IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	
Respondent,	)	
v.	)	**CP-02-CR-0000844-2005**
ROBERT L. CASH	)	
Defendant-Petitioner.	)	

Petitioner's Amended PCRA Petition

1. Petitioner, **Robert Lynn Cash**, by and through court-appointed counsel, **Craig M. Cooley**, files his *Amended PCRA Petition*. Cash's motion is presented in good faith and based on the following facts and points of authority.

Introduction

2. Robert Cash ("Cash") is entitled to a new trial because the trial court, the Honorable David R. Cashman, erred by not suppressing Jennifer Matlas's ("JM") and Teanna Williams's ("TW") out-of-court photographic identifications made on November 23, 2004 at the McKeesport Police Department. Cash is also entitled to relief because several of Judge Cashman's jury instructions were inadequate and illegal. In both instances, however, ineffective representation by trial and appellate counsel prevented the Superior Court from adjudicating these record-based claims on direct appeal. Thus, while Cash primarily challenges Judge Cashman's pre-trial admissibility ruling and his jury instructions, he does so under an ineffectiveness rubric. For instance, trial counsel failed to timely object to the inadequate and illegal jury instructions, while appellate counsel failed to raise the meritorious suggestive/unreliable identification claim.

3. In regards to the out-of-court identifications, before trial, Cash's attorney, Richard Narvin, filed a suppression motion regarding JM's and TW's out-of-court photographic identifications made on November 23, 2004. Shortly thereafter, Judge Cashman held a suppression hearing, after which he denied Narvin's motion.

4. At trial, the Commonwealth premised its case primarily on JM's and TW's out-of-court and in-court identifications, as well as Joshua Cash's incentivized testimony (which allowed him to receive a greatly reduced sentence compared to Cash and William Chaffin).

5. The Court erred by not suppressing JM's and TW's out-of-court photographic identifications because there were sufficient facts in the record to prove their identifications were the by-product of a sequence of highly suggestive events and procedures that tainted their memories and, ultimately, their identifications. These facts include:

   a. Three perpetrators assaulted JM and TW;

   b. Each perpetrator had on a hooded sweatshirt to conceal his faces, while two perpetrators actually wore ski masks;

   c. Each perpetrator was armed and repeatedly pointed their firearm at JM and TW while threatening them;

   d. The perpetrators' gun-toting actions caused JM and TW to become "hysterical" and "scared";

   e. When the perpetrators forced JM and TW to have sexual relations with them, the perpetrators placed their firearms against JM's and TW's waist or head;

   f. When police interviewed JM and TW on the night of the assault, November 16, 2004, neither mentioned Cash's name, nor told police they recognized the perpetrator who did not wear a ski mask;

   g. In the days following the assault, JM and TW heard "word on the street" was Cash, Joshua Cash, and Ivan Hale were the three perpetrators; JM and TW knew Cash by seeing him around the McKeesport community, but they did not know him personally; thus, they recognized his face, meaning if they saw a photograph of him they could identify him;

   h. On November 22, 2004, when Detective Lopretto conducted more comprehensive interviews of JM and TW:

      i. Both (JM and TW) told him about the "word on the street" regarding Cash, Joshua Cash, and Ivan Hale;

      ii. Both said they knew Cash before the assault, but not personally; instead, they knew him from seeing him around the neighborhood;

      iii. Both did not know Joshua or Hale, even from around the neighborhood; thus, of the three names circulating on the street, they only knew Cash from seeing him around the neighborhood;

iv. Detective Lopretto did not have JM and TW view photographs on this date; instead, he had them return the next day on November 23, 2004 to view a series of photo arrays;

i. On November 23, 2004, Detective Lopretto showed JM and TW three eight-man photo arrays: one array had Cash's head shot, while the other two had Joshua's and Hale's head shots; when JM viewed Cash's array, she identified Cash; when TW viewed Cash's array, she also identified Cash; TW also identified Hale as one of the perpetrators;

j. Detective Lopretto's photo array procedures included the following procedures:

i. Detective Lopretto knew the primary suspects in the case and, as a result, his photo array procedures were not performed blindly;

ii. For each photo array, Detective Lopretto showed all eight photographs simultaneously, not sequentially;

iii. Before viewing the photo arrays, Detective Lopretto never instructed JM and TW the suspect (or suspects) may or ***may not*** be in the photo arrays; and

iv. After interviewing JM and TW, and learning about Cash's, Joshua's, and Hale's names, Detective Lopretto asked JM and TW to return the next day to view photo arrays regarding these three men; in others, when JM and TW returned to the McKeesport Police Department on November 23, 2004, they knew they'd be viewing photographs containing the head shots of Cash (who they knew from the neighborhood), Joshua Cash, and Ivan Hale;

k. Pre-trial DNA testing identified William Chaffin as the alleged third perpetrator, not Ivan Hale;

l. Cash's fingerprints and DNA were not identified at the scene, despite JM's and TW's statements that Cash touched several items in JM's residence during the assault and he was not wearing gloves.

6. Despite ample facts to support a meritorious suggestive identification claim, challenging Judge Cashman's pre-trial admissibility ruling, David Chontos did not raise such a claim on direct appeal. Chontos had no strategic reason for not raising a claim challenging Judge Cashman's decision to admit JM's and TW's out-of-court photographic identifications.

7. Chontos's deficient performance prejudiced Cash: there is a reasonable probability that, had he raised this claim on direct appeal, the Superior Court would have granted relief. Here, all Chontos had to demonstrate on appeal is that Judge Cashman's factual

and legal determinations that JM's and TW's out-of-court photographic identifications were reliable were incorrect. The facts presented *infra* establish the incorrectness of Judge Cashman's decision, warranting relief for Cash.

Procedural History

8. The Commonwealth charged Cash and his co-defendants, **Joshua Cash** (CP-02-CR-07568-2005) and **William Chaffin** (CP-02-CR-03049-2005), with twenty-eight separate counts–including rape, robbery, burglary, REAP, unlawful restraint–in connection with a November 16, 2004 home invasion.

9. On May 18, 2005, the Conflict Counsel Office was appointed to represent Cash.

10. Cash pled not guilty and proceeded to trial. Chaffin and Joshua, though, both pled guilty on May 29, 2007 in exchange for reduced sentences. As part of his plea deal, moreover, Joshua agreed to testified against Cash at his trial.

11. Cash went to trial on February 20, 2007 and on February 23, 2007 a jury convicted him of the following counts: **IDSI** (Counts 3 and 4), **robbery** (Count 5), **burglary** (Count 6), **criminal conspiracy** (Count 7), **terroristic threats** (Counts 9-13), **unlawful restraint** (Counts 14-18), **REAP** (Counts 19-23), and **simple assault** (Counts 24-28).

12. The Honorable David R. Cashman presided over Cash's jury trial.

13. Veronica Brestensky of the Conflict Counsel Office represented Cash at trial.

14. On May 17, 2007, Judge Cashman sentenced Cash to 72 to 144 months of incarceration for Counts 3 and 4 (**IDSI**), 5 (**robbery**), 6 (**burglary**), and 7 (**criminal conspiracy**) to run consecutively, making for an aggregate of 30 to 60 years in prison. For Counts 9 thru 13 (**terroristic threats**) and 14-18 (**unlawful restraint**) Judge Cashman sentenced Cash to five years probation, to run consecutively (50 years total). For Counts 19-23 (**REAP**) and 24-28 (**simple assault**), Judge Cashman sentenced Cash to two years probation, to run consecutively (20 years total). Collectively, then, Cash was sentenced to 30 and 60 years followed by 70 years probation.[1]

15. At the May 17, 2007 sentencing hearing, Cash said he wished to appeal his conviction and sentence to pursue trial counsel ineffectiveness claims:

> Ms. Brestensky: Your Honor, if I may, in light of his right to counsel for appeal, Mr. Cash as voiced a desire to go forward with an appellate stage, and I believe that – my understanding under *Commonwealth versus Grant* [813 A.2d 726,

[1] NT, Re-Sentencing Hrg., 05/17/2007, at 2-3 According to Judge Cashman, the sentences he handed down on May 16th were "in error" and, as a result, he vacated those sentences and re-sentenced Cash the following day (May 17th).

> 738 (Pa. 2002)] is he wishes to perhaps allege ineffectiveness claims even as early as this stage.[2]

16. Based on Cash's desire to pursue trial counsel ineffectiveness claims, Brestensky withdraw as counsel.

17. On May 29, 2007, Joshua Cash pled guilty and received a 90-180 month sentence. William Chaffin pled guilty the same day and received a 20-40 year sentence plus 20 years probation.

18. Judge Cashman appointed David B. Chontos to serve as Cash's (initial) appellate attorney.

19. On September 14, 2007, Chontos filed Cash's *Post-Sentence Motion* pursuant to Pa. R. Crim. P. 702(B)(1)(a), raising the following issues:

    a. Jury instructions: The trial court erred when it gave improper or inadequate jury instructions for the following offenses: (1) simple assault; (2) unlawful restraint; (3) burglary; (4) terroristic threats; (5) robbery; (6) conspiracy; and (7) false imprisonment. The trial court also erred when it gave a "no adverse inference" instruction and gave improper instructions regarding accomplice liability and conspiratorial liability.

    b. Motion For Judgment of Acquittal: Cash challenged the sufficiency of the evidence for the following convictions: (1) Counts 12 and 13 (**terroristic threats** to John Doe, a three-year old boy, and to Jane Doe, a five-year old girl; (2) Counts 19 thru 22 (**REAP**); (3) Counts 15-18 (**unlawful restraint**); and (4) Counts 27-28 (**simple assault** of John Doe and Jane Doe).

    c. Motion for Modification of Sentence: Cash argued his sentence should be modified because Judge Cashman failed to merge several offenses for sentencing purposes, violating his double jeopardy rights. The Counts that should have merged are:
        i. Count 24 (Simple Assault) with Count 5 (Robbery)
        ii. Count 14 (Unlawful Restraint) with Count 5 (Robbery)
        iii. Count 19 (REAP) with Count 5 (Robbery)
        iv. Count 9 (Terroristic Threat) with Count 5 (Robbery)
        v. Counts 19 thru 23 (REAP Counts) with Counts 24 to 28 (Simple Assault Counts)
        vi. Counts 2 and 3 (IDSI Counts) with Counts 24 and 25 (Simple Assault Counts)
        vii. Counts 24 to 28 (Simple Assault Counts) with Count 6 (Burglary)

[2] *Id*. at 4.

d. Cash raised several other claims, not relevant here, including a claim that he should be re-sentenced by a different judge because Judge Cashman made inappropriate and prejudicial comments during his May 16, 2007 sentencing hearing.

20. On March 27, 2008, Chontos filed a timely notice of appeal to the Superior Court (613 WDA 2008).

21. On May 5, 2008, Chontos filed Cash's Rule 1925(b) statement, raising the same jury instruction, merger, insufficiency, and sentencing claims raised in Cash's *Post-Sentence Motion*.

22. On September 5, 2008, Judge Cashman issued his Rule 1925(b) opinion and made the following rulings:

a. Jury Instruction Claims: Cash waived *all* his jury instruction claims because trial counsel failed timely object to the allegedly inadequate instructions as required by Pa. R. Crim. P. 647 ("No portions of the charge nor omissions from the charge may be assigned as error, unless specific objections are made thereto before the jury retires to deliberate.").

b. Insufficiency Claims: Judge Cashman said the "evidence presented by the Commonwealth was more than sufficient to demonstrate that the Commonwealth had proven all of the elements of these crimes beyond a reasonable doubt."[3]

c. Merger Claims: Judge Cashman said the following offenses *should* merge for sentencing purposes:

i. Robbery with simple assault;

ii. Robbery with terroristic threats; and

iii. REAP with simple assault.

Judge Cashman said the following offenses should *not* merge: robbery with unlawful restraint; and burglary with simple assault. Judge Cashman closed by saying Cash's case should be remanded for resentencing.

23. On direct appeal, Chontos raised the following issues:

a. Is there sufficient evidence of terroristic threats when the threat is not communicated to the person identified as the victim?

b. Is there sufficient evidence of recklessly endangering another person when there is no evidence of the gun being loaded or operable?

[3] Opinion, 09/05/2008, at 9.

c. Is there sufficient evidence of unlawful restraint when the person is not exposed to serious bodily injury?

d. Is there sufficient evidence of simple assault on a bodily injury attempt theory when the actions and deeds do not manifest an intent to inflict bodily injury?

e. Do the following crimes merge at sentencing?

   i. Robbery with simple assault

   ii. Robbery and terroristic threats

   iii. REAP and simple assault

   iv. Robbery and unlawful restraint

   v. Robbery and REAP

f. Did the sentencing court comply with § 9721(b) when it failed to demonstrate any knowledge or consideration of the Sentencing Guidelines and failed to state reasons on the record for the sentences?

g. Is 70 years of probation, after a 30 to 60 prison sentence, excessive for a defendant who was 19 at the time of the charged offenses?

h. Is a 30 to 60 year prison sentence excessive for a first-time offender who was 19 at the time of the charged offense?

i. When sentencing Cash's co-defendants, can 10 to 20 years less in prison and 50 years less in probation be condoned when the sentencing court did not articulate his reasons on the record?

j. Whether Judge Cashman demonstrated ill-will, bias, or prejudice when he called Cash a "pig" and a "piece of garbage" requiring recusal if Cash is re-sentenced.

24. Cash did not raise a single jury instruction issue on appeal.

25. On October 5, 2009, before ruling on Cash's appeal, the Superior Court requested Judge Cashman to file a supplemental opinion regarding Cash's judicial bias and recusal issue.

26. On December 10, 2009, Judge Cashman issued his supplemental opinion, explaining why his comments at the May 16, 2007 sentencing hearing were appropriate and "did not demonstrate animus, bias or prejudice against Cash[.]"[4]

[4] Opinion, 12/10/2009, at 8.

27. On June 3, 2010, the Superior Court issued its second opinion, affirming many of Cash's convictions, but vacating Counts 13 (**terroristic threats**) and 28 (simple assault) based on insufficient evidence, and merging Counts 24 thru 27 (**simple assault**) with Counts 19 thru 23 (**REAP**). The Superior Court remanded for re-sentencing, but said Cash had to be re-sentenced by a different judge because Judge Cashman displayed "bias and prejudice" during Cash's initial sentencing hearing on May 16, 2007.

28. On remand, Cash's case was assigned to the Honorable Donald E. Machen ("Court"), who held Cash's re-sentencing hearing on September 20, 2010.

29. The Court issued the following sentences: Count Three (**IDSI**), 66 to 132 months; Count Four (**IDSI**), 66 to 132 months; Count Five (**robbery**), 60 to 120 months; Count Six (**burglary**), 60 to 120 months; Count Seven (**criminal conspiracy**), 60 to 120 months; Count Nine (**terrorist threats**), 5 years probation; Count Ten (**terroristic threats**), 5 years probation; Count 11 (**terroristic threats**), 5 years probation; and Count 12 (terroristic threats), 5 years probation. The prison and probation sentences are to be served consecutively.

30. On September 30, 2010, Richard Narvin, Cash's attorney at the re-sentencing hearing, filed a timely *Motion For Modification of Sentence.*

31. Cash filed a timely notice of appeal (423 WDA 2011) and was appointed new appellate counsel, Joseph F. McCarty, who timely filed his 1925(b) statement on April 25, 2011. McCarty raised one claim of error: "The trial court erred when it denied Defendant's Motion To Modify Sentence where the trial court failed to adequately consider the sentencing factors set forth in 42 Pa. C.S.A. §9721."

32. On June 23, 2011, Judge Machen filed his 1925(b) opinion, affirming Cash's sentences.

33. On August 22, 2011, McCarty filed Cash's opening brief to the Superior Court, raising the following issues:

    a. Claim 1: Did the trial court abuse its discretion when it sentenced the Defendant, a first time offender, to a total period of incarceration of twenty-six-and-a-half (26 ½) to fifty-three years?

    b. Claim 2: Did the trial court abuse its discretion when it sentenced Defendant to consecutive sentences for Robbery, Burglary, and Criminal Conspiracy and the Co-Defendant to concurrent sentences for the same crimes, resulting in a greater minimum and maximum sentencing range?

    c. Claim 3: Is 20 years probation after at 26 ½-53 year sentence for a 21-year-old excessive?

34. On November 29, 2011, the Superior Court affirmed Cash's sentence, but said he waived his discretionary sentencing claims (Claims 2 and 3) because he failed to raise them in his post-sentencing motion.[5] The Court addressed Cash's excessiveness claim (Claim 1), but said his 23 ½ to 53 year prison sentence was not excessive.

35. On December 29, 2011, Cash filed a *Petition For Allowance* to the Pennsylvania Supreme Court, which was denied on **September 4, 2012**.

36. Cash did not file a certiorari petition to the United States Supreme Court, which meanings his conviction become final on **December 4, 2012**. *See Griffith v. Kentucky*, 479 U. S. 314, 321, n. 6 (1987); 42 Pa.C.S. §9545(b)(3).

37. On September 9, 2013, **within one year of his conviction becoming final**, Cash filed a timely *pro se* PCRA petition, raising the following claims:

    a. A due process claim alleging his trial was rendered fundamentally unfair when the trial court allowed his co-defendant, Joshua Cash, to testify against him, despite the fact the Commonwealth failed to timely notify Cash and his attorney, Richard Narvin, of its intent to present Joshua as a witness.

    b. A due process-ineffective claim alleging that Cash asked his appellate attorney, David Chontos, to raise the aforementioned due process claim, but Chontos failed to do so.

38. On September 17, 2013, the Court appointed counsel to represent Cash and ordered counsel to file an amended PCRA petition.

39. On November 4, 2013, counsel filed a PCRA discovery motion. The Commonwealth agreed to disclose the requested evidence, but needed time to put together a discovery packet.

40. On March 10, 2014, the Commonwealth provided the requested discovery.

41. On July 17, 2014, counsel filed this amended PCRA petition on Cash's behalf.

I. The PCRA Statute

A. Cash Satisfies the PCRA's Requirements

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

[5] Super. Ct. Opinion, at 5-6 (quoting and citing *Commonwealth v. Rhodes*, 8 A.3d 912, 915 (Pa. Super. 2010), which quotes *Commonwealth v. Shugars*, 895 A.2d 1270, 1273-74 (Pa. Super. 2005)).

a. First, Cash 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, Cash must present a cognizable claim under 42 Pa. C.S. § 9543(a)(2).

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

B. Application of Facts to Statutory Requirement

43. Cash is serving a lengthy prison sentence at SCI-Forest. *See* 42 Pa. C.S. §9543(a)(1).

44. Cash 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).

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

II. Claims for Relief

Ineffective Assistance of Trial and Appellate Counsel Claims
U.S. Const. Amends. VI, VII, XIV; Pa. Const. Art. I, §§ 1, 9

The *Strickland-Pierce* Framework

46. Cash had a right to effective trial counsel. *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).

47. Cash also had a due process right to effective appellate representation. *See Evitts v. Lucey*, 469 U.S. 387, 394, 396 (1985); *accord Penson v. Ohio*, 488 U.S. 75, 85 (1988) ("The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage."). Thus, direct appeal, like trial, "require[s] careful advocacy to ensure that rights are not forgone and that substantial

legal and factual arguments are not inadvertently passed over." *Penson v. Ohio*, 488 U.S. at 85. While appellate counsel need not raise all non-frivolous claims, *see Jones v. Barnes*, 463 U.S. 745, 752-753 (1983), he must "examine the record with a view to selecting [and presenting] the most promising issues for review." *Id*. at 752.

48. To prevail on an ineffectiveness claim, Cash must demonstrate that counsel's performance was deficient and 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.

49. 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.[6]

<u>Claim One</u>: Appellate Counsel's Performance Fell Below Professional Norms Because He Failed to Raise A Meritorious Claim Challenging the Trial Court's Decision Not To Suppress Jennifer Matlas's and Teanna Williams's Out-of-Court Photographic Identifications of Cash. U.S. Const. Amends. VI, VII, XIV; Pa. Const. Art. I, §§ 1, 9

50. Before trial, Richard Narvin a suppression motion regarding JM's and TW's out-of-court photographic identifications made on November 23, 2004. Shortly thereafter, Judge Cashman held a suppression hearing, after which he denied Narvin's motion.

51. At trial, the Commonwealth premised its case primarily on JM's and TW's out-of-court and in-court identifications, as well as Joshua Cash's incentivized testimony (which allowed him to receive a greatly reduced sentence compared to Cash and William Chaffin).

52. The Court erred by not suppressing JM's and TW's out-of-court photographic identifications because there were sufficient facts in the record to prove their identifications were the by-product of a sequence of highly suggestive events and

[6] 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).

procedures that tainted their memories and, ultimately, their identifications. These facts include:

a. Three perpetrators assaulted JM and TW;

b. Each perpetrator had on a hooded sweatshirt to conceal his faces, while two perpetrators actually wore ski masks;

c. Each perpetrator was armed and repeatedly pointed their firearm at JM and TW while threatening them;

d. The perpetrators' gun-toting actions caused JM and TW to become "hysterical" and "scared";

e. When the perpetrators forced JM and TW to have sexual relations with them, the perpetrators placed their firearms against JM's and TW's waist or head;

f. When police interviewed JM and TW on the night of the assault, November 16, 2004, neither mentioned Cash's name, nor told police they recognized the perpetrator who did not wear a ski mask;

g. In the days following the assault, JM and TW heard "word on the street" was Cash, Joshua Cash, and Ivan Hale were the three perpetrators; JM and TW knew Cash by seeing him around the McKeesport community, but they did not know him personally; thus, they recognized his face, meaning if they saw a photograph of him they could identify him;

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    i. Both (JM and TW) told him about the "word on the street" regarding Cash, Joshua Cash, and Ivan Hale;

    ii. Both said they knew Cash before the assault, but not personally; instead, they knew him from seeing him around the neighborhood;

    iii. Both did not know Joshua or Hale, even from around the neighborhood; thus, of the three names circulating on the street, they only knew Cash from seeing him around the neighborhood;

    iv. Detective Lopretto did not have JM and TW view photographs on this date; instead, he had them return the next day on November 23, 2004 to view a series of photo arrays;

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and Hale's head shots; when JM viewed Cash's array, she identified Cash; when TW viewed Cash's array, she also identified Cash; TW also identified Hale as one of the perpetrators;

j. Detective Lopretto's photo array procedures included the following procedures:

i. Detective Lopretto knew the primary suspects in the case and, as a result, his photo array procedures were not performed blindly;

ii. For each photo array, Detective Lopretto showed all eight photographs simultaneously, not sequentially;

iii. Before viewing the photo arrays, Detective Lopretto never instructed JM and TW the suspect (or suspects) may or ***may not*** be in the photo arrays; and

iv. After interviewing JM and TW, and learning about Cash's, Joshua's, and Hale's names, Detective Lopretto asked JM and TW to return the next day to view photo arrays regarding these three men; in others, when JM and TW returned to the McKeesport Police Department on November 23, 2004, they knew they'd be viewing photographs containing the head shots of Cash (who they knew from the neighborhood), Joshua Cash, and Ivan Hale;

k. Pre-trial DNA testing identified William Chaffin as the alleged third perpetrator, not Ivan Hale;

l. Cash's fingerprints and DNA were not identified at the scene, despite JM's and TW's statements that Cash touched several items in JM's residence during the assault and he was not wearing gloves.

53. Despite ample facts to support a meritorious suggestive identification claim, challenging Judge Cashman's pre-trial admissibility ruling, David Chontos did not raise such a claim on direct appeal. Chontos had no strategic reason for not raising a claim challenging Judge Cashman's decision to admit JM's and TW's out-of-court photographic identifications.

54. Chontos's deficient performance prejudiced Cash: there is a reasonable probability that, had he raised this claim on direct appeal, the Superior Court would have granted relief. Here, all Chontos had to demonstrate on appeal is that Judge Cashman's factual and legal determinations that JM's and TW's out-of-court photographic identifications were reliable, *see Commonwealth v. Armstrong*, 74 A.3d 228, 238 (Pa. Super. 2013) (citation omitted) ("In reviewing the propriety of identification evidence, the central inquiry is whether, under the totality of the circumstances, the identification was reliable."), were incorrect. *See Commonwealth v. DeJesus*, 580 Pa. 303, 860 A.2d 102, 112 (Pa. 2004) ("Our standard of review in addressing a challenge to a trial court's

denial of a suppression motion is limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct."). The facts presented *supra* and discussed more fully *infra*, establish the incorrectness of Judge Cashman's decision.

A. The Admissibility of Photographic Identifications

55. As the Pennsylvania Supreme Court recently acknowledged, eyewitness identification "is arguably the most powerful form of evidence." *Commonwealth. v. Walker*, 28 EAP 2011, 2014 WL 2208139 (Pa. May 28, 2014), at * 10. Indeed, there 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!'" *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (emphasis in original) (quoting ELIZABETH F. LOFTUS, EYEWITNESS Testimony (1979)). Although very powerful, eyewitness identifications are also "widely considered to be one of the least reliable forms of evidence." *Id*. ("Because eyewitnesses can offer inaccurate, but honestly held, recollections in their attempt to identify the perpetrator of a crime, eyewitness identifications are widely considered to be one of the least reliable forms of evidence."); *Cf. Estate of Bryant*, 35 A. 571, 577 (Pa. 1896) ("[R]ecognition or identification [is] one of the least reliable of facts testified to even by actual witnesses who have seen the parties in question.").We know this because of the voluminous social science research and three hundred plus DNA exonerations. *See* id. at *11 ("DNA testing has brought to the fore the damaging impact of erroneous eyewitness identification as well."); *see also* www.innocenceproject.org (since 1989 there have been 317 DNA exonerations) (last visited July 15, 2014). In short, "there is no doubt that wrongful conviction due to erroneous eyewitness identification continues to be a pressing concern for the legal system and society." *Id*. at *11, *13 ("[A]dvances in scientific study have strongly suggested that eyewitnesses are apt to erroneously identify a person as the perpetrator of a crime when ***certain factors are present***") (emphasis added).

56. Considering eyewitness identification's unreliability, particularly identifications based on suggestive procedures, the Due Process Clause demands all identifications be reliable and the product of non-suggestive procedures. Indeed, as the U.S. Supreme Court noted nearly a half-century ago, "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor." *United States v. Wade*, 388 U.S. 218, 229 (1967). Identifying and prohibiting the admission of unreliable identifications, therefore, is of monumental significance because "jurors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable." *United States v. Brownlee*, 454 F.3d 131, 142 (3d Cir. 2006); *accord Commonwealth v. Walker*, 2014 WL 2208139, at *18 ("As noted above, eyewitness identification can be extremely powerful testimony; yet, its limits often are not understood by jurors. Studies have concluded that jurors misunderstand the accuracy of eyewitness identification.").

57. Thus, Cash is entitled to relief if he demonstrates that Detective Lopretto's photographic array procedures were "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" JM and TW misidentified Cash. *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977).

58. 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 a suggestive procedures: (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.

59. 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; *Commonwealth v. Armstrong*, 74 A.3d at 238. 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 Law To Facts: Detective Lopretto's Photographic Array Was Impermissibly Suggestive

60. Here, the sequence of events leading to JM's and TW's photographic identifications, as well as the manner in which Detective Lopretto presented the photo arrays, proves the photo arrays were impermissibly suggestive and JM's and TW's identifications unreliable in the sense that, the identifications are not premised on who they saw during the crime, but what name they recognized once specific names started circulating around the McKeesport community.

61. The sequence of events presents compelling evidence regarding Cash's claim because it shows how the "word on the street" tainted JM's and TW's identifications. Specifically, JM's and TW's recognition of Cash is not based on what they saw and experienced during their assaults; rather, it is based on the rumors and hearsay circulating around the McKeesport community. As noted below, JM and TW had no clue who assaulted them immediately after the assault, but after listening to the rumors and hearsay from the McKeesport streets, they recognized Robert Cash as someone they had repeatedly seen around the McKeesport community. When JM and TW finally ***had a face they knew and recognized*** this all but sealed Cash's fate.

a. First, when police interviewed JM and TW at the hospital on the night of the assault, November 16, 2004, neither JM nor TW mentioned recognizing any of the three masked and hooded perpetrators. Moreover, neither mentioned Cash's name or said they recognized one of the perpetrators as someone they knew from the McKeesport neighborhood. If JM and TW recognized any of the perpetrators, they would have immediately informed the police.

b. Second, before meeting with police to provide more formal and comprehensive statements, JM and TW heard from other people in the McKeesport community that Robert Cash, Joshua Cash, and Ivan Hale were the three perpetrators. JM and TW both knew Cash from the neighborhood, by ***seeing him*** on the streets every so often, but did not know him personally. Thus, JM and TW knew Cash ***by his face***, but not by his name. JM and TW did not know Joshua or Hale personally or by facial recognition.

c. Third, on November 22, 2004, JM and TW met with Detective Lopretto at the McKeesport Police Department and gave more detailed statements. During the interview, JM and TW told Detective Lopretto about the rumors circulating on the McKeesport streets regarding Cash, Joshua Cash, and Ivan Hale. Detective Lopretto did not present any photo arrays to JM and TW during or after this interview; instead, he asked them to return the next day, November 23rd, to view photo arrays containing Cash, Joshua, and Hale. Thus, when JM and TW left the McKeesport Police Department that day, they knew they'd be presented photo arrays containing Cash's, Joshua's, and Hale's head shots. In the end, if word on the street was that Cash, Joshua, and Hale were responsible for the assault, and JM and TW knew Cash from ***seeing him*** in the neighborhood, it was a foregone conclusion that once they viewed Cash's head shot they would identify him as one of the perpetrators.

d. Fourth, on November 23, 2004, Detective Lopretto presented three eight-man photo arrays to JM and TW; one array contained Cash's head shot, one Joshua's head shot, and one Hale's head shot. Although Detective Lopretto separately presented the photo arrays to JM and TW, the manner in which he presented the them was impermissibly suggestive:

    i. To begin with, Detective Lopretto knew the primary suspects in the case and, as a result, he did not ***blindly*** present the photo arrays. This increased the likelihood he–consciously or unconsciously–directed JM's and TW's attention toward Cash'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."); *State v. Lawson*, 291 P.3d 673, 705-706 (Or. 2012) ("In police lineup identifications, research shows that lineup administrators who know

the identity of the suspect often consciously or unconsciously suggest that information to the witness.").[7] To combat this problem, Detective Lopretto 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); *State v. Henderson*, 27 A.3d 872, 896-897 (N.J. 2011) (reviewing scientific research on double-blind administration and concluding that "[t]he consequences are clear: a non-blind lineup procedure can affect the reliability of a lineup.... An ideal lineup administrator, therefore, is someone who is not investigating the particular case and does not know who the suspect is").[8]

ii. Next, for each photo array, Detective Lopretto showed all eight photographs simultaneously, not sequentially. This increased the likelihood of misidentification because, as the social science research has established, 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).

iii. Furthermore, before viewing the photo arrays, Detective Lopretto never instructed JM and TW that the suspect (or suspects) may or ***may not*** be in the photo arrays. Instead, he did the opposite; before leaving the McKeesport Police Department on November 22, 2004, Detective Lopretto told JM and TW to return the next day, November 23rd, so they could view photo arrays containing Cash's, Joshua Cash's, and Ivan Hale's photos. 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 at 897. Social science data supports this conclusion. *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); Roy S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup*

[7] 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).

[8] 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).

Instructions and the Absence of the Offender, 66 J. APPLIED PSYCHOL. 482, 485 (1981).

62. Individually and collectively, these facts prove Detective Lopretto's photo array procedures were "impermissibly suggestive." *Neil v. Biggers*, 409 U.S. at 197.

C. Additional Factors Affecting the Reliability of JM's and TW's Identifications

63. According to the social science research, three other variables also impacted JM's and TW's ability to accurately identify the perpetrators, including Cash. Reliability, as mentioned, "is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite*, 432 U.S. at 114. Reliability, in this context, means accuracy, *i.e.*, were there factors impacting the witness's ability to accurately identify the perpetrator(s).

64. First, three men assaulted JM and TW. When an eyewitness must identify multiple perpetrators at once, especially when the eyewitness is one of the perpetrators' victims, the social science data shows the accuracy of the identification made by these witnesses (or victims) decreases. *See, e.g.*, Zoe J. Hobson & Rachel Wilock, *Eyewitness Identification of Multiple Perpetrators*, 13 INT'L J. POLICE SCI. & MGMT. 286 (2011); Ahmed M. Megreya & Markus Bindemann, *Identification accuracy for ingle- and double-perpetrator crimes: Does accomplice gender matter?*, 103 BRITISH JOURNAL OF PSYCHOLOGY 439-453 (2011); Jessica Owens, Anna Rainey, & Jennifer Dysart, *Is Three Really a Crowd?: The Effects of Multiple Perpetrators on Eyewitness Identification Accuracy and Confidence*, Paper presented at the annual meeting of the American Psychology - Law Society, TBA, San Antonio, TX, Mar 05, 2009.[9]

65. Second, as mentioned, three ***armed*** perpetrators ambushed JM, TW, and their children. Throughout the assault, the perpetrators held their weapons against JM's and TW's body to ensure they did as instructed. Social science research has repeatedly demonstrated the presence of a weapon, during a crime, affects a witness's ability to accurately identify the perpetrator(s) at a later date, particularly when the witness is the perpetrator's (or perpetrators') victim. *See* Kerri L. Pickel, *Unusualness and Threat as Possible Causes of "Weapon Focus,"* 6 MEMORY 277 (1998); Nancy Mehrkens Steblay, *A Meta-Analytical Review of the Weapon Focus Effect*, 16 LAW & HUM. BEHAV. 413 (1992).

66. Third, JM's and TW's attention to the perpetrators' facial and physical characteristics were significantly impaired because they were both under significant stress when the three men ambushed them with guns drawn. JM and TW described being "hysterical," "very scared," and "shaken up" as a result of the perpetrators' actions. Social science research has repeatedly demonstrated that, as a witness'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.

[9] Available at: http://citation.allacademic.com/meta/p_mla_apa_research_citation/2/9/6/0/3/p296033_index.html.

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).

67. Fourth, the time between the assault (November 16, 2004) and JM's and TM's photographic identifications (November 27, 2004) was seven days, 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).

68. Fifth, all three men wore hooded sweatshirts to conceal their faces, while two of the three men had on ski masks. Disguises as simple as hats have been shown to reduce identification accuracy. *See* Brian L. Cutler et al., *Improving the Reliability of Eyewitness Identification: Putting Context into Context*, 72 J. APPLIED PSYCHOL. 629, 635 (1987).

69. Sixth, before their making their identifications, JM and TW learned that "word on the street" in McKeesport was that Robert Cash, Joshua Cash, and Ivan Hale were the three hooded and masked men who assaulted them. Once they learned about their names, JM and TW spoke to one another and discussed how each knew Cash by ***seeing him*** around the McKeesport community. After speaking to one another, they met with Detective Lopretto on November 22, 2004, and told him what they were hearing from the "word on the street." After speaking with Detective Lopretto, he asked them to return the next day, November 23rd, to view photo arrays containing photos of Cash, Joshua Cash, and Ivan Hale. When they returned on November 23rd, and viewed the photo arrays, they both identified Cash. In short, there is are strong likelihood JM and TW tainted each other's actions and identifications, as well as the actions of private actors, *i.e.*, the McKeesport community members who spread the rumor that Cash, Joshua Cash, and Ivan Hale were responsible for the assault.

    a. Studies show that witness memories can be altered when co-eyewitnesses share information about what they observed. Those studies bolster the broader finding "that post-identification feedback does not have to be presented by the experimenter or an authoritative figure (e.g. police officer) in order to affect a witness' subsequent crime-related judgments." Elin M. Skagerberg, *Co–Witness Feedback in Line-ups*, 21 APPLIED COGNITIVE PSYCHOL. 489, 494 (2007). Feedback and suggestiveness, in other words, can come from co-witnesses and others not connected to the State.

    b. Moreover, other private actors also tainted JM's and TW's identifications. As explain *supra*, the "word on the street" provided a name and face JM and TW "recognized" from the McKeesport community. Notably, they "recognized" Cash not from their memories of the assault, but from simply seeing him around the McKeesport community. This was critical because, before hearing the "word on

the street," JM and TW had no idea the identity of the three perpetrators. Indeed, their initial descriptions of the three men were vague and not terribly helpful; likewise, neither mentioned Cash's name or said they recognized the non-masked perpetrator as someone they had frequently or occasionally seen in the McKeesport community. Thus, based on the fact private actors can taint a witness's identification, courts across the country are now providing jury instructions like this one from New Jersey:

> [The trial judge should refer to] "factors relating to suggestiveness, that are supported by the evidence," including "whether the witness was exposed to opinions, descriptions, or identifications given by other witnesses, to photographs or newspaper accounts, or to any other information or influence that may have affected the independence of his/her identification."[10]

70. Seventh, TW wrongly identified Ivan Hale as one of the three perpetrators. DNA testing conclusively linked William Chaffin to the assault. TW's misidentification of Hale, without question, undermines her identification of Cash.

71. Eighth, although investigators collected several item of evidence from JM's residence (where the assault occurred), Cash's fingerprints were not on a single item. This is significant because JM and TW said the men touched several objects as they ransacked the house and that they were not wearing gloves.

72. Ninth, although investigators collected JM's and TW's sexual assault kits and clothing, as well as Cash's biological samples, Cash's DNA was not identified on the sexual assault kit samples or their clothing.

73. Ten, unlike Joshua Cash, who implicated himself in the crime, when Cash gave his pre-trial statement to detectives he denied involvement.

74. Eleven, absent JM's and TW's in- and out-of-court identifications, the Commonwealth's case is supported only by the testimony of an incentivized witness, *i.e.*, Joshua Cash. Joshua, keep in mind, received a greatly reduced sentence in exchange for his testimony, so he had every incentive to craft his testimony in a manner most helpful and beneficial to the Commonwealth.

75. Individually and collective, these factors demonstrate there is a "substantial likelihood" JM and TW misidentified Cash, *Manson v. Brathwaite*, 432 U.S. at 116, meaning Judge Cashman erred when he permitted their out-of-court photographic identifications.

[10] Model Jury Charge (Criminal), "Identification: In–Court and Out–of–Court Identifications" (2007).

D. There Was No Independent Basis For JM's and TW's Identifications, Meaning Their In-Court Identifications Were Not Admissible Either

76. Here, JM and TW both made in-court identifications of Cash as well. JM made in-court identifications at trial and during multiple pre-trial hearings.

77. An unduly suggestive out-of-court photographic identification does not necessarily bar an in-court identification by the same witness. The in-court identification is 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 the 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).

78. The factors to consider when determining whether an independent basis exits are the exact 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. With this being the case, there can be no independent basis because, as Cash already demonstrated, *see supra*, when the Court reviews these five factors it is obvious that:

    a. JM and TW did not have an adequate opportunity to view the three men and their attention was significantly impaired; we know this for a variety of reasons:

        i. The man alleged to be Cash wore a hooded sweatshirt to conceal his face and JM only saw his eyes above his nose (*i.e.*, nose and eyes).

        ii. All three men had firearms, including one saw-off shotgun, and they repeatedly threatened not only JM and TW with their firearms, but also their children. This, understandably, caused JM and TW to hysterical and very scared affecting their attention and memory retention skills.

    b. JM's and TW's initial description of the non-masked, hooded man (*i.e.*, the man identified as Cash) was, for all intents and purposes, an inaccurate description because, despite knowing Cash from seeing him around the McKeesport community, they did not mention or describe him when they spoke to the police at the hospital on the night of the assault. Instead, they offered a vague description of the non-masked, hooded man. Common sense and experience. However, teach us that, if Cash was in fact one of the three men, JM and TW would have recognized him, immediately mentioned this to the police the night of the assault, and provided a more detailed description of him (because they knew him from seeing him around the McKeesport community).

c. Last, the seven day gap between the assault and their identifications undermined the reliability of their identifications.

E. Ineffective Assistance of Appellate Counsel Considerations

79. Here, Cash's initial appellate attorney, David Chontos, did not have a reasonable basis not to challenge Judge Cashman's pre-trial admissibility ruling regarding JM's and TW's identifications. *See Commonwealth v. Paddy*, 15 A.3d 431, 442 (Pa. 2011).*Commonwealth v. Rios*, 920 A.2d 790, 799 (Pa. 2007). Thus, his performance, in this respect, was deficient.

80. Chontos's deficient performance prejudiced Cash because, as the above analysis demonstrates, Judge Cashman's pre-trial admissibility ruling was incorrect as a matter of law and fact, meaning there is a reasonable probability the Superior Court would have granted relief had Chontos adequately presented the claim on direct appeal.

81. Cash is entitled to relief, namely a new trial where JM's and TW's out-of-court and in-court identifications are not admissible.

Claim Two: Trial Counsel's Performance Fell Below Professional Norms Because He Failed To Timely Object To Several Inadequate and Illegal Jury Instructions. U.S. Const. Amends. VI, VII, XIV; Pa. Const. Art. I, §§ 1, 9

A. Relevant Facts

82. On February 22, 2007, after closing arguments, Judge Cashman instructed the jury. At no time before, during, or after his instructions did trial counsel object to any of the instructions.[11] For instance, at the end of its final instructions, when Judge Cashman asked the Commonwealth and trial counsel when either wanted to make corrections or additions to his instruction, both said no.[12]

83. After trial and sentencing, Cash's initial appellate attorney, David Chontos, filed his post-sentencing motion and 1925(b) Statement. In both pleadings, Chontos argued that several jury instructions were erroneous warranting new trials for various offenses.

84. In his 1925(b) opinion, however, Judge Cashman said Cash waived every jury instruction claim because trial counsel did not object to his instructions before the jury retired to deliberate as required by Pa. R. Crim. P. 647(B) ("No portion of the charge nor omissions therefrom may be assigned as error, unless specific objections are made thereto before the jury retires to deliberate. All such objections shall be made beyond the hearing of the jury.").

[11] NT, Trial, at 427-451 (jury charge).
[12] NT, Trial, at 449.

85. Based on trial counsel's failure to timely object to the erroneous jury instructions, and Chontos's inability to litigate trial counsel ineffectiveness claims on direct appeal, *see Commonwealth v. Grant*, 813 A.2d 726, 738 (Pa. 2002); *Commonwealth v. Stollar*, 84 A.3d 635, 652 (Pa. 2014) (reaffirming *Grant*); *Commonwealth v. Holmes*, 79 A.3d 562, 563-564 (Pa. 2013) (same), Chontos made a strategic decision not to raise any jury instruction issues on direct appeal.

86. Counsel is now presenting the jury instruction claims to the Court, but doing so under an ineffective assistance of trial counsel rubric. Thus, even if Cash technically waived his jury instruction issues for appellate review purposes, thanks to trial counsel's ineffectiveness, his ineffectiveness claims are not waived due to *Grant* and its progeny.

87. Trial counsel did not have a strategic reason for not objecting to the following erroneous jury instructions.

B. Standard of Review of Jury Instruction Claims

88. When "reviewing jury instructions for error, the charge must be read as a whole to determine whether it was fair or prejudicial." *Commonwealth v. Sepulveda*, 55 A.3d 1108, 1141 (Pa. 2012). A trial court

> … has broad discretion in phrasing its instructions and may choose its own wording as long as the law is clearly, adequately, and accurately presented to the jurors. There is error only where the trial court inaccurately states the law or otherwise abuses its discretion. An abuse of discretion is not a mere error in judgment but, rather, involves bias, ill will, partiality, prejudice, manifest unreasonableness, or misapplication of law.

Commonwealth v. Scott, 73 A.3d 599, 607 (Pa. Super. 2013) (citing *Commonwealth v. Hoover*, 16 A.3d 1148, 1150 (Pa. Super. 2011)).

89. Thus, a reviewing court "will not rigidly inspect a jury charge, finding reversible error for every technical inaccuracy, but rather evaluate whether the charge sufficiently and accurately apprises a lay jury of the law it must consider in rendering its decision." *Commonwealth v. Prosdocimo*, 578 A.2d 1273, 1276 (Pa. 1990).

<u>Jury Instruction Claim 2(a)</u>: The Was a Fatal Variance Between the Commonwealth's Charging Document, *i.e.*, Information, and the Trial Court's Jury Instruction Relating to Cash's Simple Assault Convictions

A. Indictment and Fatal Variance Case Law

90. The Commonwealth must give clear notice of the charges against a defendant so he can properly prepare a defense. *See, e.g., Commonwealth v. O'Brien*, 449 A.2d 642, 643 (Pa. Super. 1982); *Commonwealth v. Wolfe*, 289 A.2d 153 (Pa. Super. 1972). The indictment or charging document's purpose, therefore, is "to provide the accused with sufficient notice to prepare a defense, and to insure that he will not be tried twice for the same act." *Commonwealth v. Rolinski*, 406 A.2d 763, 764 (Pa. Super. 1979) *accord Commonwealth v. Ackerman*, 361 A.2d 746 (Pa. Super. 1976). Indictments or charging documents, however, "must be read in a common sense manner and are not to be construed in an overly technical sense." *Commonwealth v. Pope*, 317 A.2d 887, 890 (Pa. 1974).

91. When the Commonwealth's charging document alleges a specific offense, *e.g.*, simple assault by physical menace, the trial court must instruct the jury on this specific offense, not a variant of it, *e.g.*, simple assault by causing bodily injury. If the charging document and the jury charge do not mirror one another, a variance has occurred. A variance is fatal if it "could mislead the defendant at trial, involves an element of surprise prejudicial to the defendant's efforts to prepare his defense, precludes the defendant from anticipating the prosecution's proof[,] or impairs a substantial right." *Commonwealth v. Pope*, 317 A.2d 887, 890 (Pa. 1974); *Commonwealth v. Jones*, 912 A.2d 268, 289 (Pa. 2006). In addressing a charge that there exists a fatal variance, we must first inquire whether a variance indeed exists. Absent an initial determination of variance, the reviewing court need not conduct a prejudice analysis. *See Commonwealth v. Lohr*, 468 A.2d 1375, 1377-1378 (Pa. 1983)

B. The Simple Assault Charge and Statute

92. Under Crimes Code § 2701(a), a person is guilty of simple assault if he: "(1) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another; (2) negligently causes bodily injury to another with a deadly weapon; (3) attempts by physical menace to put another in fear of imminent serious bodily injury; or (4) conceals or attempts to conceal a hypodermic needle on his person and intentionally or knowingly penetrates a law enforcement officer or an officer or an employee of a correctional institution, county jail or prison, detention facility or mental hospital during the course of an arrest or any search of the person."

93. Thus, under § 2701(a), four types of conduct can trigger a simple assault prosecution and conviction. The Commonwealth, importantly, was tasked with identifying which of the four types of conduct Cash allegedly violated, and informing him as such so he can properly defend himself at trial.

94. Here, critically, the Commonwealth charged Cash with five counts of simple assault under § 2701(a)(3), *i.e.*, Cash attempted, by *physical menace*, to put another in fear of *imminent* serious bodily injury.[13] Consequently, the Commonwealth had the burden of proving each element of this specific crime beyond a reasonable doubt.

C. Trial Court's Pre- and Post-Trial Instruction

95. The trial court's simple assault instructions, both preliminary and final, were for a different crime. This error justifies vacating Cash's four remaining simple assault convictions.[14]

96. In its preliminary instructions, the trial court said the following regarding the Commonwealth's simple assault charges:

> Finally, simple assault is engaging in a course of conduct which caused or was likely to cause bodily injury.[15]

97. In his final instructions, before the jury retired to deliberate, the trial court provided the following instruction:

> The defendant is also charged with five counts of simple assault. We talked about bodily injury as opposed to serious bodily injury. Bodily injury is the impairment of the physical condition or substantial pain. Serious means the impairment of a physical condition which creates a substantial risk of death of serious permanent disfigurement or use of a bodily member organ.
>
> In order to find him guilty of the charge of assault, you must be satisfied that the following elements have been proven beyond a reasonable doubt. First, that the defendant engaged in conduct that constituted substantial death causing bodily injury to any one or all of the five victims listed. Second, that the defendant's conduct was intentional and that it was his conscious objective or intent to cause such bodily injury.[16]

98. The trial court, notably, did not mention (or define) "attempt," "physical menace," or "imminent."

[13] Information, Counts 24 thru 28.
[14] Cash's four remaining simple assault convictions merged with his REAP convictions for sentencing purposes.
[15] NT, Trial, at 9.
[16] NT, Trial, at 445.

99. Both instructions, preliminary and final, derive from the standard jury instruction 15.2701A (Crim) of the Pennsylvania Suggested Standard Criminal Jury Instructions (2d ed. 2006), which sets forth the elements for simple assault predicated on the theory Cash intentionally inflicted bodily injury.

100. The trial court erred when it gave this instruction because the Commonwealth did not charge Cash under this theory of simple assault. Instead, the Commonwealth charged Cash under a "physical menace" theory. Thus, under the Commonwealth § 2701(a)(3) theory, it had to prove Cash *attempted*, by *physical menace*, to put another in fear of *imminent* serious bodily injury.[17] Thus, the trial court should have read standard jury instruction 15.2701D (Simple Assault – Physical Menace).

101. The trial court erred by instructing the jury it could convict Cash of an offense the Commonwealth never charged him with. Consequently, the jury's simple assault convictions must be vacated because the Commonwealth never notified Cash of its intent to pursue a § 2701(a)(1) conviction.

102. The trial court's error should have been obvious to trial counsel and should have prompted an objection. Trial counsel's failure to object was not based on a strategic decision but rather inattention and ineffectiveness.

Jury Instruction Claim 2(b): The Trial Court Failed To Instruct the Jury As To All The Essential Elements of Unlawful Restraint.

103. The Commonwealth charged Cash with five counts of unlawful restraint. *See* 18 Pa. C.S. § 2902.

104. A person commits unlawful restraint degree if he knowingly "restrains another unlawfully in circumstances exposing him [or her] to risk of serious bodily injury." Thus, when prosecuting an unlawful restraint case, "the burden… [is] on the Commonwealth to prove beyond a reasonable doubt that the bodily injury to which the victim was exposed was serious bodily injury." *Commonwealth v. Ack*erman, 361 A.2d 746, 749 (Pa. Super. 1976).

105. In other words, the Commonwealth must prove that the defendant (1) unlawfully (2) restrained the victim (3) exposing him or her to (4) the risk of serious bodily injury. Likewise, the trial court had a "fundamental duty" to "give full and explicit instructions as to the nature of the [unlawful restraint] charges." *Commonwealth v. Weatherwax*, 73 A.2d 427, 428 (Pa. Super. 1950). Stated differently,

> One of the primary requisites in doing substantial justice… is that the jury shall clearly appreciate the exact issues involved. Consequently, when the issue is not clear, it becomes the duty of the court even though not requested so to do, to give sufficient instruction to the jury that they may

[17] Information, Counts 24 thru 28.

> know precisely what propositions are submitted for their consideration so that they may render a just verdict.

Commonwealth v. Franklin, 452 A.2d 230, 232 (Pa. Super. 1947).

106. Despite its "fundamental duty" to give "full and explicit instructions," the trial court's final unlawful restraint instruction to the jury was incomplete because the it said the following:

> The defendant has been charged with five counts of unlawful restraint. Again, these involve the same five victims. In order for you to find the defendant guilty of this charge, you must be satisfied that the following elements have been proven beyond a reasonable doubt. First, that the defendant ***restrained*** either Jennifer Matlas, Tianna Williams, Terri Matlas, or the two minor children and he did so ***unlawfully*** in the circumstances which *exposed* each or every one of them to ***the risk of serious bodily injury***. And, second, that the defendant did so knowingly. That is, the defendant was aware of three things. That he was restraining the alleged victims, that the restraint was unlawful, and it exposed that victim to the risk of serious bodily injury.[18]

107. Here, the trial court did not define the following words and phrase: (1) restrained; (2) unlawful; and (3) exposed to serious bodily injury. Each word or phrase, more importantly, represented a critical element the Commonwealth had to prove beyond a reasonable doubt. These terms, however, terms have "meanings laymen do not necessarily understand without judicial guidance." *Commonwealth v. Robinson*, 425 A.2d 748 (Pa. Super. 1980) (finding legal error when trial court failed to adequately instruct jury regarding the essential elements of simple assault). As a result, the trial court erred when it did not define (1) restrain, (2) unlawfully, and (3) exposed to serious bodily injury.

108. The Court must vacate Cash's four remaining unlawful restraint convictions because the jury could not properly convict Cash under 18 Pa. C.S. § 2902(a) based on the trial court's inadequate jury instruction.

109. The trial court's error should have been obvious to trial counsel and should have prompted an objection. Trial counsel's failure to object was not based on a strategic decision but rather inattention and ineffectiveness.

[18] NT, Trial, at 443-444 (emphasis added).

<u>Jury Instruction Claim 2(c)</u>: The Trial Court Failed To Instruct the Jury on the Essential Elements of Theft When It Instructed the Jury as to What the Commonwealth Had to Prove in Order to Convict Cash of Burglary

A. Indictment and Burglary Case Law

110. The Commonwealth charged Cash with burglary. *See* 18 Pa. C.S. § 3502(a)(1).

111. A person commits burglary "if, with the ***intent to commit a crime therein***, the person enters a building or occupied structure, or separately secured or occupied portion thereof that is adapted for overnight accommodations in which at the time of the offense any person is present." 18 Pa. C.S. § 3502(a)(1) (emphasis added). The Commonwealth is not required to specify, in the Information or charging document, what crime a burglary defendant was intending to commit once inside the building or occupied structure. *See Commonwealth v. Von Aczel*, 441 A.2d 750 (Pa. Super. 1981). However, "it *is* necessary for the Commonwealth to prove at trial that the defendant did in fact intend to commit a crime in the building." *Commonwealth. v. Vazquez*, 476 A.2d 466, 469 (Pa. Super. 1984) (emphasis in original).

112. Thus, because the Commonwealth must prove the defendant intended to commit a particular offense, the intended offense becomes an essential element of the Commonwealth's burglary charge, meaning the trial court must instruct the jury regarding the elements of the intended offense. As the Superior Court explained *Vazquez*,

> Since the Commonwealth is required to prove that an accused intended to commit a crime after entering a building or occupied structure, 18 Pa. C.S. § 3502(a), it naturally follows that there should be no prohibition as to giving a jury instruction on the underlying crime if it is requested by counsel or in the alternative felt necessary by the trial judge. Otherwise, the jury could be left to speculate and possibly could not reach an adequate conclusion as to the charge of burglary.

Id. at 469-470; *accord Commonwealth v. Franklin*, 452 A.2d 797, 800 (Pa. Super. 1982) ("Since sufficient evidence was presented concerning theft at trial, the lower court properly instructed the jury concerning theft though not requested by either the Commonwealth or the defense."); *id*. ("To… prohibit a jury instruction on the crime the Commonwealth sought to prove that a defendant intended to commit, would effectively deny the defendant an instruction on one of the elements of burglary-*i.e.*, that appellant intended to commit a theft therein-and would leave a jury to speculate.").

B. The Information and Trial Court's Instructions

113. Here, the Commonwealth did not specify in the Information what crime Cash intended to commit once he entered the Matlas residence. However, at trial the Commonwealth presented evidence that Cash and his co-defendants intended to commit a sexual assault, a robbery, or a theft. For instance, during its preliminary instructions, the trial court informed the jury: "It [burglary] does not have to be a robbery or theft. In this particular case it could be any one of the sexual assaults."[19] The trial court added:

> Going back to the burglary charge here, that burglary goes around the sexual assault rather than what you would traditionally think might be although there is a robbery that is also alleged.[20]

114. The trial court's final instruction also mentioned sexual assault, robbery, and theft as the possible crime Cash intended to commit once he and his co-defendants entered the residence:

> In order for you to find the defendant guilty of this particular crime… First… Second…. Third, that the Defendant entered with the intention of committing the crimes of robbery, theft, and/or rape.[21]

115. Consequently, because the Commonwealth's burglary theory at trial included all three offenses (*i.e.*, sexual assault, robbery, and theft), the trial court had to instruct the jury as to the essential elements of each offense because any or all of the offenses could be an essential element of burglary. While the trial court identified the essential elements robbery and sexual assault (or rape) for the jury,[22] it did *not* instruct as to the essential elements of theft.[23] The trial court's failure to offer clear instructions regarding theft constitutes reversible error.

116. The trial court's error should have been obvious to trial counsel and should have prompted an objection. Trial counsel's failure to object was not based on a strategic decision but rather inattention and ineffectiveness.

[19] NT, Trial, at 8.
[20] NT, Trial, at 9.
[21] NT, Trial, at 441-442.
[22] NT, Trial, at 438 (defining rape), 440 (defining robbery).
[23] Counsel is cognizant that when "reviewing jury instructions for error, the charge must be read as a whole to determine whether it was fair or prejudicial." *Commonwealth v. Sepulveda*, 55 A.3d at 1141. With this in mind, counsel points out that the trial court briefly discussed "theft" when it instructed the jury as to the robbery charge: "Theft means the taking of moveable property of another with the intention to deprive the owner of his or her property." NT, Trial, 440. The trial court's brief definition of theft does not make its burglary instruction adequate or fair. Indeed, the trial court's theft instruction is inadequate because it failed to define "movable property" and "deprive."

<u>Jury Instruction Claim 2(d):</u> The Was a Fatal Variance Between the Commonwealth's Information and the Trial Court's Jury Instruction Relating to Cash's Robbery Conviction

117. The Commonwealth charged Cash with robbery, *see* 18 Pa. C.S. § 3701(a)(1), and identified Jennifer Matlas as the *sole* robbery victim.[24]

118. Under Pa. R. Crim. P. 564, if the Commonwealth wished to amend the Information to include additional victims, it could do so, but only if the amendment did not tact on additional offenses. Rule 564 provides:

> The court may allow an information to be amended when there is a defect in form, the description of the offense(s), the *description of any person* or any property, or the date charged, *provided the information as amended does not charge an additional* or different offense. Upon amendment, the court may grant such postponement of trial or other relief as is necessary in the interests of justice. (emphasis added).

119. Rule 564's "purpose… is to ensure that a defendant is fully apprised of the charges, and to avoid prejudice by prohibiting the last minute addition of alleged criminal acts of which the defendant is uninformed." *Commonwealth v. Sinclair*, 897 A.2d 1218, 1221 (Pa. Super. 2006). Pennsylvania courts "apply the rule with an eye toward its underlying purposes and with a commitment to do justice rather than be bound by a literal or narrow reading of the procedural rules." *Commonwealth v. Grekis*, 601 A.2d 1284, 1288 (Pa. Super. 1992).

120. The Commonwealth chose not to amend the Information before or during trial or after the record closed. However, when the trial court issued its robbery instructions, it unilaterally decided to (amend and) expand the number of victims from one (*i.e.*, Jennifer Matlas) to five (*i.e.*, Jennifer Matlas, Terry Matlas, Teanna Williams, and the two minor children). The trial court's robbery charge, in pertinent part, is as follows: "First, that the defendant threatened the ***victims*** or intentionally put the ***victims*** in fear..."[25]

121. The variance between the Information and the trial court's robbery instruction violated Rule 564. *See Commonwealth v. Martin*, 694 A.2d 343, 345 (Pa. Super. 1997).

122. Factors the trial court must consider in determining whether an amendment is prejudicial are: (1) whether the amendment changes the factual scenario supporting the charges; (2) whether the amendment adds new facts previously unknown to the defendant; (3) whether the entire factual scenario was developed during a preliminary hearing; (4) whether the description of the charges changed with the amendment; (5) whether a change in defense strategy was necessitated by the amendment; and (6)

[24] Information, Count 5.
[25] NT, Trial, at 440.

whether the timing of the Commonwealth's request for amendment allowed for ample notice and preparation. *See Commonwealth v. Beck*, 78 A.3d 656 (Pa. Super. 2013); *Commonwealth v. Grekis*, 601 A.2d at 1292.

123. Here, the prejudice from the trial court's unrequested amendment stems from the *timing* of the variance. The variance appeared *after* Cash had cross-examined all the witnesses and *after* he presented his defense. The timing, obviously, did not "allow for ample notice and preparation." *See Commonwealth v. Beck*, 78 A.3d at 660.

124. The prejudice to Cash warrants vacating his robbery conviction and granting a new trial on the robbery charge.

125. The trial court's error should have been obvious to trial counsel and should have prompted an objection. Trial counsel's failure to object was not based on a strategic decision but rather inattention and ineffectiveness.

Jury Instruction Claim 2(e): The Trial Court Failed To Instruct the Jury Regarding an Essential Element of Making Terroristic Threats

126. The Commonwealth charged Cash with five counts of terroristic threats.

127. A person "commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to… commit any crime of violence with intent to terrorize another." 18 Pa. C.S. § 2706(a)(1). Thus, an essential element of terroristic threats is that the person must have "communicated" his threat. *See Commonwealth v. Thomas*, 879 A.2d 246, 264 (Pa. Super. 2005) ("[T]he crime of terroristic threats requires communication of a threat…").

128. As an essential element of terroristic threats, the trial court had a duty to issue an instruction on the "communicated" element. The trial court, however, did not issue such an instruction. Instead, the trial court issued the following instruction:

> In order for you to find the defendant guilty of this particular crime, you must be satisfied that the following elements have been proven beyond a reasonable doubt: First, that the defendant intended to commit a crime of violence against any one or all of the five victims. Second, that the defendant acted with the intent to terrorize those victims.[26]

129. The trial court, remarkably, did not even mention the word "communicate." Thus, the trial court's failure to identify each element of terroristic threats, deprived Cash of his right to have the Commonwealth prove each element beyond a reasonable doubt. For this reason, Cash's terroristic threats convictions must be vacated and a new trial ordered.

[26] NT, Trial, at 443.

130. The trial court's error should have been obvious to trial counsel and should have prompted an objection. Trial counsel's failure to object was not based on a strategic decision but rather inattention and ineffectiveness.

Jury Instruction Claim 2(f): The Trial Court Erred When It Did Not Charge on the Lesser Included Offense of False Imprisonment to the Unlawful Restraint Charges

131. The Commonwealth charged Cash with five counts of unlawful restraint. *See* 18 Pa. C.S. § 2902(a).

132. A person commits unlawful restraint if he "knowingly restrains another unlawfully in circumstances exposing him to risk of serious bodily injury." 18 Pa. C.S. § 2902(a).

133. The Commonwealth did not charge Cash with false imprisonment, which is a lesser included offense of unlawful restraint. An "offense is a lesser included offense if each and every element of the lesser offense is necessarily an element of the greater." *Commonwealth v. Wilds*, 362 A.2d 273, 278 (Pa. Super. 1976). A person is guilty of false imprisonment if he "knowingly restrains another unlawfully so as to interfere substantially with his liberty." 18 Pa. C.S. § 2903(a). Thus, when comparing unlawful restraint and false imprisonment, the only difference is that false imprisonment does not have the exposure to serious bodily injury element. *See Commonwealth v. Belgrave*, 391 A.2d 662, 666 (Pa. Super. 1978).[27] It is "well settled that upon an indictment for a particular crime, the defendant may be convicted of a lesser offense included within it." *Commonwealth v. Nace*, 295 A.2d 87, 88 (Pa. Super. 1972).

134. With false imprisonment being a lesser included offense, Cash was entitled to a false imprisonment jury instruction if he presented "some evidence" of false imprisonment. *See Commonwealth v. Moore*, 344 A.2d 850, 861 (Pa. 1975)(Pomeroy, J., concurring) ("[B]efore a charge on . . . (a lesser-included offense) is required, there thus must be some evidence, from whatever source, which would permit the jury to return such a verdict."); *accord Commonwealth v. Channell*, 484 A.2d 783, 786 (Pa. Super. 1984).

135. Here, there is "some evidence" that Terry Matlas was not exposed to serious bodily injury. The jury never heard from Terry Matlas as she did not testify, and other witnesses told the jury that the perpetrators pointed guns at them and their children, but not Terry Matlas. These witnesses did not identify Terry Matlas as being in harm's way. These facts could have led a jury to rationally conclude Cash was guilty of false imprisonment as to Terry Matlas. As such, the jury should have been instructed on this lesser included offense. Because it was not, Cash's unlawful restraint conviction (Count 16) relating to Terry Matlas must be vacated.

[27] Unlawful restraint was intended "to serve as an indeterminate offense between kidnapping and false imprisonment." 12.2902A (Crim) Pennsylvania Suggested Standard Criminal Jury Instructions (2d ed. 2006).

136. The trial court's error should have been obvious to trial counsel and should have prompted an objection. Trial counsel's failure to object was not based on a strategic decision but rather inattention and ineffectiveness.

Prayer for Relief

137. **WHEREFORE**, Cash 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 there are any defects regarding his amended petition;

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 Cash's state and federal constitutional rights during his initial-review PCRA proceedings.

Respectfully submitted this the16th day of July, 2014.

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Certificate of Service

On **July 16, 2014**, undersigned counsel hand-delivered Cash's amended PCRA petition to the Allegheny County District Attorney's Office at the following address:

Ronald M. Wabby, Jr.
Assistant District Attorney
PCRA/Federal Habeas Unit, Appellate Division
Allegheny County District Attorney's Office
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_____
Craig M. Cooley Date