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COMMONWEALTH OF PENNSYLVANIA Respondent	: :	PHILADELPHIA COURT OF COMMON PLEAS
	:	CRIMINAL TRIAL DIVISION
v.	:	CP-51-CR-0012287-2007
DONTIA PATTERSON Petitioner	:	

Amended Petition for Post-Conviction Relief Pursuant to 42 Pa. C.S. § 9541, *et seq.*

TO THE HONORABLE STEVEN R. GEROFF, PRESIDING IN THE COURT OF COMMON PLEAS CRIMINAL TRIAL DIVISION FOR THE COUNTY OF PHILADELPHIA:

Petitioner Dontia Patterson, through his pro bono attorneys, files this *Amended Petition for Post-Conviction Relief Pursuant to 42 Pa. C.S. § 9541, et seq.*[1] Mr. Patterson seeks vacation of his conviction, a new trial, discovery, or such other relief as is just and proper. In the alternative, Mr. Patterson seeks re-sentencing. In support, Mr. Patterson represents:

Introduction

1. Dontia Patterson has been incarcerated for over ten years for a murder he has always denied committing—the shooting of his friend Antwine Jackson outside Mercado's grocery store at the corner of Granite Street and Summerdale Avenue. The Commonwealth never advanced any reason why Patterson would have shot Jackson. Patterson and his family have consistently stated that he was at home at the time of the shooting and only went to the corner store after hearing his friend had been shot outside of it. Indeed, a number of people told police that Jackson had issues with people other than Patterson and that others were involved in his shooting. Yet, these leads apparently were never investigated, and Mr. Patterson was charged with, and ultimately convicted of, first-degree murder.

2. The Commonwealth's case against Patterson rested mainly on the testimony of two eyewitnesses who claimed to be able to identify him as Jackson's shooter even though they were standing over 100 feet away from the incident and admittedly saw the shooter's face for only a few seconds. In fact, as photographs contained in Professor Jules Epstein's attached expert report show, it is impossible for these witnesses to have made an accurate identification from their vantage point.

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[1] Mr. Patterson is simultaneously filing a motion for leave to amend pursuant to Pennsylvania Rule of Criminal Procedure 905(A).

3. The Commonwealth also had a third "identification" witness—Patterson's and Jackson's neighbor, Philadelphia Police Officer Eyvette Chandler, who said that a person in store surveillance footage claimed to be Jackson's shooter reminded her of Patterson based on, among other things, the person's walk. However, as the attached expert report of Sean Morgan of Cornerstone Discovery shows, this surveillance footage is of such poor quality that it never should have been used to obtain a positive identification, and it does not accurately capture the characteristics of a person's movement.

4. Patterson, who was only 17 at the time of the crime, faced a then-mandatory life without parole sentence if convicted—the equivalent of a death sentence for a juvenile. Nevertheless, his trial counsel did nothing to investigate or meaningfully challenge the identifications by these three witnesses. He did not take even the basic step of photographing the crime scene to show the jury what the eyewitnesses could, or more significantly could not, have seen. He also did not consult an expert to assess the quality of the surveillance footage.

5. Compounding these failures, trial counsel apparently did nothing to investigate this case other than having a private investigator speak to Patterson's sister about his alibi more than a year after Jackson's shooting and just over a month before Patterson's trial began. If counsel had investigated, he would have discovered witnesses willing to testify for Patterson who would have undercut the eyewitnesses' version of events and Officer Chandler's "identification" of Patterson, such as store owner Gregorio Mercado who knew Patterson and unequivocally told police that he did not recognize the shooter in the surveillance footage (but might if he saw him again). Counsel also would have discovered, *inter alia*, character witnesses, witnesses who could attest to Jackson's and Patterson's friendship, and witnesses who could have testified about Patterson's epileptic seizures, which would have made it difficult, if not impossible, for Patterson to have carried out this crime in the manner theorized by the

Commonwealth. Counsel, however, discovered none of this because, despite the high stakes, had only a few brief meetings with Patterson before trial.

6. Despite counsel's failings, jurors struggled with this case. Patterson's first trial, during which the two eyewitnesses testified but Officer Chandler did not, ended in a hung jury. Patterson's second trial, during which the eyewitnesses and Officer Chandler testified, ended in a conviction, but only after lengthy deliberations during which the jury asked a number of questions going to the identification of Patterson as Jackson's shooter. If counsel had taken any of the steps outlined in this petition, the scales likely would have tipped in Patterson's favor, and the second trial would have resulted in a different outcome. Instead, counsel's deficient performance prejudiced Patterson and requires a new trial.

7. The evidence that counsel did not present also confirms Patterson's innocence, and a new trial is required for that reason as well.

8. Finally, at the very least, Patterson is entitled to re-sentencing as the life without parole sentence he is currently serving is unconstitutional because he was a juvenile at the time of the crime.

Factual Background

9. Antwine Jackson was shot at approximately 12:30 pm on January 11, 2007, outside of Mercado's grocery store at Summerdale Avenue and Granite Street (898 Granite Street) in Northeast Philadelphia; he was pronounced dead later that afternoon.

10. Dontia Patterson, a friend of Jackson's, was arrested on April 25, 2007. Patterson has always maintained his innocence, and the Commonwealth has never pointed to any motive Patterson may have had to shoot Jackson. The following paragraphs detail the investigation into Jackson's death as well as the evidence presented at Patterson's two trials.

The Investigation

11. Police from the Second District responded to a call of a shooting at Granite Street and Summerdale Avenue at 12:30 pm on January 11, 2007. Officers investigated an abandoned house at 874 Granite Street, controlled the crowd, interviewed witnesses, and waited for emergency medical services to arrive. Jackson was taken to Albert Einstein Medical Center and declared dead at 4:26 pm. Around 4:30 pm, a crime scene unit arrived to collect evidence. *See generally* Activity Sheets (attached as Exhibit 1).

12. After responding to the call, officers interviewed a number of people in the neighborhood about the shooting, starting with Gregorio Mercado, the owner of the corner grocery store.

13. Mercado told police that he called 911 when he heard about four gunshots and saw a man lying on the pavement in front of his store; he had previously seen the man as a customer. *See* Jan. 11, 2007 G. Mercado Investigation Interview Record at 1 (attached as Exhibit 2). He told officers that there were no customers in the store at the time of the shooting and gave officers consent to recover the store surveillance tape. *Id.* at 2-3.

14. Police next interviewed David Moshons, who was working at a pizza shop in the area when he heard shots that sounded like they came from the area of Granite and Summerdale. When he went outside, he saw a black man on the ground in front of the store across the street and saw another man running down the alley between Granite and Marcella Streets. He could not tell whether that man was black or white but described him as being about 5'10" and skinny (about 160 pounds). The man wore a black hoodie with the hood on his head and black pants. *See* Jan. 11, 2007 D. Moshons Investigation Interview Record at 1 (attached as Exhibit 3).

15. Detective Harrigan then spoke with Ruth Harmon, who returned home from shopping around 12:50 pm to see a man lying on the pavement in front of the corner store.

Harmon told police that two men were standing over the body, one of whom was Patterson. She said that Patterson was screaming, "Oh my God, Is he dead, Is he dead." Harmon said the other man was "Midnight," who also lived on Granite Street. She also told police that a third man with dreadlocks came over to the scene with his cell phone. Harmon described Patterson as a black male, 5'6", 150 pounds, with a brown complexion and pimples on the side of his cheeks. She described Midnight as 5'8" and 130 pounds. She said that she knew the man with dreadlocks from the barbershop. When asked whether it appeared that the men she described could have shot the man on the ground, Harmon replied that "[t]hey appeared to be trying to help the male on the ground." Jan. 11, 2007 R. Harmon Investigation Interview Record at 1-3 (attached as Exhibit 4).

16. Police then interviewed fellow police officer Eyvette Chandler at her home at 931 Granite Street. Office Chandler said that she was in her house around 12:30 pm getting ready to walk out the door to go to work when she heard three gunshots coming from the direction of Summerdale Avenue. By the time she heard the third shot, she was on her porch and saw a black man standing at the corner of Granite and Summerdale in front of the grocery store fall to the ground. A second black man on that corner ran toward Marcella Street. Officer Chandler then ran up the street to see what happened and called 911 as she ran. Officer Chandler said she only saw the man running from the scene for a few seconds. She described him as a black male, 5'4", with a medium build and a dark-colored jacket. Officer Chandler said that she had seen the man who had been shot around the neighborhood. When asked whether she saw anyone else in the area during the shooting, Officer Chandler responded: "No. A few people started coming up. I kept them away." Jan. 11, 2007 E. Chandler Investigation Interview Report (attached as Exhibit 5).

17. On the evening of January 11, 2007, Officers Cruz and Backley interviewed Patterson, who was outside Mercado's store after Jackson's shooting, at police headquarters. Patterson told police that he had known Jackson for about three years, since moving to Granite Street. He further informed the officers that he was in his house watching his nephews that day when he heard three to four shots. His nephews' father walked into the house, and they then went outside and walked up toward Summerdale Avenue. Before they got to the corner, Kenya Jones, Patterson's neighbor, pointed to a body lying on the ground in front of the corner store and asked Patterson if it was his friend. Jan. 11, 2007 D. Patterson Interview at 2 (attached as Exhibit 6).

18. Patterson informed the officers that, when he got to the corner, he saw a man named "Midnight," a Jamaican man, a Puerto Rican man, a white man, and a female police officer who lived across the street. *Id.* Patterson knew that Midnight lived on Granite Street but did not know his real name. Patterson identified a photo of Isaac Smith as Midnight. *Id.* at 3-4.

19. Patterson also knew that the Jamaican man worked at a barber shop on Bridge Street; he did not know the Puerto Rican man or the white man. *Id.* at 3. When Patterson looked at the body, he recognized it as his friend Jackson. *Id.* Patterson told police that Jackson sold weed at the corner outside Mercado's store and that Midnight and another guy named Mike did as well. *Id.* at 5. Patterson said that Jackson had problems with Midnight because Jackson was selling more weed than Midnight. Midnight had told Patterson "he going to start putting hot shit in niggas and giving niggers wiggies," which meant "shooting them in their hood." *Id.* at 5-6. Patterson had previously seen Midnight with guns. *Id.*

20. The next day, police interviewed Officer Chandler again. This time, Officer Chandler told police that the man she had seen on the ground the day before was named Antwine and she knew his mother. Jan. 12, 2007 E. Chandler Investigation Interview Record at 1

(attached as Exhibit 7). Officer Chandler stated that she had known Patterson and Midnight for three to four years, and she identified each of them from photographs shown to her. *Id.* at 2. She told officers that when she came out of her house the day before after hearing shots, she saw Patterson on the sidewalk in front of his house. *Id.* Regarding Midnight, she told police that Midnight's father had told her that Midnight stole his gun from inside his house. *Id.* The police do not appear to have interviewed Midnight's father or followed up in any way on this information regarding a stolen gun.

21. Also on January 12th, police spoke to the victim's mother, Inez Jackson, who told them that a person she knew at the Oxford Village Apartments told her that a man named "Var" might have information about Jackson's shooting. Jan. 12, 2007 Activity Sheet. A few days later, on January 16th, Officer Chandler contacted police saying that one of her neighbors had received threats from "Var," from Oxford Village Apartments, to not say anything about what happened to Jackson. Jan. 16, 2007 Activity Sheet. The following day, Officer Chandler again contacted the investigating officers to tell them that the neighbor who had received threats from "Var" was so scared that she had moved away from the 900 block of Granite Street. Jan. 17, 2007 Activity Sheet. On January 19th, the investigating officers located that family—the Thompsons. Jan. 19, 2007 Activity Sheet.

22. Police interviewed Quintina Thompson and her daughter Tashima Thompson on January 19th.

23. Tashima told police that Jackson came up to her on the 900 block of Granite Street two weeks before he was shot and told her that he had just finished fighting Ivan and John. Jackson told her Ivan was upset that he was selling weed on Ivan's turf. *See* Jan. 19, 2007 T. Thompson Investigation Interview Record at 1 (attached as Exhibit 8). She went on: "Then, the day that Antwine got shot, maybe like twenty minutes after, I was out there on the block with all

the others and this guy I call Midnight came up. He said that him and Antwine were in the Puerto Rican store together and then came out together, just the two (2) of them, and when they came out somebody made a phone call or got a phone call, and then the guy who did the shooting came out of the driveway and shot Antwine. Midnight said that he (Midnight) then ran up Summerdale Ave. to Bridge St. He kept saying it was a set up, that Antwine got set up." *Id.*

24. Tashima related that her brother, a man named Amir, and a girl named Kioma were also present during that conversation. She said that Midnight was wearing a black hoodie ("he had it up") and blue jeans, and she identified him when shown a photograph of Isaac Smith. *Id.* at 2. Tashima told police that, although Midnight did not say who made or got the phone call right after he and Jackson left the store, "it had to be him." *Id.* Tashima did not see Midnight again.

25. Tashima also told police that John, who Jackson had gotten into the fight with, ran the corner in front of the store. Ivan was John's brother, and Var was his cousin. Ivan, Var, and Midnight all sold drugs for John. *Id.* She told police that the issues between Jackson and the others had been going on for a while. *Id.*

26. When asked whether she had any information about who shot Jackson, Tashima responded:

> Yeah. The next day, my brother Leon called me from his school, Fels. He said that at lunch some young boy came up and was bragging that Var shot the boy on Summerdale Ave. Leon said the boy laid out the whole thing, that Antwine & Midnight were in the Puerto Rican store together and then came out and when [t]hey did ***Midnight called Var on his cell phone and that Var came out from the driveway and shot Antwine*** and that when Antwine fell down on the ground Midnight ran away and then Var shot Antwine two (2) more times. Leon said the boy even said that Amir was in the driveway across the street, across Summerdale Ave., the 900 block of Granite, being a look-out, in the 900 block of Bridge St., the driveway, John & Ivan's twin little sisters, I just know them by Ne-ne & Netta, they're like 15 yrs. [o]ld, they were look-outs there and the Jamaica[n] barber was outside the barber shop, right at [B]ridge & Summerdale, was out there when it happened too.

Id. (emphasis added).

27. Tashima then identified Var from a photo of LaVar Washington, identified Ivan from a photo of Ivan Robinson, and identified Ivan's brother John from a photo of Johnny Robinson. *Id.* at 3; *see also id.* at 2-3 (informing police she had known Midnight for the whole eight years she had lived in the area and had known Var, Ivan, and John for about five years).

28. Police asked Tashima to watch the surveillance video from Mercado's store, and she said that she recognized Jackson and Midnight on the video: "Midnight was the guy with the black clothes on, he was on the cell phone in the back of the store. Antwine was at the counter and when he leaves the store, Midnight is right behind him." *Id.* at 3. Notably, despite having lived on the same block of Granite Street as Patterson, Tashima did ***not*** identify him in the store video.

29. Tashima's mother, Quintina, gave police similar information. She had known Jackson and his family for about three years, as they lived across the street from her. She confirmed that she saw her son and daughter talking with Midnight, Kioma, and Amir not long after Jackson was shot. *See* Jan. 19, 2007 Q. Thompson Investigation Interview Record at 1 (attached as Exhibit 9). When asked if she knew why Jackson had been shot, Quintina responded: "Antwine was told to either work selling drugs for them or get of[f] the corner, and not to sell for himself." *Id.* at 2.

30. Quintina also confirmed that, the day after Jackson's shooting, her son Leon called Tashima from school and told her that "***a boy from his school was bragging that another boy named Var did shoot and kill Antwine***." *Id.* (emphasis added). Quintina told police that she believed Var's real name was LaVar and that he lived in Oxford Village Housing. *Id.* She then identified Jackson and Midnight from photographs. *Id.*

31. Finally, Quintina told police that Var called Tashima on Tashima's cell phone on January 14th and "was trying to scare her by telling her to watch herself and watch who she be with that he (Var) heard that she (Tashima) was telling others that Var and John had something to do with Antwine[']s death." *Id.* Var obtained Tashima's cell phone number from Tashima's friend Shakira, who lived in Oxford Village Housing. *Id.* at 2-3. Quintina told police that she was moving her family from the neighborhood due to Jackson's murder. *Id.* at 2.

32. Despite this information from Quintina and Tashima, police do not appear to have interviewed or otherwise investigated Amir, Kioma, Leon, Ivan, John, Ne-ne, or Netta.

33. Later on January 19th, police interviewed Elvira Urena, who lived on Granite Street. Urena told police that, on January 11, 2007, she was traveling north on Summerdale Avenue and made a u-turn in front of Mercado's store. She saw three black men standing out front and then saw one of them shoot twice at another one. *See* Jan. 19, 2007 E. Urena Investigation Interview Record at 1 (attached as Exhibit 10). The man who had been shot fell to the ground, and the third man ran toward the 800 block of Granite Street. Urena heard another shot from the same corner as she parked her car and saw the man with the gun run across Summerdale and down the drive way behind the pizza shop. *Id.*

34. Urena did not know any of the three men she saw outside the store. She described the man shooting the gun as a black male, 5'8" to 6'0" tall, 140 to 150 pounds with a thin build; the man wore "a black skully, with a dark jump suit, like the one construction people wear." *Id.* at 2. She described the man who was shot as a black male wearing a dark-colored hoodie and jeans and the third man as a black male, 5'5" tall, with a medium build. *Id.* She did not recognize Jackson or Midnight when shown photos of them and did not recognize anyone in a photo display she was shown. *Id.*

35. On January 22nd, police interviewed Kenya Jones, another resident of the 900 block of Granite Street. Jones said that she was in the basement washing clothes and waiting for her three youngest children to get home from an early school dismissal on January 11, 2007, when she heard three gunshots outside. *See* Jan. 22, 2007 K. Jones Investigation Interview Record at 1 (attached as Exhibit 11). She went outside, stood on her front porch, and saw a body lying on the pavement outside the store at Granite and Summerdale; the body looked like Jackson. *Id.* Jones saw Midnight standing next to the body and asked whether it was Jackson, but he did not answer her. *Id.*

36. Jones then ran across the street with Patterson, who was friends with Jackson. *Id.* at 1-2. Near the corner, Jones saw: Midnight talking on a cell phone; a Jamaican guy she thought was from the store on the corner of Summerdale, also on a cell phone; a young Hispanic man who she thought lived on the 800 block of Granite Street; and three women (two African American and one Puerto Rican). *Id.* at 2. After learning the man on the sidewalk was Jackson, Jones stood there for a couple of seconds and then ran to his house to get his mother. *Id.*

37. When police arrived, the Jamaican man was still standing at the corner, but Jones no longer saw Midnight or the young boy. *Id.* Jones told police she had known Midnight since he was little and had known Patterson and Jackson for about three to four years. *Id.* She identified Midnight and Patterson from photographs. *Id.* When asked whether she had any other information, Jones told police that Jackson had gotten into a fight about two weeks before with boys from 910 Bridge Street—one named John and one who she believed was named Alvin. *Id.* at 3. She also said that she heard kids saying that Amir (who lived at 920 Granite Street) had something to do with it, as he hung out with the two boys from 910 Bridge Street. *Id.*

38. On January 24th, police interviewed fellow officer Craig Perry, who was on duty in the area of Bridge Street and Roosevelt Boulevard on January 11, 2007, when he and his

partner, Officer Dennis Johnson, received information about a shooting at Granite and Summerdale. That day, they started to survey the area for a person who matched the flash information of a black male with a black hat, gray hoodie, and dark pants who was supposed to be walking through the crowd towards Bridge Street. *See* Jan. 24, 2007 C. Perry Investigation Interview Record at 1 (attached as Exhibit 12).

39. Officers Perry and Johnson turned onto the 900 block of Bridge Street, where they stopped a black man fitting the flash description and patted him down. *Id.* The man's driver's license had the name LaVar Washington. Washington told the officers that he was in the barber shop during the shooting and was walking to his car. *Id.* The officers took Washington to the barber shop to verify this. Officer Perry stayed in the car with Washington while Officer Johnson and Sergeant Barclay went into the barbershop; they came out and told Officer Perry "that they stated no one was in the shop." *Id.* However, "when we asked them to look out at the male that we had stopped, they said that he was in the barber shop." *Id.*

40. Washington told Officer Perry that he had not gotten his hair cut at the barber shop, and Officer Perry said that it did not look like Washington had gotten his hair cut. *Id.* It was about 12:45 pm when Officer Perry stopped Washington on Bridge Street. Washington had been walking east on the 900 block of Bridge Street towards Loretto. He was wearing a black coat with a hoodie, and a blue one piece with gray sweatpants underneath. *Id.*

41. Despite having information from a number of people about Washington's possible involvement in Jackson's death, police do not appear to have done any further investigation of this lead after receiving this information from Officer Perry.

42. On February 7, 2007, police interviewed Isaac Smith, known as Midnight, who a number of people had identified as being with Jackson when Jackson was shot. Midnight told police that he had known Jackson for about three years. Midnight said that on the day of the

shooting, he came out of his house and saw Jackson walking at Bridge and Summerdale. *See* Feb. 7, 2007 I. Smith Interview Record at 1 (attached as Exhibit 13). Midnight walked up to Jackson near the corner store at Bridge and Summerdale, and the two walked back toward Granite Street, stopping in front of the barber shop. Midnight said that he saw a man he did not know standing outside the Puerto Rican store at Granite and Summerdale. He and Jackson asked the man if he needed weed or anything, and the man said he did not and walked toward the bar at Marcella Street. *Id.* Midnight described the man as being black, light skinned, 5'7", 18-20 years old, and as wearing a black "skully" and "a one piece black dickie outfit." *Id.* at 2.

43. Midnight said he then went into the grocery store to get a band aid. While he was there, the man with the dickie suit came in and talked on his cell phone. Midnight walked out of the store and stood next to Jackson, as they were going to smoke another blunt. *Id.* The man with the dickie suit then came out of the store, and Midnight heard shots. He ran down Granite Street, heard more shots, and saw Jackson fall to the ground. Midnight went to his house at 874 Granite Street,[2] put down some bags of weed, and went back outside two to three minutes later. *Id.* Midnight said the man in the dickie suit was the shooter. *Id.* He did not see where the man went. *Id.* at 3. Midnight told police he would probably recognize the man if he saw him again. *Id.* He also said there was nothing unusual about the way the man walked or talked. *Id.*

44. Midnight also told police that he did not see anyone on Summerdale Avenue before Jackson's shooting other than the man in the dickie suit. *Id.* at 2. Earlier, as he and Jackson walked toward the grocery store, they had seen Var coming out of the barber shop. Var got into his car parked on Bridge Street and drove up Summerdale Avenue. *Id.*

[2] This residence is referred to as an abandoned house in the police reports. Officers searched it and did not find any weapons. *See* Jan. 11, 2007 Activity Sheet.

45. After the shooting, Midnight saw Patterson, who he described as "a friend of Antwine's," outside the corner store, as well as a corrections officer and female police officer, who both lived on Granite Street, and a man with dreads from the barber shop. *Id.* at 3. Patterson "was yelling who did this! stuff like that. . . ." *Id.*

46. When asked whether Jackson was having any problems that might have resulted in his murder, Midnight told police that Jackson had a problem with two boys from Bridge Street who Jackson had a fight with two weeks before his shooting. *Id.*

47. Police asked Midnight to view the surveillance tape from Mercado's store. Midnight identified himself in a grey hoodie, blue jeans, and Timberlands. *Id.* at 4. He pointed out the man in the dickie suit but was unable to identify him. *Id.* He said he might be able to do so if the tape could be made clearer. *Id.* Significantly, Midnight knew Patterson and recognized him as being at the corner after Jackson's shooting but did ***not*** identify him as the man in the dickie suit.

48. At this point, the police had information from a number of individuals that Jackson had issues with two men who lived on Bridge Street; however, it does not appear that they did anything to pursue this lead. As noted above, they also did not look further into Washington, even though Midnight indicated that Washington had left the barber shop ***before*** Jackson's shooting.

49. A few weeks after interviewing Midnight, police again interviewed Mercado, the store owner, who gave a more detailed account of the events of January 11th. Mercado told police that he opened his store around 10:00 or 10:30 am, and a guy who he knew from the area came in to buy cereal and milk. *See* Feb. 26, 2007 G. Mercado Investigation Interview Record at 1 (attached as Exhibit 14). That man walked down Granite Street, across Summerdale Avenue, and spoke briefly with another black man. The second man wore a dark, one-piece construction

suit. *Id.* He walked into the store, bought a Kool-aid, and walked out. *Id.* Mercado thought he was on a cell phone. *Id.* Mercado told police that he had never seen the man before and described him as black, 17 to 21 years old, medium complexion, and thin build (130 to 140 pounds) with "little marks on his face." *Id.*

50. Mercado then saw two black men he knew from the area walking toward the store from Bridge Street. *Id.* at 2. One of them, "Midnight," lived down the street and walked into the store asking for a band aid. Mercado could not remember what Midnight wore that day, but he often wore a maroon hoodie. *Id.*

51. After Midnight bought the band aid, the man in the one-piece construction suit came back into the store. When Midnight walked out of the store, that man walked out behind him. As the man went out of the store, Mercado saw him reach into his suit and pull out a silver automatic gun. *Id.* Mercado heard four gunshots and ducked down. He then looked out and saw the guy with the gun run over Summerdale Avenue toward the pizza shop at Summerdale and Marcella. Mercado thought Midnight had been shot but then realized the victim was the man who had been walking with Midnight earlier. Mercado then saw Midnight walking back up and speculated that he "must have run away from the man with the gun." *Id.* Mercado identified Midnight from a photograph. *Id.* He also told police that he did not know Jackson by name but he had been a customer before. *Id.*

52. Mercado was asked to look at a photo array and tell police whether he recognized anyone from this incident. He responded: "***No I don't recognize anyone from this incident***. I see a guy from the area, Dontel he's on the top 3rd one over. (indicating PPN #934520 assigned to Dontai [sic] Patterson)." *Id.* (emphasis added).

53. Mercado then viewed the surveillance tape from his store and pointed out the man who had bought milk and cereal and the man in the construction suit who had done the shooting. *Id.* He told police he would be able to recognize that man if he saw him again. *Id.* at 3.

54. Thus, both Mercado and Midnight, the two people closest to the events surrounding Jackson's shooting, knew and recognized Patterson but did ***not*** identify him as involved in this crime.

55. In February 2007, police also began to look for a possible witness named Pierre Laventure. *See* Feb. 20, 21, & 23, 2007 Activity Sheets. On February 23rd, Officers Fetters and Cruz interviewed Laventure at his workplace during a break; Laventure told them he had been a witness to the shooting on January 11th and had called 911 several times that day. *See* Feb. 23, 2007 Activity Sheet. No statement appears to have been taken, and there is no record of Laventure making any identification during this interview. *Id.* The officers arranged for a formal interview on February 26th, but Laventure did not report to the Homicide Unit for the appointment and did not respond to attempts to reach him by phone. Feb. 23 & 26, 2007 Activity Sheets.

56. Police finally brought Laventure to the Roundhouse for an interview on February 27th, more than one month after the shooting. Laventure told police that, when Jackson was shot on January 11th, he was standing outside the barber shop on the corner of Bridge and Summerdale, waiting to get his hair cut. Two other men were also outside—another man also waiting to get his hair cut and a Haitian man who cuts hair who Laventure knew through his brother-in-law. *See* Feb. 27, 2007 P. Laventure Investigation Interview Record at 1 (attached as Exhibit 15).

57. When Laventure heard gunshots, he looked in the direction the shots came from and saw a black man in front of the corner grocery store on Granite Street with a gun in his hand.

The man then turned and ran across Summerdale. Laventure reported that, as the man approached the alley, there was a white man standing there; the white man put up his hands and the man who had done the shooting ran through the alley. *Id.* Laventure walked toward the grocery store and saw a black man who he did not recognize lying on the ground. Laventure then called 911. *Id.* Laventure told police that, after he heard the shots, he only saw two people—the shooter and the person lying on the ground. *Id.*

58. Laventure told police that the man who works at the barber shop also walked with him to the corner store and called 911. He did not know that man's name but described him as having long dreadlocks. *Id.* at 2. Laventure described the man he saw with the gun as a black male, 5'6" to 5'7", medium build, 150 to 160 pounds, with a short afro and a short beard, dressed all in black with a hoodie. *Id.* He said the gun was big and black. *Id.*

59. Laventure said that people then started to come to the scene of the shooting. Less than five minutes went by, and he saw the man who had done the shooting coming up from Granite Street, "he was like holding his pants up and me and the barber looked at each other and said that's the male that did this shooting, except the shooter now had different clothing on, he had a brown shirt and beige pants, no shoes, just socks." *Id.* When the shooter got to the scene, he asked who did the shooting and picked up a blunt and a clear plastic bag with weed. Laventure then walked away to call police. *Id.* He did not see which house the shooter came from. *Id.*

60. Laventure did not recognize photographs of Jackson or Midnight shown to him by police. He was then shown a photo array and identified number three (Patterson) as the shooter. *Id.*

61. The next day, police interviewed Allan Brunache. He told them that, on January 11, 2007, he was outside the barber shop at Bridge and Summerdale having a cigarette and

talking with friends when he heard shots. He saw the killer with the gun run off across Summerdale Avenue, by the pizza store, and into the alley. *See* Feb. 28, 2007 A. Brunache Investigation Interview Record at 1 (attached as Exhibit 16). Brunache said that he is from Haiti and went with Laventure, also from Haiti, to the corner where the man had been shot. Both men also called police. *Id.* at 2. According to Brunache, when he arrived at the corner, he saw the victim, an older white man, and no one else.

62. Police then showed Brunache a photo array, and he identified one photograph (apparently of Patterson, though the police report is not clear on this point) as being of the shooter. He said that this man came up to him a few minutes after the shooting but was wearing different clothes—"he was just wearing white socks, no shoes." The man asked Brunache who shot his friend. *Id.* Brunache thought that Laventure said this was the same person who had done the shooting. *Id.*

63. Brunache also told police that, at the time the shooting happened, he saw a beige colored Altima on Summerdale that he thought "might have been with the shooter, but the Altima drove off quick when he did the shooting." *Id.* He saw the same car two or three weeks after the shooting in the area of Loretta and Singer. *Id.*

64. On March 1, 2007, police again interviewed Officer Chandler. They asked her to review her January 12th interview and then asked her how much time had passed between when she heard the gunshots and when she saw Patterson across the street. Officer Chandler told them it was about two to three minutes and no more than five minutes. *See* Mar. 1, 2007 E. Chandler Investigation Interview Record at 1 (attached as Exhibit 17). When she saw Patterson, he was wearing tan pants. She could not remember whether he had shoes on, though she remembered him later wearing boots when near the corner. She also thought he wore a black leather jacket. *Id.*

65. Police then showed Officer Chandler the surveillance tape from Mercado's store and asked her whether she recognized anyone. She said: "This one here (indicating the male in the dark one piece outfit) reminds me of Dontai [sic], ***the way he walks and moves and stuff***. ***I can't really make out his face***, but he looks like Dontai [sic]." *Id.* (emphasis added).

66. A few weeks later, on March 29, 2007, police interviewed Charles Berry, the father of two children with Patterson's sister Kareema. Berry told police that, at the time of Jackson's shooting, he was staying at Kareema's mother's house on Granite Street. On the morning of the shooting, sometime around 11:00 am, he went to the corner store at Granite and Summerdale to buy milk for the kids. *See* Mar. 29, 2007 C. Berry Investigation Interview Record at 1 (attached as Exhibit 18).

67. While at the store, he saw Jackson and a friend outside the store. *Id*. at 2. Berry said he was not at the store for long and that he returned to the Patterson home. *Id.* Police asked Berry to view the surveillance tape from Mercado's store, and he told them that he recognized "Poppi," who ran the store, and himself, wearing a "black skully and the headset on top." *Id.*

68. Berry said that when he returned to the house, Patterson was there sleeping, and Kareema was there with the babies. *Id.* Berry did not hear gunshots because he was in the shower, but Kareema told him about them. Berry looked outside and saw people crowded by the corner store; he also saw the police officer who lived across the street who was out on her porch and saw Patterson going outside and up to the corner. *Id.*

69. Berry told police that he did not recognize the man he had seen standing with Jackson before he went into the store and that he had not seen him again after the shooting. He described him as "a dark skinned boy, early twenties probably," and about the same height as Jackson. *Id.*

70. On April 25, 2007, officers arrested Patterson in connection with Jackson's death.

71. Patterson's preliminary hearing took place on October 16, 2007. Allan Brunache and Detective George Fetters were the Commonwealth's only witness.

72. **Allan Brunache** testified that, on January 11, 2007, he was in the area of Summerdale and Grant[3] Streets smoking a cigar with a friend. N.T. 10/16/2007, 5. He did not know his friend's name but a detective told him it was Pierre. *Id.* at 5-6. While outside smoking, he heard a noise and turned around to see someone shooting someone else; he knew the young man who was shot, ran to help him, and called 911. *Id.* at 6-7.

73. Brunache testified that the killer ran away and went by the pizza store. *Id.* at 7-8. He further testified that he "***didn't see that person who shot the guy***. . . ." *Id.* at 8 (emphasis added). Brunache said that he did not see anyone by the person who was shot and was scared to look at the shooter. *Id.* at 9. When asked, "Do you see that person here today, sir, the person that was doing the shooting," Brunache responded, "***No***." *Id.* at 10 (emphasis added); *see also id.* ("I didn't know who shot him.").

74. Brunache then testified that he went up to the man lying on the sidewalk and, not too long after that, saw another man come up where the young man was lying. *Id.* at 11-12. The man who came up asked Brunache who shot the victim. *Id.* at 11. Brunache recognized that man "as a friend" who he had seen around where he worked and testified that he did not recognize him as being involved in the shooting. *Id.* at 12. Brunache's friend said that the man who came up was the shooter, but Brunache testified: "But I didn't know. Me, I was trying to protect myself 'cause the shooter was like a block away from me. So, you know, I'm trying to protect myself." *Id.*

[3] Although the transcripts says "Grant Street, it seems more likely that Brunache's testimony referred to Granite Street.

75. When asked about his February 28, 2007, statement, Brunache testified that his statement to police that the shooter was wearing all black was correct. *Id.* at 19. However, he testified that his description of the shooter as a black guy with bumps on his face was not accurate. *Id.* He stated that he first told police that "the killer looked like a Puerto Rican guy." *Id.* at 20; *see also id.* at 44 (testimony on cross-examination that he told police before giving his February 28th statement that "the killer don't look like black. He look like a little light-skinned. He was like Puerto Rican."). According to Brunache, the police asked: "'Why you lying to me? Your friend told me this is what happened. This is what happened. This what happened.'" *Id.*

76. When asked about identifying Patterson in a photo array during the February 28th interview, Brunache testified: "***I didn't say he's the one who did it.*** I said he's the one who did it, asking me, 'Who shot him? Who shot him? Who shot him?'" *Id.* at 25 (emphasis added). He also testified again that he was scared and "didn't know exactly what was going on." *Id.* When questioned further about his identification, Brunache testified that the first time the detective showed him a picture, he said he did not know who did it, and the detective let him go. *Id.* at 26. When the detective questioned him again, the detective told Brunache, "he's the shooter," referring to a photo of Patterson. *Id.* at 26-27.

77. On cross-examination, Brunache also testified that he had been interviewed by police before giving his February 28, 2007 statement. *Id.* at 40-41. At the earlier interview, he was shown photographs, and he did not believe that Patterson's picture was in those photographs. *Id.* at 41. He "guess[ed]" that the only time he signed anything was at his second meeting with police, which led to the February 28th statement. *Id.* at 42.

78. **Detective George Fetters** testified to the process involved in taking Brunache's February 28, 2007 statement. *Id.* at 50-51. On cross-examination, Detective Fetters acknowledged that the photo array shown to Brunache was labeled "Photo Array No. 2." *Id.* at

55. He testified that there was a "Photo Array No. 1" that was shown to other witnesses on a different day. *Id.* He also testified that Brunache had been at the Homicide division about a week before giving his February 28th statement, but to his knowledge, nothing was written down the first time Brunache was brought to Homicide. *Id.* at 55-56.

79. Despite Brunache's failure to identify Patterson at the preliminary hearing, Patterson was held over for trial.

80. On June 25, 2008, well over a year after Jackson's shooting, defense investigator Richard Strohm interviewed Patterson's sister Kareema. Kareema said that Patterson was in his room at the time of Jackson's shooting. *See* June 25, 2008 K. Patterson Interview at 2 (attached as Exhibit 19). Kareema further stated that, before she got into the shower, she saw Patterson on his bed; she did not know whether he was sleeping. While in the shower, she heard three loud bangs. *Id.*

81. She then got out of the shower, got dressed, and saw Patterson sitting in a chair at the foot of the stairs putting on his shoes and socks. At this time, Berry was looking out the front door toward Summerdale to see what was going on. *Id.* at 3. Kareema, Berry, and Patterson all went out to the front porch; Patterson then walked up to Summerdale even though Kareema told him not to. Neighbors then told Kareema that police had Patterson in the back of a police car. *Id.*

82. Kareema said that she saw Patterson about three minutes after hearing the loud bangs and that he was coming from his room. *Id.* They all went outside around five minutes after hearing the shots. *Id.* at 4.

83. There is no record of any further pre-trial investigation by the defense. Indeed, a request to the Office of Judicial Records by undersigned counsel yielded only a single $300

investigator payment voucher submitted by Mr. Strohm. *See* May 5, 2008 Investigator Payment Voucher (attached as Exhibit 20).

84. In addition, Patterson's visitor logs from his pre-trial incarceration at Curram-Frumhold Correctional Facility (CFCF) show only two brief visits from trial counsel to Patterson before his first trial—one on July 19, 2008, just 16 days before trial, from 9:40 am to 10:08 am, and one on August 2, 2008, just 2 days before trial, from 9:23 am to 9:46 am. *See* CFCF Inmate Visitor Log at 2 (attached as Exhibit 21). Significantly, neither of these visits took place until approximately *eight months* after trial counsel's appointment to the case on November 13, 2007, even though Patterson had been incarcerated since his arrest. The logs do not reflect any visits from Strohm. The log of Patterson's prison phone calls similarly shows a lack of contact between Patterson and his counsel. Although Patterson attempted to call his attorney's number (215-563-3395) nine times between June 23, 2008 and the start of his first trial on August 4, 2008, he was only able to get through to that number twice, for a total of seven minutes of call time. *See* Philadelphia City Jail Inmate Call Records (Call Log) (attached as Exhibit 22).[4]

Mr. Patterson's First Trial

85. Patterson's trial began on August 4, 2008, just over a month after Strohm interviewed Kareema. The Commonwealth's evidence at trial focused on Brunache's and Laventure's identifications. The only other witnesses called by the Commonwealth discussed the response to the crime scene, evidence collection, ballistics (or the lack thereof), and the cause and manner of death. The prosecution offered no motive for Patterson to have killed his friend. *See generally* N.T. 08/05/2008, 159-67 (Commonwealth's opening statement).

[4] Although counsel requested call logs for Mr. Patterson's entire pre-trial incarceration, Philadelphia prison officials advised that records only exist beginning in June 2008.

86. The Commonwealth first called **Officer Terrence Lewis** of the Crime Scene Unit. Officer Lewis responded to the area of Jackson's shooting around 3:25 pm on January 11, 2007. *Id.* at 177. He described the area of Granite and Summerdale for the jury, with reference to a diagram of the area that also included a barber shop at Bridge and Summerdale. *Id.* at 177-78; *see also* Trial 1 Exhibits C-4, C-5. Officer Lewis testified that the distance from the corner store at Granite Street to the barber shop at Bridge Street was approximately 150 feet (or approximately 50 yards). N.T. 08/05/2008, 199-200. Officer Lewis also testified regarding the evidence collected and photographs taken at the scene. *Id.* at 183-99.

87. When trial resumed the next day, the prosecutor informed the court that her "witnesses are not being as cooperative," specifically that "Allan Brunache is in Brooklyn telling the Police Department he refuses to come back to Philadelphia." N.T. 08/06/2008, 5; *see also id.* at 5-14 (discussing material witness petition for Brunache). With regard to Laventure, the prosecutor stipulated "for crimen falsi purposes" that "he has a previous conviction for unauthorized use of an access device, which was November the second, 1998." *Id.* at 15.

88. The Commonwealth next called **Officer Richard Bowes** of the Philadelphia Highway Patrol. Officer Bowes responded to Granite and Summerdale at approximately 12:30 pm on January 11, 2007, with his partner Officer Matthew Quinn, after a radio call of a male shot on the highway. *Id.* at 17-18. He saw a man lying in front of the corner store at 898 Granite Street; when he checked the man's pockets, he did not find any identification but found a large sum of money. *Id.* at 19-20. At the time, there were three women on the corner, one of whom was an off-duty police officer. *Id.* at 21. Officer Bowes also testified that he saw Police Officer Pereborow arrive at the scene and stop an individual who Officer Bowes identified as Patterson. *Id.* at 23-24. Officer Bowes was not involved in that stop. *Id.* at 24. On cross-examination, Officer Bowes testified that the off-duty officer was Officer Chandler. *Id.*

89. **Pierre Laventure** then testified. He stated that, on January 11, 2007, he was in the area of Summerdale and Granite to get a haircut. *Id.* at 26-27. He did not go to that barber shop often. *Id.* at 27. Laventure testified that he knew Allan Brunache, who worked at the barber shop, through his brother-in-law; Laventure described Brunache as having long dreads and a Haitian accent. *Id.* at 27-28.

90. Around 12:30 pm that day, he stood at the side of the barber shop on Summerdale with Brunache and another man. *Id.* at 28. He then heard two to three gunshots coming from the southwest corner of Summerdale and Granite. *Id.* at 29-30. After the first shot, the men ducked down; after the next one, Laventure "looked in the general area from where it was coming from." *Id.* at 30. He saw a boy fall down and then saw the guy with the gun looking like he was going to pick something up. *Id.* The man with the gun then saw them and ran across the street. *Id.* Laventure identified Patterson as the person he saw with the gun. *Id.* at 30-31.

91. Laventure testified that his initial view of the shooter was of "like the side of his face because he had a hoodie, but it was like this, coming off." *Id.* at 33. Laventure also testified that the shooter looked right at them before he ran and that nothing blocked his view when looking at the shooter. *Id.* at 35-36.

92. Laventure testified that the shooter then ran across the street and into the driveway that comes off Summerdale behind 900 Granite Street; after he ran through the driveway, he ran past a white guy who raised his hands up. *Id.* at 37. After that, Laventure and Brunache ran down the block and called 911; the third man did not go with them. *Id.* at 37-38. About five minutes later, Laventure saw the shooter again, coming from Granite Street with different clothes on. *Id.* at 39. Laventure testified: "Well, I heard him first. He was like – he was like who did this, somebody did this. It was a setup, and stuff like that. And then when we saw him, we looked at each other and said, that's the guy who shot him." *Id.* at 40. Laventure

testified that, when this man approached the victim, he bent down and picked up a blunt and a bag of marijuana from the victim. *Id.* at 42-43.

93. Laventure and Brunache then walked away because Laventure had weed on him, and Laventure went to his car to call 911 again. *Id.* at 44-45. Laventure described Patterson as being 5'6" or 5'7", around 150 pounds, much shorter than the person he shot, and with "a lot of bumps on his face." *Id.* at 46. Laventure did not stay to make sure the shooter was arrested because of the weed and because his driver's license was suspended. *Id.*

94. Regarding the photo array he was shown, Laventure testified that, when the police showed him the array, they asked him "[t]o point out who it was, the shooter." *Id.* at 49. He further testified that he had no problem picking out Patterson as the shooter in the array. *Id.*

95. On cross-examination, Laventure testified that the man standing outside the barber shop with him and Brunache was the man who sold him the weed he had on him that day. *Id.* at 51-52. He also testified that, after hearing shots, ***he only saw the person with a gun for a second or two***. *Id.* at 53. Laventure stated that the shooter was wearing black clothing and that when he saw Patterson come up from Granite Street, Patterson was wearing a brown shirt and beige pants with no shoes and white socks. *Id.* at 55-56.

96. Laventure agreed that, when he called police on January 11th, he did not describe the shooter's hair or facial hair. *Id.* at 58. At the time of trial, he recalled that the shooter had a short afro and a patchy beard, which he described as hair that came down both sides of the face toward the chin but did not connect. *Id.* at 59. Laventure also testified that he was sure he told detectives that the shooter had bumps on his face but acknowledged that no such information was contained in the description of the shooter he gave to police in his February 27, 2007 statement. *See id.* at 60-61 (discussing Trial 1 Exhibit C-9).

97. Laventure acknowledged that he did not call police after the incident to tell them what he had seen and that it took police approximately six weeks to find him. *Id.* at 63-64. When shown the photograph of Patterson that he had identified in the photo array shown to him on February 27, 2007, Laventure claimed he could see a short afro, a patchy beard, and bumps on Patterson's face. *Id.* at 66-68.

98. Finally, Laventure testified that he had been convicted of credit card fraud and that he would take help from the District Attorney's Office in his open cases if the office could give it to him. *Id.* at 69.

99. On re-direct examination, Laventure testified that he did not go to police because he was afraid and did not want to testify in a homicide case. *Id.* at 71, 74.[5]

100. The Commonwealth next called **Officer Saran Pereborow**. Officer Pereborow responded to the scene of Jackson's shooting about 45 seconds after Officers Bowes and Quinn. *Id.* at 85-86. Officer Pereborow testified that, around 12:45 pm that day, he received flash information that "the shooter was on location." *Id.* at 87. The initial information described the shooter "as a black male, short[,] bumps on his face, khaki pants and a brown shirt. Later it changed, maybe 30 to 45 seconds later it changed to a greenish-brown shirt with khaki pants, short black male with bumps on his face." *Id.* at 89.

101. Officer Pereborow testified that, after receiving this information, he scanned the crowd and observed a black man named Sayeed Jordan who was wearing a green bomber jacket, brown pants, and was kind of short, but did not have bumps on his face. *Id.* at 90. Officer Pereborow stopped him based on the flash information but testified that he and the other

[5] The defense's motion for a mistrial based on this testimony was denied. N.T. 08/06/2008, 74-75.

investigators knew Jordan was not the male described in the flash information, so they released him. *Id.*

102. Officer Pereborow testified that he then observed Patterson wearing a green thermal shirt, khaki pants, "short and bumps on his face." *Id.* He detained him and put him in the back of the police car for questioning. *Id.*

103. The prosecutor then reviewed Officer Pereborow's pedestrian information report with him. Officer Pereborow testified he noticed the bumps on Patterson's face "right away" and that Patterson had "light" facial hair, "[h]e was just unshaven." *Id.* at 93.

104. Officer Pereborow testified that he detained Patterson at 12:51 pm and transported him to Northeast Detectives for questioning at approximately 2:15 or 2:20 pm. *Id.* at 94-95. During the time Patterson was in the police car, Patterson asked Officer Pereborow whether Jackson was okay and whether he was going to live. *Id.* at 95-96.

105. On cross-examination, Officer Pereborow testified that he believed Patterson had shoes and socks on when he was stopped. *Id.* at 101.

106. **Kenneth Lay**, the firearms lab supervisor at the Police Forensic Science Bureau, next testified for the Commonwealth as an expert witness. For this case, he analyzed two pieces of ballistics evidence. *Id.* at 114. One piece was a bullet fragment recovered from the crime scene, which "was unidentifiable as to caliber because of the size." *Id.* at 115. Mr. Lay testified, however, that there were markings indicating that the fragment passed through a gun barrel. *Id.* at 116. Mr. Lay also testified that the fact that there were no fired cartridge cases recovered at the scene would be consistent with a revolver having been used. *Id.* at 120. The second piece of evidence was a bullet core. Mr. Lay testified the caliber was approximately .38 or 9 millimeter. *Id.* at 122. He testified that .38 bullets are usually fired from revolvers. *Id.* On cross-

examination, Mr. Lay testified that a test can be performed on an individual's hands to determine whether he had fired a firearm. *Id.* at 125.

107. The Commonwealth's next witness was **Officer Robert Peachey**. He testified about his arrest of Mr. Patterson on April 25, 2007, and that Mr. Patterson cooperated fully with him. *Id.* at 132-34.

108. The Commonwealth next called **Dr. Edwin Lieberman**, the Assistant Medical Examiner, who testified as an expert witness. Dr. Lieberman testified that Jackson's cause of death was being shot in the head and that the manner of death was homicide. *Id*. at 138. He also testified that Jackson suffered "a distant range gunshot wound, meaning the muzzle of that gun was at least two-and-a-half feet or further away." *Id.* at 141.

109. **Allan Brunache** next testified for the Commonwealth. He testified that, on January 11, 2007, he was working at a barber shop at Summerdale and Bridge and had been working there for five to six months, during which time he got "to know the faces of the people that lived in that neighborhood." N.T. 08/11/2008, 5-6. At around 12:30 pm on January 11th, Brunache was hanging out with Laventure, also from Haiti, outside the barber shop when he heard three gunshots coming from down the block close to the store on Granite Street. *Id.* at 6-8. Brunache testified that, when he looked at the grocery store, he saw Patterson "shooting his friend." *Id.* at 8. He did not know Patterson but had seen him in the neighborhood a couple of times (which he then defined as more than ten times) before the shooting. *Id.* at 9, 12.

110. Brunache testified that the shooter looked at him after the first shot and the second shot and that he looked directly at the shooter's face ***for a few seconds***. *Id.* He further testified that he was able to recognize Patterson as the shooter because he had seen him before. *Id.* at 22. According to Brunache, the shooter was wearing all black, including a black hoodie. *Id.* at 23. After the shooter ran down the alleyway that runs parallel to Granite Street, *id.* at 12, 23,

Brunache went to the man who had been shot and called police, *id.* at 23-24. Laventure also called 911. *Id.* at 24.

111. Brunache testified that Patterson returned to the corner, coming from Granite Street, between five and ten minutes after the shooting. *Id.* at 24-25. He asked who killed his friend. *Id.* at 26. According to Brunache, Patterson also tried to pick something up from near Jackson's body. *Id.* at 30. Brunache testified that he and Laventure talked that day about how Patterson had done the shooting. *Id.* at 30-31. When asked about how he described the shooter to detectives, Brunache testified that he was shorter than 5'7" and had bumps on his face. *Id.* at 39-40.

112. On cross-examination, Brunache testified that the only people outside the barber shop before the shooting were himself and Laventure; contrary to Laventure's testimony, Brunache said no third person was present. *Id.* at 43-44. He also testified that the shooter wore his hoodie pulled up over the top of his head. *Id.* at 45-46.

113. Brunache testified that when Patterson came up to the corner store after the shooting, he had no shoes on, only white socks, and was wearing different clothing. *Id.* at 47, 49. Brunache thought he wore a white shirt and jeans. *Id.* at 48-49.

114. Brunache also testified that when police came to the crime scene, he did not tell them what he had seen and that he never called police to tell them what he knew about the shooting. *Id.* at 51-52. The defense then impeached Brunache with his preliminary hearing testimony in which he did not identify Patterson and stated he had not seen the shooter. *Id.* at 57-65.

115. On re-direct examination, Brunache testified that he could see who the shooter was, despite the hoodie, because of the bumps on his face and that he also saw the front of the shooter's face. *Id.* at 67-68. He also testified that he did not initially want to get involved

because he was scared and did not want anything to happen to his kids. *Id.* at 70-71. He further testified that he did not tell the truth at the preliminary hearing because he was scared. *Id.* at 76-77.

116. The Commonwealth then recalled **Officer Bowes**, who testified that January 11, 2007, was a clear, sunny day. *Id.* at 84.

117. The defense then called three witnesses—Kareema Patterson, Jacqueline Patterson, and Kenya Jones.

118. **Kareema Patterson**, Patterson's sister, testified that, on January 11, 2007, she lived with her mother, her 16-month old son, and her brother at 928 Granite Street. *Id.* at 94-96. In the late morning that day, she was at home about to get in the shower; Patterson, her son, and her son's father, Charles Berry, were also home at the time. *Id.* at 96. Around 12:00 or 12:30 pm, Patterson was in his room sleeping. Kareema testified that she knew this because she checked on him; she checked on him because, if he slept too long, a seizure might be coming on him. *Id.* at 96-97.

119. Kareema testified that, after seeing Patterson in his room, she got into the shower. During her shower, she heard three loud bangs. *Id.* at 98. She then got out of the shower, put her towel on, and ran downstairs. *Id.* When she got there, she saw Patterson at the foot of the stairs putting his socks on; they then both went to the porch, and Patterson went up the street toward Summerdale. *Id.* at 99. Kareema testified that a couple of people from the block, including "Ms. Kenya," also went to the corner. *Id.* at 99-100.

120. Kareema also testified that she could not really see what was happening at the corner, but someone came up the street and told her that Patterson was in a cop car. *Id.* at 101. She then called their mother to tell her that Patterson was being taken for questioning. *Id.*

121. Kareema stated that, as of January 11, 2007, they had lived in the Granite Street house for about seven years. She testified that the garage door did not go up because her mother had barricaded it so that it could not be opened after someone broke into their house a couple of years earlier. *Id.* at 101-02. She had not gone through the back door or the garage in the two years prior to the shooting. *Id.* at 102. Kareema also testified that, when she was interviewed by an investigator on June 25, 2008, no one was present other than herself and the investigator. *Id.* at 104.

122. On cross-examination, Kareema reiterated that she did not use the back door to the house although there was nothing wrong with it. *Id.* at 108. She also pointed out Patterson's girlfriend's house on Granite Street and an abandoned house on Granite Street on a diagram of the area. *Id.* at 108-9.

123. Regarding January 11, 2007, Kareema testified that she had a prenatal appointment at 1:00 pm that day, which is why she got into the shower around 12:00 or 12:30pm. *Id.* at 111. She said that, when she saw Patterson in his bed, she did not know whether he was sleeping or not. *Id.* at 112. Kareema also testified that, when she referred to getting dressed in her statement to the investigator, she meant that she put her towel on. *Id.* at 112-13.

124. Kareema testified that she took a brief, less than two-minute shower, *id.* at 116, and that Berry was watching her son during that time, *id.* at 119. She testified that if Berry had told police he was in the shower, and she was watching the kids, that would be a lie. *Id.*

125. The defense next called **Jacqueline Patterson**, Patterson's mother. She testified that, as of January 11, 2007, she had lived at 928 North Granite Street for about six years with Patterson, his twin sister, her daughter Kareema, and her grandchildren. *Id.* at 124-25. That day, she went to work at 10:00 am and finished work at 6:30 pm. *Id.* at 125. Jacqueline testified that her home had been broken into in 2004 and 2005, so she chained up the garage door; as of

January 11, 2007, you could not enter or exit the property through that door. *Id.* at 126-27. She also testified that you had to have keys to use the back door, and she was the only one with the keys; as a result of the break-ins, she had put a deadbolt lock on that door. *Id.* at 128. Jacqueline testified that, when she left for work on January 11th, the back door was locked and the key was in her pocketbook at work. *Id.*

126. Jacqueline also testified that Patterson had had epileptic seizures since being hit by a drunk driver in 1999 and, in 2006 to early 2007, had seizures two to three times a week. *Id.* at 129. She testified that, as a result of the injuries Patterson sustained in the accident and his seizures, he was not allowed to play physical contact sports or run distances. *Id.* at 129-30.

127. On cross-examination, Jacqueline testified that she had not checked the back door on the morning of January 11, 2007, to see if it was locked, but that she always carried the keys with her. *Id.* at 131-32. She also testified that she did not have any of Patterson's medical records with her. *Id.* at 132. She testified that she had not seen her son jog or run since his accident in 1999. *Id.* at 133-34.

128. **Kenya Jones** was the final defense witness. She testified that she had known Patterson for four or five years and that, as of January 11, 2007, she lived at 907 Granite Street with her five children; they had lived there since January 2000. *Id.* at 135-36. At approximately midday on January 11, 2007, she was in her basement washing clothes when she heard three gunshots. *Id.* at 136. She then ran up the steps and out the door, where she saw "[p]eople crowded around across the street from the corner store." *Id.* at 137. She met Patterson in the middle of the street, and they went across the street together. Jones testified that Patterson was wearing a white t-shirt, basketball shorts that she thought were black, socks, and no shoes. *Id.* at 140. She also noticed that "[h]e had like dried up, I would call it drool on his face, like maybe he was [a]sleep." *Id.* at 143.

129. Jones testified that she went to the corner of Granite and Summerdale and saw Jackson's body lying there. *Id.* at 140. She had known Jackson for about four to five years and testified that he was friends with Patterson. *Id.* at 141. She also knew a man named Midnight and saw him at the corner that day. *Id.* Jones also saw a female police officer named Yvette who lived on her block when she left the corner to tell Jackson's mother what had happened. *Id.* at 142.

130. On cross-examination, Jones testified that she stood on her porch for a minute or two after she heard gunshots and yelled to Midnight to ask him whether it was Jackson who had been shot. *Id.* at 148-50. He did not respond, and Jones went down her steps and met Patterson in the street; she assumed he was coming from his home. *Id.* at 151-52. She also testified that the ashy spot on Patterson's face was noticeable because it was "something white on somebody's face," *id.* at 154, and that she remembered what Patterson was wearing because she found it unusual that he had on shorts in January, *id.* at 157. Jones testified that, when she later saw Patterson being put into a police car, he was wearing khaki pants. *Id.* at 158.

131. The defense then rested. *Id.* at 161. In closing, the defense argued that the Commonwealth's theory of the case made little sense: "Does it make any sense whatsoever if you were the shooter, and if, as you've heard, this happens in broad daylight in the middle of the afternoon, and if you run down the driveway behind the block where you reside, and if you go into your house, why, what possible reason would there be for you to come back out and come back to the location where this occurred?" *Id.* at 165. The defense also emphasized that the two witnesses who identified Patterson, Laventure and Brunache, were standing a good distance away from the shooting and only saw the shooter for a few seconds. *Id.* at 167-78. The defense pointed to these witnesses' credibility issues, as Laventure had a prior conviction for credit card fraud and Brunache testified he had lied under oath at the preliminary hearing. *Id.* at 172, 176.

Finally, the defense emphasized Kareema's testimony that Patterson was in his room when she heard gunshots, as well as the lack of physical evidence in the case. *Id.* at 181, 184.

132. The prosecution in closing emphasized the testimony of eyewitnesses Laventure and Brunache. *Id.* at 190-202. The prosecution again offered no motive for Patterson to have shot his friend other than a vague allusion to drugs: "He also goes back because he wants to get the marijuana for whatever reason, whatever dispute had been going on there." *Id.* at 204. Indeed, the prosecutor openly acknowledged the lack of motive evidence and told the jury: "I do not need to prove to you motive, the whys in this case." *Id.* at 209-10.

133. The court instructed the jury on the morning of August 12, 2008. After approximately two hours of deliberations, the jury asked a question regarding the difference between first-degree and third-degree murder and also asked to see Kenya Jones's statement (with the attached photos of Patterson and Midnight). N.T. 08/12/2008, 31-32. The court again charged the jury on first- and third-degree murder and sent out the photos attached to Jones's statement but not the statement itself. *Id.* at 37-43.

134. Just after 2:00 pm on August 12th, the jury informed the court that it was at an impasse. *Id.* at 44. The court gave a *Spencer* charge and sent the jury back to continue deliberating. *Id.* at 45-47. Later that afternoon, the jury asked to hear all of Laventure's testimony as well as "the testimony of Mr. Brunache on who he saw walking down the street." *Id.* at 48.

135. The next morning, these portions of the testimony were read back to the jury. N.T. 08/13/2008, 4-5. That afternoon, the jury foreperson informed the court that he did not believe there was a reasonable probability of reaching a unanimous verdict. *Id.* at 7-8. Because the jury had been out for two days, the court declared a hung jury, declared a mistrial, and excused the jurors. *Id.* at 8.

136. After Patterson's first trial, his attorney visited him just once more—a visit of unknown duration—between June 8, 2009 and July 17, 2009. *See* CFCF Inmate Visitor Log at 2. Patterson also had difficulty contacting his attorney by phone between his two trials. Although he called his attorney's phone number sixteen times in that period, he got through to the office in only eight of those occasions, totaling just seventeen minutes of call time. *See* Call Log. There is no record of any defense investigation between Patterson's two trials.

Mr. Patterson's Second Trial

137. Patterson's second trial began on July 2, 2009, a little less than a year after his first trial ended in a hung jury. There were two main differences in the evidence the Commonwealth presented at Patterson's first and second trials. At the second trial, the Commonwealth also presented: (1) a surveillance video from Mercado's grocery store and testimony from Officer Eyvette Chandler that a person reminding her of Patterson was shown on the video as in the store a couple of minutes before the shooting; and (2) excerpts of certain of Patterson's recorded prison phone calls.

138. In his opening statement, the prosecutor emphasized Patterson's alleged appearance on the store surveillance video as well as Laventure's and Brunache's identifications of Patterson. *See generally* N.T. 07/06/2009, 107-14. As at the first trial, the prosecution offered no motive for Patterson to have shot his friend other than a vague reference to "a little competition for the sale of weed" "[o]utside the corner store." *Id.* at 108.[6]

139. Commonwealth witnesses **Dr. Edwin Lieberman** (N.T. 07/06/2009, 7-17),

[6] Contrary to the prosecutor's inference in his opening statement, the police investigation turned up no evidence of Patterson being involved in any competition for the sale of weed outside Mercado's grocery store. Rather, the police received information that Jackson had a dispute with LaVar Washington and two young men who lived on Bridge Street (Ivan and John) regarding the sale of drugs outside the corner store; as noted above, police did not follow up on that information. *See* ¶¶ 25, 32, 37, 46, 48, *supra*.

Officer Saran Pereborow (N.T. 07/07/2009, 130-54), and **Officer Terrence Lewis** (N.T. 07/08/2009, 4-24) testified essentially consistently with their testimony at the first trial.

140. **Pierre Laventure** again testified for the Commonwealth and again identified Mr. Patterson as the person he saw shoot Jackson on January 11, 2007. N.T. 07/06/2009, 27. His testimony was largely similar to his testimony at the first trial. This time, however, Laventure testified that he left the crime scene because he "didn't want to be a rat." *Id.* at 32. Laventure also testified that, when he was interviewed by homicide detectives on February 27, 2007, he told the truth but did not want to get involved; he further testified that the detectives told him: "That I would be locked up. They came to my job. They came to my people's house, my family house." *Id.* at 34-35. Laventure testified that he did not have any open cases and that he had not received anything in exchange for his cooperation with law enforcement. *Id.* at 40.

141. **Allan Brunache**'s testimony was also similar to his testimony at Patterson's first trial. He again identified Patterson as Jackson's shooter. N.T. 07/07/2009, 75. Brunache also testified that when Patterson came up to the corner after the shooting, he was wearing dark pants, a white t-shirt, white socks, and no shoes. *Id.* at 80-81. Brunache further stated that he did not tell the truth at the preliminary hearing because he was scared but, by the next time he testified (at Patterson's first trial), he had made up his mind to tell the truth. *Id.* at 96-98.

142. On cross-examination, Brunache testified that he saw the shooter's face for only a couple of seconds and that the shooter did not have facial hair. *Id.* at 107. Brunache also stated that it was raining a little at the time of the shooting. *Id.* at 123.

143. The Commonwealth also called Inez Jackson, Officer Eyvette Chandler, Officer Valerie Felici, Officer Carlos Cruz, and Detective George Fetters, none of whom testified at Mr. Patterson's first trial.

144. **Inez Jackson**, the victim's mother, testified that she lived at 951 Granite Street with her son Antwine in January of 2007. N.T. 07/06/2009, 5. She last saw him about 15 to 20 minutes before his shooting, and he was in good health at that time. *Id.* She was in the shower when someone came to the house that day; her sister yelled up to her that Jackson had been shot. *Id.* at 6. She went to the hospital to be with her son and identified him at the medical examiner's office the next day. *Id.*

145. **Officer Chandler** testified that she had been employed by the Philadelphia Police Department for ten-and-a-half years. N.T. 07/07/2009, 5-6.[7] She also testified that she had lived at 931 Granite Street for about twelve years. *Id.* at 7.

146. Officer Chandler testified that she was getting ready for work between approximately 12:20 and 12:30 pm on January 11, 2007, when she heard three gunshots. *Id.* at 8. She stood on her porch, looked down to Summerdale, and saw two men on the corner—"[o]ne was falling down and one just took off from the store." *Id.* at 9-10. She saw a black man run and go down the alley. *Id.* at 9. Officer Chandler testified that she could not see that person's face. *Id.* at 11. She described the man who ran away as about 5'4", with all dark clothes and a medium build. *Id.* at 12.

147. According to Officer Chandler, after she saw one man fall to the ground, she called 911 while running down the street; she said that she was an off-duty officer who needed an ambulance in connection with a shooting at the corner of the 800 block of Granite Street. *Id.* at 14-15. When she got to the corner, Officer Chandler recognized the man who had been shot as Jackson; she knew his mother. *Id.* at 15. She stayed at the scene until on-duty officers arrived. *Id.* at 16.

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[7] The notes of testimony for July 7, 2009, contain two sets of page numbers. The citations here refer to the page numbers at the upper right-hand corner of each page; those numbers are preceded on the transcripts by the word "page."

148. Officer Chandler testified that she knew Patterson and could not say he was the person that she had seen running. *Id.* at 17. She also testified that, after officers came to the scene, she returned to her house for two to three minutes. *Id.* at 18. When she left the house again, she saw Patterson standing in front of this house saying, "'Oh, man, they shot the boy. They shot the boy. The boy might be dead.'" *Id.*

149. The prosecutor then asked Officer Chandler about the surveillance video she had been shown on March 1, 2007 by a homicide detective. When asked whether anyone on the video looked familiar to her, she responded: "It was a guy on the video that looked like Dontia. ***I couldn't see his face***." *Id.* at 22 (emphasis added). She explained that she concluded it was Patterson on the video because: "Well, I've been knowing – I've been seeing Dontia since I moved around there, when they moved around there about eight years ago. ***I knew Dontia's stature, the way he moved, the way he walked***. He had – at the time, he had dark clothes on. I just know Dontia when I see him." *Id.* at 23 (emphasis added). Officer Chandler testified that she had seen Patterson in a "dark clothing outfit" before. *Id.*

150. The prosecutor then had Officer Chandler view the video with the jury. She testified that the person in dark clothing "***reminds me*** of Dontia," and again testified that she could not get a good look at this face in the video. *Id.* at 26-29 (emphasis added).

151. On cross-examination, Officer Chandler testified that her house was about half a block away from the corner of Granite and Summerdale; she reiterated that she had seen two African American men at the corner and that she could not see the face of the man who headed way from the corner. *Id.* at 37; *see also id.* at 38 ("Sir, all I saw was a black male with dark clothes on. I saw a blur of him going across."). She also testified that when she saw Patterson at the corner after the shooting, he was wearing long tan/khaki pants and a jacket that she thought was black; she was not sure if he had shoes on. *Id.* at 41.

152. Officer Chandler acknowledged that when she was interviewed by detectives on the afternoon of the shooting, she did not say that she knew the victim's mother or that she knew the victim's name. *Id.* at 44. She also acknowledged that during her second interview, on January 12, 2007, she said she saw Patterson on the sidewalk in front of her house; she did not say anything about "going to the corner, coming back, and then seeing Dontia." *Id.* at 48.

153. Defense counsel then showed Officer Chandler the March 2007 statement in which she told detectives that a man in the video reminded her "***of Dontia, the way he walks and moves and stuff***. I can't really make out his face but he looks like Dontia." *Id.* at 52 (emphasis added). Officer Chandler testified that, "[w]hen Dontia walks, he like has a rock to his walk when he walks," and "I don't know how to describe it. The way he walks, he doesn't walk this straight walk, straight one foot in front of the other. He has like a lean to his walk." *Id.* at 53.

154. Officer Chandler initially did not directly respond to defense counsel's questions about whether she saw someone walking like that in the surveillance video. *Id.* at 53-55. Instead, she testified: "I'm just telling you what I see. To me, it reminds me of him. I don't know but to me it reminds me of him and it's not that I just seen him or just met him." *Id.* at 54. When asked whether she could clearly see anything in the video to indicate that the person with dark clothing was a male, Officer Chandler responded, "***No, I couldn't see if it was a male***. To me, it looked like a male." *Id.* at 55 (emphasis added). She reiterated that she could not see the face of the person in the video. *Id.*

155. At the end of his cross-examination, defense counsel again asked Officer Chandler about the walk of the person in the video: "And again I ask you, did the person wearing the dark clothing, did he exhibit any unusual walk such as a hop, a skip, a strut, anything in that video?" *Id.* at 57. Officer Chandler responded, "No." *Id.*

156. **Officer Valerie Felici** testified that she came into contact with Patterson on the 5500 block of Summerdale Avenue on January 9, 2007, two days before Jackson's shooting. N.T. 07/08/2009, 26-27. At that time, he wore "black Dickies and a green jacket." *Id.* at 28. On cross-examination, she testified that her report of the incident reflected an estimated height of 5'7" and weight of 190 pounds for Patterson. *Id.* at 29.

157. **Officer Carlos Cruz** testified that he was assigned to the homicide unit and involved in the investigation into Jackson's death. *Id.* at 30-31. Officer Cruz read Laventure's February 27, 2007 statement into the record in its entirety. *Id.* at 40-48.[8] Officer Cruz also testified that Jackson's murder was the seventeenth homicide in Philadelphia in January 2007. *Id.* at 47.

158. **Detective George Fetters** testified that he was the assigned officer for the investigation into Jackson's death. *Id.* at 63. He testified that Laventure and Brunache were not at the homicide unit on the same day and that he did not share any information about the case with Brunache before questioning him. *Id.* at 68. He then read Brunache's February 28, 2007 interview into the record in its entirety. *Id.* at 69-77.[9]

159. After Detective Fetters' testimony, the Commonwealth presented ballistics testimony by stipulation; that stipulation tracked **Kenneth Lay**'s testimony at Patterson's first trial and included a stipulation that no gunshot residue test had been performed on Patterson at any time. *Id.* at 98-100. The Commonwealth then rested.

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[8] Defense counsel objected on the ground that he had only raised one inconsistency between the statement and Laventure's testimony on cross-examination; however, the court agreed with the prosecutor that the entire statement was admissible to show the consistent nature of the rest of the statement and overruled the objection. N.T. 07/08/2009, 37-39.

[9] Defense counsel also objected to the reading-in of Brunache's full statement, and the court again overruled the objection. N.T. 07/08/2009, 69.

160. During this trial, the defense called only two witnesses—Jacqueline Patterson and Kenya Jones.

161. **Jacqueline Patterson**'s testimony on direct examination was consistent with her testimony at Patterson's first trial. She reiterated that she kept the back door of her home locked and the garage door chained due to prior break-ins. *Id.* at 106-11. She also reiterated that Patterson had suffered from epileptic seizures since being hit by a drunk driver in 1999 and that he was restricted from running and participating in contact sports. *Id.* at 110-11.

162. On cross-examination, the prosecutor asked Jacqueline about the sequestration order from the earlier proceeding involving her son (his first trial). She testified that she did not know what the term "sequestration order" meant but that she did remember the court issuing the order. *Id.* at 114-15. She also testified that she did not remember discussing the case with her son. *Id.* at 116.

163. The prosecutor then played an excerpt of a recorded conversation between Patterson and his sister Kareema from August 2008. The content of the call was not transcribed, but the prosecutor characterized it as Kareema telling Patterson that their mother had to testify that he was on medication and that she was the only one with the keys to the back door. *Id.* at 118.

164. The prosecutor next played an excerpt of a call between Jacqueline and Patterson on August 8, 2008. *Id.* at 119-20. Again the content of the call was not transcribed, but the prosecutor characterized it as a conversation in which Patterson told his mother about the evidence and testimony. *Id.* at 120-21. Jacqueline testified that she had lied when she testified that she did not discuss the case pursuant to the sequestration order. *Id.* at 121. She testified that was the only time she had discussed the case. *Id.* at 122.

165. The prosecutor next played an excerpt of another call from August 8, 2008, between Patterson and Shanelle, the mother of Patterson's daughter. *Id.* at 124. Again the content of the call was not transcribed, but the prosecutor characterized it as a conversation in which Shanelle told Patterson what Jacqueline had said to her about the case. *Id.* Jacqueline testified she had lied when she said the only conversation she had about the case was in the previously-played call. *Id.* at 124-25.

166. The prosecutor next played an excerpt of an August 7, 2008 call between Patterson and Kareema. *Id.* at 125. Again the content of the call was not transcribed, but the prosecutor characterized it as a conversation in which Patterson told Kareema how she should testify. *Id.* at 127.

167. After Jacqueline's testimony, defense counsel moved for a mistrial on the grounds that: (1) the content from the recorded calls that had been introduced was not relevant; (2) the prosecutor had expressly referred to the prior trial during the testimony; and (3) there had been references to the calls being placed from the Philadelphia prison system. *Id.* at 135-37. The court denied the motion. *Id.* at 138.

168. The defense next called **Kenya Jones**. Her testimony was similar to that in the first trial. On cross-examination, she testified that she was not aware of any competition between Jackson and Patterson. *Id.* at 156.

169. The defense then rested, and the Commonwealth called Kareema Patterson as a rebuttal witness as on cross.

170. **Kareema Patterson** testified that she was in the shower on January 11, 2007, when she heard gunshots and that Patterson was home at that time. N.T. 07/09/2009, 13. The prosecutor then impeached her with inconsistencies between her June 2008 statement to defense

investigator Richard Strohm and her testimony at the first trial, such as whether Patterson put shoes on before going outside after hearing gunshots. *Id.* at 28-30.

171. The prosecutor questioned Kareema about whether she knew about the Philadelphia prison system's prohibition against "three-way calls," which she said she did. *Id.* at 43-44. The prosecutor then played an excerpt from a July 8, 2008 recorded phone call. As with the call excerpts played during Jacqueline's testimony, the content of the call was not transcribed; however, the prosecutor characterized it as a three-way call in which Patterson ultimately was connected with Shanelle. *Id.* at 44-45.

172. The prosecutor then played an excerpt of a July 18, 2008 call between Patterson and his twin sister Demetrius. *Id.* at 46-47. Again the content of the call was not transcribed. When the prosecutor asked whether "that process with the heavy breathing to get to another phone call" refreshed Kareema's memory, she answered "yes." *Id.*[10]

173. The prosecutor next played an excerpt of a July 31, 2008 call. Again the content of the call was not transcribed. When the prosecutor asked Kareema whether she realized that it was wrong to be engaging in three-way calls, she said yes. *Id.* at 47-48.

174. The prosecutor then asked Kareema about the prior sequestration order. She testified that she was told not to discuss the case with people who were not there. *Id.* at 49.

175. The prosecutor next played an excerpt of an August 1, 2008 call. Again the content of the call was not transcribed, but the prosecutor characterized it as a conversation between Patterson and Shanelle about the "Jamaican boy and the other boy Perry." *Id.* at 50.

[10] At this point, defense counsel moved to strike all of the calls; the court denied the motion. N.T. 07/09/2009, 47.

176. The prosecutor next played an excerpt of an August 2, 2008 call. Again the content of the call was not transcribed. When the prosecutor asked Kareema, "[w]as that you," she answered "[n]o." *Id.*

177. The prosecutor then played another excerpt of a recorded call. The content of the call was not transcribed and the date was not indicated on the record. The prosecutor characterized it as a call between Patterson and his mother. *Id.* at 51.

178. The prosecutor next played an excerpt of an August 5, 2008 call. Again the content of the call was not transcribed. The prosecutor characterized it as a call in which Kareema told Patterson what the defense evidence would be after the trial started and quoted Kareema as telling him that she and their mother had been listening through the door. *Id.* at 51-52. Kareema testified that she was never told that listening through the door was wrong. *Id.* at 52.

179. The prosecutor next played an excerpt of an August 7, 2008 call between Kareema and Patterson. Again the content of the call was not transcribed. Kareema agreed that they were talking about someone who was testifying at the first trial. *Id.* at 53-56.

180. After Kareema's testimony, defense counsel renewed his motion for a mistrial due to references during the Commonwealth's questioning to Patterson's first trial and calls being placed from the Philadelphia prison system. The court denied the motion. *Id.* at 74-76.

181. In his closing argument, defense counsel emphasized inconsistencies between Laventure's and Brunache's accounts of the events of January 11, 2007, as well as the distance from which they saw Jackson's shooter. N.T. 07/09/2009, 9-12. He also noted issues with Officer Chandler's purported identification of Patterson from the store surveillance video. *Id.* at 28-29.

182. In his closing argument, the prosecutor emphasized that Laventure and Brunache testified even though they had nothing to gain by doing so. *Id.* at 52-53. He also characterized Jones's testimony that Patterson and Jackson were friends as "garbage." *Id.* at 54. He further argued that Officer Chandler could identify Patterson from the surveillance video because she knew him. *Id.* at 72-73. The prosecutor also reiterated Officer Cruz's testimony that Jackson's homicide was the seventeenth in the city in January 2007 and argued that this gave Brunache and Laventure a reason to be fearful of Patterson and his friends and family, making the witnesses not want to snitch. *Id.* at 55. Once again, the Commonwealth offered no motive for Patterson to have shot Jackson.

183. The jury began deliberating on the morning of July 10, 2009. Later that day, they asked to see crime scene photographs and diagrams of the area, asked the time at which Patterson had been placed into the police car after the shooting, asked to see the surveillance video up close "to get a better view of the store and what was going on inside," and asked to hear the tapes of Laventure's and Brunache's 911 calls. N.T. 07/10/2009, 41-44. The court answered all of these requests.

184. Later that afternoon, the jury asked for transcripts of the 911 tapes. *Id.* at 44-45. The court read the only transcript that it had, which was of Laventure's second call. *Id.* at 45. The jury also asked for Officer Pereborow's description of the clothing Patterson was wearing when he was placed in the police car and a description of what Jackson was wearing at the time of his death. *Id.* The court answered those requests. Just after 4:00 pm, the jury adjourned for the weekend.

185. When the jury resumed deliberations on July 13, 2009, it asked to see photographs of Patterson and Midnight, which were sent back to the jury room. N.T. 07/13/2009, 4-5. Just after 12:00 pm, the jury returned a guilty verdict. *Id.* at 8.

Post-Trial Investigation

186. Post-trial investigation has revealed numerous weaknesses in the Commonwealth's case against Patterson and deficiencies in trial counsel's representation.

187. First, current counsel arranged for the transcriptions of the prison calls apparently played for the jury at Patterson's second trial.[11] The transcriptions, attached here collectively as Exhibit 23, reveal that the tapes contain hearsay within hearsay that was never objected to by trial counsel.

188. Second, current counsel and the Pennsylvania Innocence Project's staff investigator interviewed Gregorio Mercado. Mercado confirmed what he had told police—that he knew Patterson and Patterson was not involved in Jackson's shooting. Mercado also confirmed that he was not interviewed by trial counsel or any defense investigator.

189. Third, current counsel and the Pennsylvania Innocence Project's staff investigator interviewed Charles Berry, the father of Kareema's children who was at the Patterson house at the time of Jackson's shooting. Berry confirmed the information he had given police in March 2007, namely that Patterson was at home sleeping when Berry returned from a trip to Mercado's store to buy milk not long before Jackson's shooting and that he saw Patterson leave the house to go up to the corner after the shooting. Berry also confirmed that he had not been interviewed by trial counsel or any defense investigator.

190. Fourth, current counsel and the Pennsylvania Innocence Project's staff investigator interviewed Elvira Urena, who confirmed what she had told police in 2007, namely that there were three men outside Mercado's store—one who was shot and two who ran away.

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[11] The calls were not transcribed into the trial record, and most were not identified with specificity. Upon a motion filed by prior PCRA counsel, the Court ordered trial counsel to assist in identifying which tapes were played. This does not appear to have occurred; current counsel therefore identified the calls played to the best of their ability.

Urena was never contacted by trial counsel or an investigator. Urena, whose first language is Spanish, did receive something in the mail that began "sub" but threw it away as she did not know what it was.

191. Fifth, current counsel and the Pennsylvania Innocence Project's staff investigator interviewed a number of Patterson's neighbors, friends, and family members. Although the Pattersons told trial counsel about these individuals, they were never previously interviewed. All of them conveyed information favorable to the defense that could have, and should have, been used at trial:

- Clifford Johnson, a neighbor at 933 Granite Street, confirmed that Patterson and Jackson were friends. Johnson referred to himself as the "block captain," and stated that Patterson helped him with projects on the block such as painting and planting flowers. He described Patterson as a "good kid." Johnson was not contacted by trial counsel but would have been willing to testify for Patterson.
- Gina Bennett, a neighbor at 930 Granite Street who has lived there since 2001, confirmed that she does not see the Pattersons using their back door. She confirmed that Patterson and Jackson were friends, and that, while Patterson was "not an angel," he generally was known as a good kid who helped Johnson with his block captain projects. Bennett also related that it was common knowledge in the neighborhood that Officer Chandler did not like Patterson because Officer Chandler was unhappy that Patterson and her granddaughter had a relationship. Bennett asked to be contacted by trial counsel but was not; she would have been willing to testify for Patterson.
- Marlissa Stone stated that she had known Patterson since they were seven years old, and he was a good kid who took his cousins and neighbors to parks and to the

pool. She was not contacted by trial counsel but would have been willing to testify for Patterson.

- Naja Debose is one of Patterson's cousins. She confirmed that Patterson suffered from seizures and stated that she had personally witnessed him having them. Naja related that small things such as being out in the heat or running around could bring on a seizure. Naja also confirmed that Patterson assisted Johnson as a "junior block captain." Naja further related that Officer Chandler did not like Patterson because he flirted with her granddaughter. Naja was not contacted by trial counsel but would have been willing to testify for Patterson.
- Cierra Debose is another of Patterson's cousins. She stated that Patterson looked out for his younger cousins, including herself. Cierra confirmed that Officer Chandler did not like Patterson because of his relationship with her granddaughter. Cierra was not contacted by trial counsel but would have been willing to testify for Patterson.
- Rameek Smith is another of Patterson's cousins. He stated that he cut Patterson's hair every week or two in the years before his arrest. Patterson never had a "short afro;" his hair was always much shorter than that type of cut. Smith was not contacted by trial counsel but would have been willing to testify for Patterson.
- Taneequa Armstrong lived in the same neighborhood as the Pattersons and dated Jackson before his death. She confirmed that Patterson and Jackson were friends. She also confirmed that Officer Chandler did not like Patterson and some of the other boys in the neighborhood because they were loud and flirted with girls. Armstrong stated that she had also witnessed Patterson having seizures, which were brought on by even minor physical activities such as running or celebrating

after winning a video game. Armstrong spent time with Kareema and was often at the Pattersons' home. She knew that they kept the backdoor padlocked from the inside.

192. Sixth, current counsel and the Pennsylvania Innocence Project's staff investigator obtained a Philadelphia Inquirer article regarding a fire at Officer Chandler's son's home in Oxford Circle that occurred in the year before Jackson's death. According to the article, Officer Chandler's granddaughter Brittany Talington set fire to the home because her father was upset that she exchanged cell phones with a boy she knew and instructed her to stop doing that. Officer Chandler's son, also a Philadelphia police officer, was killed in the fire. *See* "Spat led to father's death, police say Brittany Talington, 13, is charged with setting a fatal fire in her Oxford Circle house," *Philadelphia Inquirer* (Mar. 21 , 2006) (attached as Exhibit 24-1); *see also* "Philadelphia Girl admits to setting fire that killed father," NBC 10 (May 17, 2006) (attached as Exhibit 24-2); "Teen Daughter of Philadelphia cop to be tried for his fire death," *Daily News* (May 17, 2006) (attached as Exhibit 24-3); Docket, *Commonwealth v. Talington*, CP-51-CR-0507131-2006 (showing charges of arson, murder, and causing a catastrophe) (attached as Exhibit 25). This is consistent with accounts by Patterson and his family that Officer Chandler and her son were upset that Patterson loaned Brittany his phone. The Pattersons informed trial counsel of these issues, but they do not appear to have been investigated. As shown by the trial summary above, trial counsel did not cross-examine Officer Chandler regarding any bias she may have had against Patterson.

193. Seventh, current counsel obtained expert reports from Jules Epstein of Temple University Beasley School of Law and Sean Morgan of Cornerstone Discovery. These experts have opined as follows:

- Professor Epstein, the Director of Advocacy Programs at Temple University Beasley School of Law, surveyed scientific research regarding eyewitness identification and opined that three factors present here—a brief opportunity to view the perpetrator, the use of a weapon, and, most significantly, distance—are cause for concern regarding the accuracy and reliability of Brunache's and Laventure's identifications of Patterson as Jackson's shooter. *See generally* Aug. 10, 2017 J. Epstein Report (attached as Exhibit 26). As to distance, Professor Epstein visited the scene and took photographs that demonstrate "that ***it is impossible***, in the clearest of lighting conditions, to observe facial detail of an individual at the crime scene when viewed from the vantage point of the eyewitnesses." *Id.* at 6 (emphasis added). Professor Epstein also opined as to trial counsel's deficient performance in handling this case of mistaken identification, including failing to photograph the scene and thus failing to show the jury this impossibility. *Id.* at 8-9 (listing various failures of trial counsel in handling identification issues). Ultimately, Professor Epstein opined: "The prosecution of Dontia Patterson is one where the risk of eyewitness error was great. In addition, trial counsel failed to use the well-established research regarding eyewitness perception and memory and showed no grasp of the method of investigating and litigating a case where the defense is mistaken identification." *Id.* at 10.
- Sean Morgan, Director, Litigation & Trial Technology at Cornerstone Discovery, viewed the surveillance footage that police obtained from Mercado's grocery store in 2007 and reviewed statements by witnesses who police asked to view the footage. *See generally* Aug. 15, 2017 S. Morgan Report (attached as Exhibit 27).

Mr. Morgan opined that "the store footage here is thus of extremely low resolution. . . ." *Id.* at 3. He further opined that "the store footage here is thus of extremely low frame rate." *Id.* at 6. In other words, the footage plays "an estimated 3 frames," or still images, "per second" to convey motion, in comparison with "[m]odern video games and some modern films [that] can reach upwards of 48 to 60 frames per second." *Id.* at 2, 6. In Mr. Morgan's professional opinion, "[a]lthough the quality of the footage is poor, it would not be impossible to recognize yourself or possibly someone you knew well in this footage." *Id.* at 7. However, he noted that while Isaac Smith ("Midnight") identified himself in the footage as the individual in gray, Tashima Thompson identified Midnight in the footage as the person in black, demonstrating that "even when familiar with an individual, the quality of the video cannot be relied on for identification. . . ." *Id.* Regarding Officer Chandler's statement that the person alleged to be the shooter in the video reminded her of Patterson based on the way he walked and moved, Mr. Morgan opined that "it is virtually impossible to identify someone in this footage based on characteristics of movement because of the footage's low frame which results in a jerky depiction of motion in the footage compounded with a low resolution which further drastically reduces distinctive characteristics in movement." *Id.* Ultimately, Mr. Morgan opined: "After reviewing the materials provided, the examiner has determined that the video footage (McCaffrey.wmv) is of such low resolution and frame rate that it is impossible for someone to rely solely upon it for positive identification." *Id.* at 8.

194. Finally, counsel are also investigating mitigation evidence as Patterson, as a "juvenile lifer," is entitled to re-sentencing. Because the Court has indicated its intent to deal

with non-sentencing claims first, such evidence is not included in this petition. Counsel will further amend Patterson's petition to include evidence relevant to re-sentencing should proceeding to that phase become necessary; however, if the Court grants relief on any of Patterson's other claims, the need for re-sentencing will be obviated as Patterson will be entitled to a new trial.

Procedural History & Prior Counsel

195. Mr. Patterson was held for trial after his October 16, 2007 preliminary hearing before the Honorable David C. Shuter. At the preliminary hearing, James Berardinelli represented the Commonwealth, and Gregory Pagano represented Mr. Patterson.

196. Mr. Patterson's first jury trial took place from August 4 – August 13, 2008 before the Honorable Carolyn Engel Temin, and resulted in a mistrial due to a hung jury. Beth McCaffrey represented the Commonwealth, and Lee Mandell represented Mr. Patterson.[12]

197. Mr. Patterson's second jury trial took place from July 2 – July 13, 2009 before the Honorable Steven R. Geroff. Mr. Patterson was convicted of first-degree murder and possession of an instrument of crime (PIC). Richard Sax represented the Commonwealth, and Mr. Mandell again represented Mr. Patterson. On October 22, 2009, the Court imposed the then-mandatory life without parole sentence on the murder count, and a concurrent 2.5 to 5 years of imprisonment on the PIC count.

198. On October 27, 2009, Mr. Mandell filed post-sentence motions on behalf of Mr. Patterson, which were denied without hearing or argument on November 2, 2009.

199. Mr. Patterson appealed his conviction and sentence on November 30, 2009. Mr. Mandell continued to represent Mr. Patterson during his direct appeal. The Rule 1925(b)

[12] Although Mr. Patterson was a juvenile at the time of the crime, the record contains no indication that trial counsel sought decertification of this case.

statement raised six matters complained of on appeal: (1) insufficient evidence; (2) the court's failure to grant a mistrial when a Commonwealth witness improbably claimed she saw someone walk "through" a house; (3) the court's error in allowing the entire contents of a prior statement to be read to the jury when only one part of the prior statement was inconsistent with the in-court testimony; (4) the repeated references to telephone calls being placed by Patterson from the Philadelphia Prison System; (5) the court's error in instructing the jury that Kareema was not a Commonwealth witness but instead was called as-on cross; and (6) the court's failure to instruct the jury that a prior, inconsistent statement can be considered as substantive evidence. In his appeal brief, counsel raised only issues 1, 2, 5, and 6. The Superior Court affirmed on April 21, 2011. *See Commonwealth v. Patterson*, 3501 EDA 2009. The Supreme Court denied allocatur on September 12, 2011. *See Commonwealth v. Patterson*, 332 EAL 2010.

200. On March 8, 2012, Mr. Patterson filed a *pro se* PCRA petition, which he amended, also *pro se*, on April 2, 2012, and July 19, 2012. In these filings, Mr. Patterson maintained his innocence and preserved his claim that, because he was 17 at the time of the crime,[13] his mandatory life without parole sentence was unconstitutional under the United States Supreme Court's decisions in *Miller v. Alabama* and *Jackson v. Hobbs*. On February 12, 2013, this Court appointed Daniel Silverman to represent Mr. Patterson. On February 12, 2016, after the Supreme Court's decision in *Montgomery v. Louisiana*, Mr. Silverman moved to vacate Mr. Patterson's illegal sentence.

201. Undersigned pro bono counsel from the Pennsylvania Innocence Project and Cozen O'Connor entered their appearances on behalf of Mr. Patterson on November 15, 2016, and now file this amended PCRA petition.

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[13] Mr. Patterson was born on February 27, 1989.

Jurisdictional Requirements & Eligibility for Relief

202. Dontia Patterson is currently incarcerated at SCI Chester, 500 E. Fourth Street, Chester, PA 19013 (Inmate #JF9601), serving the prison sentence imposed as a result of the conviction at issue herein.

203. Mr. Patterson maintains his absolute innocence of all charges against him.

204. Mr. Patterson is indigent and cannot afford representation or investigative expenses.

205. The PCRA requires that a petition "be filed within one year of the date the judgment becomes final. . . ." 42 Pa. C.S. § 9545(b)(1). The judgment in Mr. Patterson's case became final on December 13, 2011.[14] Mr. Patterson's petition was timely filed within one year of that date, on March 8, 2012.

206. The relief requested is arrest of judgment and discharge and/or grant of a new trial based upon the claims raised herein.

[14] For purposes of the PCRA, "a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." 42 Pa. C.S. § 9545(b)(3). Mr. Patterson had 90 days from the Pennsylvania Supreme Court's denial of allocatur to petition the United States Supreme Court for a writ of certiorari. *See* U.S. Sup. Ct. R. 13. Because the 90th day, December 12, 2011, fell on a Sunday, Mr. Patterson's time for seeking certiorari expired, and his judgment became final, on December 13, 2011. *See* 1 Pa. C.S. § 1908.

Grounds for the Relief Requested[15]

A. Mr. Patterson's Trial Counsel Provided Ineffective Assistance, Requiring A New Trial Under The PCRA And Pennsylvania And United States Constitutions.

207. A petitioner is entitled to relief under the PCRA if his conviction resulted from "[i]neffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa. C.S. § 9543(a)(2)(ii). The Sixth Amendment of the United States Constitution also requires effective assistance of counsel. *See generally Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362 (2000).

208. To establish ineffective assistance of counsel, a petitioner must show: "(1) that the underlying issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice resulted from counsel's act or failure to act." *Commonwealth v. Stewart*, 84 A.3d 701, 706 (Pa. Super. 2013) (*en banc*); *see also Commonwealth v. Pierce*, 527 A.2d 973, 976-77 (Pa. 1987) (Pennsylvania's ineffective assistance of counsel analysis corresponds to that set out by the Supreme Court in *Strickland*). Prejudice will be found where, "but for the errors or omissions of counsel," "there is a reasonable probability that the outcome of the proceedings would have been different." *Commonwealth v. Kimball*, 724 A.2d 326, 333 (Pa. 1999) (internal quotation marks omitted). Prejudice under *Strickland* is not outcome-determinative; a petitioner need only show that confidence in the outcome is undermined by counsel's deficiencies. *Strickland*, 466 U.S. at 694; *see also Commonwealth v. Bauhammers*, 92 A.3d 708, 725 (Pa.

[15] Mr. Patterson must plead and prove his asserted grounds for relief "by a preponderance of the evidence." 42 Pa. C.S. § 9534(a). The Pennsylvania Supreme Court has characterized the preponderance standard as "the lowest degree of proof recognized in the administration of justice . . . ." *Se-Ling Hosiery v. Margulies*, 70 A.2d 854, 856 (Pa. 1950). To meet this burden, a PCRA petitioner must simply present evidence sufficient "to tip a scale slightly" in his favor. *Thompson v. Thompson*, 963 A.2d 474, 477 (Pa. Super. 2008).

2014) ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

209. Here, trial counsel's performance was constitutionally deficient and prejudiced Mr. Patterson for a number of reasons at every phase of this case—from his lack of pre-trial investigation, to his failure to call witnesses, to his failure to object to much of the Commonwealth's evidence, to his failure to request cautionary jury instructions. In short, trial counsel:

- Failed to properly investigate or litigate issues surrounding Pierre Laventure's and Allan Brunache's identifications of Mr. Patterson;
- Failed to interview or call any character witnesses;
- Failed to interview or call as a witness store owner Gregorio Mercado, who saw Jackson's shooting and told police Mr. Patterson was not involved;
- Failed to interview or call as a witness Elvira Urena, whose testimony that she saw three men outside the store when Jackson was shot contradicted the accounts of key Commonwealth witnesses Laventure and Brunache;
- Failed to interview or call witnesses regarding Mr. Patterson's hairstyle at the relevant time;
- Failed to interview or call witnesses regarding Mr. Patterson's friendship with Jackson;
- Failed to interview or call any witnesses other than Mr. Patterson's mother regarding his medical condition;
- Failed to investigate and present objective witnesses regarding the condition of the Pattersons' back door and garage door at the relevant time;

- Failed to move to exclude the store surveillance video and Officer Chandler's corresponding identification of Mr. Patterson;
- Failed to consult with or call an expert witness regarding the limitations of the store surveillance footage;
- Failed to investigate Officer Chandler's bias against Mr. Patterson and, correspondingly, failed to impeach Officer Chandler with this bias;
- Failed to interview or call as witness Charles Berry, who provided Mr. Patterson with an alibi;
- Failed to call Kareema Patterson, who provided Mr. Patterson with an alibi, during the defense case;
- Failed to consult with Mr. Patterson before trial;
- Failed to object to the prosecutor's reference to a drug competition in his opening statement;
- Failed to object to the playing of excerpts of Mr. Patterson's recorded prison calls during Jacqueline Patterson's and Kareema Patterson's testimony on the ground that the calls were inadmissible hearsay;
- Failed to seek the admission of the entire content of Mr. Patterson's recorded prison calls played during Jacqueline's and Kareema's testimony;
- Failed to explain the concept of sequestration of witnesses to Mr. Patterson and his family;
- Failed to object to the playing of excerpts of Mr. Patterson's recorded prison calls on the ground that the Commonwealth improperly sought, through the call excerpts, to impute bad acts by others to Mr. Patterson;

- Failed to request a cautionary jury instruction regarding references to Mr. Patterson's incarceration in the recorded prison calls;
- Failed to object to the prosecution's improper comments regarding crime in society at large;
- Failed to object to, or request a cautionary jury instruction regarding, testimony about Laventure's and Brunache's fears of testifying;
- Failed to object to the trial court's incorrect statement of the jury instruction regarding Mr. Patterson's decision not to testify; and
- Failed to object to the trial court's incorrect jury instruction regarding an inference of malice.

210. As can be seen from this list, Mr. Mandell's deficient performance pervaded the proceedings, depriving Mr. Patterson of any chance of a fair trial. Any of these errors, each discussed in detail below, warrants a new trial; when considered cumulatively, Mr. Patterson's right to relief based on the ineffective assistance of his trial counsel becomes even more clear.

1. Trial Counsel's Failure to Properly Investigate or Litigate Issues Surrounding Laventure's and Brunache's Identifications of Mr. Patterson.

211. It is beyond dispute that Laventure and Brunache were the Commonwealth's key witnesses against Mr. Patterson. They were the only two witnesses who heard shots fired and purported to then see and identify Mr. Patterson as Jackson's shooter. Their importance to the Commonwealth's case cannot be overstated, yet, as discussed in Professor Epstein's report, trial counsel failed to properly investigate or litigate issues surrounding their identifications.

a. Trial Counsel Did Not Photograph the Scene to Show the Impossibility of a Witness Accurately Seeing the Perpetrator's Face.

212. Perhaps most egregiously, trial counsel did not present the jury with photographs of the crime scene to show that, from their vantage point in front of the barber shop, Brunache

and Laventure simply could not accurately have seen (and then identified) Jackson's shooter outside Mercado's store over 100 feet away. Relatedly, although trial counsel mentioned the distance between these witnesses and the perpetrator during his closing argument and asked jurors "to picture" this distance in their minds, N.T. 07/09/2009, 11, trial counsel never explained or demonstrated to the jury that this distance made it impossible for Brunache and Laventure to accurately identify the perpetrator.

213. First, this claim presents an issue of arguable merit. The Sixth Amendment to the United States Constitution requires trial counsel to "investigate all apparently substantial defenses available to the defendant." *United States v. Williams*, 615 F.2d 585, 594 (3d Cir. 1980). Investigation of the circumstances of the two eyewitnesses' identifications without question falls within this obligation.

214. Second, trial counsel cannot have had a reasonable strategy for failing to visit the scene and photograph it so that the jury could see what Brunache and Laventure would have seen and realized that—as demonstrated by the photographs in Professor Epstein's report, *see* Exh. 26, Epstein Report at 7-9—these two men could not have accurately seen and identified Jackson's shooter from their viewpoint over 100 feet away from the incident.[16] Such photographs would have significantly undermined the Commonwealth's case, and their presentation posed no risk to Mr. Patterson. In addition, while investigating what the witnesses could have seen is a matter of common sense, scientific principles regarding the effect of

[16] Current counsel have unsuccessfully contacted trial counsel in an attempt to discuss this case and what his trial strategy may have been. Counsel wrote to trial counsel to request a meeting on March 24, 2017 and followed up with two phone calls. *See* 03/24/2017 Ltr. from C. Padilla to L. Mandell (attached as Exhibit 28). There was no response to these inquiries. On one occasion, current counsel briefly met trial counsel while at the Criminal Justice Center on an unrelated matter; trial counsel disclaimed any recollection of this case but indicated a willingness to meet regarding specific questions. Yet, trial counsel has not responded to a follow-up letter sent on May 31, 2017. *See* 05/31/2017 Ltr. from N. Sanghvi to L. Mandell (attached as Exhibit 29).

distance on eyewitness identifications were well established and available to trial counsel by 2009. *See id.* at 9.

215. Third, this failure unquestionably prejudiced Mr. Patterson. As noted above, Brunache and Laventure were the Commonwealth's key witnesses. The prosecutor discussed their identifications of Mr. Patterson at length in both his opening and closing arguments and asked the jury to credit those identifications. *See* N.T. 07/06/2009, 108-14; N.T. 07/00/2009, 53-72. Any evidence demonstrating to the jury the likelihood that those identifications were inaccurate would have tipped the balance here.

216. This is particularly true given the closeness of this case, which the nature of the jury deliberations highlights. It bears emphasis that Mr. Patterson's first trial resulted in a hung jury. At his second trial, at issue here, the jury similarly wavered. Jurors deliberated for two days, asking nine questions during that period. Most significantly, the jury asked to review evidence *going to the identification of Mr. Patterson*, including the surveillance footage (emphasized by the prosecution in closing arguments) and the photographs of both Mr. Patterson and Midnight (who defense counsel proffered as the true perpetrator). *See* N.T. 07/10/2009, 41-45; N.T. 07/13/2009, 4-5. Courts around the country recognize that the length of a jury's deliberations is a factor to consider in assessing the strength of the prosecution's case. *See, e.g.*, *Dugas v. Coplan*, 428 F.3d 317, 335 (1st Cir. 2005) ("the length of jury deliberations can be one factor in determining how close the jury viewed the case to be"); *Silva v. Woodford*, 279 F.3d 825, 849-50 (9th Cir. 2002) (juror question on meaning of instruction supported finding of prejudice because it indicated verdict "was not a foregone conclusion"); *Mayfield v. Woodford*, 270 F.3d 915, 938 (9th Cir. 2001) (finding that two days of deliberations and a jury note suggested the jury "struggled" in penalty deliberation and supported finding prejudice from counsel's deficient performance).

217. But for counsel's failure to photograph the scene to demonstrate to the jury the impossibility of accurate identifications by Laventure and Brunache, there is a reasonable likelihood that the outcome would have been different. A new trial is required.

b. Trial Counsel Showed No Awareness of "Weapons Focus" as a Phenomenon that May Degrade Eyewitness Accuracy.

218. Trial counsel showed no awareness of the science surrounding eyewitness identifications, which was available to him and should have been known to him at the time of Mr. Patterson's 2009 trial. *See* Epstein Report at 9-10. Specifically, in addition to failing to demonstrate to the jury the issues posed by the distance from which Brunache and Laventure viewed the shooter, trial counsel also failed to inform the jury that the use of a weapon may have adversely affected these witnesses' ability to accurately identify the shooter. This too constitutes ineffective assistance.

219. First, this issue presents a claim of arguable merit, as counsel had a duty to investigate all available defenses. *See Williams*, 615 F.2d at 594.

220. Second, there can be no reasonable strategy for counsel's failure to make the jury aware of the phenomenon of "weapons focus" through his cross-examinations of Brunache and Laventure or his statements to the jury. "The phenomenon where witnesses look at a weapon during an event is referred to as the 'weapon focus effect'. As the witness focuses on the weapon, her ability to adequately remember and later recall details such as characteristics of the perpetrator is lessened. . . . In summary, although it can certainly be true that a victim pays close attention to a *weapon*, the research results indicate the attending to the weapon impairs memory for the characteristics of the person wielding the weapon and reduces eyewitness accuracy, especially when the opportunity to see the perpetrator is short or limited (e.g., due to concealment of the face." Epstein Report at 4 (emphasis in original). Scientific studies about

this phenomenon date back to 1992, seventeen years before Mr. Patterson's trial. *Id.* Yet, trial counsel failed to failed to inform the jury of the effect that looking at the gun might have on Brunache's and Laventure's ability to accurately identify the shooter. There would have been no possible risk to Mr. Patterson in raising this point.

221. Third, this deficient performance prejudiced Mr. Patterson. As already discussed at length, Brunache's and Laventure's identifications were key to the case, and the jury's questions during its deliberations shows that the jury was troubled by the question of whether Mr. Patterson was the shooter. An explanation of the effect that seeing the gun may have had on Brunache's and Laventure's ability to identify the shooter likely would have tipped the balance. A new trial is required.

c. Trial Counsel Emphasized During His Closing Argument That Witnesses Must Have Lied, Rather than Informing the Jury of the Phenomenon of Sincere but Mistaken Eyewitnesses.

222. Trial counsel furthered his deficient performance regarding Brunache's and Laventure's identifications during his closing argument, when he suggested that these witnesses may have lied rather than informing the jury that they may simply have been mistaken. For example, trial counsel argued to the jury: "So I submit to you, ladies and gentleman, somebody has got to be lying. And that's not a question of mistake. That's a question of lying." N.T. 07/09/2009, 7-8.

223. First, this issue presents a claim of arguable merit. *See generally Commonwealth v. Cooper*, 941 A.2d 655, 664 (Pa. 2007) ("The right to effective assistance of counsel extends to closing arguments, the purpose of which is to sharpen and clarify the issues presented to the trier of fact." (internal quotation marks omitted)).

224. Second, there can be no reasonable strategy behind trial counsel's failure to inform the jury of the phenomenon of sincere but mistaken eyewitnesses. As discussed above,

scientific studies surrounding eyewitness identification principles were well-established and available to counsel by the time of Mr. Patterson's 2009 trial. Epstein Report at 9. Trial counsel thus should have known that, while eyewitnesses generally are truthful when they testify, they are often wrong. *See generally Commonwealth v. Walker*, 92 A.3d 766, 779 (Pa. 2014) ("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." (citing *United States v. Wade*, 388 U.S. 218, 228 (1967)).

225. Third, this deficient performance prejudiced Mr. Patterson. The eyewitnesses' identifications were critical to the case. Jurors likely would have had a much easier time discounting them if they understood that these witnesses simply likely were mistaken rather than having to conclude, as trial counsel asked them to do, that the witnesses were lying. *See* Stephen H. Goldberg & Tracy Walters McCormack, *The First Trial, Where Do I Sit? What Do I Say?* 358 (Nutshell Series, West Academic, 2016) ("If possible, your attitude during cross examination ought to reflect that you think the witness is mistaken, rather than that you think the witness is a liar. You should not use the word lie in a courtroom, lying connotes perjury and judges are quick to admonish lawyers about accusing a witness of lying under oath."). A new trial is required.

d. Trial Counsel Failed to Anticipate or Blunt the Prosecution's Assertion that the Witnesses Would Never Forget the Perpetrator's Face.

226. Finally, compounding the problems with his closing argument, trial counsel failed to anticipate or blunt an argument made during the prosecution's closing—that the eyewitnesses would never forget the perpetrator's face. *See* N.T. 07/09/2009, 63 ("This is someone who knows the defendant and it only takes less than two seconds. It takes a moment when the person is doing something that will be unfortunately for them *etched in their memory forever*, the

execution of a human being by shooting him in the back of the head." (emphasis added)). This too constitutes ineffective assistance of counsel.

227. First, this issue presents a claim of arguable merit. *See Cooper*, 941 A.2d at 664.

228. Second, trial counsel cannot have had a reasonable strategy in failing to present this argument by the prosecution. As Professor Epstein points out, the notion that an eyewitness could never forget a perpetrator's face is one commonly used by prosecutors. *See* Epstein Report at 10. It is also wrong, as fundamental science teaches that "memory is *not* a permanent, immutable snapshot. . . ." *Id.* (emphasis in original). Given the common use of this tactic, trial counsel did not act reasonably in failing to inform the jury that eyewitnesses can make mistakes.

229. Third, this deficient performance prejudiced Mr. Patterson. Given the importance of Brunache's and Laventure's identifications, allowing the prosecution to give the jury the false impression that it would have been impossible for those witnesses to forget the perpetrator's face may well have tipped the balance in the jury's view of the case. Had trial counsel properly informed the jury of the scientific fallacy of this argument, there is a reasonable likelihood that the outcome would have been different. A new trial is required.

2. Trial Counsel's Failure to Investigate and Present Witnesses.

230. Trial counsel does not appear to have interviewed any witnesses in this case other than Mr. Patterson's sister Kareema, who was interviewed by a defense investigator over a year after Jackson's shooting and just weeks before Mr. Patterson's first trial. This overarching failure to even interview other witnesses constitutes ineffective assistance of counsel that requires a new trial.

231. When an ineffectiveness claim is based on trial counsel's failure to call a witness, "a petitioner must demonstrate: (1) the witness existed; (2) the witness was available; (3) counsel knew or, 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 testimony was so prejudicial to petitioner to have denied him or her a fair trial." *Commonwealth v. Dennis*, 17 A.3d 297, 302 (Pa. 2011).

232. The Sixth Amendment to the United States Constitution requires trial counsel to "investigate all apparently substantial defenses available to the defendant." *Williams*, 615 F.2d at 594. Thus, "at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *United States v. Kauffman*, 109 F.3d 186, 190 (3d Cir. 1997); *accord Rompilla v. Beard*, 545 U.S. 374, 387 (2005) ("It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case."); *Rolan v. Vaughn*, 445 F.3d 671, 682 (3d Cir. 2006) (counsel ineffective for failing to interview potential defense witness); *United States v. Gray*, 878 F.2d 702, 711-12 (3d Cir. 1989) (counsel must investigate and contact witnesses and attempt to obtain available evidence which diminishes the prosecution's case and support the defense).

233. The Pennsylvania Superior Court has made this clear, stating that "[i]t can be unreasonable *per se* to conduct no investigation into known witnesses." *Stewart*, 84 A.3d at 712 (citing *Commonwealth v. Dennis*, 950 A.2d 945, 960 (Pa. 2008)). *Stewart* and other cases involving the failure to investigate known witnesses rest on the principle that the failure to even interview a witness "'is not an example of foregoing one possible avenue to pursue another approach; it is simply an abdication of the minimum performance required of defense counsel.'" *Id.* (quoting *Commonwealth v. Perry*, 644 A.2d 705, 709 (Pa. 1994)); *see also, e.g.*, *Commonwealth v. McCaskill*, 468 A.2d 472, 478 (Pa. Super. 1983) ("This case is not one in which counsel decided, after investigation, not to call an alibi witness for some tactical reason, for example because in counsel's view the witness's testimony would be more harmful than helpful to the client. Nor is it a case in which the record fails to establish that the defendant told counsel of the existence of the alibi witnesses." (internal citations omitted)).

a. Trial Counsel Failed to Interview or Present Any Character Witnesses.

234. Trial counsel's failure to interview witnesses is particularly egregious regarding counsel's failure to investigate and present character witnesses on Mr. Patterson's behalf.

235. This was Mr. Patterson's first arrest for a crime outside the juvenile system. He was 17 years old at the time of the shooting and had no prior adult convictions. Trial counsel therefore was free to introduce evidence of Mr. Patterson's good character and reputation for peacefulness without fear of opening the door to the use of his (non-existent) criminal record. While numerous people familiar with Mr. Patterson could have attested to his reputation for being a law-abiding and peaceful person, no character witness investigation occurred.

236. This failure constitutes ineffective assistance of counsel. Upon request from undersigned counsel, Mr. Patterson provided a list of witnesses who could have attested to his good character at trial. Had trial counsel made a similar request, he too easily could have learned of these witnesses. As discussed above, Clifford Jones (neighbor), Gina Bennett (neighbor), Taneequa Armstrong (friend), Marlissa Stone (friend), Naja Debose (cousin), and Cierra Debose (cousin), *see* ¶ 191, *supra*, maintain good impressions of Mr. Patterson's character and would have been available willing to testify on his behalf at trial had they ever been contacted by the defense.

237. An unbroken succession of Pennsylvania appellate decisions underscores the importance of character evidence in criminal cases. As the Pennsylvania Supreme Court put it: "Evidence of good character is substantive, not mere makeweight evidence, and ***may in and of itself, create a reasonable doubt of guilt and, thus, require a verdict of not guilty***." *Commonwealth v. Weiss*, 606 A.2d 439, 442 (Pa. 1992) (emphasis added); *see also Commonwealth v. Neely*, 561 A.2d 1, 2 (Pa. 1989) (character evidence, in and of itself, may be sufficient to raise a reasonable doubt and require acquittal); *Commonwealth v. Scott*, 436 A.2d

607, 611 n.1 (Pa. 1981) (same); *Commonwealth v. Harris*, 785 A.2d 998, 1000 (Pa. Super. 2001) ("Evidence of good character is to be regarded as evidence of substantive fact just as any other evidence tending to establish innocence and may be considered by the jury in connection with all the evidence presented in the case on the general issue of guilt or innocence.").

238. Where character evidence is presented, an accused is entitled to a jury instruction on these principles. *Neely*, 561 A.2d at 2. At the time of Mr. Patterson's second trial, the standard jury instruction provided: "The law recognizes that a person of good character is not likely to commit a crime that is contrary to that person's nature. Evidence of good character may by itself raise a reasonable doubt of guilt and require a verdict of not guilty." Pa. Std. Jury Instruction 3.06(3).

239. Trial counsel's failure to even investigate, much less present, character evidence in this case constitutes ineffective assistance of counsel in violation of the Pennsylvania and United States Constitutions.

240. First, the recognized importance of character evidence in criminal cases and its use as substantive evidence, demonstrated in the cases discussed above, establishes that this is an issue of arguable merit. Indeed, these principles have been recognized in Pennsylvania criminal law for over a century: "There may be cases in which, owing to the peculiar circumstances in which a man is placed, evidence of good character may be all he can offer in answer to a charge of crime. Of what avail is a good character, which a man may have been a life-time in acquiring, if it is to benefit him nothing in his hour of peril?" *Commonwealth v. Fulton*, 830 A.2d 567, 576 (Pa. 2003) (Lamb, J., concurring) (quoting *Commonwealth v. Cleary*, 19 A. 1017, 1019 (Pa. 1890)). In cases, like this one, where the credibility of witnesses and intent are central issues, character evidence takes on even greater significance. *See, e.g.*, *Weiss*, 606 A.2d at 442 ("In a case such as this, where there are only two direct witnesses involved, credibility of the witnesses

is of paramount importance, and character evidence is critical to the jury's determination of credibility."); *Luther*, 463 A.2d at 1078 ("This court has made clear that in a case . . . where intent and credibility are decisive factors leading to either acquittal or conviction the accused's reputation is of paramount importance."). Here, as in any case where first-degree murder is charged, Mr. Patterson's intent was an important issue. Moreover, the Commonwealth's case rested entirely on the credibility of witnesses who claimed to be able to identify Mr. Patterson as Mr. Jackson's shooter. Thus, trial counsel's failure to investigate and present character evidence raises an issue of arguable merit.

241. Second, counsel cannot have had any objectively reasonable basis for his failure to investigate. A number of witnesses were available and willing to attest to Mr. Patterson's character as a "good kid" who helped out with younger relatives and with projects on his block. And, Mr. Patterson's juvenile record presented no obstacle to the presentation of character evidence at this trial. He had never been convicted in adult court, and "[t]he legislature explicitly has directed that juvenile adjudications do not rise to the level of an adult criminal conviction. Such adjudications have therefore been held to be inadmissible for impeachment purposes." *Commonwealth v. Katchmer*, 309 A.2d 591, 594 (Pa. 1973) (citing *Commonwealth v. Johnson*, 167 A.2d 511 (Pa. 1961)); *Commonwealth ex rel. Hendrickson v. Myers*, 144 A.2d 367 (Pa. 1958) (same).[17]

242. Third, trial counsel's deficient performance prejudiced Mr. Patterson. As an initial matter, it is difficult to understand how the failure to even investigate (and corresponding failure to present) character evidence could be anything but prejudicial in light of Pennsylvania's

[17] If trial counsel were truly concerned about a risk that his use of character evidence would open the door to impeachment based on Mr. Patterson's juvenile record, he could have litigated a motion *in limine* to ascertain whether the trial court would have permitted such impeachment and thus preserved the issue; the record does not indicate that he did so.

unwavering principle that such evidence ***by itself*** can create a reasonable doubt. But the degree to which trial counsel's deficient performance prejudiced Mr. Patterson is only underscored by the objective weakness of the Commonwealth's case.

243. This was a two-eyewitness identification case. Mr. Patterson did not confess, and no physical evidence linked him to the crime. The eyewitnesses were at least 120 feet away from the shooting, and admittedly saw the shooter (who was wearing a hooded sweatshirt) for only a few seconds. Both eyewitnesses failed to identify Mr. Patterson at first. In addition, the Commonwealth presented no motive for Mr. Patterson to kill his friend, and Officer Chandler's "identification" of Mr. Patterson on the store surveillance video was shaky at best—she admitted she was not even sure it was a male in the video and that she could not make out the person's face.

244. As discussed above, the jury's deliberations show just how close this case was. Against this backdrop and considering trial counsel's presentation of a misidentification defense coupled with actual innocence, evidence of good character was critically important. Given the extent of jury wavering here, evidence of Mr. Patterson's good character could have tipped the balance toward a different outcome—*i.e.*, one or more jurors having reasonable doubt.

245. Pennsylvania courts previously have held counsel to be constitutionally ineffective for failing to investigate present character evidence in cases, like this one, where there was not overwhelming evidence of guilt. *See, e.g.*, *Weiss*, 606 A.2d at 443 (finding counsel ineffective for failing to present character witness testimony and ordering new trial when, "[c]onsidering there was no overwhelming evidence of guilt in this case, credibility of the witnesses was of paramount importance, and counsel's error not to employ character witnesses, familial or otherwise, undermined appellant's chances of instilling reasonable doubt in the minds of the jury and resulted in prejudice to appellant"); *Commonwealth v. Hull*, 982 A.2d 1020,

1027-28 (Pa. Super. 2009) (affirming grant of PCRA petition and holding, "counsel lacked a reasonable basis not to call good-character witnesses based on his overall trial strategy[.] *Counsel may not justify his failure to present good-character evidence by citing a broad concern that opposing counsel might introduce bad character evidence on cross-examination without having investigated whether that concern is based in reality*." (emphasis added)). The same result is required here—trial counsel cannot have had a reasonable basis to fail to even investigate character witnesses, and his failure to do so prejudiced Mr. Patterson given the closeness of this case. A new trial is required on this basis alone.

b. Trial Counsel Failed to Interview or Call Store Owner Gregorio Mercado, Who Told Police He Recognized Mr. Patterson in a Photo Array but Did *Not* See Anyone from the Incident in that Array.

246. Another significant misstep by trial counsel was his failure to call, or even interview, store owner Gregorio Mercado, whose testimony alone likely would have led to a different outcome at trial.

247. First, this claim presents an issue of arguable merit. As discussed above, the failure to interview witnesses can constitute *per se* unreasonable conduct. *See Stewart*, 84 A.3d at 712.

248. Second, trial counsel cannot have had an objectively reasonable basis for his failure to interview or call Mercado. There is no question that Mercado was known to trial counsel, as he gave statements to police. *See* Exh. 2, Jan. 11, 2007 G. Mercado Investigation Interview Record; Exh. 14, Feb. 26, 2007 G. Mercado Investigation Interview Record. During current counsel's investigation, Mercado confirmed that not only was he willing to testify on Mr. Patterson's behalf, he expected to be called. However, no one from the defense team interviewed or subpoenaed him. Mercado also had a clean criminal record, so any impeachment concerns relating to possible past *crimen falsi* convictions would have been unfounded.

249. Third, the failure to interview or call Mercado prejudiced Mr. Patterson. Mercado, who owned the store outside which Jackson was shot, observed the shooting and its participants firsthand. He told police just a week after the crime that he observed the shooter (wearing a "one piece construction outfit") enter his store, exit, and then draw a firearm and pull the trigger. Feb. 26, 2007 G. Mercado Investigation Interview Record at 1-2. Mercado was shown surveillance footage from his store showing events in the store immediately preceding the shooting. He told police which of the individuals in the footage was the shooter and confirmed he would recognize him if he ever saw him again. *Id.* at 2-3. Significantly, despite knowing Mr. Patterson from the neighborhood and identifying him in a photo array as someone he knew, Mercado told police that ***he did not know the shooter***. *Id.* at 2. Mercado also informed police that there was a third individual, Midnight, present at the scene in addition to the shooter and the victim.

250. Therefore, Mercado's testimony would not only have directly exculpated Mr. Patterson, but it also would have undercut the testimony of key Commonwealth witnesses Brunache and Laventure that the only people outside the market were Jackson and Mr. Patterson.

251. There is no question that identification issues, to which Mercado's testimony would indisputably have been relevant, were at the heart of this case. The jury in both trials appeared troubled by the lack of a clear identification of Mr. Patterson as the shooter. In Mr. Patterson's first trial, the jury requested to hear all of Brunache's and Laventure's testimony for a second time after the Court's *Spencer* charge. More significantly, at the second trial, as discussed above, the jury deliberated for two days and asked numerous questions going to identification of Jacksons' shooter. The jury asked for, among other things: crime scene photographs and diagrams; the time at which Mr. Patterson was put in the police car after the shooting; the surveillance footage so it could "get a better view of the store and what was going

on inside;" tapes of Laventure's and Brunache's 911 calls; and photos of Mr. Patterson and Midnight. *See* N.T. 7/10/2009, 41-45; N.T. 7/13/2009, 4-5.

252. Given the obvious closeness of this case and the focus on identification, Mercado's clear, first-hand, short-distance testimony that Mr. Patterson was not the shooter likely would have tipped the scale in favor of the defense. Trial counsel's failure to investigate or present that testimony prejudiced Mr. Patterson and requires a new trial.

c. Trial Counsel Failed to Call Elvira Urena, Whose Testimony that She Saw Three People Outside the Market When Jackson Was Shot Would Have Contradicted Laventure's and Brunache's Testimony.

253. In the same vein as his failure to interview or call Mercado, trial counsel also failed to interview or call Elvira Urena.

254. First, as with the failure to interview or call Mercado, this claims presents an issue of arguable merit, as it can be *per se* unreasonable to fail to interview known witnesses, and trial counsel has a constitutional obligation to investigate all apparently substantial defenses. *See Stewart*, 84 A.3d at 712; *Williams*, 615 F.2d at 594.

255. Second, trial counsel cannot have had an objectively reasonable strategy for his failure to interview or call Urena. There is no question that trial counsel knew or should have known of Urena, as she gave a statement to police. *See* Exh. 10, Jan. 19, 2007 E. Urena Investigation Interview Record. During current counsel's investigation, Urena confirmed that she would have been willing to testify for Mr. Patterson. Although she received something in the mail that may have been a subpoena, no one from the trial defense team contacted her or interviewed her before trial to discuss the case or explain what this document was (if, indeed, it was a subpoena). Urena has no criminal record, so any impeachment concerns relating to possible past *crimen falsi* concerns would have been unfounded.

256. Third, trial counsel's deficient performance in not interviewing or calling Urena prejudiced Mr. Patterson. Urena drove by right by the shooting as it took place and told police she observed ***three*** men outside the corner store during the incident. *Id.* at 1. This direct, first-hand observation testimony would have undercut the testimony of Brunache and Laventure—both significantly further away from the events than Urena—that there were only two men, the victim and the shooter, outside the store. As discussed above, Brunache's and Laventure's identifications of Mr. Patterson were critical to the Commonwealth's case, and Mr. Patterson unquestionably was prejudiced by trial counsel's failure to call a witness who would have undercut that testimony.

257. This failure alone requires a new trial. That conclusion is only bolstered when considered in connection with trial counsel's failure to interview or call Mercado. Urena told police that the shooter wore "a black skully, with a dark jump suit, like the one construction people wear." *Id.* at 2. This statement is consistent with Mercado's description of the shooter's clothing. In addition, Urena's statement that there were three people in front of the store at the time Jackson's shooting also is consistent with Mercado's account. Thus, trial counsel did not interview or call two witnesses who were much closer to the events at issue than were Brunache and Laventure and who gave consistent accounts that undercut those provided by Brunache and Laventure. Given the closeness of this case and the importance of Bruanche's and Laventure's identifications, presenting Urena's and Mercado's testimony likely would have led to a different outcome, requiring a new trial.

d. Trial Counsel Failed to Investigate and Call Witnesses Regarding Mr. Patterson's Hair Style at the Relevant Time.

258. Also in a similar vein to the failure to interview or call Mercado and Urena, trial counsel failed to interview or call witnesses who would have testified that Mr. Patterson never

wore his hair in a "short afro" style, undercutting a critical component of Laventure's description of the shooter.

259. First, this claim, as with the others, presents an issue of arguable merit, as trial counsel had a constitutional obligation to investigate all possible defenses. *See Williams*, 615 F.2d at 594.

260. Second, trial counsel cannot have had an objectively reasonable basis for his failure to investigate this issue. As discussed above, Laventure's identification was critical to the Commonwealth's case, and a critical component of his description of the shooter and claimed ability to identify Mr. Patterson was that the shooter had a short afro. There can be no reasonable strategy involved in trial counsel's failure to even inquire of Mr. Patterson's friends and family whether he met this part of Laventure's description. If trial counsel had done so, he would have been pointed, as were current counsel, to Mr. Patterson's cousin Rameek Smith, who routinely cut Mr. Patterson's hair during the relevant time period and who would have told counsel that Mr. Patterson never had a short afro hairstyle. *See* ¶ 191, *supra*. Trial counsel should have known of Smith as his existence was easily ascertainable from speaking with Mr. Patterson and his family. Moreover, Smith has informed current counsel that he would have been willing to testify for Mr. Patterson but that he was never contacted by anyone from the defense team before trial. Smith also has no criminal history, so any impeachment concerns related to potential past *crimen falsi* convictions would have been unfounded.

261. Third, trial counsel's deficient performance in this regard prejudiced Mr. Patterson. As discussed above, Laventure's identification was a critical part of the Commonwealth's case, and the jury appears to have struggled with the identification of Mr. Patterson as the shooter. If trial counsel had presented a witness who testified that Mr. Patterson

did not match one of the key components of Laventure's description, as Smith would have, it is likely this would have tipped the balance in favor of the defense. A new trial is required.

e. Trial Counsel Failed to Interview or Call Witnesses Regarding Mr. Patterson's Friendship with Jackson.

262. Trial counsel also failed to interview or present any witnesses other than Kenya Jones regarding Mr. Patterson's friendship with Jackson. This constitutes ineffective assistance of counsel.

263. First, this claim presents an issue of arguable merit. *See Williams,* 615 F.2d at 594.

264. Second, there can be no reasonable basis for trial counsel's failure to interview and present additional witnesses to corroborate Jones's testimony on this point. That Mr. Patterson and Jackson were friends highlights that Mr. Patterson had no reason to shoot Jackson. A number of witnesses were easily found and available to testify to this for Mr. Patterson. Indeed, Taneequa Armstrong, who dated Jackson, would have testified regarding Jackson's friendship with Mr. Patterson. Neighbors Clifford Johnson and Gina Bennett would have confirmed this. *See* ¶ 191, *supra*.

265. Third, this deficient performance prejudiced Mr. Patterson. The prosecution presented *no* motive in this case. Presenting additional witnesses to testify that Mr. Patterson and Jackson were friends with no disputes between them would have allowed defense counsel to highlight the lack of motive to the jury. It also would have undermined the prosecution's efforts during closing argument to cast doubt on Jones's credibility on this point. In a case where the jury was already wavering, testimony from witnesses who would have underscored a key deficiency in the prosecution's theory of the case—the lack of motive—likely would have changed the outcome. A new trial is required.

f. Trial Counsel Failed to Interview or Call Any Witnesses Other Than Mr. Patterson's Mother Regarding His Medical Condition.

266. In addition to failing to investigate and call witnesses who could undercut the Commonwealth's identification case, trial counsel also failed to conduct a thorough investigation into Mr. Patterson's medical issues—issues that limited, or perhaps even prohibited, Mr. Patterson's ability to exert himself such that it would have been impossible (or at least very unlikely) for him to have been able to carry out the crime and its aftermath in the manner theorized by the Commonwealth. Specifically, the Commonwealth asserted that Mr. Patterson shot Jackson, ran away across Summerdale Avenue, then down an alley behind his block, then into his house where he changed clothes, and then came back to the corner store at the end of his block—all within just several minutes. Aside from the logical issues as to why Mr. Patterson, if the shooter, would have so quickly returned to the scene, doing this would have required significant exertion that could have brought on a seizure for Mr. Patterson.

267. First, this issue has arguable merit because, as discussed above, trial counsel had a constitutional duty to investigate every defense. *See Williams*, 615 F.2d at 594.

268. Second, counsel cannot have had an objectively reasonable basis for failing to investigate these issues. Mr. Patterson's medical condition was known to trial counsel. Indeed, his mother, Jacqueline, testified that Mr. Patterson had had epileptic seizures since being hit by a drunk driver in 1999; in 2006 and early 2007, the time period just before Jackson's shooting, he had seizures two to three times a week. *See* N.T. 8/11/2008, 129; N.T. 07/08/2009, 110-11. She further testified that, as a result of his condition, Mr. Patterson was not allowed to play physical contact sports or run distances. *Id.*

269. Thus, trial counsel was fully aware of Mr. Patterson's physical limitations; yet, he failed to further investigate Mr. Patterson's medical history. Had he done so, he would have

learned of Taneequa Armstrong, who informed current counsel that she had witnessed Mr. Patterson having seizures on multiple occasions and even light physical activities such as running or celebrating winning a video game could bring these seizures on. *See* ¶ 191, *supra*. He also would have learned of Naja Debose, who was well aware of Mr. Patterson's seizures and informed counsel that they could be triggered by even seemingly minor things such as just being out in the heat or running around. *Id.* These are not obscure witnesses; Armstrong was a long-time friend of Mr. Patterson's who had dated Jackson, and Naja is Mr. Patterson's cousin. Trial counsel thus should have known of these witnesses, both of whom would have been willing to testify for Mr. Patterson.

270. Third, trial counsel's deficient performance in this regard prejudiced Mr. Patterson. As discussed above, the length of the jury's deliberations and the number of questions asked show that the jury hesitated regarding whether Mr. Patterson committed this murder. Armstrong and Naja would have provided testimony to corroborate that of Mr. Patterson's mother regarding Mr. Patterson's medical condition and the corresponding unlikelihood that he could have carried out this crime in the manner asserted by the Commonwealth. This testimony would have been particularly significant given the prosecution's emphasis during closing arguments on Mr. Patterson's alleged ability to run and inference that Jacqueline's testimony to the contrary was a lie. *See* N.T. 7/10/2009, 59-60. Indeed, without such corroboration, Jacqueline could have been seen by the jury simply as biased in favor of her son. Additional testimony regarding Mr. Patterson's medical condition would have further called into question his ability to commit the crime and likely led to a different result given that the jury already was wavering as to guilt. A new trial is required.

g. Trial Counsel Failed to Interview or Call Any Witnesses Other Than Mr. Patterson's Mother and Sister Regarding the Condition of the Pattersons' Back Door and Garage Door During the Relevant Time Period.

271. Similarly, trial counsel also failed to interview or call any witnesses other than Mr. Patterson's mother and sister regarding the inability to enter the Pattersons' home through the back door or garage door during the relevant time period. This inability, as with Mr. Patterson's medical condition, undercut the Commonwealth's theory of how Mr. Patterson committed the crime.

272. First, this issue has arguable merit because, as discussed above, trial counsel had a constitutional duty to investigate every defense. *See Williams*, 615 F.2d at 594.

273. Second, trial counsel cannot have had an objectively reasonable basis for failing to investigate this issue. Patterson's mother Jacqueline testified that she chained her garage door because her home had been broken into in 2004 and 2005, so that, as of the date of Jacksons' shooting on January 11, 2007, no one could enter or exit the property through that door. *See* N.T. 08/11/2008, 126-27; N.T. 07/08/2009, 106-11. Jacqueline also testified that keys were required to use the back door, and she was the only one with the keys. N.T. 08/11/2008, 128; N.T. 07/08/2009, 106-11. When she left for work on January 11th, the back door was locked and the key was in her pocketbook at work. *Id.* Kareema corroborated this testimony by testifying that the garage door did not go up because her mother had barricaded it so that it could not be opened after someone broke into their house a couple of years before the shooting. N.T. 08/11/2008, 101-02; N.T. 07/09/2009, 66-67. She had not gone through the back door or the garage at all since that time. N.T. 08/11/2008, 102; N.T. 07/09/09, 32-33.

274. Trial counsel thus was well aware that it was impossible to enter the Pattersons' home through the back without Jacqueline's keys, making the Commonwealth's theory of events unlikely if not impossible. However, as with Mr. Patterson's medical condition, he did not

interview (much less call) any witnesses on this issue other than Mr. Patterson's immediate family members. Had counsel investigated this issue more thoroughly he again would have learned of Taneequa Armstrong, who spent a significant amount of time at the Patterson home and confirmed to current counsel that the Pattersons' back door had a padlock on the inside so that it was impossible to enter the house from the outside through this door. As noted above, Armstrong was a friend of both Mr. Patterson's and Jackson's and thus counsel should have known about her. *See* ¶ 191, *supra*. Gina Benett would have confirmed that she did not see the Pattersons using their back door. *Id.* And, as also noted above, Armstrong and Bennett would have been willing to testify on Mr. Patterson's behalf. *Id.*

275. Third, trial counsel's deficient performance in this regard prejudiced Mr. Patterson. As with Mr. Patterson's medical condition, testimony regarding the impossibility of entering his house through the back undermines the Commonwealth's theory of the case. While Jacqueline's and Kareema's testimony on this issue was important, as family members of the accused, there was a real risk that the jury would perceive them as biased. If the jury had heard corroborating testimony from another witness, particularly one like Armstrong who also had a close relationship with the victim, that testimony could have tipped the balance in favor of the defense given the weakness of the Commonwealth's case. *See generally United States v. Agurs*, 427 U.S. 97, 113 (1976) ("if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create reasonable doubt"). A new trial is required.

3. Trial Counsel Failed to Properly Challenge the Commonwealth's Use of the Store Surveillance Video and Officer Chandler's "Identification" of Mr. Patterson.

276. One of the significant differences between Mr. Patterson's first trial, which resulted in a hung jury, and his second trial, which resulted in his conviction, was the

Commonwealth's use of surveillance footage from Mercado's store at the second trial and Officer Chandler's "identification" of Mr. Patterson from this footage. Trial counsel utterly failed to properly investigate and challenge the Commonwealth's use of this evidence.

a. Trial Counsel Failed to Move to Suppress and/or Exclude the Surveillance Video and Officer Chandler's "Identification" of Mr. Patterson from the Video.

277. One of trial counsel's most egregious omissions in his defense of Mr. Patterson was his failure to move to exclude the store surveillance video and Officer Chandler's "identification" of Mr. Patterson from that video.

278. First, this claim presents an issue of arguable merit. "The failure to file a suppression motion may be evidence of ineffective assistance of counsel." *Commonwealth v. Ransome,* 402 A.2d 1379, 1381-82 (Pa. 1979).

279. Second, trial counsel cannot have had an objectively reasonable basis for his failure to seek to exclude the video and/or Officer Chandler's identification. The surveillance video shows the actual perpetrator and thus would be viewed as powerful evidence by the jury. This is particularly true when the video is coupled with testimony from Officer Chandler that the person identified as the shooter in the video reminded her of Mr. Patterson. Jurors likely would credit this given that she was a police officer. *See Commonwealth v. Futch*, 366 A.2d 246, 250 (Pa. 1976) (acknowledging "it is likely that jurors might believe testimony of law enforcement officials solely by virtue of the group's official status"). Given the high potential for prejudice from this evidence, trial counsel cannot have had a reasonable strategy in not filing pre-trial motions to exclude this evidence.

280. Third, counsel's deficient performance in this regard prejudiced Mr. Patterson. Had counsel moved to suppress or exclude the video and/or Officer Chandler's "identification" from it, the motions likely would have succeeded, resulting in the jury not seeing this evidence or

hearing Officer Chandler's testimony. The motions likely would have succeeded pursuant to both Pennsylvania Rule of Evidence 403 and, separately, the totality of the circumstances analysis that has traditionally been applied in these cases to assess the reliability of witness identifications. *See* Pa. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, ..."); *see also Commonwealth v. Bruce*, 717 A.2d 1033, 1037 (Pa. Super. 1998) ("In determining whether a particular identification was reliable, the suppression court should consider 'the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of [her] prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.' The opportunity of the witness to view the actor at the time of the crime is the key factor in the totality of the circumstances analysis." (internal citations omitted)).

281. Although a number of witnesses purported to be able to identify people they knew on the surveillance footage, those same witnesses had difficulty identifying the shooter from this low-quality footage. *See generally* Surveillance Video DVD (attached as Exhibit 30); *see* Exh. 27, Morgan Report at 7. This uncertainty indicates that the shooter was not someone from the neighborhood with whom any of these witnesses were familiar—namely, it was not Mr. Patterson. For example:

- Midnight identified himself as appearing in the footage but was unable to identify the shooter. *See* Exh. 13, Feb. 7, 2007 I. Smith Interview Record at 4. Significantly, Midnight told police he might be able to do so *if the tape could be made clearer*. *Id.*
- Tashima Thompson told police recognized Jackson and Midnight in the footage but did not identify Mr. Patterson as being on the video, despite living on the

same block of Granite Street as Mr. Patterson. *See* Exh. 8, Jan. 19, 2007 T. Thompson Investigation Interview Record at 1. Notably, Tashima identified the person wearing black in the footage as Midnight, whereas Midnight identified himself as the person wearing gray, highlighting the difficulty in making positive identifications from the footage. Morgan Report at 7.

- Officer Chandler, when initially shown the video, was uncertain about who she saw: "This one here (indicating the male in the dark one piece outfit) ***reminds me*** of Dontai [sic], the way he walks and moves and stuff. ***I can't really make out his face***, but he looks like Dontai [sic]." Exh. 17, Mar. 1, 2007 E. Chandler Investigation Interview Record at 1 (emphasis added). She similarly testified at trial: "It was a guy on the video that looked like Dontia. ***I couldn't see his face***." N.T. 07/07/2009, 22 (emphasis added); *see also id.* at 26-29 (testifying that person on video "***reminds me of Dontia***" (emphasis added)).

282. Because trial counsel did not even try to have this evidence excluded, however, the jury both saw the video and heard Officer Chandler's testimony about it. It is evident that these pieces of evidence played a significant role in the jury's decision as the jury asked to view the surveillance footage during its deliberations. As noted above, this evidence may well have been the factor that tipped the balance from the hung jury in the first trial to the conviction in the second trial. If trial counsel had moved to exclude it, the jury likely never would have seen or heard this prejudicial evidence. A new trial is required.

b. Counsel Failed to Consult an Expert Regarding the Surveillance Footage.

283. In a related vein, trial counsel also failed to consult an expert regarding issues related to the surveillance footage. Had he done so, he would have been able to understand the limitations inherent in the footage and presented those issues to the jury.

284. First, this claim presents an issue of arguable merit, as counsel had a duty to investigate all available defenses. *See Williams*, 615 F.2d at 594.

285. Second, counsel cannot have had a reasonable strategy for failing to consult an expert regarding the surveillance footage. An expert could have reviewed the footage, as Mr. Morgan has now done, and proffered opinions regarding the quality of the footage and its suitability (or lack thereof) for use as a tool in making positive identifications. The jury likely would have been allowed to hear such expert testimony, as an understanding of the footage's properties would be outside the ken of the average layperson and would give context to the jury's assessment of Officer Chandler's identification. *See generally* Pa. R. Evid. 702. Even if the expert's testimony had not been admitted, consultation with an expert would have better equipped trial counsel to challenge the video through pre-trial motions and/or during cross-examination. Moreover, although Mr. Patterson was indigent and counsel was court-appointed, counsel could have sought court funding for an expert.

286. Third, counsel's deficient performance prejudiced Mr. Patterson. The showing of the surveillance footage was one of the critical differences between Mr. Patterson's two trials. During its deliberations in Mr. Patterson's second trial, the jury specifically asked to see the footage again. N.T. 7/10/2009, 41. If the jury had heard from an expert regarding the inherent limitations of the footage, particularly that it did not accurately capture a person's movement, it is likely that it would have viewed the footage and Officer Chandler's identification in a different light and reached a different result. A new trial is required.

c. Counsel Failed to Investigate Officer Chandler's Potential Bias Against Mr. Patterson.

287. Having failed to move to exclude the footage and/or Officer Chandler's identification of Mr. Patterson in the footage, trial counsel further failed to investigate evidence that could have been used to impeach Officer Chandler's credibility.

288. First, this claim presents an issue of arguable merit. *See Commonwealth v. Grove*, 324 A.2d 405, 406 (Pa. Super. 1974) (holding trial counsel ineffective for failing to meaningfully investigate background of key prosecution witnesses for possible impeachment evidence to utilize on cross-examination).

289. Second, counsel cannot have had an objectively reasonable strategy for failing to investigate potential impeachment evidence in light of Officer Chandler's significance to the Commonwealth's case. It was well known in Mr. Patterson's neighborhood that Officer Chandler's granddaughter set fire to her home after her father (Officer Chandler's son) made her return a cell phone to Mr. Patterson. Mr. Patterson and his family conveyed this information to trial counsel, and even a cursory investigation would have corroborated their accounts, as local news outlets covered the arson, Officer Chandler's son's death, and the issue with the cell phone. *See* Exh. 24-1, "Spat led to father's death, police say Brittany Talington, 13, is charged with setting a fatal fire in her Oxford Circle house," *Philadelphia Inquirer* (Mar. 21 , 2006); Exh. 24-2, "Philadelphia Girl admits to setting fire that killed father," NBC 10 (May 17, 2006); Exh. 24-3, "Teen Daughter of Philadelphia cop to be tried for his fire death," *Daily News* (May 17, 2006).

290. In addition, even a cursory investigation would have led trial counsel to Taneequa Armstrong, Naja Debose, and Cierra Debose, all of whom were familiar with Officer Chandler's dislike of Mr. Patterson based on his relationship/flirtation with Officer Chandler's granddaughter. *See* ¶ 191, *supra*. Again, these are not obscure witnesses—Armstrong was a

friend of both Mr. Patterson and Jacskon, and Naja and Cierra are Mr. Patterson's cousins. Trial counsel thus should have known of these witnesses, all of whom were willing to testify for Mr. Patterson at trial.

291. Third, counsel's deficient performance in this regard prejudiced Mr. Patterson. Identification testimony was critical to the Commonwealth's case, and Officer Chandler's status as a police officer makes it likely the jury placed great weight on her "identification" of Mr. Patterson in the surveillance footage. But for trial counsel's failure to investigate Officer Chandler's potential bias against Mr. Patterson, her testimony would have been impeached, and there is a reasonable probability the jury would have found her not to be credible. Given that, as discussed above, Officer Chandler's testimony appears to have been a critical factor leading to the conviction in the second trial (as opposed to the hung jury in the first trial), such impeachment evidence likely would have led to a different result.

292. The Pennsylvania Supreme Court has held that the failure to impeach a critical prosecution witness is grounds for an ineffective assistance of counsel claim and, under certain circumstances, amounts to sufficient prejudice to require granting a PCRA petition. *See Commonwealth v. Baxter*, 640 A.2d 1271, 1276 (Pa. 1994) (finding counsel ineffective for failing to investigate background of primary prosecution witness and, therefore, failing properly to impeach his credibility); *Commonwealth v. Murphy*, 591 A.2d 278, 280-81 (Pa. 1991) (finding counsel ineffective for failing to attempt to impeach crucial Commonwealth witness because she was the only eyewitness to the crime and, consequently, her credibility was critical to the prosecution's case). This is such a case, and a new trial is required.

4. Trial Counsel Failed to Investigate and Present Mr. Patterson's Alibi.

293. Trial counsel also failed to properly investigate and present Mr. Patterson's alibi, failing to even interview alibi witness Charles Berry and failing to present Kareema Patterson as an affirmative alibi witness at Mr. Patterson's second trial.

a. Trial Counsel Failed to Interview or Call Charles Berry.

294. Trial counsel was ineffective for not even interviewing Charles Berry, the father of Kareema's children who was at the Patterson home at the time of Jackson's shooting and who could have provided Mr. Patterson with an alibi.

295. First, this claim presents an issue of arguable merit. As discussed above, it can be *per se* unreasonable to fail to investigate known witnesses, particularly alibi witnesses. *Stewart*, 84 A.3d at 712.

296. Second, counsel cannot have had an objectively reasonable basis for his failure to interview Berry. Berry was known to trial counsel, as he gave a statement to police. *See* Exh. 18, Mar. 29, 2007 C. Berry Investigation Interview Record. Berry told police that he went to Mercado's corner store shortly before Jackson's shooting and, when he returned to the Patterson home, Patterson was there sleeping. *Id.* at 1-2. Shortly after the shooting, Berry saw Mr. Patterson going outside of the house and up to the corner. *Id.* at 2. Berry has confirmed to current counsel that he was willing to testify for Mr. Patterson but was never contacted by the defense before trial.

297. The failure to interview Berry, who could have placed Mr. Patterson at home at the time of the shooting, was not a reasonable strategic decision. As a number of cases have recognized, there is no excuse for failing to make any effort to contact or interview alibi witnesses. *See Stewart*, 84 A.3d at 712; *McCaskill*, 468 A.2d at 478; *see also Bryant v. Scott*, 28 F.3d 1411, 1417 (5th Cir. 1994) (holding counsel was ineffective when he was aware of three

alibi witnesses before trial but made no effort to interview them). While there were differences between Berry's and Kareema's accounts of the events of January 11, 2007, trial counsel could not have made a tactical decision not to call Berry based on these differences without at least interviewing Berry to explore his recollection. Moreover, any such differences could easily have been explained by the passage of time between the shooting and the dates that Berry and Kareema first gave their accounts—Berry's statement was not taken by police until March 29, 2007, over six weeks after Jackson's shooting, and Kareema's statement was not taken by a defense investigator until June 25, 2008, nearly a year-and-a-half after Jackson's shooting. Given the long periods of time between the incident and when the statements were given, differences in recollection are understandable. However, the basic narrative of both accounts is the same: Mr. Patterson was home in his room at the time of the shooting. As such, trial counsel could not have had a reasonable strategy for failing to even interview, much less present, Berry.

298. Third, counsel's deficient performance in this regard prejudiced Mr. Patterson. The evidence against Mr. Patterson was weak, and trial counsel's strategy apparently was to mount a misidentification and actual innocence defense. Against this background, evidence that Mr. Patterson was at home at the time of the shooting would be compelling to the jury. Indeed, Mr. Patterson's first trial, during which his sister Kareema testified to his alibi in the defense case, resulted in a hung jury. As one federal court has put it, "[a]ny time a defendant's strategy is to show that the prosecution cannot prove that he was the perpetrator, evidence of an alibi is compelling." *McGahee v. United States*, 570 F. Supp. 2d 723, 735 (E.D. Pa. 2008) (granting habeas relief where, "[b]ecause the evidence linking Petitioner to the crime was not overwhelming and the question of the believability of the alibi was essentially a test of credibility, the court finds that there was a reasonable probability that the outcome would have been different if counsel had investigated the alibi witnesses"). A new trial is required.

b. Trial Counsel Failed to Present Kareema Patterson as an Alibi Witness During the Defense Case.

299. Trial counsel also did not present Mr. Patterson's sister Kareema as an alibi witness during the defense case in Mr. Patterson's second trial, instead allowing her to be called as-on-cross by the Commonwealth during its rebuttal case. This too constitutes ineffective assistance of counsel.

300. First, this claim presents an issue of arguable merit. As discussed above, it can be *per se* unreasonable to fail to investigate known witnesses, particularly alibi witnesses. *Stewart*, 84 A.3d at 712.

301. Second, counsel cannot have had an objectively reasonable basis for failing to present Kareema. Kareema clearly was known to trial counsel and available to testify, as she gave a pre-trial statement to a defense investigator, testified on Mr. Patterson's behalf at his first trial, and testified during the Commonwealth's rebuttal case at Mr. Patterson's second trial.

302. Kareema told the defense investigator that she saw Mr. Patterson on his bed before she got into the shower on the day of the shooting. *See* Exh. 19, June 25, 2008 K. Patterson Interview at 2. She further stated that she heard three loud bangs while in the shower, got out, got dressed, saw Mr. Patterson coming from his room just minutes after the shooting, and then saw him sitting in a chair at the foot of the stairs putting on his socks. *Id.* at 2-3. At Mr. Patterson's first trial, trial counsel called her as an affirmative alibi witness during the defense case, and she testified in line with her statement. *See* N.T. 08/11/2008, 96-97.

303. Despite offering this alibi testimony at Mr. Patterson's first trial, which, as discussed above, resulted in a hung jury, trial counsel did not call Kareema during the defense case at Mr. Patterson's second trial. The result of this decision was that Kareema was called as a rebuttal witness by the Commonwealth and questioned as though on cross-examination, allowing

the prosecutor to try to undermine her credibility before she even had a chance to explain her brother's alibi to the jury; there can be no reasonable strategy for this choice.

304. Third, counsel's deficient performance in this regard prejudiced Mr. Patterson. As discussed above, alibi evidence is compelling to a jury, particularly in a case like this where the Commonwealth's evidence was weak and the defense was misidentification. Indeed, the jury at the first trial apparently found it to be compelling as it did not convict Mr. Patterson. Trial counsel's failure to affirmatively present Kareema during the defense case at the second trial prejudiced Mr. Patterson because, by the time she testified about his whereabouts during Jackson's shooting, the prosecution had had the opportunity to try to compromise her credibility. If her testimony had been presented in the defense case, as it was during the first trial, trial counsel could have brought out Mr. Patterson's alibi on direct examination, and there would have been no potential for confusion on the part of the jury as to which party Kareema was testifying for. This likely would have led to a different outcome, and a new trial is required.

5. Trial Counsel Failed to Consult with Mr. Patterson.

305. All of the above claims highlight that trial counsel abdicated his duty to consult with his client in preparation for trial. This too constitutes ineffective assistance of counsel.

306. First, this claim presents an issue of arguable merit. The Pennsylvania Supreme Court has recognized "that counsel's failure to prepare for trial is 'simply an abdication of the minimum performance required of defense counsel.'" *Commonwealth v. Brooks*, 839 A.2d 245, 248 (Pa. 2003) (quoting *Commonwealth v. Perry*, 644 A.2d 705, 709 (Pa. 1994)). Thus, "in order to prepare a defense to a charge of murder in the first degree," the same charge that is at issue here, "it is essential that *at the very least*, counsel meet with his client in person to, *inter alia*, gather information from the client, evaluate the client's demeanor, and try to establish a

working relationship." *Id.* at 250 (emphasis added) (holding counsel ineffective and granting new trial where attorney met with client only once by telephone before capital trial).

307. While *Brooks* involved a situation where trial counsel met with his client only by telephone, the Pennsylvania Superior Court has since recognized that a claim for ineffective of assistance of counsel based on a failure to adequately consult with a client before trial is cognizable even where there have been face-to-face meetings. In *Commonwealth v. Johnson*, the Superior Court, sitting *en banc*, recognized that the concerns discussed in *Brooks* were implicated when an attorney met with his client face-to-face only three times before a first-degree murder trial—once at arraignment, once at the preliminary hearing, and once on the eve of trial. *See* 51 A.3d 237, 243-44 (Pa. Super. 2012) (*en banc*). The Court emphasized that "the substantive impact of the consultations" must be evaluated. *Id.* at 244; *id.* at 249-50 (Wecht, J., concurring) ("Undoubtedly, counsel's efforts must be examined in each case individually, considering the unique circumstances of each situation. The number of necessary face-to-face visits will vary depending on the complexity and extensiveness of the issues involved in each particular case. *Brooks sets a constitutional floor. It does not set a ceiling.*" (emphasis added)); *see also Commonwealth v. Brown*, 145 A.3d 196, 203 (Pa. Super. 2016) ("*Brooks* essentially announced the minimum action required by counsel to provide what is deemed constitutionally effective representation in capital cases. . . ."), *pet'n for allowance of appeal granted*, No. 407 EAL 2016, 2017 WL 444606 (Pa. Feb. 1, 2017).[18]

308. Counsel ultimately was found not to be ineffective in *Johnson* because he "present[ed] a cogent trial strategy" despite his limited consultation with his client. *Id.* However, as discussed below, an evaluation of the substantive impact of trial counsel's limited

[18] In *Brown*, the Supreme Court granted allocatur on the following question: "Did the Superior Court err by dispensing of the requirement that a defendant show prejudice to succeed on an ineffectiveness claim where counsel failed to meet with him?" 2017 WL 444606 at *1.

consultations with Mr. Patterson here—consisting of two face-to-face meetings totaling less than an hour combined just before his first trial, one face-to-face meeting of unknown duration just before his second trial, and approximately 24 minutes of phone conversations with trial counsel (or someone in his office), *see* Exh. 21, CFCF Inmate Visitor Log at 2; Exh. 22, Call Log—leads to the opposite conclusion.

309. Second, counsel cannot have had a reasonable strategy for failing to meaningfully consult with Mr. Patterson before trial. Such consultations are part of the basic function of defense counsel. As *Brooks* recognized, meaningful face-to-face meetings are necessary, particularly in first-degree murder and capital cases, because these cases are often "quite involved" and, "[w]ithout such a meeting, there is little to no hope that the client will develop a fundamental base of communication with his attorney, such that the client will freely share important information and work comfortably with the lawyer in developing a defense plan." 839 A.2d at 249. Here, although Mr. Patterson did not face the death penalty, he did face a sentence of life imprisonment without the possibility of parole for a crime he allegedly committed at age 17—a sentence that the United States Supreme Court has recognized is equivalent to the death penalty for juveniles. *See Graham v. Florida*, 560 U.S. 48, 70-71 (2010) (likening life without parole for juveniles to the death penalty and observing that: "Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender."). In light of the high stakes here, there can be no reason for trial counsel to have met with Mr. Patterson only briefly on the eve of each of his trials. *See Johnson*, 51 A.3d at 253 (Wecht, J., concurring) ("[A] *Brooks* meeting cannot be so near to trial that counsel cannot act upon any information received from the defendant.").

310. Third, this deficient performance prejudiced Mr. Patterson. As shown throughout this petition, had trial counsel meaningfully consulted with Mr. Patterson, he would have been made aware of a number of witnesses who were available to testify for Mr. Patterson at trial in a variety of capacities and who also could have provided information that could have been used to impeach Commonwealth witnesses.[19] *Cf. Brown*, 145 A.3d at 206-07 (rejecting Commonwealth's argument that defendant was not prejudiced by his attorney's failure to consult with him before trial due to allegedly overwhelming evidence of guilt where "the failure to meet with Brown and not to be aware of potential character and fact witnesses belies the Commonwealth's . . . position"). Unlike in *Johnson*, trial counsel did not manage to "present a cogent trial strategy" in spite of this lack of consultation. Indeed, as a review of the record shows, trial counsel essentially proceeded with little to no strategy at all. Thus, trial counsel's failure to adequately consult with Mr. Patterson requires a new trial.

6. Trial Counsel Failed to Object to the Prosecutor's Reference to a Drug Competition During His Opening Statement.

311. In his opening statement, the prosecutor referred to "a little competition for the sale of weed" "[o]utside the corner store," inviting the jury to infer Mr. Patterson's involvement in this competition. N.T. 07/06/2009, 108. Trial counsel did not object to this reference, even though the prosecution could not put on any evidence to back up the inference it invited the jury to make. This constitutes ineffective assistance of counsel.

312. First, this claim presents an issue of arguable merit. The principles regarding what is permissible during an opening statement "are well established. Remarks in a prosecutor's opening statement must be fair deductions from the evidence which he in good faith

[19] As now-Justice Wecht recognized in *Johnson*, formulating investigation, pre-trial motions, and impeachment strategies are all important purposes of pre-trial attorney-client consultations in a murder case. *See* 51 A.3d at 253 (Wecht, J., concurring).

plans to introduce and not mere assertions designed to inflame the passions of the jury." *Commonwealth v. Jones*, 810 A.2d 931, 939 (Pa. 1992), *habeas corpus granted on other grounds by Jones v. Love*, No. CIV. A 94-4257, 1996 WL 296525 (E.D. Pa. June 3, 1996). While a prosecutor is not required to prove conclusively all statements made in an opening, he must have "a good faith and reasonable basis to believe that a certain fact will be established. . . ." *Id.*

313. Second, trial counsel cannot have had a reasonable basis for failing to object to this part of the prosecutor's opening statement. The materials available from the police investigation show no involvement by Mr. Patterson in any "competition for the sale of weed" outside Mercado's store; indeed, as noted above, the police investigation showed that people *other than Mr. Patterson* may have been involved in such a competition. *See* note 6, *supra*. Significantly, "[c]hallenged prosecutor comments must be considered in the context in which they were made." *Commonwealth v. Robinson*, 864 A.2d 460, 517 (Pa. 2004) (internal quotation marks omitted). Here, the context shows that the prosecutor's only purpose in referring to a competition for the sale of weed outside the store was to ask the jury to infer Mr. Patterson's involvement in that competition. Because trial counsel should have known from the investigative materials available to him that there was no support for this inference, he should have known that the prosecutor did not have a good faith, reasonable basis for making this statement. Given that the prosecution had no evidence of motive in this case, there can be no reasonable basis for a failure to object to this comment that asked the jury to infer a motive involving Mr. Patterson.

314. Third, counsel's deficient performance in this regard prejudiced Mr. Patterson. It is beyond question that motive evidence is important. *See, e.g., Commonwealth v. Maisonet*, 31 A.3d 689, 695 (Pa. 2011) ("While such [motive] evidence may not go directly to any element of the crimes, prosecutors employ such proofs precisely because of the potentially persuasive effect

in explaining and contextualizing human behavior." (citing 1 Wharton's Criminal Evidence § 4:45 (15th ed. 2010) ("An inquiry as to motive is often of great importance, particularly in a case based largely on circumstantial evidence."))). Here, the Commonwealth offered no motive for Mr. Patterson to have shot Jackson, but, by failing to object to this comment regarding a drug competition in the prosecution's opening statement, trial counsel allowed the jury to hear the rest of the evidence in this case with an inference that Mr. Patterson might have shot Jackson due to this competition. In a case as close as this one, allowing the jury to believe a motive existed where there was no supporting proof likely led the jury to view the case in a different light from the outset. *See generally Commonwealth v. Montgomery*, 626 A.2d 109, 113 (Pa. 1993) ("The purpose of an opening statement is to apprise the jury how the case will develop, its background and what will be attempted to be proved. . . . In any event, the statement, its substance and presentation by counsel are the first opportunity that the jury has to hear from the defendant through his advocate and it appears to us that *as a practical matter the opening statement can often times be the most critical stage of the trial, because here the jury forms its first and often lasting impression of the case*." (emphasis added)), *abrogated on other grounds by Commonwealth v. Burke*, 781 A.2d 1136 (Pa. 2001). If counsel had objected, the reference likely would have been stricken, leading to a different outcome. A new trial is required.

7. Trial Counsel Failed to Properly Challenge the Commonwealth's Use of Mr. Patterson's Recorded Prison Calls.

315. In addition to the use of Officer Chandler's testimony, another significant different between Mr. Patterson's first and second trials was the Commonwealth's playing to the jury of excerpts of certain of Mr. Patterson's recorded prison calls during the testimony of his mother Jacqueline and his sister Kareema. These calls were highly objectionable, yet trial counsel did little to challenge their use.

a. Trial Counsel Failed to Object to Mr. Patterson's Prison Calls Played During Jacqueline Patterson's and Kareema Patterson's testimony as Inadmissible Hearsay.

316. Many of the excerpts of prison calls that the prosecutor played for the jury during Jacqueline's and Kareema's testimony included conversations between Mr. Patterson and individuals other than Jacqueline or Kareema. However, trial counsel made no hearsay objections to the playing of these calls, another example of his deficient performance that prejudiced Mr. Patterson.

317. First, this claim presents an issue of arguable merit. Pennsylvania Rule of Evidence 802 provides that hearsay is not admissible, and Pennsylvania Rule of Evidence 801 defines hearsay as "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Although Pennsylvania Rule of Evidence 803 provides many exceptions to the rule prohibiting hearsay, none are applicable to many of the recorded calls that were played during Jacqueline's and Kareema's cross-examinations.

318. Second, counsel cannot have had a reasonable strategy for failing to object to the playing of these recorded call excerpts on the grounds that they were inadmissible hearsay.[20] For example, as characterized by the prosecutor, the excerpts played during Jacqueline's testimony included:

- An August 5, 2008 call between Mr. Patterson and Kareema during which Kareema told Mr. Patterson that their mother had to testify that he was on medication and that she was the only one with keys to the back door. *See* Exh, 23-6, 08/05/2008 Call Tr.; N.T. 07/08/2009, 118.

[20] Although trial counsel moved for a mistrial at the completion of both Jacqueline's and Kareema's testimony, neither motion was based on the ground that the calls constituted inadmissible hearsay. *See* N.T. 07/09/2009, 74-76.

- An August 7, 2008 call between Mr. Patterson and Kareema during which Mr. Patterson told Kareema how she should testify. *See* Exh. 23-7, 08/07/2008 Call Tr.; N.T. 07/08/2009, 127.
- An August 8, 2008 call between Shanelle Harris, the mother of Mr. Patterson's daughter, and Mr. Patterson, during which Shanelle told Mr. Patterson what Jacqueline had said to her about the case. *See* Exh. 23-8, 08/08/2008 Call Tr.; N.T. 07/08/2009, 124.

319. All of these calls are classic hearsay—they were out-of-court statements to which Jacqueline was not party and that were offered to prove the truth of the matter asserted, specifically that Mr. Patterson supposedly coached witnesses to testify and/or violated the sequestration order. To make matters worse, the August 8, 2008 call between Shanelle and Mr. Patterson constitutes hearsay within hearsay, as it is Shanelle's statement about what Jacqueline told her. *See* Pa. R. Evid. 805.

320. What's more, the prosecutor's characterizations of the calls themselves were not a fair representation of the actual substance of the calls. For example, during the August 7, 2008 call between Mr. Patterson and Kareema, Mr. Patterson did not tell Kareema how to testify in any substantive manner. Rather, Mr. Patterson told Kareema general strategies for testifying, such as not to say "I guess" or "I think" and instead say "I don't remember or I don't know." 08/07/2008 Call Tr. at 7.

321. The prosecutor similarly played several recorded calls during Kareema's testimony. As characterized by the prosecutor, these included, for example, an August 1, 2008 call between Mr. Patterson and Shanelle about the "Jamaican boy and the other boy Perry." N.T. 07/09/2009, 50. As with the calls played during Jacqueline's testimony, this is classic inadmissible hearsay—it was an out-of-court statement made by someone other than Kareema

offered to prove the truth of the matter asserted, namely that Mr. Patterson supposedly broke the sequestration order. Given the clear hearsay nature of these calls, counsel cannot have had a reasonable strategy in failing to object to their admission.

322. Third, counsel's deficient performance in this regard prejudiced Mr. Patterson. These calls permitted the jury to hear evidence suggesting that Mr. Patterson was coaching family members as to their testimony and/or breaking the sequestration order. Such evidence undoubtedly tainted the jurors' opinion of Mr. Patterson, leading them to believe that he was violating court orders and governing laws to influence the outcome of his case. There is a reasonable probability that the jury would have viewed Mr. Patterson in a different light had the calls not been played and, given the closeness of this case, this would have tipped the scales in favor of the defense. Indeed, the first trial, during which the call excerpts were not played, resulted in a hung jury. A new trial is required.

b. Trial Counsel Failed to Demand the Admission of the Full Recordings of the Prison Calls Played During Jacqueline Patterson's and Kareema Patterson's Testimony.

323. Having not objected to the playing of excerpts of Mr. Patterson's recorded prison calls as inadmissible hearsay, trial counsel should have asked that the calls be played to the jury in their entirety. His failure to do so constituted ineffective assistance of counsel.

324. First, this claim presents an issue of arguable merit. Pennsylvania Rule of Evidence 106 mandates: "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." As the comment to the Rule explains:

> The purpose of Pa.R.E. 106 is to give an adverse party an opportunity to correct a misleading impression that may be created by the use of a part of a writing or recorded statement that may be taken out of context. This rule gives the adverse

> party the opportunity to correct the misleading impression at the time that the evidence is introduced. The trial court has discretion to decide whether other parts, or other writings or recorded statements, ought in fairness to be considered contemporaneously with the proffered part.

Pa. R. Evid. 106 Cmt.; *see also Commonwealth v. McClure*, 144 A.3d 970, 976-77 (Pa. Super. 2016) (holding trial court's failure to correct any misleading impression by refusing admission of redacted portion of a written statement constituted error that was not harmless).

325. Second, counsel cannot have had a reasonable strategy for failing to invoke Rule of Evidence 106 and seek the playing of the full calls to the jury. As the jury heard only portions of the calls, the prosecutor was able to characterize the calls in the way most beneficial to the Commonwealth, without the jury being able to hear the full context of the conversations. That full context reveals calls that were much less nefarious than implied by the Commonwealth. The full conversations reveal that Mr. Patterson and his family and friends were simply attempting to ensure he had a fair trial and that all evidence was presented.

326. Third, counsel's deficient performance in this regard prejudiced Mr. Patterson. As discussed above, the excerpts of the calls played allowed the prosecution to paint a picture of Mr. Patterson as someone who was trying to break the rules to influence the outcome of his trial. The full conversations reveal a much different picture and would have painted Mr. Patterson to the jury in a different light, likely leading to a different outcome. A new trial is required.

c. Trial Counsel Failed to Explain the Concept of Sequestration of Witnesses to Mr. Patterson and his Friends and Family.

327. The testimony at Mr. Patterson's second trial made it clear that Mr. Patterson and his friends and family did not fully grasp the meaning of significance of the sequestration order from his first trial. Trial counsel rendered ineffective assistance in failing to explain this order to Mr. Patterson, his family, and his friends.

328. First, this claim presents an issue of arguable merit. There is no question that it is the duty of the trained legal professional—in this case, trial defense counsel—to fully explain the meaning of sequestration and the ramifications of failing to abide by a sequestration order. *See* Pa. R. Prof. Conduct 1.4(a) (requiring a lawyer to, *inter alia*, reasonably consult with the client about the means by which the client's objectives are to be accomplished and to keep the client reasonably informed).

329. Second, counsel cannot have had an objectively reasonable strategy for failing to advise his client and his client's family about this order in light of the serious consequences that accompany violating such an order. *See* Pa. R. Evid. 615 Cmt. ("The trial court has discretion in choosing a remedy for violation of a sequestration order. Remedies include ordering a mistrial, forbidding the testimony of the offending witness, or an instruction to the jury." (internal citations omitted)); *see also Commonwealth v. Scott*, 436 A.2d 161, 163 (Pa. 1981) (explaining that violation of a sequestration order may result in a mistrial, a cautionary instruction to the jury, and, in certain instances, exclusion of the violating witness' testimony). Both Jacqueline's and Kareema's testimony from the second trial indicates that neither had a clear understanding of what the sequestration order meant or what damage it could cause if it was breached. *See* N.T. 07/08/2009, 114-15 (Jacqueline's testimony that she did not know what the term "sequestration order" meant); N.T. 07/09/2009, 49 (Kareema's testimony that she had only been told not to discuss the case with people who were not there). Moreover, that Mr. Patterson freely discussed his case on the phone with his friends and family shows that he too was not properly advised of the import of the sequestration order (or of the import of the prison's policy of recording such phone calls).

330. Third, although counsel's deficient performance in this regard occurred in Mr. Patterson's first trial, that deficient performance prejudiced Mr. Patterson in his second trial. By

failing to properly advise Mr. Patterson and his family as to the nature, scope, and consequences of the sequestration order at the first trial, trial counsel opened them up to discussing the case over the phone and having parts of those calls played for the jury at Mr. Patterson's second trial. This allowed the prosecution to paint both Mr. Patterson and his mother and sister in a negative light, harming their credibility. For example, when pushed on cross-examination, Jacqueline admitted she had lied when she testified she had not discussed the case. N.T. 07/08/2009, 121. Given the importance of Jacqueline's and Kareema's testimony to the defense, creating a situation that gave the prosecution ammunition to impugn their credibility was inexcusable and prejudiced Mr. Patterson. A new trial is required.

d. Trial Counsel Failed to Object to the Playing of Excerpts of Mr. Patterson's Recorded Prison Calls on the Ground that the Commonwealth Sought, Through the Calls, to Improperly Impute Alleged Bad Acts by Others to Mr. Patterson Himself.

331. Trial counsel also rendered ineffective assistance in regard to the prison calls when he failed to object to their introduction on the ground that the prosecution was using the calls as a means to improperly impute alleged bad acts by Mr. Patterson's friends and family to Mr. Patterson himself.

332. First, this claim presents an issue of arguable merit. Any alleged acts by Mr. Patterson's friends and family simply cannot be imputed to Mr. Patterson unless they would naturally tend to show he shot Jackson. *See Commonwealth v. Otero*, No. 0290-2008, 2009 Pa. Dist. & Cnty. Dec. LEXIS 299, at *16-17 (Pa. Ct. Com. Pl. Bucks Cnty. March 13, 2009) ("[W]here there is such a logical connection between the crimes or bad acts where proof of one will naturally tend to show that the accused is the person who committed the other, then the prior bad act is admissible."). Whatever conduct by Mr. Patterson's friends and family the recorded

calls may have revealed, none of it had any logical connection to Mr. Patterson's tendency to commit murder.

333. Second, trial counsel cannot have had a reasonable strategy for failing to object to the admission of the calls on this ground. During both Jacqueline's and Kareema's testimony, the prosecution played excerpts of calls designed to establish that they were bad actors who broke the sequestration order by discussing the case and by listening to the trial through the courtroom door. *See* N.T. 07/08/2009, 118, 121; N.T. 07/09/2009, 51-52. In addition, during Kareema's testimony, the prosecutor questioned Kareema about her knowledge of the Philadelphia prison system's prohibition against "three-way calls" and then played a series of excerpts of suggesting that Kareema engaged in prohibited three-way calls. N.T. 07/09/2009, 43-48.

334. These excerpts established, if anything, that Kareema, Jacqueline, and one of Mr. Patterson's friends, Shanelle, engaged in "bad acts." Moreover, that Kareema may have knowingly engaged in prohibited three-way calls has no relevance to whether Mr. Patterson committed a homicide. *See Otero*, 2009 Pa. Dist. & Cnty. Dec. LEXIS 299, at *16-17.

335. Third, counsel's deficient performance in this regard prejudiced Mr. Patterson. The call excerpts allowed the prosecutor to impugn Mr. Patterson's integrity to the jury through other witnesses and thus were highly prejudicial. Without them, the jury likely would have seen Mr. Patterson in a different light, as the jury at the first trial apparently did, and reached a different outcome. A new trial is required.

e. Trial Counsel Failed to Object to the Playing of Excerpts of Mr. Patterson's Recorded Prison Calls on the Ground that the Calls Were Inadmissible Evidence of Other Crimes, Wrongs or Acts.

336. Even if the calls suggested any bad acts by Mr. Patterson, they would nevertheless be inadmissible, as bad acts are admissible only for limited purposes.

337. First, this claim presents an issue of arguable merit. *See* Pa. R. Evid. 404(b)(2) (evidence of crimes, wrongs, or other acts only admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident). Even if the call excerpts were admissible for one of the limited purposes allowed by Rule 404(b), they nevertheless should have been excluded as the probative value of the "bad acts," particularly the three-way calls, as evidence of a proclivity to commit homicide is nil compared to the prejudicial effect. *See* Pa. R. Evid. 403.

338. Second, trial counsel cannot have had a reasonable strategy for failing to object to the admission of the calls on this ground. In light of the multiple reasons this "bad act" evidence was not admissible, trial counsel cannot have had a reasonable strategy for failing to object to the admission of the call excerpts on this ground.

339. Third, trial counsel's deficient performance in this regard undoubtedly prejudiced Mr. Patterson's defense. It is highly likely that the jurors' hearing that Mr. Patterson broke a sequestration order or participated in prohibited three-way calls impacted their opinion of him. This can be evidenced by the fact that the jurors at the first trial did not hear this evidence and decided not to convict Mr. Patterson. Trial counsel's failure to object on this basis warrants a new trial.

8. Trial Counsel Failed to Object to the Prosecution's Improper Comments Regarding Crime in Society at Large.

340. In addition to his failure to lodge objections to the playing of the excerpts of the recorded prison calls, trial counsel also rendered ineffective assistance when he inexplicably remained silent when the prosecution solicited inadmissible testimony regarding the larger societal crime problem during Mr. Patterson's trial and when the prosecutor commented on this issue. Specifically, during his testimony at Mr. Patterson's second trial, Commonwealth witness

Police Officer Carlos Cruz testified on direct examination that Jackson's death was the 17th homicide in Philadelphia in the first 11 days of 2007; in his closing argument, the prosecutor asserted that, if there were already as many as 17 homicides in just the first 11 days of the year, witnesses had reason to fear Mr. Patterson. N.T. 07/08/2009, 47; N.T. 07/09/2009, 55. Defense counsel did not object to the testimony or the commentary in closings.

341. First, this claim presents an issue of arguable merit. Pennsylvania courts have condemned commentary during specific trials on rampant crime in society at large. As the Pennsylvania Supreme Court explained:

> [W]e caution prosecuting attorneys that reference to unsafe conditions on the city's streets, rampancy of crime, etc. are inappropriate. They are irrelevant, and have no bearing on the guilt or innocence of the defendant. Even when not improperly motivated, but calculated to exhort the jurors not to shirk their responsibility of returning a verdict of guilty when the evidence so warrants, arguments in this vein appeal to the fear of jurors, and tend to impute the wrongdoing of others to the present defendant. Hence, they should be meticulously avoided.

Commonwealth v. Hamilton, 334 A.2d 588, 594 (Pa. 1975) (internal citations omitted); *see also Commonwealth v. Dennis*, 715 A.2d 404, 414 (Pa. 1998) ("the prosecutor should not have couched his argument in terms of general societal problems"); *United States v. Miles*, 53 F. App'x 622, 631 (3d Cir. 2002) (prosecutor's comment, "we're here to keep this stuff [drugs] off the street," deemed improper); *Peterkin v. Horn*, 176 F. Supp. 2d 342, 366-67 (E.D. Pa. 2001) (prosecutor's comment, "the destruction that he wreaked, or visited on two human beings in a civilized society, I hope we can't tolerate this," deemed improper).

342. Second, trial counsel cannot have had a reasonable strategy for failing to object to these references to high murder rates given their clear inadmissibility under Pennsylvania law (or to ask for a cautionary instruction after they were on the record).

343. Third, counsel's deficient performance in this regard prejudiced Mr. Patterson by improperly linking him to a general crime problem in society, which, as the Pennsylvania Supreme Court has recognized, had no relevance to his guilt or innocence and simply played on the fears of the jury. A new trial is required.

9. Trial Counsel Failed to Request Certain Jury Instructions and Failed to Object to Other Instructions.

344. Finally, trial counsel also provided ineffective assistance by failing to request certain jury instructions and failing to object to others. Each of these failures also warrants a new trial.

a. Trial Counsel Failed to Request a Cautionary Instruction Regarding References the Jury Heard to Mr. Patterson's Incarceration.

345. Having moved for a mistrial on the grounds that the jury should not have heard references to Mr. Patterson's incarceration in the Philadelphia Prison System when excerpts of his recorded calls were played for the jury and having had that motion denied, *see* N.T. 07/08/2009, 135-38; N.T. 07/09/2009, 74-76, counsel inexplicably did not then seek a cautionary jury instruction regarding those references. This failure constitutes ineffective assistance of counsel.

346. First, this claim presents an issue of arguable merit. *See* Pa. R. Crim. P. 647(B) ("Any party may submit to the trial judge written requests for instructions to the jury."); *Commonwealth v. Fisher*, 493 A.2d 719, 723-24 (Pa. Super. 1985) (finding defendant's counsel was ineffective for failure to request jury instruction).

347. Second, counsel cannot have had a reasonable strategy for failing to request a cautionary jury instruction regarding the references the jury heard to Mr. Patterson's pre-trial incarceration. As discussed at length in this amended petition, the prosecutor played a series of excerpts of Mr. Patterson's recorded prison calls for the jury. Each recording contains a warning

notifying the person being called that the calls are made by an inmate at the Philadelphia Prison System and that the calls are being recorded. *See, e.g.*, Exh. 23-1, 07/08/2008 Call Tr. at 2 ("This is a prepaid call. You will not be charged for this call. This call is from an inmate at Philadelphia."); Exh. 23-3, 08/01/2008 Call Tr. at 2 ("You will not be charged for this call. This call is from . . . an inmate at (unintelligible)."); Exh. 23-6, 08/05/2008 Call Tr. at 2 ("You have a prepaid call. You will not be charged for this call. This call is from (inaudible) an inmate. . . ."); Exh. 23-7, 08/07/2008 Call Tr. at 2 ("You have a (inaudible) call. You will not be charged for this call. This call is from (inaudible) an inmate at Philadelphia prison system."); Exh. 23-8, 08/08/2008 Call Tr. at 2 ("You have a prepaid call. You will not be charged for this call. This call is from (inaudible) an inmate at . . . ."). Although it is impossible to know precisely what the jury heard because the call excerpts were not transcribed during the trial, counsel's mistrial motion demonstrates that the jury heard references to Mr. Patterson's incarceration through the calls. *See* N.T. 07/08/2009, N.T. 136-37; 07/09/2009, 74-76. Should there be any question, the prosecutor made clear during his cross-examinations of Jacqueline Patterson and Kareema Patterson that the calls were made while Mr. Patterson was in pre-trial custody. *See generally* N.T. 07/08/2009, 118-21, 124-25; N.T. 07/09/2009, 44-47, 50-56. By way of example, the prosecutor asked Kareema: "There are certain rules and regulations when you used to talk to your brother ***when he would call from jail***?" N.T. 07/09/2009, 43 (emphasis added).

348. It is well established in Pennsylvania that evidence such as this that leads a jury to infer that the accused engaged in unrelated criminal activity is inadmissible. *See Commonwealth v. Young*, 849 A.2d 1152, 1156 (Pa. 2004) (references that expressly or by reasonable implication indicate some involvement in prior criminal activity rise to the level of prejudicial error); *Commonwealth v. Nichols*, 400 A.2d 1281, 1282 (Pa. 1979) ("In Pennsylvania, the law is clear that if a testimonial reference, absent specific circumstances, indicates to the jury the

accused has been involved in prior criminal activity, reversible error has been committed."). More specifically, references or indications that the accused is in custody are largely condemned because they suggest to the jury that the government views the accused as so dangerous to society that he must be physically detained, notwithstanding the presumption of innocence. For example, the United States Supreme Court has held that, "[i]n the presence of the jury, [the defendant] is ordinarily entitled to be relieved of handcuffs . . . so as not to mark him as an obviously bad man." *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986); *see also, e.g.*, *Deck v. Missouri*, 544 U.S. 622, 624 (2005) (holding that courts cannot routinely place defendants in shackles or other physical restraints visible to the jury, even during the penalty phase of a capital proceeding).

349. Trial counsel obviously recognized these problems with the references to Mr. Patterson's incarceration, as he moved for a mistrial on this ground. When that motion was denied, he should have sought a cautionary jury instruction to explain to the jury that this information was admissible for a very limited purpose only—to show how and why the Commonwealth was in possession of otherwise confidential recorded telephone conversations between Mr. Patterson and his family and friends. There is no reasonable strategic explanation for counsel's failure to do this; Mr. Patterson's recorded calls were a focus of the second trial, taking up a significant amount of trial time. In light of this, a cautionary instruction was necessary and would not have further highlighted this issue given that it was already prominent.

350. Third, counsel's deficient performance in this regard prejudiced Mr. Patterson. Allowing the jury to hear references to Mr. Patterson's incarceration without any cautionary instruction explaining the limited admissibility of those references significantly undermined the presumption of innocence and allowed the jury to view Mr. Patterson as dangerous. Trial counsel was ineffective for failing to request a limiting instruction. *Commonwealth v. Buehl*,

658 A.2d 771, 777-79 (Pa. 1995) (finding that counsel was ineffective for failing to request a cautionary instruction regarding defendant's prior crimes because it could not be said with any reasonable degree of certainty that, but for the omission, the outcome of the defendant's trial would not have been different). A new trial is required.

b. Trial Counsel Failed to Request a Cautionary Instruction Regarding Testimony about Brunache's and Laventure's Fears of Testifying.

351. Trial counsel similarly failed to request a cautionary instruction regarding testimony about Pierre Laventure's and Allan Brunache's fears of testifying at trial. The record is replete with such testimony, yet defense counsel failed to request any instruction explaining to the jury whether and how they could consider these inflammatory statements.

352. First, this claim presents an issue of arguable merit. *See* Pa. R. Crim. P. 647(B) (permitting any party to submit to the trial judge written requests for instructions to the jury); *Fisher*, 493 A.2d at 723-24 (finding defendant's counsel was ineffective for failure to request jury instruction).

353. Second, counsel cannot have had a reasonable strategy for failing to request a cautionary instruction regarding this testimony, which permeated Mr. Patterson's second trial. For example, when explaining why he did not identify Mr. Patterson as the shooter at the preliminary hearing, Commonwealth witness Allan Brunache testified:

> I was – I was scared, you know. It's a gun involved, you know. People got killed. So I don't want to – you know, I was scared. I was trying to protect myself, my family . . . . I was scared. I was trying to protect myself, protect my family . . . I was trying to protect myself. . . I said I was trying to protect myself. . . . I was trying to keep my family safe. Like I said, I didn't want to get involved. I was trying to keep myself safe. . . . I was trying to protect my family because my family live over there. All my kids, everybody, live over there, so I was trying to keep my family safe. They were in school over there, so I was trying to keep them safe. . . . I was trying to keep my family safe. . . . I try to keep my family safe. . . . I was trying to keep my family safe. . . . I didn't want to get involved because people got killed, you know. . . . I didn't know so many people over there so I didn't want to come in and say anything about him, the next thing

> you know – my kids going to school over there. The next thing you know, my kids getting hurt.

N.T. 07/07/2009, 96-97, 121-26, 128. Similarly, Police Officer Cruz testified that Commonwealth witness Pierre Laventure was so scared to testify that he began to cry. Trial counsel apparently recognized the issues with such testimony, as he eventually objected to Brunache's testimony (but not to Officer Cruz's). That objection was overruled, but counsel did not then seek any cautionary instruction to the jury.

354. Trial counsel's failure to seek such an instruction was not an objectively reasonable strategy decision. Given how much of this kind of testimony the jury heard, a cautionary instruction would not have called further attention to it; rather, the instruction would have allowed the jury to put it into the proper context.

355. And, while the Commonwealth is entitled to offer evidence to explain why its witnesses were reluctant to cooperate, that evidence undoubtedly portrayed Mr. Patterson in an unfavorable light. *See Old Chief v. United States*, 519 U.S. 172, 180 (1997); *Commonwealth v. Spruill*, 391 A.2d 1048, 1049-50 (Pa. 1978). Defense counsel therefore had a duty to request a cautionary instruction on this issue to mitigate the possibility of prejudice. *See Spencer v. Texas*, 385 U.S. 554, 561-62 (1967); *Albrecht v. Horn*, 485 F.3d 103, 128 (3d Cir. 2007). As the Pennsylvania Supreme Court has explained, "[i]t is extremely important that the jury understand in every case the limited purpose of such evidence." *Commonwealth v. Billa*, 555 A.2d 835, 841 (Pa. 1989); *see also Commonwealth v. Claypool*, 495 A.2d 176, 179 (Pa. 1985) ("such evidence must be accompanied by a cautionary instruction which fully and carefully explains to the jury the limited purpose for which that evidence has been admitted"). In the face of this authority, there was no excuse for counsel's failure. Moreover, this was not a situation in which a cautionary instruction would have served to unnecessarily highlight this issue for the jury; the

prosecutor had already reminded the jury of it by emphasizing Brunache's and Laventure's fears during his closing argument. *See* N.T. 07/10/2009, 53-56.

356. Third, counsel's deficient performance in this regard prejudiced Mr. Patterson by painting a picture of him as a dangerous person. A new trial is required.

c. Trial Counsel Failed to Object to the Trial Court's Incorrect Statement of the Jury Instruction Regarding Mr. Patterson's Decision Not to Testify.

357. Mr. Patterson elected to invoke his Fifth Amendment privilege and did not testify at trial. The trial court issued the following instruction:

> Ladies and gentlemen, it is entirely up to the defendant in every criminal trial whether or not to testify. The defendant has an absolute right founded on the [C]onstitution to remain silent. You must not draw any inference of guilt or any other inference ***adverse to the testimony*** from the fact that he did not testify.

N.T. 07/10/2009, 13 (emphasis added). Trial counsel did not object, again rendering ineffective assistance.

358. First, this claim presents an issue of arguable merit. Although a trial court has broad discretion in phrasing the charge, a jury instruction, taken as a whole, must adequately and accurately set forth the applicable law. *Commonwealth v. Daniels*, 963 A.2d 409, 430 (Pa. 2009). That did not occur here; a correct jury instruction on this issue would have been that the jury could not draw any other inference ***adverse to the defendant*** (not "adverse to the testimony"). *See Commonwealth v. Garcia*, 888 A.2d 633, 643 n.1 (Pa. 2005) (quoting Pennsylvania Standard Criminal Jury Instructions, 3.10).

359. Second, counsel cannot have had a reasonable basis for failing to object and seek a correction to this instruction, which was improper on its face (even though the trial court's error was undoubtedly unintentional). *See Bey v. Superintendent Greene SCI*, 856 F.3d 230, 243 (3d Cir. 2017) (concluding trial counsel should have objected to a faulty jury instruction on

eyewitness testimony where, contrary to *Kloiber*, the instruction instructed the jury not to weigh the testimony that was most critical to establishing petitioner's guilt).

360. Third, counsel's deficient performance in this regard prejudiced Mr. Patterson. As the Third Circuit recently recognized in *Bey*, even an unintentional wording error in a jury charge can prejudice a defendant and require a new trial. *Id.* At best, the phrase "adverse to the testimony" is ambiguous and confusing; it likely left the jury confused as to whether Mr. Patterson should have testified—precisely the opposite of the goal the "no adverse inference" instruction is meant to accomplish. In a case where the incriminating evidence was weak, as here, this kind of error likely affected the outcome. A new trial is required.

d. Trial Counsel Failed to Object to the Trial Court's Incorrect Jury Instruction Regarding an Inference of Malice.

361. Counsel similarly failed to object to the trial court's incorrect jury instruction regarding an inference of malice.

362. First, this claim presents an issue of arguable merit. In this case, as in many homicide cases, two issues for the jury to decide were whether this killing was malicious and whether this killing was intentional. Not all malicious killings are intentional, and not all intentional killings are malicious. *See* 18 Pa. C.S. § 2503(b); *Commonwealth v. Hamilton*, 766 A.2d 874, 876 n.4 (Pa. Super. 2001).

363. Pennsylvania allows a jury to infer intent to kill from the shooter's use of a deadly weapon on a vital body part. Here, the evidence established that Jackson's assailant shot his gun three times from a distance of a few feet, and one of the bullets struck Jackson's head. The trial court should have instructed the jury that it could, if it wished to, infer from these facts that the assailant had the intent to kill, as follows:

> When deciding whether the defendant had the specific intent to kill, you should consider all the evidence regarding [his] [her] words and conduct and the

> attending circumstances that may show [his] [her] state of mind, including [*evidence*]. [If you believe that the defendant intentionally used a deadly weapon on a vital part of the victim's body, you may regard that as an item of circumstantial evidence from which you may, if you choose, infer that the defendant had the specific *intent to kill*.]

Pennsylvania Suggested Standard Criminal Jury Instruction 15.2502A(5).

364. Instead, the trial court here erroneously instructed the jury that it could infer "malice" from these facts, stating:

> When deciding whether the defendant ***acted with malice***, you should consider all the evidence regarding his words, conduct, and the pending circumstances which may show his state of mind. If you believe that the defendant intentionally used a deadly weapon on a vital part of Mr. Jackson's body, you may regard that as an item of circumstantial evidence from which you may, if you choose, infer that the defendant did ***act with malice***.

N.T. 07/10/2009, 28-29 (emphasis added).

365. Second, counsel cannot have had a reasonable strategy for failing to object to, and seek a correction of, this jury instruction. As with the instruction discussed above, the trial court's wording error here likely was unintentional, but it resulted in a facially erroneous instruction. Given the risk of juror confusion, there was no reason to fail to object.

366. Third, counsel's deficient performance in this regard prejudiced Mr. Patterson. The law provides for verdicts less than murder, including outright acquittals, even where an assailant fires a gun at a person's vital body part. Permitting a jury to infer malice, a significant element of the prosecution's case, impermissibly relieved the Commonwealth of its burden of proof, to Mr. Patterson's detriment.

10. Trial Counsel's Failures, When Considered Cumulatively, Require a New Trial.

367. Finally, while Mr. Patterson believes that each instance of counsel's deficient performance discussed above requires a new trial, if the Court disagrees, it is beyond question that the cumulative effect of trial counsel's failures was to deny him due process. *See, e.g.*,

Commonwealth v. Hutchinson, 25 A.3d 277, 318-19 (Pa. 2011) (recognizing that cumulative error may result in a denial of due process that requires a new trial).

368. Here, trial counsel failed at all phases of his representation of Mr. Patterson: he did not adequately investigate or challenge any aspect of the Commonwealth's identification case, failing to even take the simple step of photographing the scene to demonstrate the impossibility of accurate identifications to the jury; he did not interview or present witnesses regarding key aspects of the case such as Mr. Patterson's character, friendship with Jackson, and medical issues; he did not meaningfully consult with his client before trial; he failed to object to highly prejudicial evidence presented by the Commonwealth, including the playing of excerpts of Mr. Patterson's recorded prison calls to the jury; he failed to even try to exclude the surveillance footage and Officer Chandler's "identification" of Mr. Patterson; and he failed to request appropriate cautionary jury instructions. These are just some examples of the deficient performance discussed above, and they show that Mr. Patterson was left without any coherent defense in a first-degree murder trial in which he faced a then-mandatory life without parole sentence. The cumulative effect of trial counsel's errors was to deny Mr. Patterson due process. A new trial is required.

B. Mr. Patterson's Appellate Counsel Provided Ineffective Assistance, Requiring A New Trial Under The PCRA And The Pennsylvania And United States Constitutions.

369. "Representation by ineffective appellate counsel gives rise to an independent basis for relief" in post-conviction proceedings. *Commonwealth v. Hare*, 404 A.2d 388, 390 (Pa. 1979). To succeed on a claim of appellate counsel's ineffectiveness, "a PCRA petitioner must demonstrate that appellate counsel was ineffective in the manner by which he litigated the claim on appeal." *Commonwealth v. Koehler*, 36 A.3d 121, 142 (Pa. 2012) (citing *Commonwealth v.*

Paddy, 15 A.3d 431 (Pa. 2011)). The *Pierce*/*Strickland* test described above also applies to such claims. *See Paddy*, 15 A.3d at 433; *see also id.* at 473-76 (Castille, J., concurring).

370. Here, trial counsel continued to represent Mr. Patterson during his direct appeal and his performance during the appeal was also constitutionally ineffective. In particular, counsel failed to raise meritorious claims despite having preserved them during trial. On appeal, Mr. Mandell committed the following unjustifiable errors:

1. Appellate Counsel Failed to Raise the Court's Error in Refusing to Give the Jury a *Kloiber* Instruction Related to Officer Chandler's Identification of Mr. Patterson.

371. On appeal, counsel did not raise the trial court's failure to give the jury a *Kloiber* instruction with respect to Officer Chandler's identification of Mr. Patterson from the store surveillance footage even though he had preserved the issue by requesting such an instruction during trial. N.T. 07/10/2009, 33-34. This constitutes ineffective assistance by appellate counsel.

372. First, this claim presents an issue of arguable merit. A *Kloiber* instruction is a cautionary instruction to the jury informing it of the potential unreliability of witness identification when the witness either: (1) did not have an opportunity to view the defendant clearly; (2) equivocated on the identification of the defendant; or (3) has had difficulties identifying the defendant on prior occasions. *Commonwealth v. Sanders*, 42 A.3d 325, 332 (Pa. Super. 2012). Counsel is deemed ineffective by failing to request a *Kloiber* instruction where one is warranted under the circumstances. *Commonwealth v. Chmiel*, 30 A.3d 1111, 1127 (Pa. 2011).

373. Here, Officer Chandler both did not have an opportunity to view Mr. Patterson clearly and, as a result thereof, equivocated on her identification of Mr. Patterson on the surveillance video played at trial. When initially shown the video, Officer Chandler was

uncertain about who she saw, stating: "This one here (indicating the male in the dark one piece outfit) reminds me of Dontai [sic], the way he walks and moves and stuff. I can't really make out his face, but he looks like Dontai [sic]." Exh. 17, Mar. 1, 2007 E. Chandler Investigation Interview Record at 1. She similarly testified at trial: "It was a guy on the video that looked like Dontia. I couldn't see his face." N.T. 07/07/2009, 22; *see also id.* at 26-29 (testifying that person on video "reminds me of Dontia"). Plainly, Officer Chandler did not have an opportunity to view Mr. Patterson on the surveillance video clearly.

374. Nevertheless, Officer Chandler testified at the second trial that she concluded it was Mr. Patterson on the surveillance video because she purportedly knew Mr. Patterson's stature and the way he moved and walked. N.T. 07/07/2009, 23. Upon viewing the surveillance video along with the jury, Officer Chandler testified that the person in the video in dark clothing reminded her of Patterson but that she could not get a good look at his face in the video. *Id.* at 26-29. Such testimony established that Officer Patterson equivocated in her identification of Mr. Patterson in the surveillance video.

375. Second, appellate counsel cannot have had any reasonable strategy for failing to raise the court's error in refusing to give the jury a *Kloiber* instruction related to Officer Chandler's identification of Mr. Patterson. This is a clear example of a case where a *Kloiber* instruction is warranted. Not only did Officer Chandler's witness statement and testimony suggest that she did not have an opportunity to view Mr. Patterson clearly, her testimony changed throughout the course of the investigation and trial regarding that identification. Nevertheless, even though he preserved the issue during trial, counsel failed to raise this issue in either his statement of errors complained of on appeal or in his appellate brief. There could be no reasonable basis for failing to argue in the Superior Court that the trial court's omission of a *Kloiber* instruction regarding Officer Chandler was in error.

376. Third, counsel's failure to argue this error on appeal prejudiced Mr. Patterson. As discussed above, Officer Chandler's identification of Mr. Patterson from the surveillance footage was equivocal at best and thus presented the classic situation calling for a *Kloiber* instruction. Had counsel raised this issue on appeal, it is likely that the Superior Court would have found grounds upon which to reverse the trial court's judgment and order a new trial.

2. Appellate Counsel Failed to Raise the Court's Error in Allowing the Jury to Hear References to Mr. Patterson's Incarceration in the Excerpts of the Recorded Prison Calls Played to the Jury.

377. Counsel also failed to raise on appeal the trial court's error in allowing the jury to hear references to Mr. Patterson's incarceration in the excerpts of Mr. Patterson's recorded prison calls. This too constitutes ineffective assistance of appellate counsel.

378. First, this claim presents an issue of arguable merit. In his statement of errors complained on appeal, appellate counsel asserted that Mr. Patterson must be awarded a new trial as the result of repeated, improper references to certain telephone calls being placed by Mr. Patterson from the Philadelphia Prison System, which identified Mr. Patterson as having been an inmate in the prison. However, and without explanation, counsel did not include this argument in his brief, which waived Mr. Patterson's right to pursue this claim on appeal and denied him meaningful appellate review on this point. *See* Pa. R. App. P. 2116(a) ("No question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby.").

379. Second, appellate counsel cannot have any reasonable strategy for failing to raise the trial court's error in allowing the jury to hear references to Mr. Patterson's incarceration in the excerpts of the recorded prison calls played to the jury in Mr. Patterson's second trial. Counsel clearly recognized this legal issue, having preserved it by moving for a mistrial on these grounds and having included this argument in his Rule 1925(b) statement, yet he inexplicably

failed to include it his appellate brief. There can be no reasonable strategic basis for failing to do so.

380. Third, trial counsel's failure to raise this error on appeal significantly prejudiced Mr. Patterson. As discussed above, evidence that suggests prior criminal activity by the defendant and/or that the accused is in custody has been held to be prejudicial by both Pennsylvania and federal courts. Indeed, here the Commonwealth's playing of the recorded prison calls at trial likely significantly colored the jurors' impression of Mr. Patterson. By failing to raise this argument in his appellate brief, counsel allowed this error at trial to continue to harm Mr. Patterson, without giving the Superior Court the opportunity to review the prejudicial effect these calls had on Mr. Patterson's defense. Mr. Patterson is entitled to a new trial on this issue.

3. Appellate Counsel's Failures, When Considered Cumulatively, Require A New Trial.

381. As with counsel's deficient performance at trial, each of appellate counsel's failures prejudiced Mr. Patterson and requires a new trial. Again, when the errors are viewed cumulatively, this result is even more clear. *See, e.g.*, *Hutchinson*, 25 A.3d at 318-19 (recognizing that cumulative error may result in a denial of due process that requires a new trial).

382. Here, counsel repeatedly failed Mr. Patterson when pursuing his appeal: he failed to raise the issue of the court's error in refusing to give a *Kloiber* instruction to the jury where one was clearly warranted under the circumstances and he failed to raise the argument that the court erred in failing to exclude references to Mr. Patterson's incarceration in the prison calls played at trial. These errors compounded the numerous instances of deficient performance at the trial level and left Mr. Patterson without any viable claims on appeal. And, these two errors went to key pieces of evidence presented at the second trial (Officer Chandler's identification from the

surveillance footage and the playing of excerpts of Mr. Patterson's recorded prison calls) but not at the first, which had resulted in a hung jury. The cumulative effect of these errors on appeal was to deny Mr. Patterson due process. A new trial is required.

C. Newly-Available Evidence In the Form of Expert Opinion Testimony Regarding Eyewitness Identification Issues Requires A New Trial.

383. To be eligible for relief based on newly-available evidence, Mr. Patterson must demonstrate that the evidence: (a) could not have been obtained prior to the conclusion of trial by the exercise of reasonable diligence; (b) is not merely corroborative or cumulative; (c) will not be used solely to impeach the credibility of a witness; and (d) would likely result in a different verdict if a new trial were granted. *Commonwealth v. Padillas*, 997 A.2d 356, 363 (Pa. Super. 2010) (citing *Commonwealth v. Pagan*, 950 A.2d 270, 292 (Pa. 2008)).

384. Here, Mr. Patterson seeks a new trial based on new evidence in the form of Professor Epstein's expert opinion regarding eyewitness identification issues, specifically issues with the identifications made by eyewitnesses Allan Brunache and Pierre Laventure. This new opinion evidence meets all of the elements of the newly-discovered evidence test.

385. First, Mr. Patterson could not have obtained the evidence prior to the conclusion of trial, even with the exercise of reasonable diligence. At the time of Mr. Patterson's trial, opinions like the one now offered by Professor Epstein were *per se* inadmissible in criminal trials in the Commonwealth. *See generally Commonwealth v. Walker*, 92 A.3d 766 (Pa. 2014). It was not until 2014 that the law changed. *Id.*

386. Second, Professor Epstein's opinion is not corroborative or cumulative. The jury did not hear any expert testimony explaining social science research regarding issues with eyewitness identification. Even though trial counsel cross-examined Laventure and Brunache regarding their identifications, cross-examination even when adequate (which it was not here

because, as explained above, trial counsel rendered ineffective assistance in challenging these identifications), is no substitute for providing a jury with expert opinion to educate the jury regarding issues with eyewitness identifications. *See id.* at 786 ("While cross-examination and advocacy in closing argument may be common methods to unearth falsehoods and challenge the veracity of a witness, it is less effective in educating the jury with respect to the fallability of eyewitness identification.").

387. Third, the new evidence also does not merely serve to impeach another witness's credibility. In pointing out factors that may have made Brunache's and Laventure's identifications unreliable, Professor Epstein is not impugning their credibility or claiming that they lied about what they saw. Rather, he points out reasons, supported by social science, that they may simply have been mistaken in identifying Mr. Patterson.

388. Fourth, if a new trial were granted, it is highly likely that the jury would reach a different verdict. As discussed at length in this petition, the Commonwealth's case against Mr. Patterson rested in large part on Brunache's and Laventure's identifications. The jury clearly already was troubled by identification issues, as it deliberated at length before convicting Mr. Patterson and asked a number of questions during deliberations that went to identification (such as asking to see photos of Mr. Patterson and Midnight and asking to watch the surveillance footage again). If the jury had heard Professor Epstein testify about objective reasons that Brunache and Laventure very well may have been mistaken—including "weapons focus," their brief opportunity to view the shooter, and most significantly the sheer impossibility of making an accurate identification in light of their distance from the shooting—it likely would have reached a different outcome, *i.e.*, had a reasonable doubt about Mr. Patterson's guilt. This is particularly true given the weight that juries tend to place on eyewitness testimony. *Id.* at 779 (recognizing that eyewitness identification "is arguably the most powerful form of evidence. As Justice

William Brennan noted, '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!"'" (quoting *Watkins v. Souders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (emphasis in *Watkins*)). A new trial is required.

D. Mr. Patterson Is Entitled To Relief Under The United States And Pennsylvania Constitutions Because Both Prohibit The Incarceration Of One Who Is Actually Innocent

389. The United States Supreme Court has indicated that a claim of actual innocence may be a cognizable and free-standing basis for relief under the Eighth (prohibition against cruel and usual punishments) and/or Fourteenth (due process clause) Amendments to the United States Constitution. *See Herrera v. Collins*, 506 U.S. 390, 406 (1993) (outlining what a freestanding actual innocence claim, one not tied to an underlying claim of constitutional error at trial, would require and evaluating petitioner's claim of actual innocence on its merits).

390. The Pennsylvania Constitution also provides two separate potential avenues for relief based upon actual innocence: Article I, Section 13 (prohibiting "cruel punishments") and Article I, Section 9 (providing that trials must follow the "law of the land").

391. Under Article I, Section 13, when a sentence is so severe as to "show the moral conscience of the community," it is unconstitutional. *Commonwealth v. Sourbeer*, 442 A.2d 116, 123 (Pa. 1980). The continued incarceration of an individual who is actually innocent would "shock the moral conscience of the community" and thus is an unconstitutionally cruel punishment under this provision of the Pennsylvania Constitution. *Cf. People v. Hamilton*, 979 N.Y.S.2d 97, 107 (N.Y. App. Div. 2014) (recognizing freestanding innocence claim because "punishing an actually innocent person is inherently disproportionate to the acts committed by that person").

392. Article I, Section 9 of the Pennsylvania Constitution is referred to as "the due process clause of our state constitution." *Commonwealth v. Heck*, 535 A.2d 575, 576 (Pa. 1987). Where an interpretation of this provision is involved, "most cases which shed light on the question are analyses of the strictures imposed by the due process clause of the Fourteenth Amendment of the United States Constitution." *Commonwealth v. Davis*, 586 A.2d 914, 915-16 (Pa. 1991). However, the federal due process clause "may not be controlling if the due process clause of the Pennsylvania Constitution sets a higher standard." *Id.* at 916. As a matter of substantive due process, Pennsylvania appellate courts have regularly held our state constitution provides individuals with greater protection than its federal counterpart. *See, e.g., id.* at 917 (finding "no doubt that the due process clause of the Pennsylvania Constitution prohibits the deprivation of liberty solely on the basis of hearsay evidence" while acknowledging "doubt" that the federal due process clause would do the same). Pennsylvania's history of fiercely protecting its citizens' rights against arbitrary state action supports the recognition of a freestanding innocence claim under the state due process clause.

393. Indeed, numerous other states have recognized a freestanding innocence claim pursuant to their own state due process clauses. The Supreme Court of Illinois, for example, held that "[i]mprisonment of the innocent would also be so conscience shocking as to trigger operation of substantive due process." *People v. Washington*, 665 N.E.2d 1330, 1336 (Ill. 1996) (recognizing freestanding innocence claim under Illinois Constitution). Similarly a New York appellate court recognized a freestanding innocence claim because, like Pennsylvania's, New York's due process clause provides "greater protection than its federal counterpart as construed by the Supreme Court." *Hamilton*, 979 N.Y.S.2d at 107 ("Since a person who has not committed any crime has a liberty interest in remaining free from punishment, the conviction or incarceration of a guiltless person, which deprives that person of freedom of movement and

freedom from punishment and violates elementary fairness, runs afoul of the Due Process Clause of the New York Constitution. . . ." (internal quotation marks and citations omitted)); *see also Summerville v. Warden, State Prison*, 641 A.2d 1356, 1369 (Conn. 1994) (holding that "a substantial claim of actual innocence is cognizable by way of a petition for a writ of habeas corpus, even in the absence of proof by the petitioner of an antecedent constitutional violation"); *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996) (granting state habeas relief where petitioner alleged actual innocence as an independent claim), *superseded by statute on other grounds as stated in Ex parte Blue*, 230 S.W.3d 151, 162 n.46 (Tex. Crim. App. 2007); *State ex rel. Amrine v. Roper*, 102 S.W.2d 541, 543-44 (Mo. 2003) (recognizing that "the continued imprisonment and eventual execution of an innocent person is a manifest injustice" so that "a habeas petitioner under a sentence of death may obtain relief from judgment of conviction . . . upon a clear and convincing showing of actual innocence"); *Montoya v. Ulibarri*, 163 P.3d 476, 484 (N.M. 2007) (holding that "the conviction, incarceration, or execution of an innocent person violates all notions of fundamental fairness implicit within the due process provision" of the New Mexico Constitution).

394. Accordingly, this Court should recognize a freestanding claim of actual innocence under the Pennsylvania and federal constitutions. As to the merits of that claim, the federal courts have never articulated the precise burden of proving a right to relief on a freestanding innocence claim but have indicated that it is "extraordinarily high." *Herrera*, 506 U.S. at 391. Some of the states that have recognized the claim have required "clear and convincing evidence that the defendant is innocent." *Hamilton*, 979 N.Y.S.2d at 108; *see also Roper*, 102 S.W.3d at 543-44 (same).

395. Such evidence exists here.

396. First, and foremost, the two people closest to Jackson's shooting, Gregorio Mercado and Isaac Smith ("Midnight"), both knew Mr. Patterson, yet ***neither identified him as Jackson's shooter***. Similarly, Tashima Thompson did not identify Mr. Patterson in the surveillance footage even though she lived near him on Granite Street.

397. Second, Elvira Urena, who saw the shooting up close, told police, as did Mercado, that there were three people standing outside the store when Jackson was shot. Urena and Mercado were approximately 100 feet closer to the events than Brunache and Laventure, who claimed there were only two people outside the store, and Mercado's and Urena's accounts call Brunache's and Laventure's into significant question.

398. Third, a number of people, including Jackson's own mother and Mr. Patterson's neighbors Quintina and Tashima Thompson, identified another person, LaVar Washington, as being involved in the shooting, yet police accepted his alibi of being in the barber shop at the time of the shooting at face value without further investigation (and even though Midnight told police that Washington had left the barber shop before the shooting).

399. Fourth, as Professor Epstein's report demonstrates, it would have been nearly impossible for Brunache and Laventure to accurately identify Jackson's shooter given their vantage point over 100 feet away, coupled with other issues such as the use of a gun and the admittedly brief period of time during which the witnesses viewed the shooter's face that also likely undermined their ability to accurately identify the perpetrator.

400. Tellingly, the jury heard ***none*** of this evidence.

401. Furthermore, there is additional evidence of Mr. Patterson's innocence. Both Berry and Kareema placed Mr. Patterson at home at the time of the shooting (and the jury at the second trial heard only from Kareema, called, confusingly for the jury, by the Commonwealth). The Commonwealth never presented any motive for Mr. Patterson to have shot Jackson (much

less in broad daylight at a short distance), and a number of witnesses attest to their friendship. Officer Chandler told police that she saw Mr. Patterson outside his home at or about the same time she heard the third gunshot, making it nearly impossible for him to have been the shooter. Kenya Jones similarly met Mr. Patterson near his home right after hearing shots and went with him to the corner. And, Ruth Harmon heard Mr. Patterson screaming near Jackson's body and told police he appeared to be trying to help Jackson, behavior significantly at odds with having just committed the shooting.

402. In light of the strong evidence of innocence and weak Commonwealth case, this is an appropriate case in which to recognize a freestanding actual innocence clam and grant immediate relief.

E. Mr. Patterson Is Serving An Illegal Sentence And Must Be Re-Sentenced Pursuant To The United States Supreme Court's Decisions In *Miller v. Alabama, Jackson v. Hobbs,* and *Montgomery v. Louisiana*.

403. As discussed above, Mr. Patterson is a "juvenile lifer" who is entitled to re-sentencing pursuant to the United States Supreme Court's decisions in *Miller v. Alabama*, *Jackson v. Hobbs*, and *Montgomery v. Louisiana*. If the Court grants relief on any of the other claims raised in this petition, that will moot Mr. Patterson's re-sentencing, as he will be entitled to a new trial. If the Court does not grant relief on any of the other claims, it must proceed to consider the appropriate sentence for Mr. Patterson. As noted above, Mr. Patterson's counsel are conducting an investigation into issues relevant to re-sentencing and will seek to amend this petition to include such evidence should a re-sentencing phase become necessary. At this time, Mr. Patterson briefly outlines his re-sentencing claim to continue to preserve this issue.

1. Mr. Patterson Was Sentenced to Life Without Parole for a Crime He Allegedly Committed While a Juvenile.

404. The trial court sentenced Mr. Patterson to life without parole for first-degree murder on October 22, 2009. At the time, that sentence was mandatory. *See* 18 Pa. C.S. § 1102(a)(1), *effective* Dec. 16, 2008 to Oct. 24, 2012.

405. Jackson's shooting occurred on April 25, 2007.

406. Mr. Patterson was born on February 27, 1989. Therefore, he was a minor of 17 years old at the time of the crime for which he was convicted.

2. Mr. Patterson's Sentence of Mandatory Life Without Parole Violates the Eighth Amendment's Prohibition of Cruel and Unusual Punishment.

407. The United States Supreme Court, in *Miller v. Alabama* and *Jackson v. Hobbs*, 567 U.S. ---, 132 S. Ct. 2455 (2012), held that it was a violation of the Eighth Amendment's prohibition against cruel and unusual punishments to subject juvenile homicide offenders to mandatory sentences of life imprisonment without the possibility of parole.

408. The petitioners in *Miller* and *Jackson* were two individuals who each had committed a murder at the age of 14 and were subject to such mandatory sentences. *Id.* at 2457.

409. In holding the sentences to be unconstitutional, the *Miller* decision recognized that mandatory sentencing schemes that require juveniles to serve life in prison with no chance of parole are flawed because they do not account for differences between adults and juveniles and "prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionally punishes a juvenile offender." *Id.* at 2466. Juveniles lack maturity, have less developed brains, and are more subject to peer pressure than adults; yet, at the same time, juveniles are more capable of change and growth. Therefore, "they are less deserving of the most severe punishments." *Id.* at 2464 (quoting *Graham v. Florida*, 560 U.S. ---, 130 S. Ct. 2011 (2010)).

410. Accordingly, the United States Supreme Court held that "mandatory life without parole for those under age 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Id.* at 2460.

3. Mr. Patterson Is Entitled to Re-Sentencing Under *Miller v. Alabama*, *Montgomery v. Louisiana*, and *Commonwealth v. Batts*

411. Under *Miller*, Mr. Patterson is currently serving an unconstitutional sentence in violation of the Eighth Amendment.

412. In January 2016, the United States Supreme Court issued its decision in *Montgomery v. Louisiana*, --- U.S. ---, 136 S. Ct. 718 (2016), holding that "*Miller* announced a substantive rule [of constitutional law] that is retroactive in cases on collateral review." *Id.* at 732.

413. The Court explained that, "[l]ike other substantive rules, *Miller* is retroactive because it necessarily carries a significant risk that a defendant—here, the vast majority of juvenile offenders—faces a punishment that the law cannot impose upon him." *Id.* (internal quotation marks omitted). The Court emphasized that "*Miller* determined that sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption.'" *Id.* (quoting *Miller*, 132 S. Ct. at 2469).

414. On June 26, 2017, the Pennsylvania Supreme Court (which previously had held that *Miller* was not retroactive), issued its decision in *Commonwealth v. Batts*, No. 45 MAP 2016, 2017 WL 2735411 (Pa. June 26, 2017) ("*Batts II*"), which recognized that *Montgomery* applies to juveniles in Pennsylvania serving mandatory sentences of life without parole, regardless of whether they were sentenced before, or after, the *Miller* decision." *Id.* at *1.

415. The Court in *Batts II* further held that "a faithful application of the holding in *Miller*, as clarified in *Montgomery*, requires the creation of a presumption against sentencing a

juvenile offender to life in prison without the possibility of parole." *Id.* at *31. This presumption is strong and may only be overcome by proof, beyond a reasonable doubt, that "the juvenile is removed from [the] generally recognized class of potentially rehabilitatable offenders." *Id.*

416. The Supreme Court in *Batts II* also provided guidance to lower courts re-sentencing juveniles serving unconstitutional sentences under *Miller* and *Montgomery*. The Court preserved the "sentencing court's discretion to determine an appropriate, individualized sentence for a given offender." *Id.* at *36. Although the Court directed the sentencing court to "seek guidance" from Pennsylvania's amended juvenile first-degree murder sentencing statute, 18 Pa. C.S. § 1102.1(a), it specifically noted that this provision is "not directly applicable to juveniles" who, like Mr. Patterson were "convicted of first-degree murder prior to *Miller*." *Id.* Indeed, the Court noted that "[n]either party has argued that section 1102.1 must be applied to pre-*Miller* juvenile offenders" and that its instruction was only that sentencing courts should consider "the new legislative provision as guidance without making it mandatory." *Id.* at *36 n.25.

417. As a "juvenile lifer" currently serving an unconstitutional sentence, Mr. Patterson is entitled under *Miller*, *Montgomery*, and *Batts II* to a full and complete re-sentencing hearing that takes into account his individual characteristics, the rehabilitation he has undergone since his conviction, his likelihood for recidivism, and any other characteristics relevant to an appropriate sentence.

Discovery Request

418. "In PCRA proceedings, discovery is . . . permitted upon leave of court after a showing of exceptional circumstances." *Commonwealth v. Frey*, 41 A.3d 605, 611 (Pa. Super. 2012 (citing 42 Pa. C.S. § 9545(d)(2); Pa. R. Crim. P. 902(E)(1)). It is within the Court's

discretion to determine if Mr. Patterson's case is exceptional and warrants discovery. *Frey*, 41 A.3d at 611 (Pa. Super. 2012). Exceptional circumstances may be found where a case is "somewhat unusual," there is a reasonable possibility that another person is culpable, and there is a reasonable belief that the requested evidence may support one of petitioner's PCRA theories. *Id.* at 611-123.

419. Here, Mr. Patterson requests access to the full homicide file in this case. As discussed in this petition, from the materials available to Mr. Patterson, police appear to not have followed up on investigative leads pointing to other perpetrators such as LaVar Washington. In addition, from the materials available to Mr. Patterson, there does not appear to be any written record of Allan Brunache's interview with police that occurred before he gave an interview and statement on February 28, 2007. It seems unlikely that police would have wholly failed to investigate leads regarding other perpetrators and also seems unlikely that there is no record at all of the first Brunache interview. The full homicide file likely will shed additional light on these issues and the police investigation and further point to Mr. Patterson's innocence and the existence of another perpetrator—there can be no more exceptional circumstance.

420. Accordingly, Mr. Patterson's discovery request should be granted.[21]

The Issues Raised In This Petition Have Not Been Previously Litigated Or Waived

421. Under the PCRA, "the petitioner must plead and prove by a preponderance of the evidence . . . that the allegation of error has not been previously litigated or waived." 42 Pa.C.S.A. § 9543(A)(3). The allegations set forth above have not been previously litigated. Nor have they been waived, as they are being raised at the earliest opportunity in the proceedings.

[21] Counsel have also filed a Right to Know request for trial counsel's billing records, which may shed further light on his investigation and work (or lack thereof) on this case. The City has asked for additional time to respond to the request; should the request be denied, Mr. Patterson may seek the Court to compel the production of these records.

422. This is Mr. Patterson's first PCRA petition. Mr. Mandell represented Mr. Patterson at his trials and in his direct appeal. This is therefore Mr. Patterson's first opportunity to raise ineffective assistance of counsel, new evidence, and innocence claims. In addition, *Miller*, *Jackson*, and *Montgomery* were all decided after Mr. Patterson filed this petition; thus, this is also the first opportunity for Mr. Patterson to raise his sentencing claims. Accordingly, Mr. Patterson has not, and could not have, previously litigated or waived the claims presented here.

An Evidentiary Hearing Is Required

423. Mr. Patterson hereby requests an evidentiary hearing on his petition pursuant to Pennsylvania Rule of Criminal Procedure 902. A certification of witnesses is attached as Exhibit 31.

424. The witnesses expected to testify at Mr. Patterson's evidentiary hearing are as follows:

- Dontia Patterson;
- Lee Mandell
- Jules Epstein;
- Sean Morgan;
- Zachary Stern
- Gregorio Mercado;
- Elvira Urena;
- Charles Berry;
- Clifford Johnson;
- Gina Bennett;

- Marlissa Stone;
- Naja Debose;
- Cierra Debose;
- Rameek Smith; and
- Taneequa Armstrong.

425. The timeliness of Mr. Patterson's petition has been established. The claims he raises within this petition are not frivolous. On the contrary, this petition raises several material facts which, if uncontested by the Commonwealth or proven at an evidentiary hearing, establish the jurisdiction of this Court and entitle Mr. Patterson to relief. Unless the Commonwealth concedes Mr. Patterson's entitlement to relief, an evidentiary hearing is required. *See* Pa. R. Crim. P. 907 (providing that a PCRA petition may only be decided without a hearing "when the petition and answer show that there is no genuine issue concerning any material fact and that the defendant is entitled to relief as a matter of law"); *Commonwealth v. Williams*, 732 A.2d 1167, 1190 (Pa. 1999) (holding that PCRA court erred in dismissing claim without an evidentiary hearing where a "material factual controversy" existed regarding the credibility of expert witnesses).

426. Counsel who will represent Mr. Patterson on this petition are:

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427. Counsel are not waiving any other issue Mr. Patterson may have and reserve the right to supplement his petition pursuant to Pennsylvania Rule of Criminal Procedure 905(A).

Conclusion

428. In sum, this is a case where a juvenile facing life imprisonment for murder received wholly inadequate assistance from his trial and appellate counsel; counsel's failures require a new trial whether considered individually or cumulatively. The totality of the evidence also demonstrates Mr. Patterson's actual innocence of Jackson's shooting—something the jury would have seen had counsel performed his constitutional obligations in representing Mr. Patterson and something that also is an independent basis for a new trial.

429. In the alternative, if the Court does not agree that Mr. Patterson is entitled to a new trial, Mr. Patterson should be re-sentenced.

WHEREFORE, the Petitioner prays that this Honorable Court will grant relief in the form of an arrestment of judgment and/or a new trial. In addition, Petitioner asks this Court for leave to conduct additional discovery and to order an evidentiary hearing on the allegations contained in this Petition.

Respectfully submitted,

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Counsel for Dontia Patterson

Dated: August 16, 2017

IN THE COURT OF COMMON PLEAS
PHILADELPHIA COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA Respondent	:	
	:	CP-51-CR-0012287-2007
v.	:	
DONTIA PATTERSON Petitioner	:	

PROOF OF SERVICE

Nilam A. Sanghvi, Esquire, being duly sworn according to law does hereby state and aver that she is counsel for the petitioner in the above-captioned matter and that she has served by electronic filing and first-class mail, postage prepaid upon:

Samuel Ritterman, Esq.
Assistant District Attorney
PCRA Unit
Office of the Philadelphia District Attorney
Three South Penn Square
Philadelphia, PA 19107

a copy of the *Amended Petition for Post-Conviction Relief Pursuant to 42 Pa. C.S. § 9541, et seq.* being filed on behalf of the petitioner in the above-captioned matter.

/s/ *Nilam A. Sanghvi*

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August 16, 2017