juries." *Watkins v. Sowders*, 499 U.S. at 352 (Brennan, J., dissenting). Likewise, Justice Marshall said: "[T]he witness' [sic] degree of certainty in making the identification [] is worthless as an indicator that he is correct." *Manson v. Brathwaite*, 432 U.S. at 130 (Marshall, J., dissenting); *see id*. at 120 (a "fundamental fact of judicial experience" ignored by the Court is that "juries unfortunately are often unduly receptive to [identification] evidence").

(Ga. 2005) (recognizing that "[a]n important body of psychological research undermines the lay intuition that confident memories of salient experiences… are accurate," prompting the court to hold it could "no longer endorse an instruction authorizing jurors to consider the witness's certainty in his/her identification as a factor to be used in deciding reliability of that identification[.]"); *State v. Ledbetter*, 881 A.2d 290, 311 (Conn. 2005) (citing the "uncontradicted" scientific literature, the court found that "the fourth *Biggers* factor is particularly flawed because a weak correlation, at most, exists between the level of certainty demonstrated by the witness at the identification and the accuracy of that identification."); *Commonwealth v. Santoli*, 680 N.E.2d 1116, 1121 (Mass. 1997) (the court expressed "significant doubt about whether there is any correlation between a witness's confidence in her identification and the accuracy of her recollection," and held that trial courts should not instruct a jury to "take into account… the strength of the identification."); *State v. Ramirez*, 817 P.2d 774, 780 (Utah 1991) (finding the *Biggers* analysis "scientifically unsupported," the court fashioned a "more empirically based approach," that led the court to reject the certain factor as an indicator of an identification's accuracy); *State v. Long*, 721 P.2d 483, 490 (Utah 1986) ("Research has also undermined the common notion that the confidence with which an individual makes an identification is a valid indicator of the accuracy of the recollection.").

101. Other courts have expressly relied on the empirical research to remedy due process concerns stemming from defects in the *Biggers* test. *See, e.g.*, *State v. Dubose*, 699 N.W.2d 582, 596 (Wisc. 2005) ("Based on our reading of the [due process] clause… the approach outlined in *Biggers* and *Brathwaite* does not satisfy this requirement."); *Commonwealth v. Johnson*, 650 N.E.2d 1257, 1261 (Mass. 1995) ("[W]e conclude that we cannot accept *Brathwaite* as satisfying [due process] requirements… [under the Massachusetts Constitution].").

102. Here, based on Darryl's preliminary hearing testimony and the evidence available in the police reports and first trial, the likely reason Darryl and Caraballo were so confident with their identifications is because they were by-products of an unduly suggestive identification procedure. *See Cossel v. Miller*, 229 F.3d 649, 655 n.4 (7th Cir. 2000) ("The fourth *Biggers* factor-the level of certainty demonstrated by the witness at the time of the identification-has little relevance here, where the level of certainty a witness demonstrates is just as likely to be a product of a prior unduly suggestive identification as it is to be a product of an independent recollection of the crime.").

(5). *Strickland* Prejudice

103. Thus, had the Court excluded Darryl's and Caraballo's out-of-court photographic identifications, there is a reasonable probability the outcome of Lunsford's trial would have been different because there was no independent

basis for their in-court identifications. With no identification evidence, the Commonwealth's case is non-existent.

104. Lunsford is entitled to a new trial.

3. Trial Counsel Was Ineffective For Failing To Investigate, Develop, and Introduce Caraballo's Criminal History And His Failure To Do So Prejudiced Lunsford Because The Information Would Have Impeached Caraballo's Credibility As To Why She Called Darryl In the First Place, While Bolstering Lunsford's Testimony That Caraballo Called Darryl Because A Man She Sold Drugs To Refused To Pay Her

105. Before his second trial, Lunsford told Thomassey his version of events the night of the shooting, *i.e.*, a man Caraballo sold drugs to refused to pay her, prompted her to go get Darryl in order to collect. Based on these facts, a reasonably competent trial attorney would investigated Darryl's and Caraballo's backgrounds to see if either had a history of drug use or drug-related arrests or convictions as well as theft/stealing arrests or convictions; such evidence would have undermined their credibility, while at the same time bolstering Lunsford's version of events.

106. Thomassey failed to uncover readily available (public) information regarding Caraballo's criminal history. Undersigned counsel quickly identified these arrests when his investigator searched a common investigative database:

a. On February 2, 2000, Caraballo was charged with **misdemeanor possession of drug paraphernalia** and **misdemeanor possession of marijuana** in Highland County, Florida. On June 21, 2000, however, the prosecutor dropped the charges the day Caraballo's bench trial was scheduled to begin.[116]

b. On November 3, 1999, Caraballo was charged with **misdemeanor-petty theft** in Highland County, Florida. On December 3, 1999, she pled *nolo contendere* and is sentenced to probation. On April 20, 2000, a probation violation is reported, which Caraballo admitted to on June 21, 2000, causing her probation to be revoked on September 12, 2000.[117]

107. Caraballo's drug history supports Lunsford's version of events, *i.e.*, she fabricated the story of the man approaching her to protect herself; once the shooting occurred, Caraballo realized she had to concoct a story as to why she called Darryl in the first place because she could not tell the police she got stiffed on a drug deal and this was why she called Darryl. Likewise, her theft conviction supports Lunsford's claim that Caraballo is untrustworthy and willing to fabricate a story to protect her and Darryl's drug use and dealings.

[116] Ex. 8.
[117] Ex. 8.

108. Keep in mind, the Commonwealth presented no witnesses to corroborate Caraballo's version of events, despite the fact someone was working in the food truck and would have witnessed the encounter between Caraballo and the man. The only two people who claim this version of events is true are Darryl and Caraballo: the two people most inclined to fabricate a story to hide their drug dealings.

109. The new evidence is critical because the Court struggled with the Darryl's and Caraballo's credibility, at one point commenting: "There are some serious credibility questions presented by this evidence."[118] Had the Court been made aware of this evidence, there is a reasonable probability the credibility issue would have titled in Lunsford's favor; meaning, the new evidence would have further undermined the Court's verdict, making it reasonably probable the Court would have acquitted Lunsford of all charges.

110. Thomassey had no strategic reason not to investigate Caraballo's and Darryl's criminal histories.

111. Lunsford is entitled to a new trial where he can impeach Caraballo with her criminal history.

4. Trial Counsel Was Ineffective For Failing To Impeach Darryl With His Sworn Preliminary Hearing Testimony Where Darryl Admitted Detectives Showed Him A Photographic Show-Up of Lunsford

112. Before Lunsford's second trial, a reasonably competent attorney would have known the importance of undermining Darryl's out-of-court photographic identification, especially if trial counsel did not move to suppress the identification before trial. Thus, a reasonably competent attorney would have developed and introduced all evidence undermining the accuracy and authenticity of Darryl's out-of-court photographic identification, including statements he made *under oath* during the preliminary hearing and first trial.[119]

113. At his preliminary hearing, Darryl admitted Detectives Canofari and Hitchings showed him only two photos of the same man–Lunsford.[120] Darryl's testimony represents classic impeachment evidence that would have easily undermined the authenticity of his photographic identification because a show-up is unduly suggestive. *See Simmons v. United States*, 390 U.S. at 383 ("It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals… This danger will

[118] NT, Second Trial, 09/19/2007, at 154.
[119] Authenticity meaning: whether Darryl's identification of Lunsford was based on his own memory or the suggestive nature of the six-man photo array. Yes, Darryl identified Lunsford, but if the photo array was unduly suggestive, his identification is not authentic, meaning it is not based on his own accurate recollection.
[120] NT, Prelim. Hrg., 11/25/2003, at 15.

be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw[.]"); *Commonwealth v. Bradford*, 451 A.2d at 1036.

114. Moreover, it also undermines Caraballo's out-of-court photographic identification because, if Detectives Canofari and Hitchings showed Darryl only two photos of Lunsford at AGH on June 11, 2003, they had to show Caraballo the same two photos because she was present when Darryl viewed the photos.[121]

115. Thomassey knew of Darryl's preliminary hearing testimony because he impeached him with it during the first trial.[122] Thomassey, therefore, had no strategic reason for not impeaching Darryl with the same testimony at Lunsford's second trial. Thus, his decision not to use his preliminary hearing testimony was objectively unreasonable.

116. Thomassey's deficient performance prejudiced Lunsford because the Court struggled to reconcile the inconsistencies in Darryl's and Caraballo's descriptions of the shooter, with the "positiveness" of their out-of-court photographic identifications.[123] Thus, had the Court known of Darryl's sworn testimony regarding the photographic show-up, the Court would have immediately realized why Darryl and Caraballo were so certain of their identifications. The Court, in other words, would have realized the "positiveness" of their identifications was illusory and not the by-product of pure memory, but rather the by-product of an impermissibly suggestive show-up. Based on these facts, there is a reasonable probability the Court would have acquitted Lunsford of all charges.

117. Lunsford is entitled to a new trial where he can impeach Darryl with his preliminary hearing testimony.

5. Trial Counsel's Cumulative Errors Undermine All Confidence In The Court's Already Less-Than-Confident Verdict

118. The cumulative impact of Thomassey's errors warrants relief because they undermine confidence in the Court's less-than-confident verdict.

119. Courts have long recognized constitutional errors are to be considered cumulatively and, and that cumulative error or prejudice may lead to relief whether or not the effect of individual errors warrant relief. *See Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) (cumulative impact of several undisclosed items warranted *Brady* relief); *Taylor v. Kentucky*, 436 U.S. 478, 487-88 & n.15 (1978) (cumulative effect of potentially damaging instructions and prosecution argument violated due process guarantee of

[121] NT, First Trial, 07/20/2006, at 124.
[122] NT, First Trial, 07/19/2006, at 115-117.
[123] NT, Second Trial, 09/19/2007, at 154.

fundamental fairness, necessitating relief); *Donnelly v. DeChristoforo*, 416 U.S. 637, 639 (1974) (considering totality of prosecutorial misconduct in context of entire trial to decide if misconduct was sufficiently prejudicial to violate defendant's due process rights); *Berryman v. Morton*, 100 F.3d 1089 (3d Cir. 1996) (the cumulative effect of each instance of counsel's deficient performance was sufficiently prejudicial to require relief); *Lesko v. Lehman*, 925 F.2d 1527, 1541 (3d Cir. 1991) (cumulative prejudicial effect of prosecutor's penalty phase remarks entitled petitioner to relief, even if individually the remarks may not have been sufficiently prejudicial to warrant relief).

120. If the Court finds cumulative prejudice, it need not analyze the individual prejudicial effect of each deficiency. *See Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992). Furthermore, if the court finds itself in equipoise as to the effect of these cumulative errors, such that it "merely ha[s] 'grave doubts' as to the existence of prejudice," relief must be granted. *Glenn v. Tate*, 71 F.3d at 1211 (quoting *O'Neal v. McAnnich*, 513 U.S. 432, 437 (1995)).

121. Here, the impact of Thomassey's errors must be considered in conjunction with what the Court said before issuing its verdict: "There are some serious credibility questions presented by this evidence."[124] Consequently, credibility was an overarching theme during Lunsford's second trial, which is critical because the following errors deprived the Court of evidence that would have bolstered Lunsford's credibility, while undermining Darryl's and Caraballo's credibility: (1) Andre Cain's testimony; (2) Caraballo's arrest/criminal history; and (3) Darryl's preliminary hearing testimony.

122. The impact must also be considered in conjunction with the Court's statement that: "This case is essentially what one would call in the law an eyewitness identification case."[125] With this being the case, Thomassey had a duty to make certain Lunsford's second trial was not tainted by unreliable eyewitness testimony. Thomassey failed to do this because, despite having ample evidence calling into question the suggestiveness and reliability of Darryl's and Caraballo's out-of-court photographic identifications, Thomassey did nothing to prevent the Commonwealth from introducing them. To make matters worse, when the Commonwealth introduced them, Thomassey failed to utilize all the weapons in his arsenal to undermine their authenticity and accuracy; most notably, he failed to introduce Darryl's sworn preliminary hearing testimony, which would have undermined his *and* Caraballo's out-of-court photographic identifications.

123. Lunsford is entitled to a new trial.

[124] NT, Second Trial, 09/19/2007, at 154.
[125] NT, Second Trial, 09/19/2007, at 152.

PRAYER FOR RELIEF

124. WHEREFORE, Lunsford requests the following relief:

a. A new trial because "there is no genuine issue concerning any material fact" and he "is entitled to relief as a matter of law." Pa. R. Crim. P. 907(3).

b. A hearing on all his claims if the Court concludes his amended petition "raises material issues of fact." Pa. R. Crim. P. 908(A)(2).

c. The right to amend his PCRA petition, *see* Pa. R. Crim. P. 905(A), if he develops new facts, which may in fact happen because counsel is currently trying to obtain Lunsford's medical records and affidavits from family members demonstrating that Lunsford cannot drink alcohol. Such evidence would further undermine Caraballo's credibility because she said the man who allegedly approached her before the shooting reeked of alcohol.[126]

d. An order requiring the Commonwealth to timely answer his amended petition. *See* Pa. R. Crim. P. 906(A).

e. And any other relief the Court deems necessary to protect and vindicate his state and federal constitutional rights during his PCRA proceedings.

Respectfully submitted this the 7th day of March, 2014.

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Date: March 7, 2014

[126] NT, Second Trial, 09/17/2007, at 56.

Certificate of Service

On **March 7, 2014**, undersigned counsel mailed the aforementioned PCRA petition to ADA Ron Wabby at the following address:

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PCRA/Federal Habeas Unit
Appellate Division
Office of the District Attorney of Allegheny County
401 Courthouse
Pittsburgh, PA 15219
Telephone: 412-350-3108
Fax: 412-350-3312

_____

Craig M. Cooley Date

Exhibits

1. Officers Williams's and Pugh's June 3, 2003 Report Summarizing Their Interview of Jassenia Caraballo

2. Sgt. Kacsuta's June 3, 2003 Report Summarizing Her Interview of Jassenia Caraballo

3. Detectives Meder's and Braddick's June 3, 2003 Report Summarizing Their Interview of Darryl Terry, Jr.

4. Detectives Canofari's and Hitching's June 11, 2003 Report Summarizing Photo Array And Identification Procedures

5. Preliminary Hearing Transcripts

6. *Commonwealth v. Ajamu R. Lunsford*, 1918 WDA 2011, Superior Court Opinion, Dated June 25, 2013

7. Andre Cain's February 4, 2014 Statement

8. Black-and-White Six-Man Photo Array

9. Jassenia Caraballo's Criminal History Records

10. Detectives Canofari's and Hitching's June 3, 2003 Report Summarizing Shayisha Wood's Statement