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nilam.sanghvi@temple.edu

Counsel for Petitioner Andrew Swainson

IN THE PHILADELPHIA COUNTY COURT OF COMMON PLEAS

Commonwealth of Pennsylvania, Respondent	: :	
v.	:	CP-51-CR-0431311-1988
Andrew Swainson, Petitioner	: :	

EMERGENCY JOINT MOTION TO PRESIDENT JUDGE IDEE FOX TO AUTHORIZE AND/OR DIRECT PCRA HEARING TO BE SCHEDULED AND HELD FORTHWITH UTILIZING ADVANCED COMMUNICATION TECHNOLOGY

To the Honorable President Judge Idee Fox in the Philadelphia County Court of Common Pleas:

Petitioner Andrew Swainson, through his *pro bono* attorneys, files this *Emergency Joint Motion to President Judge Idee Fox to Authorize and/or Direct PCRA Hearing to be Scheduled and Held Forthwith Utilizing Advanced Communication Technology*.

On February 12, 2020, after a thorough investigation of the facts and analysis of the relevant case law, the Commonwealth filed an Answer and Joint Stipulations of Fact in the instant case in which it recognized and agreed that Mr. Swainson has proved that he was deprived of his constitutional right to a fair trial. The fundamentally unfair trial that culminated in Mr. Swainson's wrongful conviction occurred more than three decades ago and, as a result, Mr. Swainson has been unjustly incarcerated for more than 32 years. This PCRA matter has been fully briefed for over two months, and the parties advised the assigned PCRA judge (Judge Shelley Robins New) that they did not intend to present any witnesses. The PCRA Court was prepared to hold a short hearing on the matter on April 24, 2020. *See* Mar. 10, 2020 Scheduling Email from E. Keyser (attached as Exhibit A). The victim's family was informed of this date.

Now, however, due to the current judicial emergency, the PCRA Court refuses to hold the previously-scheduled hearing regarding Mr. Swainson's right to a new trial. The COVID-19 pandemic and the Pennsylvania Supreme Court's April 1, 2020 Second Supplemental Order demand judicial action in situations such as this where a wrongfully convicted man's freedom and safety are at stake. In this context and under these circumstances, the First Judicial District's continued refusal to make the court available to Mr. Swainson—through advanced communication technology or otherwise—constitutes a conscious indifference to his life and liberty.

After the announcement of court closures, the parties made every effort to adhere to the emergency protocols and to demonstrate that this matter can and should be heard forthwith using advanced communication technology, consistent with the Second Supplemental Order. The PCRA Court however continues to refuse to act—first by denying, without explanation, a joint emergency motion addressed to her and then denying, again without explanation, a joint emergency motion addressed to Your Honor. *See* Docket at 13 (attached as Exhibit B).

As Your Honor has recognized, however, while much judicial business is suspended, critical matters must still be addressed during this emergency—particularly if the matter involves "someone with the loss of freedom—such as in criminal matters." *See* KYW Podcast, *Three Judicial Leaders Navigate Philadelphia's Court System During the Corona Virus Pandemic*, *available at* https://kywnewsradio.radio.com/media/audio-channel/three-judicial-leaders-navigate-philadelphias-court-system-during-the (at 2:05-2:45) (last accessed Apr. 20, 2020) (describing the Court's efforts to keep its systems as operational as possible and recognizing that the current crisis is heightened in cases where people are incarcerated). There can be nothing more critical to life and liberty than having a hearing on a post-conviction petition that is ripe for decision—where the Commonwealth has conceded that the evidence proves that Mr. Swainson was denied his constitutional right to a fair trial—and that can be decided on the papers or with a short hearing involving no witnesses.

We therefore once again seek an Order from this Honorable Court on the motion filed with Your Honor on April 14, 2020 (attached as Exhibit C and incorporated fully by reference). The parties respectfully request that this Court direct that this essential matter be "dealt with procedurally as quickly as possible" by authorizing and/or directing the assigned PCRA judge to

schedule and make the necessary logistical arrangements for the hearing to be held on April 24, 2020 via advanced communication technology.

There is simply no time to waste. From the time the first joint emergency motion on April 7, 2020 was filed, to the date of this motion, the number of confirmed COVID-19 cases in the Pennsylvania Department of Corrections system has spiked from 4 inmates and 11 staff members to 27 inmates and 49 staff members, with 1 inmate death. *Compare* Apr. 7, 2020 Mot. at ¶ 10 (attached to Apr. 14, 2020 Mot. as Exhibit B) *with* "Inmate and Employee Testing, Last Updated Apr. 21, 2020," *available at* https://www.cor.pa.gov/Pages/COVID-19.aspx (last accessed Apr. 21, 2020). The report includes a COVID-19 positive staff member at SCI Dallas, where Mr. Swainson is incarcerated. Unfortunately, these confirmed positive cases will only continue to rise.

Other courts around the country have recognized the need to continue to rule on similarly-situated post-conviction petitions in recent weeks, despite the challenges facing the courts.[1] We urge this Court to do the same.

WHEREFORE, in light of the unique posture of this case and the COVID-19 crisis, the Petitioner prays that this Honorable Court grant this Emergency Joint Motion and Order that the hearing on Mr. Swainson's pending PCRA petition be scheduled for and held on April 24, 2020, or forthwith immediately thereafter, with the use of available advanced communication technology. A proposed order, reflecting the relief requested in this Emergency Joint Motion is attached.

[1] *See, e.g.*, Nat'l Registry of Exonerations, "Daniel Carnevale," *available at* https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5710 (outlining post-conviction proceedings and March 17, 2020 *nolle prosse* decision by Allegheny County Court of Common Pleas); *Smith v. Warden, Toledo Correctional Institution*, No. 1:12:-cv-425 (S.D. Ohio) (Apr. 9, 2020 Order granting federal habeas petition and recognizing need for immediate release in light of COVID-19 crisis) (attached as Exhibit D).

In the event this Honorable Court denies the relief requested herein, the parties jointly request findings of fact and conclusions of law be submitted in support of that denial so that Mr. Swainson may pursue his appellate rights.

Respectfully submitted,

/s/ *Nathan J. Andrisani*

Nathan J. Andrisani (PA ID No. 77205)
Jacqueline C. Gorbey (PA ID No. 312041)
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Craig M. Cooley (PA ID No. 315673)
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Nilam A. Sanghvi (PA ID No. 209989)
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Counsel for Andrew Swainson

Agreed as to substance and form:

/s/ *Patricia Cummings*

Patricia Cummings, Esquire
Andrew Wellbrock, Esquire
Conviction Integrity and Special Investigations Unit
Philadelphia District Attorney's Office
3 South Penn Square
Philadelphia, PA 19107

Counsel for the Commonwealth

Dated: April 21, 2020

IN THE PHILADELPHIA COUNTY COURT OF COMMON PLEAS
CRIMINAL DIVISION

Commonwealth of Pennsylvania,	:	
	:	
Respondent,	:	
	:	
v.	:	CP-51-CR-0431311-1988
	:	
Andrew Swainson,	:	
	:	
Petitioner.	:	
	:	

[Proposed] ORDER

On this ___ day of April, 2020, upon consideration of the *Emergency Joint Motion to President Judge Idee Fox to Authorize and/or Direct PCRA Hearing to be Scheduled Forthwith Utilizing Advanced Communication Technology*, it is HEREBY ORDERED that said motion is GRANTED. The PCRA hearing shall be scheduled for and held on April 24, 2020. The parties and Court shall confer by April ____, 2020 to make arrangements for the hearing to proceed on April 24, 2020 through the use of appropriate advanced communication technology.

By the Court:

_____

The Honorable Idee Fox

IN THE PHILADELPHIA COUNTY COURT OF COMMON PLEAS
CRIMINAL DIVISION

Commonwealth of Pennsylvania,	:	
	:	
Respondent,	:	
	:	
v.	:	CP-51-CR-0431311-1988
	:	
Andrew Swainson,	:	
	:	
Petitioner.	:	
	:	

VERIFICATION

The facts set forth in this Motion are true and correct to the best of the undersigned's personal knowledge, information, and belief and are verified subject to the penalties for unsworn falsification to authorities under Pennsylvania Crimes Code Section 4904 (18 Pa. C.S. § 4904).

/s/ *Nathan J. Andrisani*
Nathan J. Andrisani, Esquire

Counsel for Andrew Swainson

April 21, 2020

IN THE PHILADELPHIA COUNTY COURT OF COMMON PLEAS
CRIMINAL DIVISION

Commonwealth of Pennsylvania,	:	
	:	
Respondent,	:	
	:	
v.	:	CP-51-CR-0431311-1988
	:	
Andrew Swainson,	:	
	:	
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 the foregoing by electronic filing and email delivery, upon

Patricia Cummings, Esquire
Andrew Wellbrock, Esquire
Conviction Integrity and Special Investigations Unit
Philadelphia District Attorney's Office
3 South Penn Square
Philadelphia, PA 19107

/s/ *Nilam A. Sanghvi*
Nilam A. Sanghvi

Counsel for Andrew Swainson

April 21, 2020

EXHIBIT A

TEMPLE UNIVERSITY

Nilam Sanghvi <tuf33066@temple.edu>

FW: ANDREW SWAISON - CP 431311 (1988)

Keyser, Edward F. <Edward.Keyser@courts.phila.gov> Tue, Mar 10, 2020 at 4:29 PM
To: "nathan.andrisani@morganlewis.com" <nathan.andrisani@morganlewis.com>, "jacqueline.gorbey@morganlewis.com" <jacqueline.gorbey@morganlewis.com>, "craig.m.cooley@gmail.com" <craig.m.cooley@gmail.com>, Nilam Sanghvi <nilam.sanghvi@temple.edu>
Cc: "Koodathil, Anu" <Anu.Koodathil@courts.phila.gov>, "Malmgren, Lynn" <lynn.malmgren@courts.phila.gov>

Good afternoon.

At the direction of Judicial Chambers this matter has been rescheduled.

NCD: 4/24/20, CR 200, JUDGE ROBINS NEW.

*PLEASE NOTE THAT THE EFFECTUATION OF A HABEAS CORPUS WRIT SHOULD BE COORDINATED WITH SUPERVISORY STAFF OF COURTROOM OPERATIONS:

215-683-7095

Michael.Lanzalotti@courts.phila.gov

Gino.Giacomucci@courts.phila.gov

Edward Keyser

Scheduling Coordinator; PCRA Unit

Justice Juanita Kidd Stout Center for Criminal Justice

1301 Filbert Street, Suite 206

Philadelphia, PA, 19107

215.683.7523

EXHIBIT B

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0431311-1988

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Andrew Swaison

CASE INFORMATION

Cross Court Docket Nos: 1236 EDA 2006, 1597 EDA 2010

Judge Assigned: Robins New, Shelley
Date Filed: 04/25/1988
Initiation Date: 04/25/1988

OTN: M 343667-2
LOTN:
Originating Docket No: MC-51-CR-0314231-1988

Initial Issuing Authority:
Final Issuing Authority:

Arresting Agency: Philadelphia Pd
Arresting Officer: Affiant

Complaint/Incident #:

Case Local Number Type(s)	Case Local Number(s)
District Control Number	8818003831
Police Incident Number	8818003831
Legacy Microfilm Number	99002028
Legacy Docket Number	C8804313111

STATUS INFORMATION

Case Status: Closed

Status Date	Processing Status
08/18/2014	Awaiting PCRA Decision
01/18/2012	Completed
06/11/2010	Awaiting Appellate Court Decision
05/14/2010	Completed
12/11/2008	Awaiting PCRA Decision
12/10/2007	Completed
04/13/2006	Awaiting Appellate Court Decision
03/14/2006	Completed
10/13/1989	Migrated Final Disposition
04/25/1988	Migrated Case (Active)

Arrest Date: 03/18/1988

Complaint Date: 04/25/1988

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0431311-1988

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Andrew Swaison

CALENDAR EVENTS

Case Calendar Event Type	Schedule Start Date	Start Time	Room	Judge Name	Schedule Status
Post Sentence	10/06/2004	9:30 am	1106	Judge D. Webster Keogh	Scheduled
Post Sentence	12/08/2004	9:30 am	1106	Judge D. Webster Keogh	Scheduled
Post Sentence	12/15/2004	9:00 am	1106	Judge D. Webster Keogh	Scheduled
Post Sentence	01/27/2005	9:30 am	1106	Judge D. Webster Keogh	Scheduled
Post Sentence	03/01/2005	9:30 am	1106	Judge D. Webster Keogh	Scheduled
Post Sentence	04/06/2005	9:30 am	1106	Judge D. Webster Keogh	Scheduled
Post Sentence	05/18/2005	9:30 am	1106		Scheduled
Post Sentence	06/21/2005	9:30 am	200		Scheduled
Post Sentence	07/19/2005	9:30 am	1106	Judge D. Webster Keogh	Scheduled
Post Sentence	09/21/2005	9:30 am	1106	Judge D. Webster Keogh	Scheduled
Post Sentence	11/15/2005	9:30 am	1106	Judge D. Webster Keogh	Scheduled
Post Sentence	01/25/2006	9:30 am	1106	Judge D. Webster Keogh	Scheduled
Post Sentence	03/13/2006	9:30 am	1106	Judge D. Webster Keogh	Scheduled
Post Sentence	03/14/2006	9:30 am	1106	Judge D. Webster Keogh	Scheduled
PCRA	06/02/2009	9:00 am	607	Judge Shelley Robins New	Continued
PCRA	09/03/2009	9:00 am	607	Judge Shelley Robins New	Continued
PCRA	11/06/2009	9:00 am	607	Judge Shelley Robins New	Continued
PCRA	12/04/2009	9:00 am	607	Judge Shelley Robins New	Continued
PCRA	02/25/2010	9:00 am	607	Judge Shelley Robins New	Continued
PCRA	03/29/2010	9:00 am	607	Judge Shelley Robins New	Continued
PCRA	05/14/2010	9:00 am	607	Judge Shelley Robins New	Scheduled
PCRA	07/30/2015	9:00 am	206		Moved
PCRA	08/18/2015	9:00 am	206		Moved
PCRA	10/29/2015	9:00 am	206		Moved
PCRA	01/12/2016	9:00 am	206		Moved
PCRA	04/14/2016	9:00 am	206		Moved
PCRA	06/23/2016	9:00 am	206		Moved
PCRA	07/22/2016	9:00 am	801	Judge Shelley Robins New	Moved
PCRA	09/23/2016	9:00 am	802	Judge Shelley Robins New	Continued
PCRA	01/06/2017	9:00 am	1108	Judge Shelley Robins New	Continued
PCRA	03/10/2017	9:00 am	602	Judge Shelley Robins New	Continued
PCRA	05/19/2017	9:00 am	907	Judge Shelley Robins New	Continued
PCRA	09/15/2017	9:00 am	1102	Judge Shelley Robins New	Continued
PCRA	11/17/2017	9:00 am	1001	Judge Shelley Robins New	Continued
PCRA	01/19/2018	9:00 am	905	Judge Shelley Robins New	Continued
PCRA	03/16/2018	9:00 am	904	Judge Shelley Robins New	Continued

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0431311-1988

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Andrew Swaison

CALENDAR EVENTS

Case Calendar Event Type	Schedule Start Date	Start Time	Room	Judge Name	Schedule Status
PCRA	05/25/2018	9:00 am	1101	Judge Shelley Robins New	Continued
PCRA	07/20/2018	9:00 am	702	Judge Shelley Robins New	Continued
PCRA	09/14/2018	9:00 am	1101	Judge Shelley Robins New	Continued
PCRA	11/16/2018	9:00 am	502	Judge Shelley Robins New	Continued
PCRA	01/25/2019	9:00 am	200	Judge Shelley Robins New	Moved
PCRA	02/22/2019	9:00 am	708	Judge Shelley Robins New	Continued
PCRA	07/19/2019	9:00 am	1007	Judge Shelley Robins New	Continued
PCRA	11/22/2019	9:00 am	707	Judge Shelley Robins New	Continued
PCRA	03/27/2020	9:00 am	200	Judge Shelley Robins New	Cancelled

CONFINEMENT INFORMATION

Confinement Known As Of	Confinement Type	Destination Location	Confinement Reason	Still in Custody
03/27/1989	State Correctional Institution	SCI Dallas		Yes

DEFENDANT INFORMATION

Date Of Birth: 05/04/1965 City/State/Zip: BRONX, NY 10416

CASE PARTICIPANTS

Participant Type	Name
Defendant	Swaison, Andrew

CHARGES

Seq.	Orig Seq.	Grade	Statute	Statute Description	Offense Dt.	OTN
4	4		**18 § 907**	POSSESSING INSTRUMENTS OF CRIME	01/17/1988	M 343667-2
8	8		**18 § 2502**	MURDER-1ST DEGREE	01/17/1988	M 343667-2
10	10		**18 § 903**	CRIMINAL CONSPIRACY	01/17/1988	M 343667-2

DISPOSITION SENTENCING/PENALTIES

Disposition
Case Event
Sequence/Description
Sentencing Judge
Sentence/Diversion Program Type
Sentence Conditions
Disposition Date
Offense Disposition
Sentence Date
Incarceration/Diversionary Period
Final Disposition
Grade Section
Credit For Time Served
Start Date

Migrated Disposition

Migrated Dispositional Event
4 / POSSESSING INSTRUMENTS OF CRIME
Sabo, Albert F.
10/13/1989
Guilty
10/13/1989
Final Disposition
18 § 907

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0431311-1988

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Andrew Swaison

DISPOSITION SENTENCING/PENALTIES

Disposition

Case Event / Sequence/Description / Sentencing Judge / Sentence/Diversion Program Type / Sentence Conditions	Disposition Date / Offense Disposition / Sentence Date / Incarceration/Diversionary Period	Final Disposition / Grade / Section / Credit For Time Served / Start Date
Confinement	Min of 2.00 Years 6.00 Months Max of 5.00 Years	
8 / MURDER-1ST DEGREE	Guilty	18 § 2502
Sabo, Albert F.	10/13/1989	
Confinement	LIFE	
10 / CRIMINAL CONSPIRACY	Guilty	18 § 903
Sabo, Albert F.	10/13/1989	
Confinement	Min of 5.00 Years Max of 10.00 Years	

COMMONWEALTH INFORMATION

Name: Philadelphia County District Attorney's Office
Prosecutor
Supreme Court No:
Phone Number(s):
215-686-8000 (Phone)
Address:
3 South Penn Square
Philadelphia, PA 19107

ATTORNEY INFORMATION

Name: Nilam Ajit Sanghvi
Private
Supreme Court No: 209989
Rep. Status: Active
Phone Number(s):
Address:

ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
1	04/25/1988		Unknown Filer
Held for Court			
1	10/13/1989		Migrated, Filer
Migrated Automatic Registry Entry (Disposition) Text			
2	10/13/1989		Migrated, Filer
Disposition Filed			
3	10/13/1989		Migrated, Filer
Migrated Sentence			

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0431311-1988

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Andrew Swaison

ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
1	05/20/2004		Migrated, Filer
PSS CASE ENTRY SUFFIX A			
2	05/20/2004		Migrated, Filer
PSS ATTORNEY DATA			
1	08/25/2004		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
1	10/07/2004		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
2	10/07/2004		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
2	12/08/2004		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
1	12/09/2004		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
2	12/15/2004		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
2	01/27/2005		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
2	03/01/2005		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
2	04/06/2005		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
2	05/18/2005		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
2	06/21/2005		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0431311-1988

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Andrew Swaison

ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
2	07/19/2005		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
2	09/21/2005		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
2	11/15/2005		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
2	01/25/2006		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
2	03/13/2006		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
2	03/14/2006		Keogh, D. Webster
Order Denying Motion for DNA Testing			
3	03/14/2006		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
1	04/13/2006		Unknown Filer
Notice of Appeal to the Superior Court			
1	04/20/2006		Migrated, Filer
APPL FILE MAINT SUFFIX C			
2	04/20/2006		Migrated, Filer
APPEAL CASE FILED SUFFIX C			
1	05/10/2006		Migrated, Filer
APPL FILE MAINT SUFFIX C			
1	05/12/2006		Migrated, Filer
APPL FILE MAINT SUFFIX C			
2	05/12/2006		Migrated, Filer
APPL FILE MAINT SUFFIX C			

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0431311-1988

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Andrew Swaison

ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
1	05/15/2006		Migrated, Filer
APPL FILE MAINT SUFFIX C			
1	05/25/2006		Migrated, Filer
COURT APPOINTMENTS			
1	06/05/2006		Migrated, Filer
APPL FILE MAINT SUFFIX C			
1	06/08/2006		Migrated, Filer
APPL FILE MAINT SUFFIX C			
1	07/14/2006		Migrated, Filer
APPL FILE MAINT SUFFIX C			
1	02/16/2007		Court of Common Pleas - Philadelphia County
Certificate and Transmittal of Record to Appellate Court			
1	03/23/2007	03/21/2007	Superior Court of Pennsylvania - Eastern District
Superior Court Order			
1	06/01/2007		Court of Common Pleas - Philadelphia County
Certificate and Transmittal of Record to Appellate Court			
D41/D42/1	12/10/2007	10/23/2007	Superior Court of Pennsylvania - Eastern District
Affirmed - Superior Court			
D43/1	12/11/2008		Rodrigues, Sondra R.
Post-Conviction Relief Act Petition Filed			
D44/2	12/11/2008		Rodrigues, Sondra R.
Memorandum of Law			
D44A/1	04/22/2009		Woods-Skipper, Sheila
Judge Reassignment			

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0431311-1988

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Andrew Swaison

ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
D45/1	08/20/2009		Rodrigues, Sondra R.
Motion for Admission Pro Hac Vice of Craig M. Cooley, Esquire			
1	08/21/2009		Robins New, Shelley
Order Granting Motion to Admit Pro Hac Vice			
D46/1	08/24/2009	08/21/2009	Robins New, Shelley
PCRA Order			
1	09/03/2009		Robins New, Shelley
PCRA HEARING CONTINUED			
3	11/06/2009		Robins New, Shelley
PCRA HEARING CONTINUED			
D47/1	12/03/2009		Commonwealth Court of Pennsylvania
Motion to Dismiss			
D48/1	12/04/2009		Commonwealth of Pennsylvania
Motion to Dismiss			
2	12/04/2009		Robins New, Shelley
PCRA HEARING CONTINUED			
3	02/25/2010		Court of Common Pleas - Philadelphia County
Defense Request			
D49/1	03/26/2010		Rodrigues, Sondra R.
Reply to the Commonwealth Letter Brief In Opposition to Petitioner's 2nd PCRA Petition			
3	03/29/2010		Robins New, Shelley
PCRA Order			
D50/1	05/14/2010		Robins New, Shelley
Order Dismissing PCRA Petition			
D51/1	06/11/2010		Rodrigues, Sondra R.
Notice of Appeal to the Superior Court			

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0431311-1988

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Andrew Swaison

ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
Service To		Service By	
Issue Date	Service Type	Status Date	Service Status

Philadelphia County District Attorney's Office
06/11/2010 First Class
Robins New, Shelley
06/11/2010 First Class

D52/1 06/15/2010 Robins New, Shelley
Order Issued Pursant to Pa.R.A.P. 1925(b)
Philadelphia County District Attorney's Office
06/15/2010 First Class
Rodrigues, Sondra R.
06/15/2010 First Class

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1 07/27/2010 Court of Common Pleas - Philadelphia County
Preliminary Docket Entries Prepared

D53/1 08/09/2010 Robins New, Shelley
Order Issued Pursant to Pa.R.A.P. 1925(b)
Philadelphia County District Attorney's Office
08/09/2010 First Class
Rodrigues, Sondra R.
08/09/2010 First Class

D54/1 09/08/2010 Rodrigues, Sondra R.
Statement of Matters Complained on Appeal

D55/1 10/19/2010 Robins New, Shelley
Opinion

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2 10/19/2010 Court of Common Pleas - Philadelphia County
Appeal Docket Entries and Served

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0431311-1988

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Andrew Swaison

ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
3	10/19/2010		Court of Common Pleas - Philadelphia County
Certificate and Transmittal of Record to Appellate Court			
1	12/02/2011		Superior Court of Pennsylvania - Eastern District
Appeal of Denial of PCRA Affirmed			
1	08/18/2014		Cooley, Craig Mitchell
Post-Conviction Relief Act Petition Filed			
1	08/19/2014		Cooley, Craig Mitchell
Memorandum of Law			
1	08/21/2015		Gorbey, Jacqueline Cecile
Entry of Appearance			
1	04/14/2016		Philadelphia County District Attorney's Office
Answer/Response			
1	07/22/2016		Cooley, Craig Mitchell Gorbey, Jacqueline Cecile
Answer/Response			
1	09/16/2016		Gorbey, Jacqueline Cecile
Motion for Discovery			
4	09/23/2016		Robins New, Shelley
PCRA Order			
1	12/20/2016		Philadelphia County District Attorney's Office
Answer to Motion for Discovery			
1	12/23/2016		Andrisani, Nathan Joseph
Answer/Response			
1	01/06/2017		Robins New, Shelley
Order Granting Motion for Continuance			

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0431311-1988

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Andrew Swaison

ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
1	03/10/2017		Robins New, Shelley
Order Granting Motion for Continuance			
4	05/19/2017		Robins New, Shelley
PCRA Continued For Court's Interim Decision			
1	07/12/2017		Bluestine, Marissa Boyers
Entry of Appearance			
1	07/13/2017		Andrisani, Nathan Joseph
Motion for Leave			
2	07/13/2017		Andrisani, Nathan Joseph
PCRA - Amended PCRA Petition Filed			
1	07/14/2017		Gorbey, Jacqueline Cecile
Motion for Leave			
1	07/17/2017		Robins New, Shelley
Order Denying Motion to Seal			
1	09/12/2017		Gorbey, Jacqueline Cecile
Letter in Brief			
1	09/15/2017		Robins New, Shelley
Order Granting Motion for Continuance			
1	11/06/2017		Philadelphia County District Attorney's Office
Answer/Response			
1	11/15/2017		Gorbey, Jacqueline Cecile
Letter in Brief			
1	11/17/2017		Robins New, Shelley
PCRA Decision Held Under Advisement			
1	01/19/2018		Robins New, Shelley
PCRA Continued for Status			

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0431311-1988

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Andrew Swaison

ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
1	03/16/2018		Robins New, Shelley
Joint Request For Continuance			
1	05/25/2018		Robins New, Shelley
PCRA Continued for Status			
4	07/20/2018		Robins New, Shelley
Order Granting Motion for Continuance			
1	09/14/2018		Robins New, Shelley
Order Granting Motion for Continuance			
1	11/16/2018		Robins New, Shelley
PCRA Continued for Further Investigation by Commonwealth			
3	01/07/2019		Court of Common Pleas - Philadelphia County
Hearing Notice			
4	02/22/2019		Robins New, Shelley
Joint Request For Continuance			
1	07/19/2019		Robins New, Shelley
PCRA Continued For Further Filings By Commonwealth			
1	09/27/2019		Sanghvi, Nilam Ajit
Entry of Appearance			
1	11/18/2019		Gorbey, Jacqueline Cecile
PCRA - Amended PCRA Petition Filed			
1	11/22/2019		Robins New, Shelley
Order Granting Motion for Continuance			
1	02/12/2020		Philadelphia County District Attorney's Office
Answer to Petition for Post Conviction Relief			

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0431311-1988

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Andrew Swaison

ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
2	02/12/2020		Philadelphia County District Attorney's Office
Miscellaneous Motion Filed			
2	03/09/2020		Philadelphia County District Attorney's Office
Memorandum of Law			
1	04/07/2020		Sanghvi, Nilam Ajit
Motion for Extraordinary Relief			
1	04/14/2020		Sanghvi, Nilam Ajit
Miscellaneous Motion Filed			
1	04/15/2020		Robins New, Shelley
Order Denying Miscellaneous Motion			
Andrisani, Nathan Joseph			
04/15/2020	E-Mail		
Gorbey, Jacqueline Cecile			
04/15/2020	E-Mail		
2	04/15/2020		Robins New, Shelley
Order Denying Motion for Extraordinary Relief			

CASE FINANCIAL INFORMATION

Last Payment Date: 11/20/2019 — Total of Last Payment: -$12.50

Swaison, Andrew Defendant	Assessment	Payments	Adjustments	Non Monetary Payments	Total
Costs/Fees					
Motion Filing Fee (Philadelphia)	$12.50	($12.50)	$0.00	$0.00	$0.00
Motion Filing Fee (Philadelphia)	$12.50	($12.50)	$0.00	$0.00	$0.00
Costs/Fees Totals:	$25.00	($25.00)	$0.00	$0.00	$0.00
Grand Totals:	$25.00	($25.00)	$0.00	$0.00	$0.00

** - Indicates assessment is subrogated

EXHIBIT C

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Jacqueline C. Gorbey (PA ID No. 312041)
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nilam.sanghvi@temple.edu

Counsel for Petitioner Andrew Swainson

IN THE PHILADELPHIA COUNTY COURT OF COMMON PLEAS

Commonwealth of Pennsylvania, Respondent	: :	
v.	:	CP-51-CR-0431311-1988
Andrew Swainson, Petitioner	: :	

EMERGENCY JOINT MOTION TO AUTHORIZE AND/OR DIRECT APRIL 24, 2020 HEARING TO BE HELD UTILIZING AVAILABLE TECHNOLOGY PURSUANT TO THE PENNSYLVANIA SUPREME COURT'S APRIL 1, 2020 SECOND SUPPLEMENTAL ORDER

To the Honorable President Judge Idee Fox in the Philadelphia County Court of Common Pleas:

Petitioner Andrew Swainson, through his *pro bono* attorneys, files this *Emergency Joint Motion to Authorize and/or Direct April 24, 2020 Hearing to be Held Utilizing Available Technology Pursuant to the Pennsylvania Supreme Court's April 1, 2020 Second Supplemental Order.*

For the reasons set forth below, Petitioner and the Commonwealth, as evidenced by their signatures below, jointly move this Court to authorize and/or direct Judge Shelly Robins New to hold the previously scheduled hearing in this PCRA matter on April 24, 2020, and to go forward on that date via tele-conference or video conference consistent with the Pennsylvania Supreme Court's Orders regarding the current judicial emergency and Your Honor's Orders regarding the operation of the First Judicial District during this crisis.

Mr. Swainson, through counsel, filed his first emergency joint motion regarding his upcoming hearing date in front of Judge Shelley Robins New, who is presiding over his PCRA proceedings, on April 7, 2020 by e-filing and e-mailing Judge Robins New's law clerks. *See* Apr. 7, 2020 E-mail to L. Malmgren (attached as Exhibit A); Apr. 7, 2020 Joint Emergency Motion (attached as Exhibit B); Apr. 7, 2020 E-mail Confirmation of E-Filing (attached as Exhibit C). Prior to filing said motion on April 7, 2020, Judge Robins New's law clerk responded to an email inquiry regarding the status of the April 24, 2020 PCRA hearing by indicating the Court was in need of guidance from Court Administration regarding whether the previously scheduled hearing could go forward on April 24, 2020. *See* Apr. 2, 2020 E-mail from L. Malmgren (attached as Exhibit D).

Because time is of the essence and Mr. Swaison's life and liberty are at stake, we now seek an Order from this Honorable Court to authorize and/or direct Judge Robins New to make

the necessary logistical arrangements for the hearing to be held via available advanced communication technology.

BACKGROUND RE: ANDREW SWAINSON'S PCRA PETITION

1. On March 21, 1989, Andrew Swainson was convicted of first-degree murder in connection with the January 1988 shooting of Stanley Opher.[1] Mr. Swainson has always maintained his innocence. The only two witnesses to implicate him at trial have both recanted, and a recent investigation by the Conviction Integrity Unit (CIU) at the Philadelphia County District Attorney's Office has revealed a trove of exculpatory and impeachment evidence that had previously been suppressed in violation of *Brady v. Maryland* and its progeny.

2. Mr. Swainson's currently pending PCRA petition, his third, was filed on August 18, 2014, and has since been amended twice as additional evidence of the due process violations in this case have come to light.

3. On February 23, 2018, Mr. Swainson, through his attorneys, submitted a formal request that the CIU review and investigate his case and claim of innocence.

4. Mr. Swainson filed his most recent amendment on November 18, 2019. *See* Nov. 18, 2019 Second Amended PCRA Pet'n (attached without exhibits as Exhibit F).

5. After Mr. Swainson filed that amendment, the CIU continued its ongoing investigation. On February 12, 2020, the Commonwealth answered Mr. Swainson's amended PCRA petition. *See* Feb. 12, 2020 Commw. Answer (attached to Apr. 7, 2020 Mot. as Exhibit 2). It agreed that Mr. Swainson is entitled to relief on his due process claims—specifically, that the Commonwealth violated Mr. Swainson's constitutional rights by suppressing: critical impeachment evidence; evidence that completely undermined the Commonwealth's trial theory

[1] Mr. Swainson has no other criminal convictions. *See* Andrew Swainson Court Summary (attached as Exhibit E).

that Mr. Swainson had been a fugitive; and evidence of alternate suspects. *See id.* at ¶¶ 132-141. That same day, the parties filed detailed joint stipulations of facts underlying the Commonwealth's position and demonstrating Mr. Swainson's right to PCRA relief. *See* Feb. 12, 2020 Joint Stipulations of Fact (attached to Apr. 7, 2020 Mot. as Exhibit 3).

6. At the time of the Commonwealth's filing, this matter was listed for a hearing before Judge Robins New on March 27, 2020. *See* Docket at 3 (attached as Exhibit G).

7. On February 27, 2020 counsel for both Mr. Swainson and the Commonwealth met with Judge Robins New's law clerks in City Hall to discuss logistics in preparation for the scheduled March 27 hearing.

8. On March 4, 2020, counsel for both Mr. Swainson and the Commonwealth spoke by telephone with Judge Robins New's law clerk, who communicated that the Court might continue the hearing to April 24, 2020, if it could not be heard on the afternoon of March 27, 2020. In response, counsel for Mr. Swainson and the Commonwealth reiterated their common view that this matter should and could be decided based on the filings by both parties. They also stated that they did not intend to call witnesses at the hearing and instead would read the stipulations into the record and offer brief arguments (pursuant to the Court's request that argument be limited to five minutes per side). The law clerk then communicated the Court's request for a stipulation that the District Attorney's Office had contacted the victim's family and apprised his relatives of the status of the case and the date of the hearing.

9. On March 9, 2020, the Court informed the parties that the March 27 hearing had been continued and re-scheduled for a video-conference hearing on April 24, 2020. *See* Mar. 9, 2020 E-Mail from L. Malmgren (attached as Exhibit H).

10. That same day, the Commonwealth filed a stipulation detailing its contacts with the victim's family members and confirming that they had been informed of the hearing date. *See* Mar. 9, 2020 Stipulation (attached as Exhibit I).

11. In the meantime, the District Attorney's Office also requested that Mr. Swainson be transferred from his home prison of SCI Dallas to SCI Phoenix so that he could be present at the April 24, 2020 hearing.

12. On March 31, 2020, counsel for Mr. Swainson e-mailed Judge Robins New's law clerks to inform the Court that the request for Mr. Swainson's transfer had been rescinded in light of the COVID-19 crisis and also requested an opportunity to discuss the best way to move forward with the hearing on April 24, 2020 via video conference or other means, particularly in light of the heightened risk of transmission of the coronavirus in prisons. *See* Mar. 31, 2020 E-mail from N. Andrisani (attached as Exhibit J).

13. On April 2, 2020, Judge Robins New's law clerks responded that any discussion would be premature in light of the extension of the court closure and that judges were awaiting guidance regarding court administration matters, including dealing with backlogs and scheduling of hearings. *See* Exh. C, Apr. 2, 2020 E-mail from L. Malmgren.

THE PENNSYLVANIA SUPREME COURT'S SECOND SUPPLEMENTAL ORDER

14. According to the Pennsylvania Supreme Court's April 1, 2020 Second Supplemental Order *In Re: General Statewide Judicial Emergency*: "The Court continues to specifically AUTHORIZE AND ENCOURAGE use of advanced communication technology to conduct court proceedings, subject only to constitutional limitations."

15. "Advanced communication technology includes, but is not limited to: systems providing for two-way simultaneous communication of image and sound; closed-circuit

television; telephone and facsimile equipment; and electronic mail." *In re: General Statewide Judicial Emergency*, Nos. 531 and 532 Judicial Administration Docket, Second Suppl. Order at 4 (Pa. Apr. 1, 2020) (*per curiam*) (emphasis in original) (hereinafter "Second Suppl. Order") (citing Pa.R.J.A. No. 1952(A)(2)(e) & comment (citing Rule of Criminal Procedure 103 for the definition of advanced communication technology)).

16. Further, the Supreme Court's April 1, 2020 Order provides that, to the extent that matters such as this one "could be handled through advanced communication technology consistent with constitutional limitations, they **may and should proceed**." *Id.* at 5 (emphasis added).

17. The Court broadened the scope of business courts may conduct from its prior order and "CLARIFIE[D] that it expects that non-essential matters can continue to move forward, within the sound discretion of President Judges, so long as judicial personnel, attorneys, and other individuals can and do act in conformity with orders and guidance issued by the executive branch." *Id.* (emphasis in original).

ORDERS AND GUIDANCE FROM THE FIRST JUDICIAL DISTRICT

18. Following the Pennsylvania Supreme Court's Second Supplemental Order, this Court issued its Administrative Order No. 29 of 2020 regarding civil litigation during the COVID-19 crisis. The Court directed that steps be taken to "advance civil litigation in a safe manner consistent with appropriate social distancing practices." Apr. 8, 2020 Administrative Order No. 29 of 2020, *In re: Civil Litigation during the COVID-19 crisis*. These steps include continuing with discovery and conducting depositions remotely, where possible, by using telephones, videoconferences, or similar technology. *Id.*

19. Consistent with this, Supervising Judge Arnold New expressed to the state civil litigation section of the Philadelphia Bar Association at its April 6, 2020 town hall meeting that "the legal system should be moving forward." *See* Apr. 7, 2020 E-mail from J. Strokovsky (attached as Exhibit K).

20. "The PCRA system is not part of the criminal proceeding itself, but is, in fact, civil in nature." *Commonwealth v. Haag*, 809 A.2d 271, 284 (Pa. 2002). These directives therefore should not only apply with equal force to this PCRA matter, they should apply with greater force given the life and liberty interests at stake as described more fully herein.

THE EMERGENT NEED TO PROCEED WITH THE PCRA HEARING SCHEDULED PREVIOUSLY FOR APRIL 24, 2020

21. As of the filing of this Second Emergency Joint Motion, Pennsylvania continues to be in a state of public health emergency due to the novel coronavirus, COVID-19.

22. That emergency is spreading through the prison system more quickly than had been anticipated.

23. The most recent report from the Pennsylvania Department of Corrections (DOC) is that 14 inmates and 22 staff members have tested positive for COVID-19, with 1 inmate death due to the virus; as the DOC acknowledges, the staff numbers are reliant on self-reporting. *See* Pa. DOC Coronavirus Dashboard, *available at* https://www.cor.pa.gov/Pages/COVID-19.aspx (last accessed Apr. 13, 2020). These numbers have already risen from the 4 positive inmates and 11 positive DOC staff members that had been reported as of Mr. Swainson's April 7th Emergency Joint Motion filed before Judge Robins New. *See* Apr. 7, 2020 Mot. at ¶ 10.

24. The experience in our county jails and in other prison systems throughout this country shows that the spread reflected above is just the beginning for a variety of reasons.

25. As the attached graphs put together by the Defender Association of Philadelphia show, the rate of infection in Philadelphia jails has spiked dramatically (as of April 3, 2020 standing at 7.11 positive tests per 1,000 people) since the first cases were reported in late March and is significantly higher than the infection rate for the general public. *See* Defender Ass'n Graphs (attached as Exhibit 1 to Apr. 7, 2020 Mot.); *see also, e.g.*, "Illinois Prisoners Sick with COVID-19 'Overwhelm' Joliet Hospital," ABC7 Eyewitness News, Mar. 30, 2020 (reporting on the rapid spread of the novel coronavirus among Illinois prisoners), *available at* https://abc7chicago.com/health/illinois-prisoners-sick-with-covid-19-overwhelm-joliet-hospital/6064085/?fbclid=IwAR0j_sUzSiykPgEgLTDf_Yx8B3VmgBKfU2SQFCmLwKGXtabc8qIszwA2uM4 (last accessed Apr. 11, 2020).

26. Simply put, it is impossible to practice social distancing in the prison environment, and the transmission risk is therefore high.[2]

[2] On March 30, 2020, during the initial period of judicial emergency, the ACLU of Pennsylvania, on behalf of the Pennsylvania Prison Society and detained individuals, asked the Pennsylvania Supreme Court to exercise its King's Bench jurisdiction to protect public health by ordering the county Courts of Common Pleas to release some people from county jails, particularly those most vulnerable to the coronavirus. The petition argued, among other things, that social distancing measures necessary to "flatten the curve" are impossible in the prison and jail environment. The Supreme Court denied the petition, but it recognized that "[t]he potential outbreak of COVID-19 in the county correctional institutions of this Commonwealth poses an undeniable threat to the health of the inmates, the correctional staff and their families, and the surrounding communities." *In re: Pet'n of the Pa. Prison Soc'y*, No. 70 MM 220, Order at 1-2 (Pa. Apr. 3, 2020) (*per curiam*). Therefore, our Supreme Court has directed President Judges to consider ways to safely depopulate jails. *Id.* at 2-3. On April 10, 2020, Governor Tom Wolf similarly recognized the need to safely depopulate county prisons, announcing that he would use his constitutional reprieve power to work with the DOC on this important issue. *See* "Gov. Wolf: Department of Corrections to Establish Temporary Program to Reprieve Sentences of Incarceration," *available at* https://www.governor.pa.gov/newsroom/gov-wolf-department-of-corrections-to-establish-temporary-program-to-reprieve-sentences-of-incarceration/ (last accessed Apr. 11, 2020).

ANDREW SWAINSON, WHO IS A HIGH RISK INDIVIDUAL IF HE CONTRACTS THE NOVEL CORONAVIRUS, COVID-19, HAS PROVEN HE IS ENTITLED TO A NEW TRIAL

27. Mr. Swainson is almost 55 years old; his date of birth is May 4, 1965.

28. The CDC has advised that older adults are at a higher risk of infection and severe illness and death. *See* "People Who Are at Higher Risk," Centers for Disease Control and Prevention, *available at* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html (last accessed Apr. 11, 2020). Although Mr. Swainson is younger than the age of 65 cited by the CDC, studies show incarceration decreases life expectancy. *See, e.g.*, "Incarceration Shortens Life Expectancy," Prison Policy Initiative, *available at* https://www.prisonpolicy.org/blog/2017/06/26/life_expectancy/ (last accessed Apr. 11, 2020).

29. After substantial investigation and careful consideration of the individual facts of Mr. Swainson's case and the relevant case law, the Commonwealth has agreed that Mr. Swainson's conviction "resulted from a violation of his right to due process as described by *Brady* and its progeny, i.e., the suppression of evidence that would have changed the outcome of his trial, as well as the Commonwealth's reliance on false testimony in violation of *Napue*" and that he is entitled to have that conviction vacated. *See* Apr. 7 Mot. Exh. 2, Feb. 12, 2020 Commw. Answer at ¶ 144.

30. Before the current public health and court emergencies, the Court and the parties were all reportedly prepared to proceed with a hearing on April 24, 2020 that would include reading into the record the Joint Stipulations of Fact (filed on Feb. 12, 2020 and attached to Apr. 7, 2020 Mot. as Exhibit 3) and brief argument by counsel.

31. If a hearing on this matter continues to be delayed due to the ever-evolving conditions in this unprecedented pandemic, there is a significant risk that a man, who the Commonwealth has acknowledged has been wrongfully incarcerated for 32 years, could die in

prison during this crisis. *See, e.g.*, "Innocent Prisoners Are Going to Die of the Coronavirus," The Atlantic (Mar. 31, 2020), *available at* https://www.theatlantic.com/ideas/archive/2020/03/americas-innocent-prisoners-are-going-die-there/609133/ (last accessed Apr. 11, 2020); "Inmates with Ongoing Innocence Claims Sit in Prisons Threatened by Coronavirus as Courts Shut Down," The Chicago Tribune (Apr. 8, 2020), *available at* https://www.chicagotribune.com/coronavirus/ct-coronavirus-inmates-wrongful-convictions-20200408-22xxm3ly6bgsjnu3c4syjmdpny-story.html?fbclid=IwAR0soEcjX9zG2nvlo5NmCOnlnC7ZC3K_WikfcDuvwDSM5YuomciuCA26yBo (last accessed Apr. 11, 2020).

MR. SWAINSON KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVES HIS RIGHT TO BE PRESENT DURING HIS PCRA HEARING

32. Pennsylvania Rule of Criminal Procedure 908(C) requires PCRA courts to permit a defendant to be present at a post-conviction evidentiary hearing. However, as with other hearings, Mr. Swainson may waive that right if he chooses to do so. Due to limitations on mail and travel at this time, counsel could not obtain a written waiver from Mr. Swainson. However, counsel obtained an oral waiver. Specifically, counsel spoke with Mr. Swainson on Monday, April 6, 2020 , and Mr. Swainson has knowingly, voluntarily and intelligently agreed to waive his physical presence at the hearing. He has authorized his counsel to proceed with the hearing in his absence. Mr. Swainson affirmed that waiver again on April 13, 2020 before the filing of this motion. Mr. Swainson and/or his counsel will make a representation to the Court and will put on the record Mr. Swainson's knowing, voluntary and intelligent waiver of his presence at the outset of the hearing.

THE VICTIM'S FAMILY HAS RECEIVED NOTICE OF THE APRIL 24, 2020 HEARING AND ARRANGEMENTS FOR ACCESS TO VIDEOCONFERENCING WILL BE MADE AVAILABLE TO THEM

33. On March 12, 2020, before the Court's most recent closure, the Commonwealth informed the victim's sister that the hearing was set for April 24, 2020.

34. The Commonwealth will ensure that the victim's sister is able to virtually attend a videoconference hearing through the use of Zoom, Microsoft Teams, or some other publicly available software.

35. The use of publicly available software will further allow any other interested members of the public to attend the hearing virtually as well.

WHEREFORE, in light of the unique posture of this case and the COVID-19 crisis, the Petitioner prays that this Honorable Court grant this Emergency Joint Motion and Authorize and/or Direct (and Order if necessary) that the April 24, 2020 hearing on the pending PCRA petition move forward as scheduled with the use of available advanced communication technology.

A proposed order, reflecting the relief requested in this Emergency Joint Motion is attached.

Respectfully submitted,

/s/ *Nathan J. Andrisani*

Nathan J. Andrisani (PA ID No. 77205)
Jacqueline C. Gorbey (PA ID No. 312041)
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Nilam A. Sanghvi (PA ID No. 209989)
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1515 Market Street, Suite 300
Philadelphia, PA 19102

Counsel for Andrew Swainson

Agreed as to substance and form:

/s/ *Patricia Cummings*
Patricia Cummings, Esquire
Andrew Wellbrock, Esquire
Conviction Integrity and Special Investigations Unit
Philadelphia District Attorney's Office
3 South Penn Square
Philadelphia, PA 19107

Counsel for the Commonwealth

Dated: April 14, 2020

IN THE PHILADELPHIA COUNTY COURT OF COMMON PLEAS
CRIMINAL DIVISION

Commonwealth of Pennsylvania,	:	
	:	
Respondent,	:	
	:	
v.	:	CP-51-CR-0431311-1988
	:	
Andrew Swainson,	:	
	:	
Petitioner.	:	
	:	

[Proposed] ORDER

On this ___ day of April, 2020, upon consideration of the *Emergency Joint Motion to* Authorize and/or Direct the April 24, 2020 Hearing to be Held *Utilizing Available Technology in Light of COVID-19 Crisis and per the Pennsylvania Supreme Court's April 1, 2020 Second Supplemental Order*, it is HEREBY ORDERED that said motion is GRANTED. The parties and Court shall confer by April ____, 2020 to make arrangements for the hearing to proceed on April 24, 2020 through the use of appropriate advanced communication technology.

By the Court:

_____

The Honorable Idee Fox

IN THE PHILADELPHIA COUNTY COURT OF COMMON PLEAS
CRIMINAL DIVISION

Commonwealth of Pennsylvania,	:	
	:	
Respondent,	:	
	:	
v.	:	CP-51-CR-0431311-1988
	:	
Andrew Swainson,	:	
	:	
Petitioner.	:	
	:	

VERIFICATION

The facts set forth in this Motion are true and correct to the best of the undersigned's personal knowledge, information, and belief and are verified subject to the penalties for unsworn falsification to authorities under Pennsylvania Crimes Code Section 4904 (18 Pa. C.S. § 4904).

/s/ *Nathan J. Andrisani*
Nathan J. Andrisani, Esquire

Counsel for Andrew Swainson

April 14, 2020

IN THE PHILADELPHIA COUNTY COURT OF COMMON PLEAS
CRIMINAL DIVISION

Commonwealth of Pennsylvania,	:	
	:	
Respondent,	:	
	:	
v.	:	CP-51-CR-0431311-1988
	:	
Andrew Swainson,	:	
	:	
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 the foregoing by electronic filing and email delivery, upon

Patricia Cummings, Esquire
Andrew Wellbrock, Esquire
Conviction Integrity and Special Investigations Unit
Philadelphia District Attorney's Office
3 South Penn Square
Philadelphia, PA 19107

/s/ *Nilam A. Sanghvi*
Nilam A. Sanghvi

Counsel for Andrew Swainson

April 14, 2020

EXHIBIT A

From: Andrisani, Nathan J.
Sent: Tuesday, April 7, 2020 12:32 PM
To: Lynn Malmgren
Cc: Lynn; Andrew Wellbrock; Patricia Cummings; Patrick <Patrick.Brown@courts.phila.gov>, Michael <Michael.Bonner@courts.phila.gov>, Kathleen O.
Subject: RE: Swainson hearing

Importance: High

Lynn,

Good afternoon. I hope this note finds you, your family and your loved ones doing well. As a follow up to our communications below, I am writing to you to give you and the Judge a heads-up that, due to the rapidly changing conditions during these bizarre and crazy days of the COVID-19 pandemic, we are going to file an emergency motion to have the hearing on April 24 through the utilization of available advanced communications technology. I will send you a copy of the papers that we file. Please let me know if you have any questions or wish to discuss. Thanks. Be well.

Have a great day.

Nate

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nathan.andrisani@morganlewis.com | www.morganlewis.com
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---

From: Andrisani, Nathan J. <nathan.andrisani@morganlewis.com>
Sent: Thursday, April 2, 2020 5:33 PM
To: Lynn Malmgren <lynn.malmgren@runbox.com>
Cc: Lynn <lynn.malmgren@courts.phila.gov>; Andrew Wellbrock <andrew.wellbrock@phila.gov>; Patricia Cummings <Patricia.Cummings@Phila.gov>; Patrick <Patrick.Brown@courts.phila.gov>, Michael <Michael.Bonner@courts.phila.gov>, Kathleen O. <Kathleen.Paris@courts.phila.gov>
Subject: RE: Swainson hearing

Lynn,

I am very sorry to hear that you have been dealing with a family medical emergency. I hope that the situation is improving on that front. Good luck. Thank you very much for getting back to me. Obviously, the current situation is difficult and frustrating for us all with respect to this matter (as well as with many other things in life right now). We appreciate your efforts to work with us and we hope that during the week of May 4 we can connect and get this matter back on track. Until then, be well. Best to all of you and your families.

Have a great day.

Nate

Nathan J. Andrisani
Morgan, Lewis & Bockius LLP
1701 Market Street | Philadelphia, PA 19103-2921
Direct: +1.215.963.5362 | Main: +1.215.963.5000 | Fax: +1.215.963.5001 | Mobile: +1.610.996.6585
nathan.andrisani@morganlewis.com | www.morganlewis.com
Assistant: Donna M. Gappa | +1.215.963.4858 | donna.gappa@morganlewis.com

From: Lynn Malmgren <lynn.malmgren@runbox.com>
Sent: Thursday, April 2, 2020 11:27 AM
To: Andrisani, Nathan J. <nathan.andrisani@morganlewis.com>
Cc: Lynn <lynn.malmgren@courts.phila.gov>; Andrew Wellbrock <andrew.wellbrock@phila.gov>; Patricia Cummings <Patricia.Cummings@Phila.gov>; Patrick <Patrick.Brown@courts.phila.gov>, Michael <Michael.Bonner@courts.phila.gov>, Kathleen O. <Kathleen.Paris@courts.phila.gov>
Subject: Re: Swainson hearing

[EXTERNAL EMAIL]

Forgive my delayed response; I've been dealing with a family medical emergency.

As of today, the Courts will not reopen until May 4th. I have discussed this matter with Judge Robins New who thinks that a conference call is premature. She has no control over a great many unresolved issues in FJD court administration, both criminal and civil, that will be addressed only when its offices are back in operation. If we are lucky, that will be in the week of May 4th. Whenever it is, court administration will issue to the judges its guidance on how to address the backlog of matters that are accumulating during this crisis, including the scheduling of hearings.

I am sorry we cannot be more helpful. At the same time, I sincerely wish you and your families well during this "new normal."

Lynn

On Tue, 31 Mar 2020 21:44:21 +0000, "Andrisani, Nathan J." wrote:

> Lynn,
>
> Good afternoon. I hope this note finds you and your family well and managing through these very strange, stressful and trying times.
>
> I am reaching out to you to let you know that given the current Court emergency and COVID-19-related health risks, the Commonwealth has contacted the DOC to retract the request to have Mr. Swainson transferred to SCI Phoenix so he can be brought to Court for the hearing scheduled on April 24. We understand from the DOC that all prisoner transfers and bring down orders have been suspended indefinitely. If it is possible for the Court to hold the hearing on April 24 via video-conference as indicated below - or by conference call - we will make arrangements to waive Mr. Swainson's presence and proceed in whatever manner Judge Robins New finds suitable. Given the rather unique circumstances of Mr. Swainson's pending motion, the Commonwealth's response, the COVID-19 health emergency and the heightened risk of widespread transmission if/when the virus invades a prison, as well as the overall uncertainty we are all confronting on a daily basis, I wanted to reach out to you to see if you would be available for a call with me and the Commonwealth's attorneys (ADAs Patricia Cummings and Andrew Wellbrock) to discuss how best to try to manage this situation and make preparations for the hearing on April 24 (or some other date).

>
> Thank you very much for your continued attention to this matter and consideration of this request. Be well.
>
> Have a great day.
>
> Nate
>
> Nathan J. Andrisani
> Morgan, Lewis & Bockius LLP
> 1701 Market Street | Philadelphia, PA 19103-2921
> Direct: +1.215.963.5362 | Main: +1.215.963.5000 | Fax: +1.215.963.5001 | Mobile: +1.610.996.6585
> nathan.andrisani@morganlewis.com | www.morganlewis.com
> Assistant: Donna M. Gappa | +1.215.963.4858 | donna.gappa@morganlewis.com
>
> From: Malmgren, Lynn
> Sent: Monday, March 9, 2020 9:42 AM
> To: Andrisani, Nathan J.
> Subject: Swainson hearing
>
> [EXTERNAL EMAIL]
> Dear Counsel:
>
> We have asked for a video-conferenced hearing for Andrew Swainson on Friday, April 24, 2020. I hope to know the exact time later today.
>
> Please call if you have questions.
>
> Lynn
>
> _____
> Lynn Malmgren, Esq.
> Law Clerk to The Honorable Shelley Robins New
> Chambers CH 673:
> Tel. 215-686-2961 Fax. 215-686-9547
> Court Room CH 625:
> Tel. 215-686-4310 Fax. 215-686-3703
>
>
>
> From: Andrisani, Nathan J.
> Sent: Wednesday, March 4, 2020 12:37 PM
> To: Malmgren, Lynn ; Andrew Wellbrock
> Subject: RE: Voicemail
>
> CAUTION: This email originated from outside the organization. Do not click on links or open any attachments unless you recognize the sender and confirmed the content is safe.
>
> That works for me.
>
> Have a great day.
>

> Nate
>
> Nathan J. Andrisani
> Morgan, Lewis & Bockius LLP
> 1701 Market Street | Philadelphia, PA 19103-2921
> Direct: +1.215.963.5362 | Main: +1.215.963.5000 | Fax: +1.215.963.5001
> nathan.andrisani@morganlewis.com | www.morganlewis.com
> Assistant: Donna M. Gappa | +1.215.963.4858 | donna.gappa@morganlewis.com
>
> From: Malmgren, Lynn >
> Sent: Wednesday, March 4, 2020 12:36 PM
> To: Andrew Wellbrock >
> Cc: Andrisani, Nathan J. >
> Subject: RE: Voicemail
>
> [EXTERNAL EMAIL]
> How about 3:30? I'll be sure to be at my desk.
>
> Lynn
>
> From: Andrew Wellbrock >
> Sent: Wednesday, March 4, 2020 11:59 AM
> To: Malmgren, Lynn >
> Cc: Andrisani, Nathan J. >
> Subject: Voicemail
>
> CAUTION: This email originated from outside the organization. Do not click on links or open any attachments unless you recognize the sender and confirmed the content is safe.
>
> Lynn-
>
> Nate and I just tried to three-way call over to you, but you were down in the courtroom.
>
> Is there a good time today to call back? I'm available any time with the exception of 2pm to 3pm.
>
> Thanks,
>
> Andrew Wellbrock
> Assistant District Attorney
> Conviction Integrity Unit
> District Attorney's Office
> Three South Penn Square
> Philadelphia, PA 19107
> (o) 215-686-8738
> (f) 215-686-8765
> andrew.wellbrock@phila.gov
>
>
> DISCLAIMER
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> e-mail and delete the original message.

Lynn Malmgren

215-768-5568 (mobile)

215-686-9564 (office)

EXHIBIT B

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Jacqueline C. Gorbey (PA ID No. 312041)
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Tel.: (215) 204-4255
nilam.sanghvi@temple.edu

Counsel for Petitioner Andrew Swainson

IN THE PHILADELPHIA COUNTY COURT OF COMMON PLEAS

Commonwealth of Pennsylvania, Respondent	: :	
v.	:	CP-51-CR-0431311-1988
Andrew Swainson, Petitioner	: :	

EMERGENCY JOINT MOTION TO UTILIZE AVAILABLE TECHNOLOGY TO CONDUCT APRIL 24, 2020, HEARING PURSUANT TO THE PENNSYLVANIA SUPREME COURT'S APRIL 1, 2020 SECOND SUPPLEMENTAL ORDER

To the Honorable Judge Shelley Robins New in the Philadelphia County Court of Common Pleas:

Petitioner Andrew Swainson, through his *pro bono* attorneys, files this *Emergency Joint Motion to Utilize Available Technology to Conduct April 24, 2020 Hearing Pursuant to the Pennsylvania Supreme Court's April 1, 2020 Second Supplemental Order.*

For the reasons set forth below, Petitioner and the Commonwealth, as evidenced by their signatures below, jointly move this Court to conduct the previously scheduled hearing in this PCRA matter on April 24, 2020, and to go forward on that date via tele-conference or video conference consistent with orders of the President Judge of this Court and the Pennsylvania Supreme Court regarding the current judicial emergency.

THE PENNSYLVANIA SUPREME COURT'S SECOND SUPPLEMENTAL ORDER

1. According to the Pennsylvania Supreme Court's April 1, 2020 Second Supplemental Order *In Re: General Statewide Judicial Emergency*: "The Court continues to specifically AUTHORIZE AND ENCOURAGE use of advanced communication technology to conduct court proceedings, subject only to constitutional limitations."

2. "Advanced communication technology includes, but is not limited to: systems providing for two-way simultaneous communication of image and sound; closed-circuit television; telephone and facsimile equipment; and electronic mail." *In re: General Statewide Judicial Emergency*, Nos. 531 and 532 Judicial Administration Docket, Second Suppl. Order at 4 (Pa. Apr. 1, 2020) (*per curiam*) (emphasis in original) (hereinafter "Second Suppl. Order") (citing Pa.R.J.A. No. 1952(A)(2)(e) & comment (citing Rule of Criminal Procedure 103 for the definition of advanced communication technology)).

3. Further, the Supreme Court's April 1, 2020 Order provides that, to the extent that matters such as this one "could be handled through advanced communication technology consistent with constitutional limitations, they **may and should proceed.**" *Id.* at 5.

4. The Court broadened the scope of business courts may conduct from its prior order and "CLARIFIE[D] that it expects that non-essential matters can continue to move forward, within the sound discretion of President Judges, so long as judicial personnel, attorneys, and other individuals can and do act in conformity with orders and guidance issued by the executive branch." *Id.*

DENIAL OF KING'S BENCH PETITION AND THE RESULTING PENNSYLVANIA SUPREME COURT ORDER

5. On March 30, 2020, during the initial period of judicial emergency, the ACLU of Pennsylvania, on behalf of the Pennsylvania Prison Society and detained individuals, asked the Pennsylvania Supreme Court to exercise its King's Bench jurisdiction to protect public health by ordering the county Courts of Common Pleas to release some people from county jails, particularly those particularly vulnerable to the coronavirus. The petition argued, among other things, that social distancing measures necessary to "flatten the curve" are impossible in the prison and jail environment.

6. The Supreme Court denied the petition, but it recognized that "[t]he potential outbreak of COVID-19 in the county correctional institutions of this Commonwealth poses an undeniable threat to the health of the inmates, the correctional staff and their families, and the surrounding communities." *In re: Pet'n of the Pa. Prison Soc'y*, No. 70 MM 220, Order at 1-2 (Pa. Apr. 3, 2020) (*per curiam*).

7. Therefore, our Supreme Court has directed President Judges to consider ways to safely depopulate jails. *Id.* at 2-3.

THE EMERGENT NEED FOR AN EXPEDITED HEARING

8. As of the filing of this Emergency Joint Motion, Pennsylvania continues to be in a state of public health emergency due to the novel coronavirus, COVID-19.

9. That emergency is spreading through the prison system more quickly than had been anticipated.

10. The most recent report from the Pennsylvania Department of Corrections (DOC) is that 4 inmates and 11 staff members have tested positive for COVID-19; as the DOC acknowledges, the staff numbers are reliant on self-reporting. *See* Pa. DOC Coronavirus Dashboard, *available at* https://www.cor.pa.gov/Pages/COVID-19.aspx (last accessed Apr. 7, 2020).

11. The experience in our county jails and in other prison systems throughout this country shows that the spread reflected above is just the beginning for a variety of reasons.

12. As the attached graphs put together by the Defender Association of Philadelphia show, the rate of infection in Philadelphia jails has spiked dramatically (as of April 3, 2020 standing at 7.11 positive tests per 1,000 people) since the first cases were reported in late March and is significantly higher than the infection rate for the general public. *See* Defender Ass'n Graphs (attached as Exhibit 1); *see also, e.g.*, "Illinois Prisoners Sick with COVID-19 'Overwhelm' Joliet Hospital," ABC7 Eyewitness News, Mar. 30, 2020 (reporting on the rapid spread of the novel coronavirus among Illinois prisoners), *available at* https://abc7chicago.com/health/illinois-prisoners-sick-with-covid-19-overwhelm-joliet-hospital/6064085/?fbclid=IwAR0j_sUzSiykPgEgLTDf_Yx8B3VmgBKfU2SQFCmLwKGXtabc8qIszwA2uM4 (last accessed Apr. 5, 2020).

13. Simply put, it is impossible to practice social distancing in the prison environment, and the transmission risk is therefore high.

ANDREW SWAINSON, WHO IS A HIGH RISK INDIVIDUAL IF HE CONTRACTS THE NOVEL CORONAVIRUS, COVID-19, HAS PROVEN HE IS ENTITLED TO A NEW TRIAL

14. Mr. Swainson is almost 55 years old; his date of birth is May 4, 1965.

15. The CDC has advised that older adults are at a higher risk of infection and severe illness and death. *See* "People Who Are at Higher Risk," Centers for Disease Control and Prevention, *available at* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html (last accessed Apr. 5, 2020). Although Mr. Swainson is younger than the age of 65 cited by the CDC, studies show incarceration decreases life expectancy. *See, e.g.*, "Incarceration Shortens Life Expectancy," Prison Policy Initiative, *available at* https://www.prisonpolicy.org/blog/2017/06/26/life_expectancy/ (last accessed Apr. 5, 2020).

16. After substantial investigation and careful consideration of the individual facts of Mr. Swainson's case and the relevant case law, the Commonwealth has agreed that Mr. Swainson's conviction "resulted from a violation of his right to due process as described by *Brady* and its progeny, i.e., the suppression of evidence that would have changed the outcome of his trial, as well as the Commonwealth's reliance on false testimony in violation of *Napue*" and that he is entitled to have that conviction vacated. *See* Feb. 12, 2020 Commw. Answer (attached as Exhibit 2) at ¶144.

17. Before the current public health and court emergencies, the Court and the parties were all reportedly prepared to proceed with a hearing on April 24, 2020 that would include reading into the record the Joint Stipulations of Fact (filed on Feb. 12, 2020 and attached as Exhibit 3) and brief argument by counsel.

18. In light of the high risk Mr. Swainson faces of contracting COVID-19 due to his confinement in the state prison system and the unique posture of this case, we urge Your Honor

to hold the previously scheduled April 24, 2020 hearing utilizing available video-conferencing and/or telephonic technology.

19. If a hearing on this matter continues to be delayed due to the ever-evolving conditions in this unprecedented pandemic, there is a significant risk that a man, who the Commonwealth has acknowledged has been wrongfully incarcerated for 32 years, could die in prison during this crisis. *See generally* "Innocent Prisoners Are Going to Die of the Coronavirus," The Atlantic (Mar. 31, 2020), *available at* https://www.theatlantic.com/ideas/archive/2020/03/americas-innocent-prisoners-are-going-die-there/609133/ (last accessed Apr. 5, 2020).

MR. SWAINSON KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVES HIS RIGHT TO BE PRESENT DURING HIS PCRA HEARING

20. Pennsylvania Rule of Criminal Procedure 908(C) requires PCRA courts to permit a defendant to be present at a post-conviction evidentiary hearing. However, as with other hearings, Mr. Swainson may waive that right if he chooses to do so. Due to limitations on mail and travel at this time, counsel could not obtain a written waiver from Mr. Swainson. However, counsel obtained an oral waiver. Specifically, counsel spoke with Mr. Swainson on Monday, April 6, 2020, and Mr. Swainson has knowingly, voluntarily and intelligently agreed to waive his physical presence at the hearing. He has authorized his counsel to proceed with the hearing in his absence.

THE VICTIM'S FAMILY HAS RECEIVED NOTICE OF THE APRIL 24, 2020 HEARING AND ARRANGEMENTS FOR ACCESS TO VIDEOCONFERENCING WILL BE MADE AVAILABLE TO THEM

21. On March 12, 2020, before the Court's most recent closure, the Commonwealth informed the victim's sister that the hearing was set for April 24, 2020.

22. The Commonwealth will ensure that the victim's sister is able to virtually attend a videoconference hearing through the use of Zoom, Microsoft Teams, or some other publicly available software.

23. The use of publicly available software will further allow any other interested members of the public to attend the hearing virtually as well.

WHEREFORE, in light of the unique posture of this case and the COVID-19 crisis, the Petitioner prays that this Honorable Court grant this Emergency Joint Motion and order that the April 24, 2020 hearing on the pending PCRA petition move forward as scheduled with the use of available advanced communication technology.

In the alternative, if Your Honor believes that only President Judge Fox and/or Court Administration can list this matter for its previously-scheduled April 24, 2020 hearing utilizing appropriate and available advanced communication technology, please indicate as such in the Court's Order so that counsel can seek emergency relief from President Judge Fox and/or Court Administration.

A proposed order, reflecting the relief requested in this Emergency Joint Motion is attached.

Respectfully submitted,

/s/ *Nathan J. Andrisani*

Nathan J. Andrisani (PA ID No. 77205)
Jacqueline C. Gorbey (PA ID No. 312041)
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103-2921

Craig M. Cooley (PA ID No. 315673)
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Temple University Beasley School of Law
1515 Market Street, Suite 300
Philadelphia, PA 19102

Counsel for Andrew Swainson

Agreed as to substance and form:

/s/ *Patricia Cummings*
Patricia Cummings, Esquire
Andrew Wellbrock, Esquire
Conviction Integrity and Special Investigations Unit
Philadelphia District Attorney's Office
3 South Penn Square
Philadelphia, PA 19107

Counsel for the Commonwealth

Dated: April 7, 2020

IN THE PHILADELPHIA COUNTY COURT OF COMMON PLEAS
CRIMINAL DIVISION

Commonwealth of Pennsylvania,	:	
	:	
Respondent,	:	
	:	
v.	:	CP-51-CR-0431311-1988
	:	
Andrew Swainson,	:	
	:	
Petitioner.	:	
	:	

[Proposed] ORDER

On this ___ day of April, 2020, upon consideration of the *Emergency Joint Motion to Utilize Available Technology to Preserve the April 24, 2020 Hearing Date in Light of COVID-19 Crisis and per the Pennsylvania Supreme Court's April 1, 2020 Second Supplemental Order*, it is HEREBY ORDERED that said motion is GRANTED. The parties and Court shall confer by April ____, 2020 to make arrangements for the hearing to proceed through appropriate advanced communication technology.

By the Court:

_____

The Honorable Shelley Robins New

IN THE PHILADELPHIA COUNTY COURT OF COMMON PLEAS
CRIMINAL DIVISION

Commonwealth of Pennsylvania,	:	
	:	
Respondent,	:	
	:	
v.	:	CP-51-CR-0431311-1988
	:	
Andrew Swainson,	:	
	:	
Petitioner.	:	
	:	

[Alternate Proposed] ORDER

On this ___ day of April, 2020, upon consideration of the *Emergency Joint Motion to Utilize Available Technology to Preserve the April 24, 2020 Hearing Date in Light of COVID-19 Crisis and per the Pennsylvania Supreme Court's April 1, 2020 Second Supplemental Order*, it is HEREBY ORDERED that said motion is DENIED because the Court believes that the matter can only be listed for a hearing on April 24, 2020 by and/or with the authorization of President Judge Idee Fox and/or Court Administration.

By the Court:

_____

The Honorable Shelley Robins New

IN THE PHILADELPHIA COUNTY COURT OF COMMON PLEAS
CRIMINAL DIVISION

Commonwealth of Pennsylvania,	:	
	:	
Respondent,	:	
	:	
v.	:	CP-51-CR-0431311-1988
	:	
Andrew Swainson,	:	
	:	
Petitioner.	:	
	:	

VERIFICATION

The facts set forth in this Motion are true and correct to the best of the undersigned's personal knowledge, information, and belief and are verified subject to the penalties for unsworn falsification to authorities under Pennsylvania Crimes Code Section 4904 (18 Pa. C.S. § 4904).

/s/ *Nathan J. Andrisani*
Nathan J. Andrisani, Esquire

Counsel for Andrew Swainson

April 7, 2020

IN THE PHILADELPHIA COUNTY COURT OF COMMON PLEAS
CRIMINAL DIVISION

Commonwealth of Pennsylvania,	:	
	:	
Respondent,	:	
	:	
v.	:	CP-51-CR-0431311-1988
	:	
Andrew Swainson,	:	
	:	
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 the foregoing by electronic filing and email delivery, upon

Patricia Cummings, Esquire
Andrew Wellbrock, Esquire
Conviction Integrity and Special Investigations Unit
Philadelphia District Attorney's Office
3 South Penn Square
Philadelphia, PA 19107

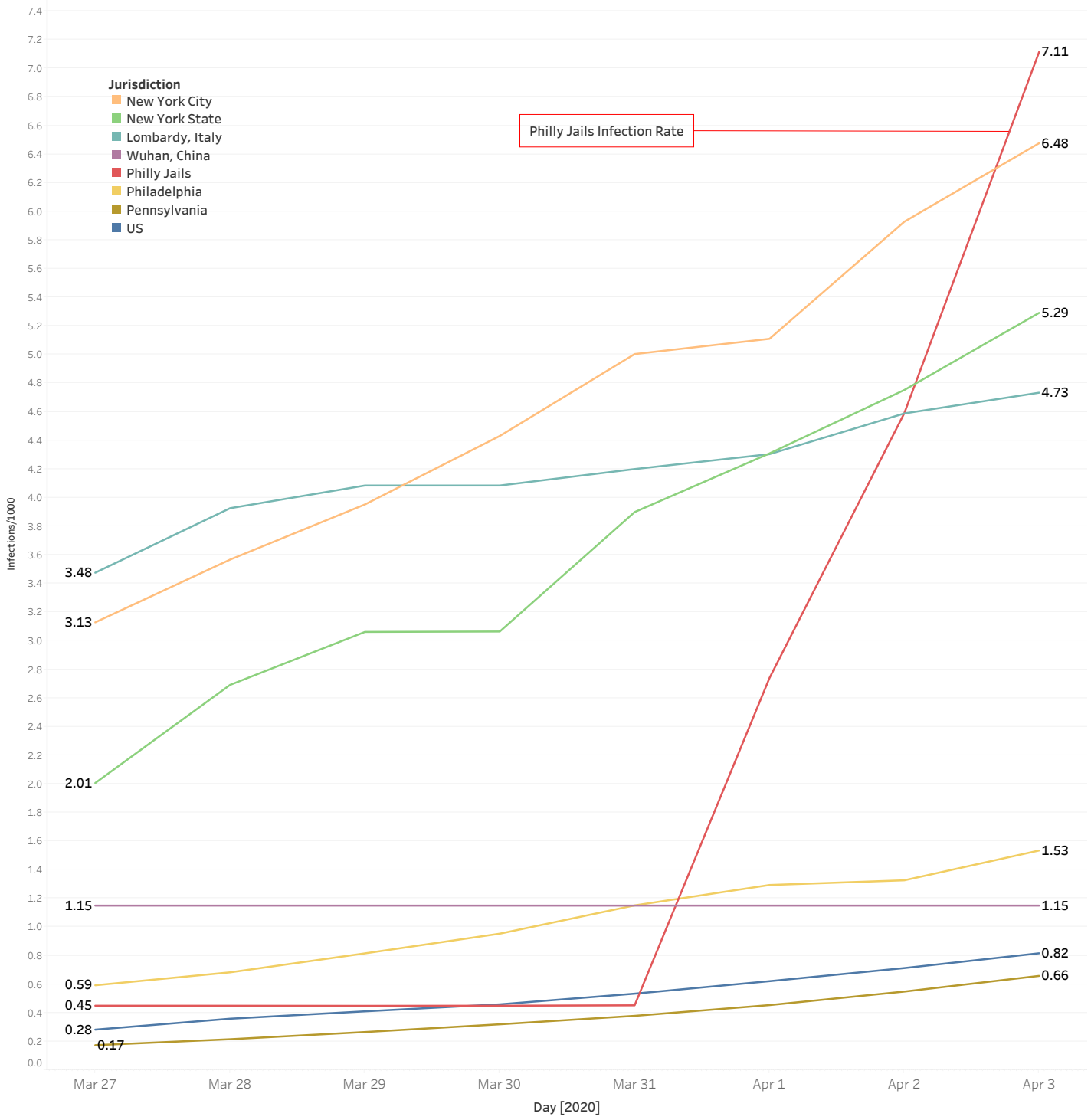
/s/ *Nilam A. Sanghvi*
Nilam A. Sanghvi

Counsel for Andrew Swainson

April 7, 2020

EXHIBIT 1

COVID-19 Infection Rates per 1,000 People - Multiple Jurisdictions



COVID-19 Infection Rates per 1,000 People as of April 3 - Philadelphia Jails vs. Philadelphia Zip Codes With Highest Rates

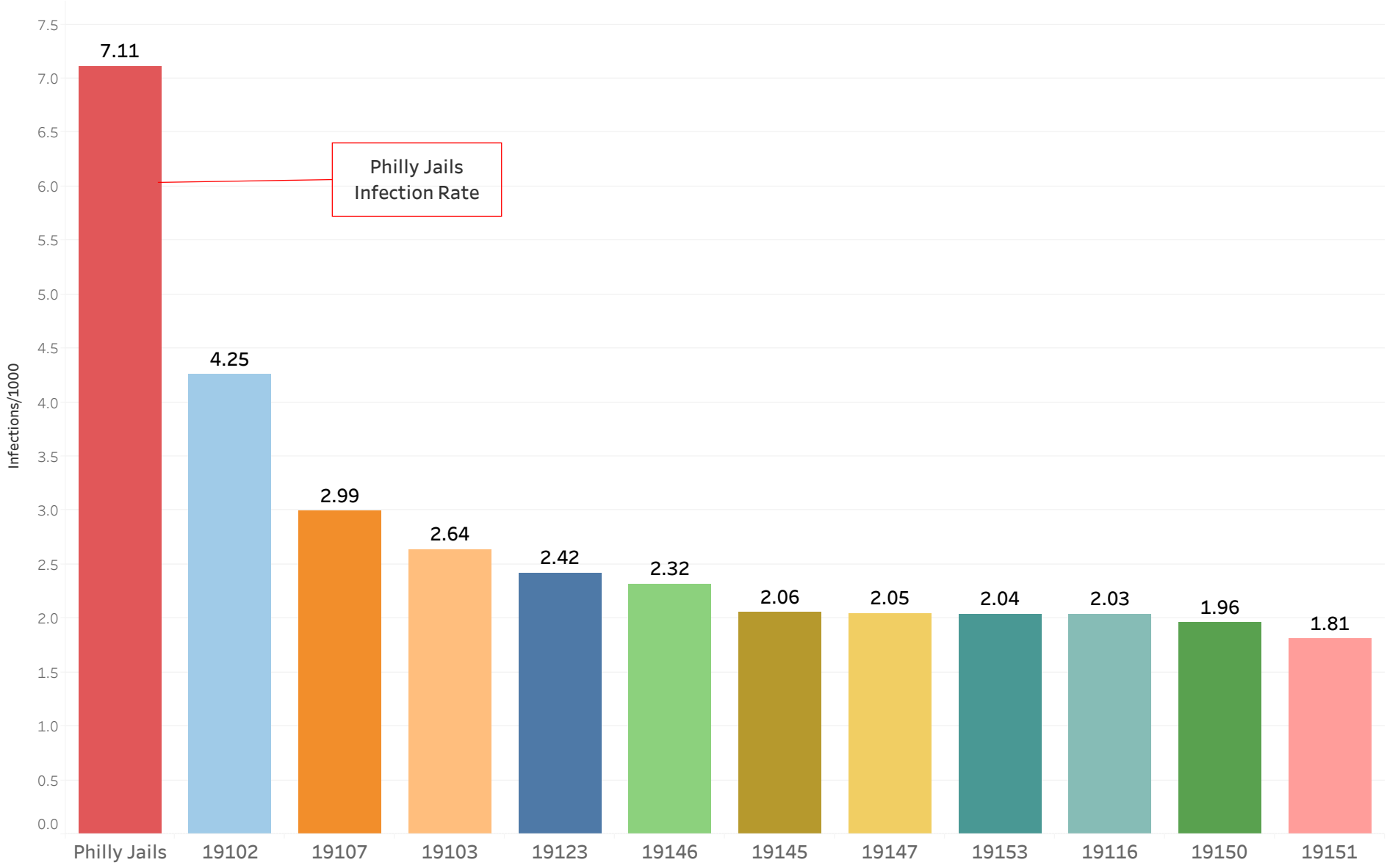


EXHIBIT 2

DISTRICT ATTORNEY'S OFFICE
Andrew Wellbrock
Assistant District Attorney
Three South Penn Square
Philadelphia, PA 19107
215-686-8738

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
CRIMINAL SECTION TRIAL DIVISION

COMMONWEALTH	:	
	:	
v.	:	CP-51-CR-0431311-1988
	:	
ANDREW SWAINSON	:	

COMMONWEALTH'S ANSWER TO
AMENDED PETITION FOR POST-CONVICTION RELIEF

TO THE HONORABLE SHELLEY ROBINS NEW:

LAWRENCE S. KRASNER, District Attorney of Philadelphia County, by his representative Andrew Wellbrock, Assistant District Attorney, respectfully petitions this Honorable Court and answers that Mr. Andrew Swainson ("Swainson") is entitled to relief on certain claims enumerated in his second amendment to his third petition for post-conviction relief and joins Swainson in asking this Court to enter an order vacating his convictions and sentence, and ordering a new trial.

On February 23, 2018, attorneys with the Pennsylvania Innocence Project submitted a request for review of this case to the Philadelphia District Attorney's Office Conviction Integrity Unit ("CIU"). That request was

premised on Swainson's claim of actual innocence. Shortly after that request, the CIU began its review and investigation. A comprehensive review of both the record and applicable law combined with a thorough review of all available materials has revealed that at least two of Swainson's claims warrant relief.

More specifically, based on the pleadings, the trial and post-conviction records, and the factual record set forth in the parties' Joint Stipulations of Fact, filed on February 12, 2020, the Commonwealth concedes that Swainson is entitled to relief based on newly discovered evidence and violations of his right to due process under the Pennsylvania Constitution and the United States Constitution.

OVERVIEW AND SHORT FACTUAL SUMMARY

The Crime

1. Just before 4am on January 17, 1988, Officer John Kay was at the corner of 54th and Sansom Streets when he heard a shotgun blast and saw two men run from a house on the north side of Samson Street.

2. Officer Kay chased the two men to the next corner and ultimately arrested them.

3. The two men were Paul Presley (who was bleeding from his hand) and Jeffrey Green.

4. Meanwhile, Officer Robert Rouse and other officers arrived on scene pursuant to a radio call.

5. Officer Rouse found the victim of the shotgun blast, Stanley Opher, laying in front of 5409 Sansom Street bleeding profusely and saying only that "[t]hey shot me."

6. Sergeant James Shannon located a rifle sticking out of a snow bank along with a small blue duffle bag in front of 5419 Sansom Street.

7. Other officers located a sawed-off shotgun under a car, located just east of where Opher was found.

8. After Officer Kay had already stopped Presley and Green, Officer Elga Peay was driving down Sansom Street when she observed Ashley Hines walk down the front steps of 5413 Sansom Street, get into his car, and drive towards 55th Street.

9. Other officers flagged Hines down and when Hines stopped, he told the officers that he had just dropped Green off when an unknown man tried to enter his car.

10. Based on the observations of the officers, Hines was arrested along with Presley and Green – and all were charged with Aggravated Assault and related offenses.

The Homicide Investigation

11. The investigation became a homicide investigation the following day when Opher died from injuries suffered from the gunshot wound.

12. As the investigation continued, police took a statement from Jacqueline Morsell, a friend of Opher's.

13. According to Morsell's statement, a drug operation was being run out of the house located at 5413 Samson Street and an individual known as "Dred" had been making threats against Opher for his involvement in that operation.

14. The only mention of Swainson in Morsell's nine-page statement were references to the fact that Swainson worked in the drug house.

15. Within just three weeks of the crime and the arrests of Presley, Green and Hines, the Commonwealth withdrew all charges against all three men, and Presley, inexplicably, went from being a perpetrator to a star witness for the Commonwealth in the homicide case against Swainson.

16. In a statement provided to police, Presley claimed to have witnessed the shooting when he went to the aforementioned drug house to purchase narcotics after getting high all evening at a house approximately two miles away.

17. When Presley arrived at the door of the drug house, the door opened and Opher ran by him and a man he described as "this brown skin dude" came out the door with a sawed-off shotgun and fired at Opher.

18. Presley then began to struggle with a second man who came out of the house with a rifle. During the struggle, Presley fell down the stairs and then both men with guns fled in opposite directions.

19. After the shooting, Presley fled toward 55th Street, but stopped to take a look in a bag the second man had discarded with his rifle.

20. The bag contained Opher's personal items, such as prescription medication and cigarettes.

21. When Presley saw that the bag did not contain drugs, he continued to flee until encountering Hines and eventually the police.

22. When stopped by the police, Presley was bleeding from his hand and his coat was covered in his own blood.

23. Despite Presley stating that Opher had fallen off the steps after being shot and that neither gunman approached his body prior to fleeing, the

bag was stained on the bottom with type A blood – the same blood type as Opher.

24. In addition to the implausible story Presley told of how he witnessed the crime, Presley also identified Swainson as the man with the sawed-off shotgun from a "series of photos" shown to him by Detective Manuel Santiago.

25. Despite a claim that he would also be able to identify the second man, detectives never showed Presley any additional photographs.

26. Presley's statement was typed by the police and when it was provided to the Commonwealth, it was accompanied by a hand-written confidence statement signed by Presley containing statements and language a reasonable person might conclude were dictated or suggested by the police.

27. The confidence statement reflects that Presley's attorney was not present at the time the statement was given.

28. During a pretrial hearing on the defense's motion to suppress, Detective Santiago was asked how the confidence statement came about during the interview of Presley and he offered the following answer:

> Well, what happened here was that I left Mr. Presley alone in the room while I was reviewing the statement, the statement that he had just given, just going through it to see if there was something that was additional, some things that – other things that I might want to cover with him. And when I came back to the room I find that he had spent this time writing this out. He was not asked to write it out. Why he did it I'm not sure, but it is something he wanted to do. And he gave it to me and I included it as part of his statement. N.T. 3/08/89, p. 42 - 43, lines 22 – 25 & 1 – 8.

29. Detective Santiago's testimony about the circumstances surrounding this confidence statement during a pretrial hearing serves to exacerbate serious credibility concerns about Presley as well as Detective Santiago.

30. Although both guns were recovered along with other physical evidence, there is no evidence linking Swainson to the crime.

31. Meanwhile, when questioned by the police, Swainson gave two consistent exculpatory statements during the investigation. The first occurred when he voluntarily appeared in the Homicide Division pursuant to the detectives' request and the second after waiving his rights post-arrest.

32. In his statements (both of which are largely consistent), Swainson explained that he met Opher in September when he first moved to Philadelphia and lived with him for two or three weeks near 57th and Spruce Streets.

33. According to Swainson, at the time of the murder, Opher was living with "Dred" at 5413 Sansom Street and both were selling drugs out of the house.

34. On the night of the murder, Swainson and his brother went by the house to check on Opher, but neither he nor "Dred" answered the door.

35. After stopping to check in with Opher, Swainson went to a club at 57th and Market Streets.

36. The next day, Swainson and his brother assumed that the house had been busted by the police.

37. Shortly after making the above assumption, Swainson remembered having recently received a warning "to be careful" because the house was going to get robbed so he called the woman who had communicated that warning to him and she informed him that Opher had been killed.

The Prosecution of Swainson

38. The Commonwealth's theory at trial was that Swainson knew Opher had decided to get out of the drug operation on Sansom Street and he was so upset with Opher about that decision that he murdered Opher on the front steps of the drug house. To support that theory, the Commonwealth relied on motive testimony from Morsell and Presley's implausible account of the crime.

39. In order to bolster Presley's weak single eyewitness identification, the Commonwealth presented evidence of flight against Swainson through the testimony of Detective Michael Cohen.

40. The Commonwealth requested a jury charge on flight and then after the jury was instructed on flight, the prosecution argued flight in its closing.

41. After a three-day trial, Swainson was convicted of first-degree murder and related offenses and was sentenced to a mandatory term of life imprisonment.

The Commonwealth's Witnesses Recant

42. As outlined in Swainson's 2nd PCRA petition, Presley has a long history of recanting his identification of Swainson.

43. The recantations began at the preliminary hearing in this case on April 14, 1988, when Presley did not identify Swainson.

44. A few months later, on June 10, 1988, Presley gave a statement to a defense investigator stating that he incorrectly identified Swainson.

45. Then, just one month prior to trial, Presley was brought to the District Attorney's Office and was interviewed twice in one week. On

February 15, 1989, and February 17, 1989, during those interviews, Presley renounced his prior recantations.[1]

46. On March 17, 1989, during trial, Presley identified Swainson as the shooter.

47. Years later, on October 13, 2008, Presley provided defense investigators with a hand-written and tape-recorded recantation in which he stated that he was pressured to identify Swainson and was promised leniency on his open charges in exchange for testifying.[2]

48. Presley died on November 15, 2009.

49. Morsell, the Commonwealth's motive witness, also recanted her trial testimony but that recantation did not occur until many years after Swainson's trial and conviction.

50. Morsell's trial testimony differed significantly from her original statement provided to the police days after the murder.

51. In her original statement, Morsell identified an individual named "Dred" as the person who had a motive for killing Opher.

52. Her trial testimony on March 16, 1989, however, conveniently substituted Swainson in place of Dred as the person who had been threatening Opher before the murder.

53. On July 22, 2014, Morsell gave a detailed statement to Swainson's attorneys and investigator recanting her trial testimony

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[1] Curiously, despite having tape-recorded both of those interviews, Detective Santiago denied having tape recorded the February 15, 1989 statement at trial.

[2] On July 28, 1988, Presley was charged with felony Possession with Intent to Deliver and Knowing and Intentional Possession. The case was first listed for trial on July 10, 1989 and all charges were nolle prossed.

claiming she falsely implicated Swainson due to pressure and threats from Opher's family.

54. Morsell's recantation is alleged to be newly discovered evidence in the instant PCRA pleadings currently pending before this Court.

55. On March 15, 2019, Mike Miller, an attorney for the City of Philadelphia Law Department, provided a four-sentence affidavit of Morsell to the CIU that it obtained while defending the City in a federal civil rights lawsuit regarding a separate exoneration resulting from a wrongful conviction.

56. The affidavit, signed by Morsell, is dated December 14, 2018, and reads as follows:

> I have personal knowledge of the facts recited below.
> I testified at the trial of Andrew Swainson for the murder of Stanley Opher.
> I have never been pressured or forced by anyone working for the Philadelphia Police Department to say anything false or misleading about the murder.
> I testified truthfully at the jury trial for the murder.

57. After receiving the affidavit, the CIU requested that the City of Philadelphia Law Department provide all other information it has regarding Swainson's case and his claim of actual innocence. Although some general information was provided, the City of Philadelphia Law Department provided limited information regarding Morsell and the circumstances surrounding the writing of her affidavit (none of which assists in evaluating Morsell's credibility).

58. As will be discussed supra under the sub-heading "*Morsell's Recantation is New Evidence and an Evidentiary Hearing is Warranted,*" the shear lack of detail in the affidavit combined with the lack of information regarding the circumstances surrounding the taking of that affidavit,

negates any usefulness the affidavit has in regard to assessing this witness's credibility absent testimony from Morsell and Mike Miller, the attorney for the City who apparently obtained the affidavit.

59. The City of Philadelphia also recently settled the civil lawsuit referenced in paragraph 55 for 4.15 million dollars so Morsell will not ever be called as a witness to testify in regards to the Plaintiff's *Monell* claim. See Chris Palmer, *Philly pays $4 million to settle lawsuit brought by man cleared of murder conviction in 2017*, PHILADELPHIA INQUIRER, January 2, 2020, https://www.inquirer.com/news/shaurn-thomas-wrongful-conviction-murder-lawsuit-martin-devlin-paul-worrell-20200102.html.

The CIU Investigation

60. After Swainson's counsel requested review of his conviction, the CIU obtained all available records relating to the case, including the District Attorney's Office files and the Philadelphia Police Department archived files. Review of those files revealed that *Brady* information was suppressed at trial and throughout these proceedings and false information was presented to the jury and was never corrected.

61. At the time of trial, the Commonwealth suppressed evidence that Presley was being prosecuted under the false name of Kareem Miller and was facing far more serious charges than the charge that was disclosed to the defense and the jury.

62. The testimony (and ensuing argument) presented at trial that Swainson fled the jurisdiction to avoid prosecution was false. Although Swainson traveled home to Jamaica and New York after the homicide, there was and is no evidence that he knew there was a warrant for his arrest and

homicide detectives knew Swainson's travel plans both before and after he traveled.

63. Homicide detectives assigned to the case were aware of at least two potential alternate suspects and pursued an investigation of an alternate theory involving at least one of those suspects. That information was suppressed at trial by the Commonwealth.[3]

PROCEDURAL HISTORY

64. In the almost 32 years since his conviction, Swainson has zealously pursued his claim of innocence as outlined in his pleadings.

65. In Swainson's first PCRA petition in 1993, he alleged both prosecutorial misconduct and ineffective assistance of counsel. The petition was dismissed in 1997 without an evidentiary hearing.

66. In 2008, Swainson filed a second PCRA petition based on the October 12, 2008 recantation of Presley where Presley claimed that the Commonwealth promised him special favors on his open cases. The second PCRA petition was denied on May 14, 2014, again without an evidentiary hearing.

67. The instant PCRA Petition, Swainson's third, was filed on August 18, 2014 – within 60 days of receiving the information that formed the basis of the recantation affidavit from Morsell.

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[3] Swainson's PCRA pleadings also identify other *Brady* information. The CIU investigation has revealed that some of the information identified was indeed suppressed by the Commonwealth at the time of trial. Rather than address each individual instance in this answer, the CIU has considered all of the suppressed information in its totality and that consideration has led to the conclusion that Swainson is entitled to relief based on material *Brady* violations.

68. On November 18, 2019, Swainson filed an Amended Petition raising claims relating to the suppressed evidence first disclosed during the CIU's investigation.[4]

THERE ARE NO MATERIAL FACTS IN DISPUTE IN THIS CASE REGARDING *BRADY* AND *NAPUE* CLAIMS

69. As noted at the outset, the parties in this matter are in agreement that Swainson is entitled to relief. However, the Commonwealth recognizes that this agreement alone does not obligate this Court to set aside the verdict in this case. *See Commonwealth v. Brown*, 196 A.3d 130, 146 (Pa. 2018).

70. Rather, the Commonwealth's position in support of relief here is an "attempt[], through the exercise of effective advocacy, to persuade the courts to agree that error occurred as a matter of law." *Id.*; *see also id.* at 145 (noting that "the PCRA requires judicial merits review favorable to the petitioner before any relief may be granted.").

71. Put another way, the Commonwealth urges this Court to grant Swainson relief because it believes the record establishes his rights have been violated, not simply because the parties are in agreement. *Commonwealth v. Cox*, — A.3d —, No. 498 CAP, 2019 WL 1338435, at *13 (Pa. Mar. 26, 2019) ("[C]onfessions of error by the Commonwealth are not binding on a reviewing court but may be considered for their persuasive value").

[4] The November 18, 2019 Amendment replaces and supersedes the original Petition as well as an earlier amendment filed on July 13, 2017.

Standard of Review

72. In his concurrence in *Brown*, Justice Wecht outlined an appropriate framework for post-conviction courts resolving uncontested petitions:

> The PCRA court is tasked with considering the facts before it and resolving factual disputes. If there is no factual dispute because the Commonwealth and the petitioner are in agreement regarding the petitioner's entitlement to relief, then the role of the PCRA court is to resolve the legal implications of these facts.

Brown, 196 A.3d at 196 (Wecht, J., concurring).

73. As Justice Wecht described, there is no factual dispute here and the parties agree that Swainson's rights have been violated. But the ultimate decision whether to grant relief—*i.e.*, whether the facts and circumstances of this case amount to a constitutional violation—rests with this Court.[5]

Stipulations of Fact

59. In order to facilitate this Court's review (and consistent with its ethical duties), the Commonwealth has entered into and filed joint stipulations of facts with Swainson. *Commonwealth v. Mathis*, 463 A.2d 1167, 1171 (Pa. Super. Ct. 1983) (noting that "[i]t is axiomatic that parties may bind themselves by stipulations" in criminal proceedings) (quoting *Marmara v.*

[5] Justice Wecht also opined that PCRA courts may premise relief on "the Commonwealth's confession of error." *Brown*, 196 A.3d at 196; *see also id.* at 194 (Dougherty, J. concurring) (disagreeing with Justice Wecht and opining that "a prosecutor's confession of error is properly viewed not as dispositive, but as persuasive, often highly persuasive"). This point was not resolved by the *Brown* majority and need not be addressed here, as the parties agree that relief in this case ought to be premised on the Court's independent legal determinations.

Rawle, 399 A.2d 750 (Pa. Super. Ct. 1979)). The stipulations represent the relevant facts as disclosed during the CIU's review of the case and independent investigation of Swainson's claims.

60. Where parties stipulate as to particular facts, the stipulation does away with the necessity for introducing evidence of the fact stipulated. *In re Shank's Estate*, 161 A.2d 47 (Pa. 1960). This is so even if the evidence contains otherwise inadmissible hearsay statements. *Jones v. Spidle*, 286 A.2d 366 (Pa. 1971).

61. A stipulation is part of the evidentiary record and "binds the Commonwealth, and the Court[.]" *Commonwealth v. Phila. Elec. Co.*, 372 A.2d 815, 821 (Pa. 1977); *Commonwealth v. Rizzuto*, 777 A.2d 1069, 1088 (Pa. 2001) (noting that stipulations "become the law of the case") *abrogated on other grounds by Commonwealth v. Freeman*, 573 Pa. 532, 827 A.2d 385 (2003); *Park v. Greater Delaware Valley Savs. & Loan Ass'n*, 523 A.2d 771, 773 (Pa. Super. 1987) ("[S]tipulated facts are binding upon the court as well as the parties"); *Tyson v. Commonwealth*, 684 A.2d 246, 251 n.11 (Pa. Cmmw. Ct. 1996)).

62. This Court need not conduct an evidentiary hearing to grant relief because no material facts remain in dispute as to the claims discussed below. Pa. R. Crim. P. 907(2); *Commonwealth v. Morris*, 684 A.2d 1037, 1042 (Pa. 1996) ("when there are no disputed factual issues, an evidentiary hearing [on PCRA petition] is not required under the rules."); *see Commonwealth v. Martinez*, 147 A.3d 517, 524 (Pa. 2016) (affirming grant of relief where "[t]he trial court held a hearing" at which "[n]o evidence was offered . . . as the Commonwealth was willing to stipulate to the facts as stated in Martinez's petition.").

63. In light of the parties' stipulation, the Commonwealth submits that the record in this case establishes that Swainson is entitled to relief as discussed more fully below. *Cox*, 204 A.3d at 387.

SWAINSON IS LEGALLY ENTITLED TO RELIEF

64. The Commonwealth's failure to disclose the evidence discussed above violated Swainson's right to due process as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963). Likewise, the Commonwealth's reliance on and failure to correct the false testimony presented at Swainson's trial violated his rights under *Napue v. Illinois*, 360 U.S. 264 (1959).

65. The newly discovered evidence regarding Morsell's recantation also confers jurisdiction on this Court and it warrants an evidentiary hearing under 42 Pa. C.S. § 9543(a)(2)(vi) independent of the aforementioned constitutional violations.[6]

66. If this Court agrees with the Commonwealth that Swainson is entitled to relief on any one of his claims and orders that he be granted a new trial, any of his other claims will be rendered moot.[7]

67. Thus, the Commonwealth respectfully requests that this Court defer judgment (and any evidentiary hearing, should one be necessary) on

[6] See the parties Joint Stipulations of Fact for details regarding efforts to interview Morsell.

[7] See *Commonwealth v. Medina*, 92 A.3d 1210 (Pa. Super. 2014) in footnote 5 where the Superior Court specifically states that where the grant of relief is affirmed as to one ground, there is no need for the court to address remaining grounds. More specifically, in *Medina*, the trial court granted relief based on newly discovered evidence so the Superior Court, in affirming that decision held there was no need to address the remaining *Brady* claim.

any remaining claims not addressed and agreed to in this answer. Such deferral would be in the interest of judicial economy and justice.[8]

68. The Commonwealth further concedes that the new evidence and the suppressed evidence in this case indicates that Swainson may be innocent of the crime for which he was convicted, *i.e.*, it is "more likely than not that no reasonable juror would have found [Swainson] guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327 (1995).[9] However, given

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[8] While the merits of these potentially moot claims may not be resolved in these proceedings, their existence is not surprising as the majority of documented wrongful convictions are the result of multiple constitutional and systems-level errors. *See generally*, BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (Harvard University Press) (2012) (discussing the cases of the first 250 wrongfully convicted people exonerated by DNA testing and highlighting that such cases generally involve numerous investigatory and trial errors).

[9] Neither the Pennsylvania legislature nor the courts have adopted a standard of proof for demonstrating "actual innocence" in post-conviction proceedings. See, e.g., *In re Payne*, 129 A.3d 546, 556 (Pa. Super. Ct. 2015) (en banc) (noting that the "quantum of evidence necessary to satisfy" the actual innocence requirement of Pennsylvania's post-conviction DNA testing statute, 42 Pa.C.S. § 9543.1, "has never been defined"). The Commonwealth therefore relies upon the standard applied in federal courts "where when the claimed injustice is that constitutional error has resulted in the conviction of one who is actually innocent of the crime." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Under those circumstances, the standard for "actual innocence" is defined as whether it is "more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt—or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt." *House v. Bell*, 547 U.S. 518, 538 (2006) (describing *Schlup* innocence standard); see also *Commonwealth v. Conway*, 14 A.3d 101, 109 (Pa. Super. 2011) (noting parties' agreement that the *Schlup* standard for actual innocence applied in context of proceedings under post-conviction DNA testing statute).

the Commonwealth's inability to completely assess the Morsell recantation claim, any recommendation or agreement as to Swainson's claim of innocence would be premature at this time.

Brady v. Maryland

69. The Commonwealth has an obligation to disclose to the defense information that is favorable to the guilt or punishment of the defendant. *Brady v. Maryland*, 373 U.S. 83 (1963).

70. This obligation requires that the Commonwealth disclose information that is exculpatory as well as impeaching. *Smith v. Cain*, 565 U.S. 73 (2012). And, this obligation extends to information possessed by law enforcement in the same jurisdiction as the prosecutors. *Kyles v. Whitely*, 514 U.S. 419, 434 (1995).

71. Evidence is material within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *Cone v. Bell*, 556 U.S. 449, 470 (2009).

72. A reasonable probability does not mean the defendant would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial. *Kyles v. Whitely*, 514 U.S. 419, 434 (1995).

73. In sum, to succeed on a *Brady* claim, the petitioner must establish:

> the evidence was favorable to the accused, either because it is exculpatory or because it impeaches; the evidence was suppressed by the prosecution, either willfully or inadvertently; and prejudice ensued.

Commonwealth v. Burke, 781 A.2d 1136, 1141 (Pa. 2001).

74. A claim may be established regardless of the good or bad faith of the prosecutor.

Napue v. Illinois

75. It is well settled that the Commonwealth may not knowingly use false evidence, including false testimony, to obtain a tainted conviction. *Commonwealth v. Hallowell*, 383 A.2d 909, 911 (Pa. 1978) (citing *Napue v. Illinois*, 360 U.S. 264 (1959)).

76. A conviction obtained through the knowing use of materially false evidence/testimony may not stand. *Id.* A prosecuting attorney has an affirmative duty to correct the testimony of a witness which he knows to be false. *Id.* The prosecutor may not present testimony that it knows is false, without correcting the error as soon as it becomes known. The knowledge of one prosecutor is attributable to all the prosecutors in the same office. *Id.* at 238.

77. A strict standard of materiality is applied such that the false testimony is material—and a new trial is required—if it could in *any reasonable likelihood* have affected the judgment of the jury." *Commonwealth v. Wallace*, 455 A.2d 1187, 1190–91 (Pa. 1983) (citations and quotations omitted).

New Evidence - § 9543(a)(2)(vi)

78. To be eligible for relief based on newly-available evidence under § 9543(a)(2)(vi), Swainson must demonstrate that the evidence: (1) could not have been obtained prior to the conclusion of trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will

not be used solely to impeach the credibility of a witness; and (4) 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)).

79. In *Commonwealth v. Lambert*, 884 A.2d 848, 852–53 (Pa. 2005), the Pennsylvania Supreme Court held that a PCRA court has jurisdiction under the *newly discovered evidence exception* to review a *Brady* claim so long as the facts supporting the *Brady* claim were known to the police and not known to the petitioner until the PCRA petition was filed.[10]

THE SUPPRESSED EVIDENCE, THE FALSE EVIDENCE AND THE NEW EVIDENCE

80. Swainson's petition alleges (and the Commonwealth concedes) that significant exculpatory and impeaching evidence in this case was withheld and that false evidence was used. If the suppressed evidence had been disclosed and the false evidence had either not been admitted or been corrected as the Pennsylvania and United States Constitutions demand, the outcome of his case would have been different.

81. Swainson is entitled to relief under 42 Pa. C.S. § 9543(a)(2)(i), as the suppression violated his right to due process under both the Pennsylvania and United States Constitutions.

[10] *Lambert* held that the Court's jurisdiction does not otherwise depend on the merits of a *Brady* claim; there is jurisdiction even if the withheld information is not material for *Brady* purposes. *Lambert*, 884 A.2d at 852-53. In any event, the Commonwealth concurs with Swainson that the withheld evidence was material and concedes that *Brady* was violated here.

Presley Was Arrested Under the Alias of "Kareem Miller"

82. At Swainson's trial, Presley testified that he had open "possession" charges without mentioning that he had been arrested for felony Possession with Intent to Deliver. He also denied being known by any aliases other than a specific few which did not expressly include Kareem Miller.

83. As alleged in Swainson's petition, at the time that Presley testified against Swainson, he was being held in local custody after being arrested under the name Kareem Miller for Possession with Intent to Deliver on July 28, 1988, in the same police district where Opher was murdered. Due to the passage of time and state retention schedules, no additional information on the Kareem Miller arrest is available from either the police department or DAO.

84. At the time of that arrest, Presley had an open fugitive case listed for status on August 8, 1988. Due to being arrested under a fictitious name, he was not brought down for the August 8th hearing and a bench warrant was issued for his failure to appear. Then for reasons unknown, the hearing was eventually rescheduled to February 15, 1989. However, February 15, 1989, was one of the days that Detective Santiago brought Presley to the District Attorney's Office to make a statement, so he did not appear in court that day either.

85. A review of the DAO file proves that, not only is Swainson's allegation correct about the link between Presley and Kareem Miller, but the Commonwealth was aware that Kareem Miller and Presley were the same person at the time of trial as evidenced by the below referenced documents located in the DAO trial file.

86. A copy of a "Bring down Order" for Presley's February 17, 1989 interview with Detective Santiago located in the DAO trial file clearly states Presley's alias was Kareem Miller.

87. A single page of handwritten notes in the DAO trial file, dated July 29, 1988, also indicates that Presley and Kareem Miller share the same prison identification number. Significantly, on that same date (July 29, 1988), Presley was arraigned on the July 28th arrest and sent to county prison showing the Commonwealth had clear knowledge of that arrest.

88. However, in the face of those facts, the Commonwealth filed a response to Swainson's PCRA pleadings on April 14, 2016, prior to the recent amendment and CIU review, disputing the link between Presley and Kareem Miller and calling the allegation that they were the same person "pure speculation."[11]

89. As stated in footnote 2, Presley's July 28, 1988 felony drug charges were nolle prossed at the first trial listing of the case on July 10, 1989. Swainson, in his most recent PCRA pleading, maintains that Presley was promised leniency in exchange for testifying.

90. While there is no specific indication in any DAO records that a promise was made, there are factors that exist that support the notion that Presley certainly hoped and expected consideration from the Commonwealth in exchange for his testimony. Those factors include the early stage at which the case was withdrawn, Presley's extensive record and the gradation of the offense.

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[11] Given the erroneous nature of that response based on what is now known, the Commonwealth withdraws its April 14, 2016 response, as well as any other Commonwealth response filed prior to the instant filing.

Swainson Never Fled the Jurisdiction to Avoid Prosecution

91. At the time of trial, the Commonwealth possessed evidence that proved Swainson never fled the jurisdiction to avoid prosecution.

92. On January 22, 1988, Swainson voluntarily went to the Homicide Unit and provided Detective Santiago a witness statement regarding the pending homicide investigation – he also consented to being photographed and fingerprinted.

93. In his statement, Swainson listed two Philadelphia addresses as his residence and a place of employment in New York City. He also provided his mother's name and address in New York City.

94. Swainson was never informed by Detective Santiago or anyone else that he was a suspect in the crime during the witness interview.

95. On February 15, 1988, detectives obtained an arrest warrant for Swainson and that warrant listed both of his Philadelphia addresses.

96. Suppressed activity sheets and other police documents reflect that when police attempted to serve the arrest warrant at one of those locations the afternoon after obtaining the arrest warrant, two residents of the home told police Swainson was in Jamaica on vacation until the first week of March.

97. Then on February 19, 1988, detectives were specifically told by Swainson's sister that Swainson went to Jamaica on February 11, 1988 to get married and would be returning.

98. Without ever attempting to serve the arrest warrant on Swainson at his New York address and despite the fact that he left the country prior to any knowledge of being a suspect, police labeled Swainson a fugitive.

99. On March 8, 1988, Detective Santiago recorded on an activity sheet that Swainson called him to say he had returned from Jamaica and was at his parents' house in New York.

100. Detective Santiago specifically noted on the above-referenced activity sheet that "Swinson [sic] does not know that he his [sic] currently wanted for murder, and the information was not given to Swinson [sic]."

101. Despite having personal knowledge that Swainson did not flee the jurisdiction to avoid prosecution, Detective Santiago went on to testify during trial that after he obtained an arrest warrant for Swainson, he turned the case over to the fugitive squad explaining that "[w]hen you make attempts to locate a person and even if he is within Pennsylvania but he can't be located for whatever reason, then the Fugitive Squad would take over the assignment."

102. Immediately after Detective Santiago testified, Detective Michael Cohen testified. Detective Cohen was assigned to the Fugitive Squad of the PPD Homicide division and was assigned to Swainson's case on February 18, 1988.

103. According to Detective Cohen, on February 19, 1988 he applied for a federal warrant which he described as an "unlawful flight to avoid prosecution warrant." Then a few weeks later, Swainson was arrested on March 9, 1988 in New York.

104. At trial, the Commonwealth elicited testimony from Detective Cohen regarding Swainson's appearance when he was arrested and how at the time of his arrest, he appeared redder than how he looked in his January photograph (although this witness had no personal knowledge that Swainson had been in Jamaica, he testified that he had learned, to the best of his knowledge, that Swainson had been to Jamaica and when the

prosecutor asked the following question, "Do you know whether he had any kind of sunburn when he came back?" he replied "It could have been…).[12]

105. Finally, the prosecutor argued in her closing statement that Swainson's "leaving town" from Philadelphia to Jamaica and then New York was evidence of "consciousness of guilt."

Alternate Suspects - The "Hold-up Attempt" and Allen Proctor & The Known Assailant "Kevin Pearson"

106. On January 21, 1988, just four days after the crime, detectives interviewed Vernon Montague, a friend of Opher's.

107. Montague's interview was documented in a homicide activity sheet that same day when a detective wrote that Montague told police that "word being passed around on the streets is that [Opher] was shot during a hold-up attempt."

108. Then on January 23, 1988, according to another homicide activity sheet related to this investigation, the assigned detectives assisted in the arrest of a man named Allen Proctor for a separate earlier homicide.

109. Despite the arrest of Proctor, neither the DAO file or the homicide file contain any other mention of Proctor and his connection to, or the possible role he played in, the murder of Opher.

110. After a CIU search for records regarding Proctor in January 2020, the Commonwealth learned that Proctor's arrest on January 23, 1988

[12] This evidence appears to have been elicited for the additional reason of shoring up issues relating to Presley's identification of Swainson because Presley described the shooter as having "dark skin" in his original statement and during the preliminary hearing yet during trial he described Swainson as the shooter and described Swainson as having "red skin."

was for a murder committed on September 21, 1987 at 3:45 am – under similar circumstances and in the early morning hour as Opher's murder.

111. According to the homicide file in the 1987 murder, Proctor and two other men held up the victim, a drug dealer, at gunpoint then Proctor fired a gun and killed him.

112. A few months after the preliminary hearing in that case, Proctor's bail was lowered and he was released on September 16, 1988.

113. While on bail, on December 31, 1988, Proctor along with Leonard Roberts murdered another man during an argument inside a drug house.

114. A witness in the second homicide case heard that Proctor "was sticking up the dope dealers in the neighborhood."

115. A police activity sheet in the second homicide case reflects that officers in the district described Proctor as "a holdup guy and always has a gun on his person."

116. Then on January 9, 1989, a warrant was issued for Proctor's arrest for the second homicide that occurred on December 31, 1988.

117. Before he was arrested on the second homicide, Proctor got into an altercation with a drug dealer who shot and killed him on January 10, 1989.

118. According to a witness in the Proctor homicide, Proctor was killed after robbing someone who returned fire when Proctor shot at him – and that witness specifically stated Proctor had been "robbing us from time to time for months."

119. At the time of trial, the Commonwealth possessed evidence that detectives suspected Proctor may be involved as an alternate theory of

the crime and even assisted in the arrest of Proctor in a separate murder committed in a similar manner as the Opher murder.

120. However, in Montague's written witness interview, a copy of which was disclosed to Swainson at the time of trial, Montague is only recorded as saying that there was a rumor that the drug house was being moved. None of the activity sheets referenced above were disclosed to the defense at the time of trial.

121. By suppressing both the narrative of the "hold-up attempt" and any mention of Proctor's name, Swainson was prevented from discovering any of the above and investigating Proctor as an alternate suspect.

122. Had this information been disclosed, it would have also corroborated information in both of Swainson's statements that Swainson heard the murder occurred as a result of a hold-up (interestingly, he said this in his January 22, 1988 statement the day before the assigned detectives arrested Proctor for the 1987 homicide).

123. A second possible suspect was also identified on January 21, 1988, four days after the shooting when Homicide Detective Joseph Fisher sent a request to the police photo lab to have Presley's left hand photographed as evidence of the injury he sustained during the incident.

124. On the photograph request form, under the section "Known Assailants," the name "Kevin Pearson" is hand-written in (a name that does not appear in any other police paperwork related to the case).

125. At that stage of the homicide investigation, the only people who witnessed the shooting who were interviewed by police were Presley and Hines – and the police documentation regarding those interviews does not reflect that either witness mentioned a "Kevin Pearson."

126. Although not entirely clear, it appears as if Presley may have identified Kevin Pearson as a "known assailant" because Pearson was identified on official police paperwork filled out at the time photographs of Presley's injuries were taken by police.

127. If Presley identified Pearson as a known assailant, Pearson is not simply an alternate suspect the Commonwealth failed to disclose; his identification by Presley also constitutes an undisclosed, inconsistent statement by the Commonwealth's sole eyewitness to the crime.

128. The CIU's investigation has revealed a Kevin Pearson with a Philadelphia arrest record around the same time as this incident which includes arrests for robbery and witness intimidation.

Morsell's Recantation is New Evidence and an Evidentiary Hearing is Warranted

129. Swainson's pleadings and Morsell's affidavit establish that Swainson did not know Morsell lied during her trial testimony as a result of third party threats and coercion. Due to the threats and coercion, Swainson also could not have discovered the new evidence with reasonable diligence prior to the 2014 interview with Swainson's defense team. Thus, Swainson has met the newly-discovered fact exception to the PCRA time-bar. See *Commonwealth v. McCracken*, 540 Pa. 541, 659 A.2d 541, 545 (1995).

130. The CIU has attempted to interview Morsell on several occasions but has been unsuccessful. Based on that fact, as well as the apparent attempt to recant the 2014 recantation, it is difficult to make a credibility determination without an evidentiary hearing.

131. In order to assess whether the information contained in the 2014 Morsell recantation "would likely result in a different verdict if a new trial were granted," the Commonwealth would like to elicit testimony from

at least two witnesses – Morsell and Mike Miller (or whoever interviewed her on behalf of the Law Department at the City of Philadelphia). See *Commonwealth v. Williams*, 557 Pa. 207, 732 A.2d 1167, 1181 (1999).

Materiality and Different Outcome

132. The Commonwealth concedes that the evidence at issue here was suppressed. That suppression continued throughout the investigation of this crime, Swainson's trial and his direct and collateral appeals.[13]

133. Evidence is material within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *Cone v. Bell*, 556 U.S. 449, 470 (2009). A reasonable probability does not mean the defendant would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial. *Kyles*, 514 U.S. 434.

134. The suppressed evidence in this case easily meets this standard. The jury would have had significant additional information by which to judge the credibility of Presley and Morsell as well as their motives to testify. Additionally, the suppressed information regarding Swainson's purported flight would have severely undermined the theory of the crime advanced by the Commonwealth.

135. The Commonwealth's suppression of Presley's alternate identity "Kareem Miller" and active criminal record at the time of trial corroborates Swainson's claim, and Presley's assertion in his 2008 affidavit,

[13] For example, as recently as November 2017, the Commonwealth argued that Swainson "fled to Jamaica" in order to avoid prosecution.

that he was given a benefit for his testimony that the Commonwealth hoped to hide.

136. By repeating Presley's claim that he was facing an open charge of "possession" and by concealing the true nature of Presley's open charges and functionally restricting defense counsel's ability to cross-examine, the Commonwealth violated Swainson's due process rights as delineated by *Napue* and *Davis*.

137. In the initial days after Presley was arrested and charged with Aggravated Assault, it appears he likely identified Pearson as a known assailant. Around that same time, homicide detectives were also given information regarding Proctor as a possible suspect. Since Presley had already given inconsistent testimony at the preliminary hearing, and in statements to a defense investigator, and the Commonwealth had evidence corroborating the "hold- up" alternate theory of the crime, had the jury heard any of this evidence, it would have changed the result at trial.

138. Additionally, the Commonwealth violated *Napue* again when the trial prosecutor presented evidence and argued that Swainson fled to avoid prosecution because Swainson was not aware he was a suspect, he was never told to remain in the jurisdiction, and he kept the police informed of his whereabouts when they reached out to locate him.

139. Presenting false evidence of flight and arguing it as consciousness of guilt is a clear violation of Swainson's due process rights.[14]

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[14] It is of no moment whether the prosecutor herself was aware of this evidence, as the information was known to the police and was therefore imputed to the prosecutor. See *Commonwealth v. Wallace*, 455 A.2d 1187, 1191 (Pa. 1983) (finding *Napue* violation where State Trooper was aware of particular testimony's falsity).

140. As noted above, there is a reasonable probability of a different result—*i.e.*, it is likely the jury would have acquitted Swainson—if the suppressed evidence had been available to him at trial. *Id.*; *Brady*, 373 U.S. 83 (1963). The Commonwealth concedes that this evidence is material. *United States v. Agurs*, 427 U.S. 97, 103 (1976).

CONCLUSION

141. After careful consideration of the individual facts of this case, the relevant law, and the role of the prosecutor as a "minister of justice," *see* Pa. R. Prof. Resp. 3.8 comment 1 (Special Responsibilities of a Prosecutor), the Commonwealth agrees that Swainson's conviction resulted from a violation of his right to due process as described by *Brady* and its progeny, *i.e.*, the suppression of evidence that would have changed the outcome of his trial, as well as the Commonwealth's reliance on false testimony in violation of *Napue.* Swainson is entitled to post-conviction relief in the form of a new trial under 42 Pa. C.S. § 9543.

THEREFORE, the Commonwealth asks this Court to vacate the sentence, and order a new trial.

Respectfully submitted,

Andrew Wellbrock
Assistant District Attorney
Conviction Integrity Unit

VERIFICATION

The undersigned hereby verifies that the facts set forth in the foregoing motion are true and correct to the best of my knowledge, information, and belief. This verification is made subject to the penalties for unsworn falsification to authorities under 18 Pa. C.S. Section 4904.

Andrew Wellbrock
Assistant District Attorney

Date: 2/12/2020

AFFIDAVIT OF SERVICE

I, ANDREW WELLBROCK, Assistant District Attorney, hereby certify that, on February 12, 2020, I served a true and correct copy of the within motion for the above-captioned matter to the following via hand delivery or electronic delivery:

The Honorable Shelley Robins New
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Andrew Wellbrock
Assistant District Attorney

Date: 2/12/2020

EXHIBIT 3

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
CRIMINAL SECTION TRIAL DIVISION

COMMONWEALTH	:	
	:	
v.	:	CP-51-CR-0431311-1988
	:	
ANDREW SWAINSON	:	

JOINT STIPULATIONS OF FACT OF PETITIONER ANDREW SWAINSON AND RESPONDENT COMMONWEALTH OF PENNSYLVANIA[1]

LAWRENCE S. KRASNER, the District Attorney of Philadelphia County, by his assistant, Andrew Wellbrock, and Petitioner Andrew Swainson, through his undersigned *pro bono* attorneys, move this Court to accept and adopt the following stipulations of fact[2] derived from the record and the post-conviction investigation into this matter.

[1] These stipulations of facts are submitted by the Commonwealth and are being filed as joint stipulations by agreement of the parties as evidenced by the signature of Swainson's counsel and counsel for the District Attorney.

[2] "A stipulation is a declaration that the fact agreed upon is proven." *Commonwealth v. Rizzuto*, 777 A.2d 1069, 1088 (Pa. 2001), *abrogated on other grounds by Commonwealth v. Freeman*, 827 A.2d 385 (2003). "Parties may by stipulation resolve questions of fact or limit the issues, and, if the stipulations do not affect the jurisdiction of the court or the due order of the business and convenience of the court they become the law

FACTS DERIVED FROM THE INITIAL INVESTIGATION AND THE TRIAL RECORD

The Crime and Police Investigation

1. At approximately 3:40 am on January 17, 1988, Stanley Opher was shot on the front porch of 5413 Sansom Street. He died the next day.

2. Paul Presley, Jeffrey Green and Ashley Hines were each arrested leaving the scene and charged in connection with the shooting.

3. Police Officer John Kay heard the gunshot from up the street and then immediately observed Presley running from the direction of 5413 Sansom Street. He also saw Green running approximately 10 feet behind Presley.

4. Officer Kay pursued the men and apprehended Presley after finding him hiding near the bushes on the lawn of a house on 55th Street near Sansom Street. Presley was bleeding from his left hand and had large amounts of blood on his coat.

5. Green was arrested nearby as well.

6. Hines was arrested after an officer observed him leaving 5413 Sansom shortly after Presley and Green were arrested.

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of the case." *Id.* (quoting *Parsonese v. Midland National Ins. Co.*, 706 A.3d 814, 815 (Pa. 1998), *abrogated on other grounds by Sveen v. Melin*, 138 S. Ct. 1815 (2018)).

7. Within minutes of the shooting, Police Officer Robert Rouse asked Opher, who was still conscious and crying for help on the ground in front of 5413 Sansom Street, to tell him what happened. Opher replied, "they shot me in my back."

8. Later, at Misericordia Hospital, Police Officer Stephen Szymanski reported hearing Opher tell nurses that he was "shot with a shotgun." Opher never identified his assailants.

9. Philadelphia Homicide Detective Manuel Santiago was assigned to lead the investigation of Opher's murder.

10. Detective Santiago's investigation focused on individuals known to have worked in the drug house at 5413 Sansom Street, and he interviewed many of them, including Swainson.

11. On January 18, 1988, police interviewed Jacqueline Morsell, a good friend of Opher's, about Opher's murder.

12. Morsell provided a nine-page statement describing her knowledge of Opher's work in the drug operation at 5413 Sansom Street that did not implicate Swainson in the shooting or mention him other than to indicate that he worked at the drug house.

13. Morsell provided police a physical description of Swainson.

14. Morsell also provided information about three other individuals who worked in the drug operation: "Dred," "Indian," and Green.

15. According to Morsell, a week before the shooting, Opher got into an argument with "Dred" over not being paid. During the argument, "Dred" said "keep talking shit, and I will shoot you in your pussy." Morsell explained this meant that "Dred" would kill Opher.

16. When asked if she ever saw any weapons inside 5413 Sansom Street, Morsell said: "Yes. 'Dred' has shotguns, rifles, .45 automatic, an UZI as they call it and a snub nose that they call it."

17. When police showed her a 12-gauge bolt action shotgun, Morsell said that she had "seen Dred cleaning it in the living room" of the drug house. She also told police that she had "seen 'Indian' with" a sawed-off shotgun.

18. Morsell identified Green as someone that "used to sell drugs out of 5413 Sansom Street, but now he buys drugs from 5413 Sansom Street."

19. Hines was interviewed on January 21, 1988 and did not provide any relevant information to the investigation.

20. The police did not ask Hines for physical descriptions of any of the people he saw on the street the night of Opher's shooting.

21. On January 22, 1988, Swainson provided a voluntary, exculpatory statement to Detective Santiago. During this interview, Swainson allowed Detective Santiago to take a photograph of him and provided his fingerprints. Detective Santiago did not tell Swainson that he should not or could not leave Philadelphia while police were investigating the shooting.

22. On January 25, 1988, police interviewed Green who, other than identifying Presley as someone he had seen before, did not provide any relevant information.

23. The police did not ask Green for physical descriptions of any of the people he saw on the street the night of Opher's shooting.

24. On February 10, 1988, the Commonwealth withdrew all charges against Presley, Hines and Green.

25. On February 12, 1988, Detective Santiago interviewed Presley about what he saw the night of the shooting.

26. Presley gave a six-page statement in response to Detective Santiago's questions. Presley described a long night of drinking alcohol and getting high on cocaine with his girlfriend at her house at 1750 North Peach Street in the Wynnefield neighborhood of Philadelphia before leaving the house, catching a bus, and heading to 5413 Sansom Street at approximately 3:00 am to buy more drugs.

27. Presley told Detective Santiago that he was on the porch of the drug house at the time of the shooting and saw two gunmen who he had no recollection of ever seeing before that night.

28. Detective Santiago did not ask Presley for a physical description of either of the two gunmen.

29. The only physical description that Presley provided of the shooter was: "brown skin dude." Detective Santiago never asked Presley to expand on that description.

30. Presley never provided any physical description of the second gunman.

31. According to the police report of the interview, Detective Santiago asked whether Presley would be able to recognize the shooter and showed him a series of photographs from which Presley identified Swainson.

32. Presley told Detective Santiago that he believed he would also be able to recognize the second gunman, but there is no evidence or police documentation indicating that Detective Santiago ever showed Presley any photographs, including any photographs of "Dred," in an effort to identify the second gunman.

33. On February 15, 1988, Detective Santiago obtained an arrest warrant for Swainson based on Presley's photo identification. Later that day, Detective

Santiago attempted to locate and apprehend Swainson at a house in Philadelphia, but Swainson was not there.

34. On March 9, 1988, the Fugitive Squad arrested Swainson in New York.

35. On March 17, 1988, Swainson waived his Miranda rights and gave a second statement to police.

36. On April 14, 1988, at Swainson's preliminary hearing, Presley testified that Swainson was not Opher's shooter and that he could not identify Swainson as the shooter because Swainson is "red-skinned," while the shooter was "brown-skinned" and "darker complected."

37. Swainson was held for court on all charges based on the evidence of Presley's prior photo identification.

38. On June 10, 1988, Presley met with defense investigator Terrance Gibbs and executed an affidavit in which he stated that Swainson was not the shooter because the shooter was "much darker" skinned.

39. On February 15 and 17, 1989, Detective Santiago interviewed Presley at the District Attorney's Office about Presley's preliminary hearing testimony and the June 10, 1988 affidavit.

40. According to police reports of Presley's statements, Presley told Detective Santiago he refused to identify Swainson at the preliminary hearing

because he assumed that Swainson was behind an assault he had suffered in jail two days before the preliminary hearing.

41. According to the police reports of Presley's statements, Presley also said that his affidavit was false and that he signed it only because the defense investigator (Gibbs) had pressured, threatened, and bribed him.

The Trial

42. Swainson was tried before a jury from March 16, 1989 to March 21, 1989. Judge Albert F. Sabo presided.

43. On March 17, 1989, Presley testified for the Commonwealth at Swainson's trial.

44. Presley testified that he was "certain" Swainson was the shooter and had "no problem" picking his photograph.

45. Presley testified that his April 14, 1988 preliminary hearing testimony was false and that he did not identify Swainson because he feared for his life as the result of the attack he suffered in prison.

46. Presley said that he assumed Swainson was behind the assault inflicted by an inmate named James Brown – who broke Presley's jaw and struck him in the head with a wooden bench two days before he was scheduled to testify at Swainson's preliminary hearing.

47. During cross examination by the defense, Presley admitted that Brown had told him and prison officials that he beat Presley up because Presley had stolen his shoes. Prison officials punished both Presley and Brown for the stolen shoes and the assault.[3]

48. Regarding his June 10, 1988 affidavit, Presley testified that he only signed the affidavit due to threats and offers of bribes from defense investigator Gibbs.

49. In response to the prosecutor's question "[d]id you make any kind of a deal, any kind of arrangements, any promises made to you in exchange for your testifying in this case?," Presley unequivocally stated no.

50. The only other witness against Swainson at trial was Jacqueline Morsell.

51. Morsell testified that Swainson had a reputation for being "pistol happy," was nicknamed "Blood" because he bragged about killing people, and that she had seen him handling and cleaning the sawed-off shotgun used to kill Opher.

[3] In an attachment to Swainson's second PCRA petition, a letter dated October 29, 2008 from Brown further corroborates that Swainson had nothing to do with the assault.

52. Morsell also testified that Swainson and his associates were concerned that Opher planned to quit working in the drug house, and they were worried that Opher would snitch on them.

53. At trial, the Commonwealth also presented evidence of flight.

54. Detective Santiago testified that Swainson went to Jamaica and referred to him as a "fugitive" at trial.

55. Detective Santiago further testified about the process for pursuing "people that leave the Philadelphia area [to] insure their arrest" and said that he turned the assignment of arresting Swainson over to Detectives Cohen and Alexander of the Fugitive Squad.

56. Detective Cohen testified that he applied for "an unlawful flight to avoid prosecution warrant" while Swainson was in Jamaica on February 18, 1988.

57. At the Commonwealth's request, the trial judge instructed the jury that evidence of flight could be used to show consciousness of guilt.

58. The Commonwealth argued to the jury that Swainson's trip to Jamaica and return to his parents' home in New York was an attempt to avoid prosecution and was evidence of consciousness of guilt.

59. The jury deliberated over the course of two days. During those deliberations, they made requests to have Presley's testimony read to them and to see the map of the street, photos, and "the line-up shots."

60. The jury convicted Swainson of first-degree murder, criminal conspiracy, and possessing an instrument of crime on March 21, 1989.

POST-CONVICTION LITIGATION

61. The Pennsylvania Superior Court affirmed Swainson's conviction and sentence on June 26, 1990, and the Pennsylvania Supreme Court denied his petition for allowance of appeal on February 5, 1991.

62. Swainson filed his first Post Conviction Relief Act (PCRA) petition on January 12, 1993. While that petition was pending, Swainson filed a *habeas corpus* petition in federal court on February 24, 1993. On March 18, 1993, the PCRA court dismissed Swainson's petition without prejudice in light of the pending federal petition. On July 15, 1993, the federal court dismissed the habeas petition for failure to exhaust state remedies.

63. On August 3, 1993, Swainson re-filed his PCRA petition alleging ineffective assistance of counsel. The PCRA court dismissed the petition on August 6, 1997 after an evidentiary hearing. The Superior Court affirmed the dismissal on

July 13, 1998, and the Supreme Court denied Swainson's petition for allowance of appeal on December 30, 1998.

64. On December 20, 1999, Swainson re-filed his federal *habeas corpus* petition. The petition was dismissed on February 19, 2002. Swainson did not appeal.

65. In April 2004, Swainson applied for DNA testing pursuant to 42 Pa. C.S. § 9543.1. The PCRA court denied the petition on March 14, 2006, and the Superior Court affirmed on October 23, 2007.

66. On December 11, 2008, Swainson filed his second PCRA petition based on Presley's recantation of his trial testimony. The PCRA court dismissed the petition without a hearing on May 14, 2010. The Superior Court affirmed on December 2, 2011.

67. On March 17, 2012, Swainson sought permission from the United States Court of Appeals for the Third Circuit to file a second federal *habeas corpus* petition based primarily on Presley's recantation, which was granted on April 25, 2012. The District Court denied relief on that petition on July 16, 2014, and the Third Circuit affirmed on August 13, 2015.

68. On August 18, 2014, Swainson filed his (current) third PCRA petition based on, among other things, Morsell's recantation of her trial testimony. He

amended that petition on July 13, 2017 (within 60 days of obtaining previously-suppressed evidence from the Opher homicide file) to raise *Brady* claims.

69. On July 11, 2018, Swainson again sought permission from the United States Court of Appeals for the Third Circuit to file a successive *habeas* petition, which the Third Circuit granted on October 15, 2018. Swainson's *habeas* petition was then filed in the Eastern District of Pennsylvania. Swainson amended the petition on January 24, 2020. That proceeding is currently stayed in the Eastern District of Pennsylvania.

70. On November 18, 2019, Swainson once again amended his current PCRA within one year of the Commonwealth's disclosures of previously-suppressed evidence regarding Presley and Swainson's alleged flight discussed in these stipulations.

CIU INVESTIGATION AND DISCLOSURE OF SUPPRESSED EVIDENCE

The Investigation

71. On February 23, 2018, Swainson, through his attorneys, submitted a formal request that the Conviction Integrity Unit (CIU) in the District Attorney's Office review and investigate his case and claim of innocence.

72. The CIU began its review and investigation into Mr. Swainson's case in July 2018.

73. The CIU reviewed the prosecution file and all the transcripts in the case along with a copy of the homicide file that Swainson had received in 2017 as a result of discovery provided in the Section 1983 civil rights law suit filed by Anthony Wright.[4]

74. On September 17, 2018, the CIU made a request to inspect and copy the original homicide file in the possession of the Philadelphia Police Department Homicide Unit (the "Homicide File").

75. The Homicide File was not made available to the CIU until March 2019.

76. The CIU provided a copy of the Homicide File to defense counsel on March 21, 2019.

77. Several pieces of evidence in the partial copy of the Opher homicide file obtained in 2017 and in the full Homicide File obtained in 2019 had never previously been disclosed to Swainson or his trial counsel.

---

[4] In June 2017, Swainson's counsel obtained a partial copy of the homicide file related to the investigation of Opher's murder. It was provided by the City of Philadelphia in discovery in a federal civil rights lawsuit against several detectives, including Detective Santiago (the detective assigned to investigate Opher's shooting). Wright's claim, which was settled in 2018, was that the Philadelphia Police Department had engaged in a pattern and practice of misconduct "in homicide investigations" where they used coercive interview and interrogation techniques to obtain confessions and incriminating witness statements.

78. During the course of the CIU investigation, the CIU endeavored to interview relevant witnesses – with the understanding that the two critical witnesses are Presley and Morsell.

79. Presley, however, died on November 15, 2009.

80. Morsell was contacted on December 11, 2019 and at that time, she agreed to meet and participate in an interview on December 19, 2019.

81. On December 19, 2019, at the time scheduled for the interview, Morsell did not answer her door or phone.

82. On December 26, 2019, the CIU contacted Morsell again by phone. A woman who sounded like Morsell answered the phone and then abruptly hung up after being told that the call was coming from the CIU.

83. On February 4, 2020, the CIU reached out to Morsell by mail with no response.

84. The CIU also reached out to the City Law Department in an attempt to get information regarding the facts and circumstances regarding the affidavit Morsell provided by Mike Miller in December 2018.

85. On February 12, 2020, citing work-product privilege, the Law Department declined to provide additional information.

86. On February 3, 2020, as part of the investigation, the CIU spoke with former Assistant District Attorney (ADA) Judith Rubino, the trial prosecutor, who stated that she recalled the evidence against Swainson at trial as being weak.

Suppressed Evidence Related to Paul Presley

87. As noted in Swainson's PCRA pleadings, during the defense's post-conviction investigation, Swainson's counsel discovered information indicating that, between the preliminary hearing and trial, Presley had been arrested and prosecuted under the fictitious name Kareem Miller under CP-51-CR-1024751-1988 for felony possession with intent to deliver (35 P.S. § 780-113(a)(30)) and misdemeanor possession of a controlled substance (35 P.S. § 780-113(a)(16)). This arrest did not appear on Presley's criminal history at trial and no records exist as to when it was merged.[5]

88. Although attempts have been made, the District Attorney's Office has been unable to locate any police paperwork or prosecution file relating to the "Kareem Miller" case.

89. As part of the investigation, the CIU reviewed the District Attorney's Office's file (the "DAO File) related to Swainson's prosecution and discovered that

[5] As discussed *infra*, this information was suppressed in the DAO File.

prosecutors had information related to Presley's July 1988 arrest under the name "Kareem Miller."

90. The DAO File contained a February 17, 1989 bring-down order used to arrange for Presley to be transported from prison to the District Attorney's Office for a meeting with Detective Santiago. The order reads: "Paul Presley AKA Kareem Miller."

91. The DAO File also contained a page of notes listing Presley and Kareem Miller with the same inmate number and also listing Kareem Miller with the date of July 29, 1988, the date that Presley was arrested, charged, and incarcerated under that name.

92. Presley was incarcerated in Philadelphia under the fictitious name Kareem Miller for seven months leading up to Swainson's trial.

93. The Commonwealth dismissed all charges against Presley in the case captioned *Commonwealth v. Kareem Miller*, CP-51-CR-1024751-1988 on July 10, 1989, which was the very first trial listing of the case and the first listing of any type after Swainson's trial.

94. The Commonwealth now concedes that Presley was the person arrested, charged, and incarcerated in Philadelphia under the fictitious name

"Kareem Miller" in the case *Commonwealth v. Kareem Miller*, CP-51-CR-1024751-1988.

95. The Commonwealth provided the Presley/Miller documents from the DAO File to Swainson's counsel on July 2, 2019.

96. Information regarding Presley's arrest in the case *Commonwealth v. Kareem Miller*, CP-51-CR-1024751-1988, was not provided to Swainson or his counsel before or during trial.

97. Former ADA Rubino said that she does not recall seeing the bring-down order or page of notes regarding Kareem Miller (aka Paul Presley).

98. However, she stated that if she had seen them, she would have provided them to the defense.

Suppressed Evidence Related to Swainson's Alleged Flight

99. As stated in paragraph 76 *supra*, the Commonwealth disclosed the complete Philadelphia Police Department Homicide File related to the investigation of Opher's murder to Swainson's counsel on March 21, 2019.

100. The Homicide File contained activity sheets and "attempt to apprehend logs" showing that, as of February 15, 1988, Philadelphia police were aware that Swainson had gone to Jamaica for a few weeks and would be returning

during the first week of March. Nonetheless, Philadelphia Police compiled a "fugitive package" on Swainson.

101. These activity sheets and logs also show that police knew as early as February 19, 1988 that Swainson had left for Jamaica on February 11, 1988 and was set to return to Philadelphia the first week of March 1988.On February 20, 1988, Philadelphia Police Detective Bureau Chief Inspector Robert Wolfinger wrote a letter asking Deputy District Attorney Raymond Harley to seek a federal warrant charging Swainson with unlawful flight to avoid prosecution on the charge of murder. Chief Inspector Wolfinger stated that Detective Santiago was assigned to the homicide investigation and that the investigation "revealed that Andrew Swainson informed persons close to him that, after the murder, he was going to flee to Jamaica." Given the information documented by police, it is clear that Inspector Wolfinger made this request on the basis of erroneous evidence.

102. Documents in the Homicide File also show that Swainson contacted Detective Santiago upon his return from Jamaica and told him that he was staying at his parents' house in the Bronx, New York. Detective Santiago noted that he did not inform Swainson of the warrant for his arrest.

103. This information was not disclosed to Swainson or his counsel before or during trial.

104. The trial prosecutor emphasized Swainson's alleged fugitive status to the jury during closing arguments.

105. The Commonwealth also sought and obtained a jury instruction regarding flight. The Commonwealth specifically asked Judge Sabo to charge the jury "both on flight from the scene and the evidence that he left the country," stating that "[t]here is evidence that after he is picked up by the police on January 22nd and knew that they were considering him as a suspect, he left the country. And left the jurisdiction of Philadelphia entirely. He went to New York after he came back from Jamaica, he didn't return to Philly."

106. Former ADA Rubino said that she does not recall seeing Detective Santiago's activity sheets and reports regarding Swainson's trip to Jamaica documenting the fact that before trial: [1] Santiago knew Swainson left for Jamaica before an arrest warrant was issued for him and [2] Swainson did not know he was a suspect nor did Santiago ever tell Swainson he was a suspect.

107. She stated that if she had seen the Santiago activity sheets and reports, she would have provided them to the defense.

108. In regard to the issue of flight, former ADA Rubino said that had she known the above-described information, she would not have argued flight as consciousness of guilt at trial.

Suppressed Evidence Related to Other Suspects and Theories of the Crime

109. Several pieces of evidence in the partial copy of the Opher homicide file obtained in 2017 by Swainson's defense counsel had never previously been disclosed to Swainson or his trial counsel, including documentation indicating that Presley had identified "Kevin Pearson" as his assailant and police activity sheets noting that a witness, Vernon Montague, corroborated Swainson's statement that he heard that the murder occurred during a hold-up attempt.

110. In one of the activity sheets turned over in that production, detectives noted that they participated in the arrest of a man named Allen Proctor the day after they spoke to Montague. There is no other mention of Proctor anywhere else in the Homicide File or in the DAO File.

111. In an effort to locate more information about Proctor, beginning in January 2020, the CIU searched archives and databases to locate the homicide for which Proctor had been arrested. In doing so, the CIU learned that there were three homicides related to Proctor.

112. Proctor's arrest on January 23, 1988 was for murder committed on September 21, 1987 at 3:45am (similar circumstances and timing as Opher's murder).

113. According to documents and information in the Philadelphia Police Department's homicide file for the September 21, 1987 murder, Proctor and two other men held the victim, a drug dealer, at gunpoint when Proctor fired the gun and killed him.

114. A few months after the preliminary hearing, Proctor's bail was lowered and he was released on September 16, 1988.

115. On December 31, 1988, Proctor and Leonard Roberts murdered a man during an argument inside of a drug house. A witness in that case had heard that Proctor "was sticking up the dope dealers in the neighborhood." In an activity sheet in that case, officers in the district described Proctor as "a holdup guy and always has a gun on his person."

116. The following day, Proctor was arrested for gun possession.

117. On January 9, 1989, a warrant was issued for Proctor's arrest for the December 31, 1988 homicide.

118. On January 10, 1989, Proctor got into an altercation with a drug dealer who shot and killed him. According to a witness, Proctor had been "robbing us from time to time for months. He robbed James outright, pulled out his gun and all." He went on to say that Proctor was killed after robbing someone who returned fire when Proctor shot at him.

119. This information regarding Proctor was not provided to Swainson before or during his trial. It was provided to current defense counsel until January 23, 2020.

STIPULATED AND AGREED BY:

Dated: February 12, 2020

/s/ *Nathan J. Andrisani*

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Telephone: (215) 686-8000

Counsel for the Commonwealth of Pennsylvania

VERIFICATION

The undersigned hereby verifies that the facts set forth in the foregoing motion are true and correct to the best of my knowledge, information, and belief. This verification is made subject to the penalties for unsworn falsification to authorities under 18 Pa. C.S. Section 4904.

Dated: February 12, 2020

/s/ *Nathan J. Andrisani*

Nathan J. Andrisani (PA ID No. 77205)
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Counsel for the Commonwealth of Pennsylvania

EXHIBIT C

TEMPLE UNIVERSITY

Nilam Sanghvi <tuf33066@temple.edu>

Confirmation of your E-Filing #2004007607

Criminal.eFiling@courts.phila.gov <Criminal.eFiling@courts.phila.gov> Tue, Apr 7, 2020 at 3:44 PM
To: nilam.sanghvi@temple.edu

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Comm. v. Swaison, Andrew

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DEPUTY COURT ADMINISTRATOR
DIRECTOR, OFFICE OF JUDICIAL RECORDS

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EXHIBIT D

Andrisani, Nathan J.

From: Lynn Malmgren <lynn.malmgren@runbox.com>
Sent: Thursday, April 2, 2020 11:27 AM
To: Andrisani, Nathan J.
Cc: Lynn; Andrew Wellbrock; Patricia Cummings; Patrick <Patrick.Brown@courts.phila.gov>, Michael <Michael.Bonner@courts.phila.gov>, Kathleen O.
Subject: Re: Swainson hearing

[EXTERNAL EMAIL]

Forgive my delayed response; I've been dealing with a family medical emergency.

As of today, the Courts will not reopen until May 4th. I have discussed this matter with Judge Robins New who thinks that a conference call is premature. She has no control over a great many unresolved issues in FJD court administration, both criminal and civil, that will be addressed only when its offices are back in operation. If we are lucky, that will be in the week of May 4th. Whenever it is, court administration will issue to the judges its guidance on how to address the backlog of matters that are accumulating during this crisis, including the scheduling of hearings.

I am sorry we cannot be more helpful. At the same time, I sincerely wish you and your families well during this "new normal."

Lynn

On Tue, 31 Mar 2020 21:44:21 +0000, "Andrisani, Nathan J." wrote:

> Lynn,
>
> Good afternoon. I hope this note finds you and your family well and managing through these very strange, stressful and trying times.
>
> I am reaching out to you to let you know that given the current Court emergency and COVID-19-related health risks, the Commonwealth has contacted the DOC to retract the request to have Mr. Swainson transferred to SCI Phoenix so he can be brought to Court for the hearing scheduled on April 24. We understand from the DOC that all prisoner transfers and bring down orders have been suspended indefinitely. If it is possible for the Court to hold the hearing on April 24 via video-conference as indicated below - or by conference call - we will make arrangements to waive Mr. Swainson's presence and proceed in whatever manner Judge Robins New finds suitable. Given the rather unique circumstances of Mr. Swainson's pending motion, the Commonwealth's response, the COVID-19 health emergency and the heightened risk of widespread transmission if/when the virus invades a prison, as well as the overall uncertainty we are all confronting on a daily basis, I wanted to reach out to you to see if you would be available for a call with me and the Commonwealth's attorneys (ADAs Patricia Cummings and Andrew Wellbrock) to discuss how best to try to manage this situation and make preparations for the hearing on April 24 (or some other date).
>
> Thank you very much for your continued attention to this matter and consideration of this request. Be well.
>
> Have a great day.
>

> Nate
>
> Nathan J. Andrisani
> Morgan, Lewis & Bockius LLP
> 1701 Market Street | Philadelphia, PA 19103-2921
> Direct: +1.215.963.5362 | Main: +1.215.963.5000 | Fax: +1.215.963.5001 | Mobile: +1.610.996.6585
> nathan.andrisani@morganlewis.com | www.morganlewis.com
> Assistant: Donna M. Gappa | +1.215.963.4858 | donna.gappa@morganlewis.com
>
> From: Malmgren, Lynn
> Sent: Monday, March 9, 2020 9:42 AM
> To: Andrisani, Nathan J.
> Subject: Swainson hearing
>
> [EXTERNAL EMAIL]
> Dear Counsel:
>
> We have asked for a video-conferenced hearing for Andrew Swainson on Friday, April 24, 2020. I hope to know the exact time later today.
>
> Please call if you have questions.
>
> Lynn
>
> _____
> Lynn Malmgren, Esq.
> Law Clerk to The Honorable Shelley Robins New
> Chambers CH 673:
> Tel. 215-686-2961 Fax. 215-686-9547
> Court Room CH 625:
> Tel. 215-686-4310 Fax. 215-686-3703
>
>
>
> From: Andrisani, Nathan J.
> Sent: Wednesday, March 4, 2020 12:37 PM
> To: Malmgren, Lynn ; Andrew Wellbrock
> Subject: RE: Voicemail
>
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>
> That works for me.
>
> Have a great day.
>
> Nate
>
> Nathan J. Andrisani
> Morgan, Lewis & Bockius LLP
> 1701 Market Street | Philadelphia, PA 19103-2921

> Direct: +1.215.963.5362 | Main: +1.215.963.5000 | Fax: +1.215.963.5001
> nathan.andrisani@morganlewis.com | www.morganlewis.com
> Assistant: Donna M. Gappa | +1.215.963.4858 | donna.gappa@morganlewis.com
>
> From: Malmgren, Lynn >
> Sent: Wednesday, March 4, 2020 12:36 PM
> To: Andrew Wellbrock >
> Cc: Andrisani, Nathan J. >
> Subject: RE: Voicemail
>
> [EXTERNAL EMAIL]
> How about 3:30? I'll be sure to be at my desk.
>
> Lynn
>
> From: Andrew Wellbrock >
> Sent: Wednesday, March 4, 2020 11:59 AM
> To: Malmgren, Lynn >
> Cc: Andrisani, Nathan J. >
> Subject: Voicemail
>
> CAUTION: This email originated from outside the organization. Do not click on links or open any attachments unless you recognize the sender and confirmed the content is safe.
>
> Lynn-
>
> Nate and I just tried to three-way call over to you, but you were down in the courtroom.
>
> Is there a good time today to call back? I'm available any time with the exception of 2pm to 3pm.
>
> Thanks,
>
> Andrew Wellbrock
> Assistant District Attorney
> Conviction Integrity Unit
> District Attorney's Office
> Three South Penn Square
> Philadelphia, PA 19107
> (o) 215-686-8738
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>
>
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Lynn Malmgren

215-768-5568 (mobile)

215-686-9564 (office)

EXHIBIT E

First Judicial District of Pennsylvania
Court Summary

Swaison, Andrew
BRONX, NY 10416
Aliases:
Andrew Swaison

DOB: 05/04/1965

Sex: Male
Eyes: Unknown
Hair: Unknown or Completely Bald
Race: Black

Closed

Philadelphia

CP-51-CR-0431311-1988 Proc Status: Awaiting PCRA Decision DC No: 8818003831 OTN:M3436672

Arrest Dt: 03/18/1988 Disp Date: 10/13/1989 Disp Judge: Sabo, Albert F.
Def Atty: Sanghvi, Nilam Ajit - (PR)

Seq No	Statute	Grade	Description	Disposition
	Sentence Dt.	**Sentence Type**	**Program Period**	**Sentence Length**
4	18 § 907		POSSESSING INSTRUMENTS OF CRIME	Guilty
	10/13/1989	Confinement		Min: 2 Year(s) 6 Month(s) Max: 5 Year(s)
8	18 § 2502		MURDER-1ST DEGREE	Guilty
	10/13/1989	Confinement	LIFE	
10	18 § 903		CRIMINAL CONSPIRACY	Guilty
	10/13/1989	Confinement		Min: 5 Year(s) Max: 10 Year(s)

Archived

MC-51-CR-0314231-1988 Comm. v. Swaison, Andrew

EXHIBIT F

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nilam.sanghvi@temple.edu

Counsel for Petitioner Andrew Swainson

IN THE PHILADELPHIA COUNTY COURT OF COMMON PLEAS

Commonwealth of Pennsylvania, Respondent	: :	
v.	:	CP-51-CR-0431311-1988
Andrew Swainson, Petitioner	: :	

SECOND AMENDMENT TO PETITIONER'S THIRD PETITION FOR POST-CONVICTION RELIEF PURSUANT TO 42 Pa. C.S. § 9541 *ET SEQ.*[1]

[1] This Second Amendment to Petitioner's Third Petition for Post-Conviction Relief replaces and supersedes the Petitioner's Third Petition for Post-Conviction Relief filed on August 18, 2014, and the First Amendment thereto filed on July 13, 2017, and moots the outstanding Motion for Discovery filed on September 16, 2016.

To the Honorable Shelley Robins New in the Philadelphia County Court of Common Pleas:

Petitioner Andrew Swainson, through his *pro bono* attorneys, files this *Second Amendment to his Third Petition for Post-Conviction Relief Pursuant to 42 Pa. C.S. § 9541 et seq.*[2] For the reasons set forth here, this Court should vacate Mr. Swainson's conviction and grant him a new trial.

Introduction

On March 21, 1989, Andrew Swainson was convicted of the January 1988 murder of Stanley Opher based on Paul Presley's and Jacqueline Morsell's false testimony in what is now known—due to the recent discovery of previously undisclosed information—to have been a constitutionally deficient and manifestly unjust trial. For the more than three decades that followed, Mr. Swainson has maintained his innocence and has done everything possible to prove his innocence and the injustice that occurred. To date, his efforts have been futile.

However, evidence has recently been disclosed that demonstrates that Andrew Swainson was wrongfully and unjustly convicted based on Presley's false eyewitness testimony and undisclosed incentives to lie, Morsell's false motive testimony, and the Commonwealth's introduction of unsupported evidence of Mr. Swainson's alleged flight to avoid prosecution. This previously-suppressed evidence establishes that the Commonwealth secured its conviction by violating Mr. Swainson's due process rights. It is time for this injustice to be addressed and corrected.

[2] A motion for leave to amend pursuant to Pennsylvania Rule of Criminal Procedure 905(A) is being filed simultaneously with this Second Amendment to Andrew Swainson's Third PCRA Petition. Mr. Swainson's August 18, 2014 Third PCRA Petition, July 22, 2016 Reply to the Commonwealth's Letter Brief in Opposition to Petitioner's Third Petition for Post-Conviction Relief, and the July 13, 2017 First Amendment to Petitioner's Third Petition for Post-Conviction Relief are attached as Exhibits 1, 2 and 3, respectively, and incorporated fully herein by reference.

The recently-disclosed evidence that is the subject of this amended petition establishes that Mr. Swainson is now entitled to relief. Specifically, Mr. Swainson presents previously-suppressed evidence that:

- The Commonwealth knowingly and intentionally elicited testimony and introduced evidence in support of a false and manufactured narrative to create the impression that Andrew Swainson was a fugitive of justice and to obtain a jury instruction that evidence of flight can be used to prove a consciousness of guilt despite knowing that Mr. Swainson had not fled, but was away on a short vacation;

- The Commonwealth knowingly and intentionally suppressed exculpatory evidence regarding its star eyewitness, Paul Presley's, arrest and incarceration under the fictitious name "Kareem Miller" for selling drugs in the same West Philadelphia neighborhood where Opher's murder occurred; [3]

- The Commonwealth knowingly and intentionally suppressed exculpatory evidence regarding the leniency agreement that it had with its star eyewitness, Paul Presley, the pressure that it exerted over Presley and the motivation that Presley had to testify falsely at trial; and

- The Commonwealth failed to disclose significant exculpatory evidence from the Philadelphia Police Department's homicide file to Andrew Swainson before his trial. The suppressed information included: evidence about the identity of the assailant who fired the shotgun that injured the Commonwealth' star eyewitness, Paul Presley, at the scene of the murder; evidence about alternative suspects; alternative descriptions of the immediate aftermath of the crime; alternative theories of the motive for the murder; failed polygraph examinations of suspects originally charged in the shooting; and information about additional potential witnesses.

This information has been concealed from Andrew Swainson for decades. Its recent discovery—obtained in connection with the civil rights lawsuit filed by Anthony Wright in the United States District Court for the Eastern District of Pennsylvania and through the investigation of the Philadelphia District Attorney's Office's Conviction Integrity Unit (CIU)—

[3] After years of the Commonwealth denying that the Paul Presley was the same person arrested, charged and incarcerated in Philadelphia in connection with the case *Commonwealth v. Kareem Miller*, CP-51-CR-1024751-1988, evidence recently obtained from the Philadelphia Police Department's homicide file and the Philadelphia District Attorney's prosecution file reveals that Presley was indeed the defendant in *Commonwealth v. Kareem Miller* and that the Commonwealth has known it for more than 30 years. The complete Philadelphia Police Department Opher Homicide File, as eventually produced by the CIU in March 2019, is incorporated by reference herein as Ex. 50 to this Second Amendment to Andrew Swainson's Third PCRA Petition and is being submitted to the Court on a disc due to its large size.

corroborates claims presented by Mr. Swainson in his previous PCRA petitions and illuminates the unconstitutionality of his conviction. The cumulative impact of the significant *Brady* violations set forth in detail below demonstrates that the foundation of the Commonwealth's prosecution theory was hollow and incapable of supporting a conviction of Andrew Swainson. Mr. Swainson did not have a fair trial; his conviction should be vacated and a new trial granted so that he can finally have the due process that both the federal and state constitutions guarantee.

Factual Background

A. The Commonwealth's Investigation And Case At Trial

1. Mr. Swainson's conviction is premised on Paul Presley's and Jacqueline Morsell's trial testimony. This section sets forth the Commonwealth's investigation and prosecution theory of the case as presented at trial.

2. At approximately 3:40 am on January 17, 1988, Stanley Opher was shot on the front porch of 5413 Sansom Street, just around the corner from the 18th Police District at 55th and Pine Streets. He died the next day.

3. Paul Presley, Jeffrey Green and Ashley Hines were each arrested leaving the scene and charged in connection with the shooting of Stanley Opher.

4. Police Officer John Kay heard the gunshot from up the street and then immediately observed a black male (Paul Presley) running from the direction of 5413 Sansom Street. The male crossed over to the south side of Sansom Street and ran west, while glancing over his shoulder at the officer. Officer Kay pursued Presley and apprehended him after finding him hiding near the bushes on the lawn of a house on 55th Street near Sansom Street. Presley was bleeding from his left hand and had large amounts of blood on his coat. *See* 1/21/88 Officer John Kay Interview Record, attached as Ex. 4.

5. Officer Kay also saw Jeffrey Green running from the scene and arrested him at 55th and Sansom Street. *Id.*

6. Ashley Hines was arrested after being seen leaving the drug house and running down the front steps of 5413 Sansom Street following the shooting. 1/18/88 Officer Elga Peay Interview Record, attached as Ex. 5.

7. Numerous officers responded immediately to the scene of the shooting given its proximity to the police station. Within minutes of the shooting, Police Officer Robert Rouse asked Stanley Opher, who was still conscious and crying for help on the ground in front of 5413 Sansom Street, to tell him what happened. Opher replied, "they shot me in my back." *See* 1/21/88 Rouse Interview Record at 2, attached as Exhibit 6.[4]

8. Philadelphia Homicide Detective Manuel Santiago was assigned to lead the investigation of Opher's murder. Detective Santiago's investigation focused on individuals known to have worked in the drug house at 5413 Sansom Street, and he interviewed many of them, including Mr. Swainson.

9. On January 18, 1988, police interviewed Morsell, a good friend of Opher's, about Opher's murder. Morsell provided a nine page statement describing her knowledge of Opher's work in the drug operation at 5413 Sansom Street that did not implicate Mr. Swainson in the shooting. *See* 1/18/88 Morsell Statement, attached as Ex. 8. Indeed, Morsell did not even mention Mr. Swainson other than indicating that he worked in the drug operation and providing a

[4] Opher knew and was friends with Andrew Swainson and did not mention him as being present or involved in the shooting when asked by police for information about his assailant. Later, at Misericordia Hospital, Police Officer Stephen Szymanski reported hearing Opher tell nurses that he was "shot with a shotgun." *See* 1/21/88 Szymanski Interview Record at 2, attached as Exhibit 7. Again, in his efforts to provide police and medical personnel with information about the shooting and his assailant, Opher did not identify his friend Andrew Swainson as being his attacker, present at the scene, or otherwise involved in the shooting.

detailed physical description of him—"22, 5'8" or 5'9", light skin, curly sandy brown hair, he has a real thick full beard, kinky eyes and a scar between his eyes. He wears two chip diamonds in his left ear. He wears a lot of gold all over his hands. He wears a lot of rings. One of the rings says 'Blood' on it." *Id.* at D3418-3419.

10. Instead, Morsell's statement suggested that any one of the other people who worked in the drug operation at 5413 Sansom Street could have been the shooter. Specifically, Morsell provided the following information about Edrick Hume, Clarence Threkheld and Jeffrey Green:

a. A week before the shooting, on January 12, 1998, Opher got into an argument with "Dred" (Edrick Hume PP#541183) over not being paid. During the argument "Dred" said "keep talking shit, and I will shoot you in your pussy." Morsell explained this meant that "Dred" would kill Opher. *Id.* at page 3.

b. Morsell said she knew "Dred" for approximately four months and explained: "He's crazy. He used to ask if we could kill somebody and not have any feelings. I would say no. 'Dred' said 'I have killed. I have plenty of bodies.'" *Id.*

c. Morsell also said: "Every other day he ["Dred"] would get on the phone and say nasty stuff to me. He would talk about what he wanted to do to me with sex. He would only say it when Stanley [Opher] wasn't around." *Id.* at 4.

d. When asked if she ever saw any weapons inside 5413 Sansom Street, Morsell said: "Yes. 'Dred' has shotguns, rifles, .45 automatic, an UZI as they call it and a snub nose that they call it." *Id*. at 6.

e. When police showed her a 12 gauge bolt action shotgun, Morsell said that she had "seen Dred cleaning it in the living room" of the drug house. She also told police

that she had "seen 'Indian' [Clarence Threlkeld PP# 678298] with" a sawed-off shotgun in the middle bedroom of the house. *Id*. at 9.

f. When police showed her Philadelphia Police Photo No. 683689 (Jeffrey Green), Morsell said she knew the person to be Jeffrey Green and that "he used to sell drugs out of 5413 Sansom Street, but now he buys drugs from 5413 Sansom Street." *Id*.

11. On January 21, 1988, Detective Santiago interviewed Ashley Hines. The police interview record indicates that Detective Santiago never asked Hines for physical descriptions of any of the people he saw at 5413 Sansom Street on the night he was arrested leaving the drug house immediately after the shooting—nor did Detective Santiago ever show Hines any photographs of any potential suspects. *See* 1/21/88 Hines Interview Record, attached as Ex. 9. According to previously undisclosed notes from the Opher Homicide File, the police administered a polygraph examination to Hines and noted that deception was indicated in his response denying involvement with and knowledge of the shooting. *See* 1/21/88 Activity Sheet re Ashley Hines Interview and Polygraph results, Excerpt of Complete Opher Homicide File, AS (HF) 000667, attached as Ex. 10.

12. On January 22, 1988, Andrew Swainson provided a voluntary statement to Detective Santiago describing his relationship with Opher, his knowledge of what happened on January 17, 1988, and his whereabouts on that day. *See* 1/22/88 Swainson Interview Record, attached as Ex. 11. During this meeting, Mr. Swainson allowed Detective Santiago to take a photograph of him and provided his fingerprints. Because Mr. Swainson had never been arrested,

police had neither his photograph nor his fingerprints on file. Detective Santiago let Mr. Swainson leave after taking his photograph. N.T. 3/17/89, 192-96.[5]

13. On January 25, 1988, police interviewed Green in connection with the investigation of Opher's murder. The police never asked Green for physical descriptions of any of the people he saw on the street the night that he was arrested running from the scene of the shooting. The January 25, 1988 police interview of Green indicates that Detective Miller showed Green photos of the following individuals: PP#388714 [Paul Presley]; PP#622476 [Stanley Opher]; PP#428535 [James Smith]; PP#678298 [Clarence Threlkeld]; and one without a number (most likely the January 22, 1988 picture that Andrew Swainson voluntarily provided). Green indicated that the only person he had ever seen before was Paul Presley.[6] *See* 1/25/88 Green Interview Record, attached as Ex. 12. According to previously undisclosed notes from the Opher Homicide File, the police administered a polygraph examination to Green and noted that deception was indicated in his response denying involvement with and knowledge of the shooting. *See* 1/21/88 Notation re Jeffrey Green Polygraph Exam, Excerpt of Opher Homicide File, D4005, attached as Ex. 13.

14. On February 10, 1988, the Commonwealth dismissed all charges against Presley, Hines and Green.

15. On February 12, 1988, Detective Santiago interviewed Presley about what he saw the night of the shooting. Presley gave a six-page statement in response to Detective Santiago's questions in which he described a long night of drinking alcohol and getting high on cocaine

[5] At no point during the meeting did Detective Santiago inform Mr. Swainson that he could not leave Philadelphia while police were investigating the shooting. *See* 1/22/88 Swainson Interview Record.

[6] Despite being aware that "Dred" threatened to kill Opher, neither Detective Santiago nor anyone else ever showed Jeffrey Green a picture of Edrick "Dred" Hume (PP#451183).

with his girlfriend at her house at 1750 North Peach Street in the Wynnefield neighborhood of Philadelphia before leaving the house, catching a bus, and heading to 5413 Sansom Street at approximately 3:00 am to buy more drugs. *See* 2/12/88 Presley Statement, attached as Exhibit 14.

16. Presley told Detective Santiago that he was on the porch of the drug house at the time of the shooting and saw two gunmen who he did not recall ever having seen before. Detective Santiago never asked Presley for a physical description of either of the two gunmen that Presley claimed to have seen. The only physical description that Presley provided of the shooter was: "brown skin dude." *Id.*

17. Detective Santiago never asked Presley to expand on that vague description. Instead, according to the statement, Detective Santiago simply asked whether Presley would be able to recognize the shooter and showed him a series of photographs from which Presley allegedly identified Mr. Swainson.[7]

18. Presley told Detective Santiago that he believed he would also be able to recognize the second gunman, but there is no evidence or police documentation indicating that Detective Santiago ever showed Presley any photographs in an effort to identify that person. There is also no indication in the Complete Opher Homicide File that Detective Santiago or anyone else ever showed Presley a picture of Edrick "Dred" Hume (PP#541183).

19. On February 15, 1988, Detective Santiago obtained an arrest warrant for Mr. Swainson based on Presley's photo identification. N.T. 3/17/89, 176. Detective Santiago

[7] It is unclear what criteria Detective Santiago used to create an alleged photo spread of "brown skin dude(s)" to show to Presley since he had no other physical description to work with to determine approximate height, weight, existence of facial hair and/or any other identifying features typically used to create a photo array.

attempted to locate and apprehend Mr. Swainson at a house in Philadelphia, but Mr. Swainson was not there.

20. On March 9, 1988, the Fugitive Squad arrested Mr. Swainson in New York. N.T. 3/17/89, 203-04.

21. On April 14, 1988, at Mr. Swainson's preliminary hearing, Presley testified that Andrew Swainson was ***not*** Opher's shooter and that he could not honestly identify Andrew Swainson as the shooter because Mr. Swainson is "red-skinned," while the shooter was "brown-skinned" and "darker complected" than Mr. Swainson. N.T. 4/14/1988, 68-69. Mr. Swainson was held for court on all charges based on the evidence of Presley's prior photo identification of Mr. Swainson. *See id.* at 86.

22. On June 10, 1988, Presley met with defense investigator Terrance Gibbs and executed an affidavit in which he averred that Mr. Swainson was not the shooter because the shooter was "much darker" skinned than Mr. Swainson. *See* 6/10/88 Presley Affidavit, attached as Ex. 15.

23. On February 15 and 17, 1989, Detective Santiago interrogated Presley at the District Attorney's Office about Presley's preliminary hearing testimony and the June 10, 1988 affidavit. According to Presley's statements, Presley told Detective Santiago he refused to identify Andrew Swainson at the preliminary hearing because he assumed that Mr. Swainson was behind an assault he had suffered in jail two days before the preliminary hearing. He also said that his affidavit was false and that he signed it only because the defense investigator (Gibbs) had pressured, threatened, and bribed him. *See* 2/15/89 Presley Statement, attached as Ex. 16; 2/17/89 Presley Statement, attached as Ex. 17.

24. On March 17, 1989, Presley testified for the Commonwealth at Mr. Swainson's trial.

25. Regarding his February 12, 1988, interview with Detective Santiago, Presley testified that he was "certain" Mr. Swainson was Opher's shooter and had "no problem" picking his photograph. N.T. 3/17/89, 59-61. He claimed there was "no doubt" in his mind that Mr. Swainson murdered Opher. *Id.* at 137.

26. Regarding his April 14, 1988 preliminary hearing testimony, Presley testified that it was false and that he did not identify Andrew Swainson because he feared for his life as the result of the attack he suffered in prison. *Id.* at 24-27, 96, 108-09. Presley said an inmate named James Brown struck him in the head with a wooden bench two days before Presley was scheduled to testify at Mr. Swainson's preliminary hearing, breaking his jaw. *Id.* at 91-92. Presley said that he assumed that Mr. Swainson was behind the assault. *Id.* at 92-93.[8]

27. Regarding his June 10, 1988 affidavit, Presley testified that he only signed the affidavit due to threats and offers of bribes from defense investigator Gibbs. *Id.* at 30-32.

28. Presley testified unequivocally that he did ***not*** have any leniency agreement in place with the Commonwealth in exchange for his testimony against Mr. Swainson. *Id.* at 20.

9	Q. Did you make any kind of a deal, any kind of
10	arrangements, any promises made to you in exchange for
11	your testifying in this case?
12	A. No.

29. The only other person to implicate Mr. Swainson at trial was Jacqueline Morsell.

[8] However, Presley admitted that Brown told him and prison officials that he beat Presley up because Presley had stolen his shoes. Prison officials punished both Presley and Brown for the stolen shoes and the assault. N.T. 3/17/89, 93-95.

30. Morsell's trial testimony, however, was vastly different than her police statement that did not implicate Mr. Swainson in any way. Instead of naming "Dred" as the person with the guns who bragged about killing people, Morsell now said that Mr. Swainson: had a reputation for being "pistol happy," (N.T., 3/18/1989, at 156), was nicknamed "Blood" because he bragged about killing people, *id.* at 135-36, and had been seen handling and cleaning the sawed-off shotgun used to kill Opher, *id.* at 121, 155.

31. Morsell provided critical motive testimony. She claimed that Mr. Swainson and his associates were concerned that Opher planned to quit working in the drug house and were worried that Opher would snitch on them. *Id.* at 97, 112.

32. In its efforts to bolster its theory of the case and the corresponding credibility of Presley and Morsell, the Commonwealth presented suspect and disingenuous evidence of flight.

33. First, Detective Santiago testified that Mr. Swainson went to Jamaica and referred to him as a "fugitive" at trial. Detective Santiago further testified about the process for pursuing "people that leave the Philadelphia area [to] insure their arrest" and said that he turned the assignment of arresting Andrew Swainson over to Detectives Cohen and Alexander of the Fugitive Squad. N.T. 3/17/89, 177.

34. Second, Detective Cohen testified that he applied for "an unlawful flight to avoid prosecution warrant" while Mr. Swainson was in Jamaica on February 18, 1988. N.T. 3/17/89, 205.

35. Third, at the Commonwealth's request, the trial judge instructed the jury that evidence of flight could be used to show consciousness of guilt. N.T. 3/20/89, 102-03.

36. Fourth, the Commonwealth argued to the jury that Mr. Swainson's trip to Jamaica and return to his parents' home in New York was an attempt to avoid prosecution and was evidence of consciousness of guilt. N.T. 3/20/89, 70-71.

37. The jury deliberated over the course of two days and convicted Mr. Swainson of first-degree murder and related charges on March 21, 1989.

38. Mr. Swainson's counsel only recently became aware of the troubling nature of the Commonwealth's flight-related representations at trial through their receipt of the Complete Opher Homicide File.

B. Paul Presley's 2008 Recantation and Related Evidence

39. As part of his work assisting Mr. Swainson in proving his innocence, Mr. Swainson's investigator, Russell Kolins, sent correspondence to Paul Presley asking whether Presley would be willing to speak with him about his testimony at Mr. Swainson's trial. *See* 2019 Affidavit of Russ Kolins, attached as Ex. 18; 12/7/08 Affidavit of Russ Kolins, attached as Ex. 19.

40. Presley responded to Kolins and agreed to meet with him at Bayside State Prison in Leesburg, New Jersey. The meeting took place on October 11, 2007. Presley informed Kolins that his trial testimony was false, but said that he wanted to meet with an attorney before speaking further due to a fear of perjury charges. *See* 12/7/08 Affidavit of Russ Kolins, Ex. 19.

41. On December 12, 2007, Presley sent Kolins a letter stating that Kolins could visit him again. Presley also stated that he had reservations and wanted to see a lawyer about possible perjury charges. *See* 12/12/07 Letter from Presley to Kolins, attached as Ex. 20; *see also* 10/13/08 Presley Handwritten Statement, attached as Ex. 21.

42. Kolins did not hear from Presley again. In September 2008, Kolins tried to contact Presley at Bayside State Prison, but learned that he was no longer incarcerated there and instead resided at the Albert "Bo" Robinson Assessment and Treatment Center in Trenton, New Jersey. *See* 12/07/08 Affidavit of Russ Kolins, Ex. 19.

43. Presley and Kolins met at the treatment center on October 13, 2008. During the meeting, Presley gave a tape recorded supplemental statement and executed an affidavit in which he completely disavowed his trial testimony. Presley told Kolins that he "was facing a lot of guilt" and "c[a]me to the conclusion that it was time to tell the truth." *See* 10/13/08 Presley Taped Supplemental Statement, attached as Ex. 22.

44. Specifically, Presley stated that:

a. He did **not** pick Presley out of a photo array as he testified to at trial. Instead, Presley said that he was shown several photos of just one person—Andrew Swainson;

b. Prosecutor Judith Rubino told him that Mr. Swainson was wanted for several other murders;

c. Ms. Rubino told him he had to identify Mr. Swainson;

d. He "knew in his heart" that Andrew Swainson was not the shooter because the shooter was a dark-skinned African-American, while Mr. Swainson was a light-skinned Jamaican;

e. Defense investigator Terrance Gibbs did **not** bribe, threaten, or pressure him to sign the June 10, 1988 affidavit but the prosecutor instructed him to testify at trial that Gibbs had done so; and

f. Ms. Rubino promised him that, if he testified against Mr. Swainson at trial, the Commonwealth would drop his pending criminal charges and help him find a job.[9]

See 10/13/08 Presley Handwritten Statement, Ex. 21.

45. Two other pieces of new evidence also came to light in 2008.

46. First, in response to his outreach efforts, Kolins received a letter on October 29, 2008 from James Brown, who was then incarcerated at SCI Huntingdon, stating that Mr. Swainson had nothing to do with his 1988 assault on Presley. Instead, Mr. Brown said he assaulted Presley because Presley was flirting with a female guard who Brown liked and that Presley had stolen his valium. *See* 10/29/08 Brown Letter, attached as Ex. 24.

47. Second, on December 2, 2008, former defense investigator Terrance Gibbs—who by 2008 was a lieutenant in the Philadelphia Police Department's Internal Affairs Division—executed an affidavit in which he affirmed that he never bribed, pressured, or threatened Presley. Gibbs indicated that, if Mr. Swainson's trial counsel had asked him to testify, he would have rebutted Presley's testimony on those points. He also said that he informed the prosecutor that Presley's allegations were false. He could not recall whether that conversation occurred before, during, or after Mr. Swainson's trial. *See* 12/2/08 Gibbs Affidavit, attached as Ex. 25.

48. Based on this evidence, Mr. Swainson filed his second PCRA petition on December 11, 2008; that petition was denied without a hearing. Mr. Swainson thus kept pressing forward to investigate his case and obtain new evidence to support his innocence.

C. The Newly-Discovered and Previously-Suppressed Evidence Underlying the Third PCRA Petition Filed on August 18, 2014, as Amended on July 13, 2017.

[9] Mr. Swainson's counsel and investigator searched Presley's criminal records at the time and did not uncover Presley's arrest for dealing drugs in the 18th Police District under the fictitious name "Kareem Miller." *See* 11/12/19 Affidavit of Craig Cooley, attached as Ex. 22, and 2019 Affidavit of Russell Kolins, attached as Ex. 18.

1. *Evidence Discovered in 2014*

a. *Commonwealth v. Kareem Miller*

49. After searching for records relating to Paul Presley, *pro bono* counsel from Morgan Lewis discovered on July 15, 2014 the computer docket sheet in *Commonwealth v. Kareem Miller*, CP-51-CR-1024751-1988. Counsel also discovered that the court computer was now listing "Kareem Miller" as a previously-undisclosed alias for Paul Presley. Upon searching for available court records of the prosecution of *Commonwealth v. Kareem Miller*, CP-51-CR-1024751-1988, counsel recognized that they may have identified the case Presley referred to in his October 2008 affidavit disavowing his trial testimony. In that affidavit, Presley averred that charges against him were dropped in exchange for his testimony against Mr. Swainson: "The charges I faced were ultimately dropped and I made bail on pending charges and parole from a detainer in New Jersey." *See* 10/13/08 Presley Taped Supplemental Statement, Ex. 22.

50. Presley testified at trial that he had an outstanding drug possession charge and used two aliases, "Pike" and "Pipe." N.T. 3/17/89, at 104-05; *see also* Ex. 1, 8/18/14 Third PCRA Pet'n ¶¶ 25. Mr. Swainson's trial counsel cross-examined Presley on his then-known aliases and criminal record as provided in discovery by the Commonwealth—which did not show the name "Kareem Miller" as a potential alias or reference the case *Commonwealth v. Kareem Miller*, CP-51-CR-1024751-1988. *See* Paul Presley Criminal Record, attached as, Ex 26. Neither Presley nor the Commonwealth ever mentioned the name "Kareem Miller" or that his charges were actually felony drug charges. *See* Declaration of Perry DeMarco, Sr., Esq., attached as Ex. 27.

51. The District Attorney's Office has indicated that it has searched for but is unable to locate any police paperwork or prosecution file relating to the case *Commonwealth v. Kareem*

Miller, CP-51-CR-1024751-1988.[10] It is not surprising, therefore, that it took decades to discover that the Commonwealth's recalcitrant witness, Paul Presley, had been arrested, charged, and incarcerated in a Philadelphia prison under the fictitious name "Kareem Miller" in order to prevent him from being extradited to New Jersey, give the Commonwealth leverage to coerce Presley to falsely identify Andrew Swainson at trial, and hide that Presley dealt drugs in the same West Philadelphia neighborhood where Opher was shot from the judge and the jury.

52. During cross-examination of Presley in connection with his open violation of probation hearing, Mr. Swainson's trial counsel (Perry DeMarco, Sr.) asked, "Can you tell us why, sir, the computer indicates that the case [a VOP hearing before Judge Carson] was continued because you are a Commonwealth witness?" N.T. 3/17/89, at 121-22. The fact that trial counsel checked the court computer and did not question Presley about any pending felony drug dealing charges under the fictitious name "Kareem Miller" further demonstrates that information on the arrest of Presley in the case *Commonwealth v. Kareem Miller*, CP-51-CR-1024751-1988, was not provided to trial counsel before trial and was not listed in the court's computer system at the time of trial. *See* DeMarco Declaration, Ex. 27, ¶ 3.

53. As described in detail in the *Timeline of Events Regarding Paul Presley's Arrest Under the Fictitious Name "Kareem Miller"* that is attached hereto as Ex. 28, the Commonwealth arrested and charged Presley—under the fictitious name "Kareem Miller"—with two felony drug counts for PWID—possession with intent to distribute. This arrest came at the time Presley—its star witness—was set to be extradited and returned to New Jersey to face justice for his crimes. The Commonwealth was able to secure the assistance and cooperation of

[10] Similarly, in 2016, undersigned counsel contacted Louis Priluker—who is listed on the Court's computer as being counsel for "Kareem Miller"—and he indicated that he no longer had a file from that case in 1988-1989.

Presley by incarcerating him in Philadelphia under the fictitious name "Kareem Miller" for more than seven months leading up to Andrew Swainson's trial.

54. As detailed in his 2008 Statement, Presley testified falsely against Andrew Swainson on March 17, 1989, in exchange for leniency with his open charges and the promise of a job.

55. The Commonwealth dismissed all the outstanding charges against Presley in the case captioned *Commonwealth v. Kareem Miller*, CP-51-CR-1024751-1988 on July 10, 1989, at the very first trial listing after Mr. Swainson's trial.

56. Mr. Swainson filed his currently pending Third PCRA petition on August 18, 2014 based on this information as well as Jacqueline Morsell's recantation, discussed below. Through 2017, the Commonwealth claimed that Mr. Swainson's contention that Paul Presley was the person arrested, charged, and incarcerated in the case *Commonwealth v. Kareem Miller,* CP-51-CR-1024751-1988, was "pure speculation." *See* 4/14/16 Letter from Tracey Kavanagh, attached as Ex. 29 (representing that "defendant's claim that Paul Presley used the alias Kareem Miller and was arrested on the drug charges in question is pure speculation"); N.T. 5/17/17, 40 ("There's no proof Paul Presley is even Kareem Miller. The fact that a guy named Kareem Miller used Paul Presley as an alias just doesn't prove Paul Presley was arrested on drug charges.").

57. Based upon investigation by the CIU, including its discovery of documents in the prosecution file linking Presley and "Kareem Miller," the Commonwealth has now conceded that Paul Presley was indeed the person arrested, charged and incarcerated in Philadelphia under the fictitious name "Kareem Miller" in the case *Commonwealth v. Kareem Miller*, CP-51-CR-1024751-1988. *See* 7/16/19 Letter from A. Wellbrock, attached as Ex. 44.

b. **Morsell's Recantation**

58. Russell Kolins contacted Jacqueline Morsell requesting a meeting with her several times during the course of his work on Mr. Swainson's case. *See* 7/22/14 Morsell Affidavit at ¶ 5, attached as Ex. 30. Morsell declined requests because she feared retribution from Mr. Opher's family, particularly his mother Tina Davis. *Id.* After Opher's murder, Morsell and her son lived with Opher's mother and other family members. Morsell was sexually abused by some of those family members and physically abused and prostituted out by Davis. Morsell's children were also abused. *Id.*

59. On June 11, 2014, Morsell finally agreed to meet with Mr. Kolins and two of Mr. Swainson's attorneys, and the meeting took place on June 19, 2014. *Id.*

60. On July 22, 2014, Jacqueline Morsell executed an affidavit disavowing her trial testimony. *See* 7/22/14 Morsell Affidavit. She stated that Andrew Swainson: did not call her to say something about Opher's murder going as planned; was not nicknamed "Blood" and did not brag about killing people; and was never known to be "pistol happy" or seen cleaning any shotgun.[11] *Id.*

61. Morsell also said that she testified falsely because she feared retribution from Opher's family, as described above. *Id.*

62. Morsell also said that Davis forced her to testify and that she was afraid that, if she did not do so, Davis would kick them out of her house, leaving Morsell and her young son homeless. *Id.*

[11] During the pendency of this PCRA proceeding, the City Solicitor's office obtained a conclusory statement from Morsell in which she stood by her trial testimony against Mr. Swainson. *See* 12/14/18 Statement of Jacqueline Morsell, attached as Ex. 31. This statement was apparently obtained in connection with ongoing civil rights cases brought by others claiming that they were unjustly convicted. The manner in which the statement was obtained is unknown. However, given its complete lack of detail and Morsell's prior unreliable statements, the December 2018 Morsell Statement is not reliable.

2. *Evidence Discovered in 2017*

63. In June 2017, undersigned counsel obtained a partial copy of the homicide file related to the investigation of Opher's murder. It was provided the City in discovery in a federal civil rights lawsuit against a number of detectives, including Detective Santiago (the detective assigned to investigate Opher's shooting). *See Wright v. City of Philadelphia,* 2:16-cv-05020 (E.D. Pa.).[12]

64. The City produced full or partial homicide files, including a partial copy of the Opher homicide file, in Wright's case pursuant to a claim that the Philadelphia Police Department had engaged in a pattern and practice of misconduct "in homicide investigations, and in particular, using coercive techniques in interviews and interrogations to obtain confessions." *See Wright v. City of Philadelphia*, 2:16-cv-05020 (E.D. Pa.), Compl., Sept. 20, 2016, ECF No. 1, ¶ 114, attached as Ex. 32.

65. A number of pieces of evidence in the partial copy of the Opher homicide file obtained in 2017 had never previously been disclosed to Mr. Swainson. By way of example, the following information, discussed in chronological order, had been suppressed:

a. **January 21, 1988, Potential Alternate Perpetrator**: The police were aware of a Kevin Pearson, who purportedly assaulted Presley at the time of Opher's shooting and thus was a potential alternate perpetrator. This was not disclosed to Mr. Swainson or his counsel. *See* 1/21/87 Injured Officer Color Photograph Request Form, Excerpt of Opher Homicide File, D3998, attached as Ex. 33.

b. **January 21, 1988, Failed Polygraphs of Potential Alternate Perpetrators**: The police also had records of the failed polygraph examinations of Jeffrey Green and

[12] Wright had allegedly confessed to a murder in a statement obtained by Detectives Devlin and Santiago. DNA evidence later showed someone else had murdered the victim, and a jury acquitted Wright at his re-trial despite testimony from Detective Devlin and Detective Santiago about the purported confession.

Ashley Hines, who had both been arrested leaving the scene of Opher's murder and were originally charged with the crime (along with Paul Presley). Information about the failed polygraph examinations were never disclosed to Mr. Swainson or his counsel. *See* 1/21/88 Notation re: Jeffrey Green Polygraph Exam, Excerpt of Opher Homicide File, D4005, attached as Ex. 13; 1/21/88 Activity Sheet re Ashley Hines Interview and Polygraph Results, Excerpt of Complete Opher Homicide File, AS (HF) 000667, attached as Ex. 10.

c. **January 21, 1988, Alternate Theory of the Crime**: An activity sheet indicates that police interviewed Vernon Montague, a friend of Opher's. Montague reported to detectives that "word being passed around on the streets is that [Opher] was shot during a hold-up attempt." *See* 1/21/88, Activity Sheet, Excerpt of Opher Homicide File, attached as Ex. 34. The record of Montague's interview provided to Andrew Swainson before trial did not mention Montague's statement about a possible robbery attempt at the drug house at 5413 Sansom Street. *See* 1/21/88, Vernon Montague Investigation Interview Record, Excerpt of Opher Homicide File, D3512-3513, attached as Ex. 35. Instead, the interview report reflected a statement by Montague that the rumor on the street was that the drug house was being moved to a different location. *Id.*

d. **January 22, 1988, Potential Alternate Perpetrator**: In an activity sheet, Detective Santiago memorialized the arrest of Allen Proctor for murder, possession of an instrument of crime, and VUFA. *See* 1/23/88 Activity Sheet, Excerpt of Opher Homicide File, D2868, attached as Ex. 36. No information about Proctor was ever disclosed to Mr. Swainson or his counsel.

e. **January 26, 1988, Potential Alternate Perpetrator**: An activity sheet reveals that Detective Fischer confronted Jeffrey Green's attorney at Green's scheduled preliminary hearing on the charges relating to the shooting of Stanley Opher about the possibility that a Jamaican man named "George" was involved in Opher's murder. *See* 1/26/88 Activity Sheet, Excerpt of Opher Homicide File, D2870, attached as Ex. 37. This information was never disclosed to Mr. Swainson or his counsel.

f. **Undated, Potential Witness**: Ernestine Opher told police that someone named "Douglas Northern" was with Opher until 1:30 am on the morning of his murder (just two hours before the shooting). *See* Undated Notes, Excerpt of Opher Homicide File, D3950, attached as Ex. 38. The existence of this potential witness was never disclosed to Mr. Swainson.

g. **Undated, Potential Witnesses**: Undated neighborhood surveys conducted by police reveal a version of events different from those reported by Presley and the responding police officers. Detective Harmon interviewed Karen Clark, who lived directly across from the drug house where Opher was shot. She reported: hearing three gunshots; seeing "a lot of people in the middle of Sansom Street;" seeing two men holding shotguns; and hearing someone yell "let's get out of here." *See* Neighborhood Survey, Excerpt of Opher Homicide File, D3981, attached as Ex. 39. Tino Daniels, who lived on the 5400 block of Sansom Street, also reported hearing three gunshots. *See* Neighborhood Survey, Excerpt of Opher Homicide File, D3990, attached as Ex. 40. Presley and Officer Kay, however, reported only a single shot, and Presley did not report seeing a lot of

people around the scene at the time of the shooting. This information was never disclosed to Mr. Swainson or his counsel.

66. Mr. Swainson amended his 2014 PCRA petition to bring claims based on the discovery of this suppressed evidence.

3. *Evidence Discovered in 2019*

67. On June 15, 2019, the Commonwealth, through the CIU, disclosed to undersigned counsel two documents from the prosecution file of Andrew Swainson. These documents—which were readily found when prosecutors retrieved and reviewed the prosecution file—demonstrated that the Commonwealth's earlier arguments that there was no evidence that Paul Presley was arrested, charged, and incarcerated in Philadelphia under the fictitious name "Kareem Miller" were plainly incorrect. The Commonwealth also disclosed the full Opher Homicide File, which contained documents showing Mr. Swainson was not a fugitive, contrary to the Commonwealth's position at trial.

a. Paul Presley Was Kareem Miller

68. First, a February 17, 1989 "bring-down" order used to arrange for Presley to be transported from prison to the Philadelphia DA's Office for his trial prep meeting with Detective Santiago clearly reads: "Paul Presley AKA Kareem Miller." 2/17/89 Order, attached as Ex. 41, shown below. This order was in the prosecution file and had never previously been disclosed to Andrew Swainson or his counsel. Such orders are not typically in the court's file. This order was not in the court's file.

☒ Trial Division Criminal Section ☐ Family Court Division ☐ Domestic Rel. ☐ Juvenile ☐ Women's Criminal ☐ Misdemeanant's

IN THE PHILADELPHIA MUNICIPAL COURT
☐ Criminal Section

Commonwealth

vs.

Andrew Swinson

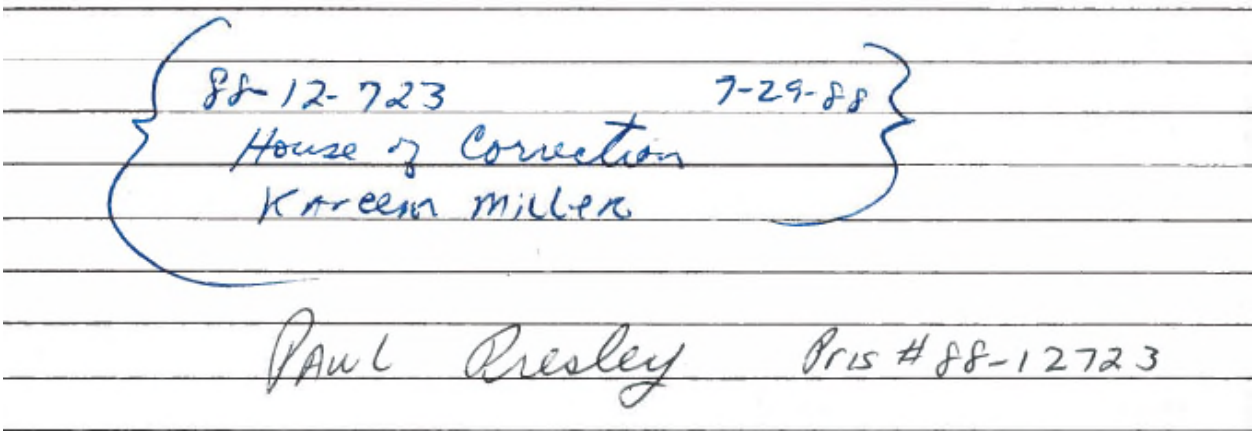
Date: Friday 2-17-89

CP 88-04-3131-3135

I hereby certify, That on 17 day of February A.D. 19 89

I hereby order that the Sheriff release Paul Presley AKA Kareem Miller PR # 88-12723 TO Det Santiago 823, Homicide Division for Interview.

69. Second, a page of notes in the District Attorney's prosecution file listed Presley and "Kareem Miller" with the same inmate number and also lists the name "Kareem Miller" with the date of July 29, 1988—the date when Presley was arrested, charged, and incarcerated in Philadelphia under the fictitious name "Kareem Miller." *See* Handwritten Notes, attached as Ex. 42, shown below.



b. The Commonwealth Knew Andrew Swainson Was Not A Fugitive

71. On March 21, 2019, the Commonwealth, again through the CIU, disclosed the complete Philadelphia Police Department Opher Homicide File. The complete file contained significant undisclosed evidence regarding Mr. Swainson's alleged fugitive status in connection with this case.

72. First, activity sheets and attempt to apprehend logs show that Philadelphia police were aware that Mr. Swainson had left for Jamaica on February 11, 1988—before they sought or obtained an arrest warrant for Mr. Swainson and before Presley even identified his photograph—and was set to return to Philadelphia in the first week of March 1988. *See* Combined Philadelphia Police Department Opher Homicide File Excerpt at AS (HF) 000390, 392, 394-95, 412, 662, attached as Ex. 43.[13]

73. Second, the activity sheets and attempts to apprehend logs make clear that Detective Santiago and the Commonwealth knew Mr. Swainson would return to the United States in a few weeks, but still compiled a "fugitive package" on him. *Id.* at 390-92, 412.

74. Third, the complete Philadelphia Police Department Opher Homicide File shows that Andrew Swainson contacted Detective Santiago upon his return from Jamaica and told him that he was staying at his parents' house in the Bronx, New York. Detective Santiago noted that he did **not** inform Mr. Swainson of the active warrant for his arrest. *See id.* at AS(HF)000676 ("Sw[a]inson does not know that he is currently wanted for murder, and the information was not given to Sw[a]inson.").

[13] These citations are to the Bates-stamped pages of the complete Philadelphia Police Department Opher Homicide File as produced in March 2019.

75. Despite this knowledge of Mr. Swainson's whereabouts, police continued to treat Mr. Swainson as a fugitive. The Commonwealth also capitalized on the "fugitive" designation and bogus evidence of "flight" to argue to the jury that Mr. Swainson's trip to Jamaica and return to his parents' home in New York was an attempt to avoid prosecution and was evidence of consciousness of guilt. N.T. 3/20/89, 70-71.

76. In addition to this evidence negating Mr. Swainson's purported flight, the complete Philadelphia Police Department Opher Homicide File contained a previously-undisclosed audio recording of Presley's February 15, 1989 statement. *See* 7/16/19 Letter from ADA Wellbrock, attached as Ex. 44. At trial, Detective Santiago expressly denied having recorded any statements from Presley other than his February 17, 1989 statement.[14] N.T. 3/17/89, 187.

Procedural History

77. Mr. Swainson's jury trial proceeded before Judge Albert F. Sabo from March 9, 1989 to March 21, 1989. The jury convicted Mr. Swainson of first-degree murder, criminal conspiracy, and possession of an instrument of crime (PIC). Perry DeMarco Sr. represented Mr. Swainson, and Judith Rubino prosecuted the case for the Commonwealth. Mr. DeMarco filed post-trial motions, which were denied. Judge Sabo sentenced Andrew Swainson to life imprisonment without the possibility of parole on the murder bill, with concurrent sentences of five-ten years for the conspiracy bill and two-and-a-half to five years on the PIC bill.

78. The Superior Court affirmed Mr. Swainson's conviction and sentence on June 26, 1990, and the Supreme Court denied Mr. Swainson's petition for allowance of appeal on

[14] Detective Santiago appeared at the re-trial of Anthony Wright on August 16, 2016 and testified falsely that recording statements was not available to the police in 1991 and that he had never previously taken a statement from a witness in the course of an investigation and recorded that statement. *See Commonwealth v. Wright*, N.T. 8/16/16, 119, attached as Ex. 45. As we now know, he twice interviewed and recorded the statements of Paul Presley in 1989 in this matter.

February 5, 1991. David Belmont represented Mr. Swainson for direct appeal. Suzan Wilcox represented the Commonwealth.

79. Mr. Swainson filed his first PCRA petition on January 12, 1993. While that petition was pending, Mr. Swainson filed a *habeas corpus* petition in federal court on February 24, 1993. On March 18, 1993, the PCRA court dismissed the PCRA petition without prejudice in light of the pending *habeas* petition. On July 15, 1993, the federal court dismissed the *habeas* petition for failure to exhaust state remedies. Mr. Swainson proceeded *pro se.*

80. On August 3, 1993, Mr. Swainson therefore re-filed his PCRA petition, which was dismissed on August 6, 1997 after an evidentiary hearing. The Superior Court affirmed that decision on July 13, 1998, and the Supreme Court denied Mr. Swainson's petition for allowance of appeal on December 30, 1998. Paul Hetznecker represented Mr. Swainson. Joan Weiner represented the Commonwealth.

81. On December 20, 1999, Mr. Swainson re-filed his federal *habeas corpus* petition, which was dismissed on February 19, 2002. Mr. Swainson did not appeal. Samuel Stretton represented Mr. Swainson. David Glede represented the Commonwealth.

82. In April 2004, Mr. Swainson applied for DNA testing pursuant to 42 Pa. C.S. § 9543.1. The PCRA court denied his petition on March 14, 2006, and the Superior Court affirmed the denial on October 23, 2007. Sondra Rodrigues represented Mr. Swainson. Joan Weiner represented the Commonwealth.

83. On December 11, 2008, Mr. Swainson filed his second PCRA petition, which the court denied without a hearing on May 14, 2010. The Superior Court affirmed the denial on December 2, 2011, and Mr. Swainson did not petition for allowance of appeal. Mr. Swainson

was represented by Craig Cooley, Sondra Rodrigues, and Valerie Charles. Tracey Kavanagh represented the Commonwealth.

84. On March 17, 2012, Mr. Swainson sought permission from the United States Court of Appeals for the Third Circuit to file a second federal habeas corpus petition, which the Third Circuit granted on April 25, 2012. The District Court denied relief on that petition on July 16, 2014, and the Third Circuit affirmed on August 13, 2015. Mr. Swainson was represented by Craig Cooley and Sondra Rodrigues. John Goldsborough represented the Commonwealth.

85. On August 18, 2014, Mr. Swainson filed his Third PCRA Petition, which he first amended on July 13, 2017, and now seeks to amend again. Undersigned counsel represent Mr. Swainson in these proceedings. Andrew Wellbrock and Thomas Gaeta represent the Commonwealth.

86. On July 11, 2018, Mr. Swainson, through counsel, also sought permission from the United States Court of Appeals for the Third Circuit to file a successive federal habeas petition, which the Third Circuit granted October 15, 2018. That proceeding is currently stayed in the Eastern District of Pennsylvania pending the outcome of these state court proceedings.

Jurisdiction & Eligibility for Relief

87. This Court has jurisdiction over this petition, and Mr. Swainson is eligible for relief under the PCRA.

Jurisdiction

88. A PCRA petition shall be filed within one year of the date the judgment becomes final. *See* 42 Pa. C.S. § 9545(b).

89. Though Mr. Swainson's conviction became final many years ago, this petition is timely under exceptions to the one-year limitation.

90. Two exceptions apply here: (1) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution and laws of this Commonwealth and the Constitution and laws of the United States; and (2) Mr. Swainson presents new facts that he could not have ascertained earlier with the exercise of due diligence. *See* 42 Pa. C.S. § 9545(b)(1)(i), (ii).

91. Whether a petitioner has exercised due diligence in attempting to obtain new evidence is a fact-specific analysis focused on whether the petitioner made "reasonable efforts" to uncover the new facts on which his petition is based. In *Commonwealth v. Cox*, the Supreme Court emphasized that "[d]ue diligence 'does not require perfect vigilance and punctilious care, but merely a showing the party has put forth reasonable effort' to obtain the information upon which a claim is based." 146 A.3d 221, 230 (Pa. 2016) (quoting *Commonwealth v. Edmiston*, 65 A.3d 339, 348 (Pa. 2013)); *see also, e.g.*, *Commonwealth v. Burton*, 121 A.3d 1063, 1070 (Pa. Super. 2015) (*en banc*) ("[T]he due diligence inquiry is fact-sensitive and dependent upon the circumstances presented."), *aff'd*, 158 A.3d 618 (Pa. 2017) (emphasizing prisoners' lack of access to information); *Commonwealth v. Williams*, 35 A.3d 44, 53 (Pa. Super. 2011) (due diligence requires that a PCRA petitioner "take reasonable steps to protect his own interests").

92. Mr. Swainson has exercised reasonable efforts to obtain the information upon which his claims are based. Throughout his incarceration, he has attempted to obtain relief through the courts and has sought the assistance of attorneys and investigators. He wrote to a number of organizations and individuals who he thought might be able to help him find new evidence of his innocence, including the Pennsylvania Innocence Project, Centurion Ministries, the Innocence Project, the Philadelphia District Attorney's Office, state and local politicians, media outlets, and many criminal defense attorneys. Mr. Swainson's efforts have been hampered

by his incarceration. For example, he has no access to the internet and can only visit the law library at certain times after requesting permission. He is also indigent.

93. And, perhaps most significantly, Andrew Swainson only obtained the new and exculpatory evidence demonstrating that at the precise moment when the Commonwealth's recalcitrant star witness, Paul Presley, was to be extradited to New Jersey to face justice for his crimes, the Commonwealth arrested, charged and incarcerated Presley in Philadelphia under the fictitious name "Kareem Miller" for more than seven months in order to secure his attendance and pressure him to testify falsely against Andrew Swainson at trial. This revelation occurred after hundreds of hours of work and investigation by his current *pro bono* counsel. Mr. Swainson did not obtain the exculpatory information in the Opher Homicide File until his counsel received a partial copy through discovery in Anthony Wright's civil rights litigation and later a full copy from the CIU. Mr. Swainson did not obtain the exculpatory material from the District Attorney's prosecution file until the CIU provided him access to it. Although Mr. Swainson consistently sought discovery seeking such materials through the years, those requests were denied.[15] In addition, the materials cannot be obtained through Pennsylvania's Right to Know Act.

94. The claims at issue in this petition were thus pursued with diligence and also are timely raised "within one year of the date the claim could have been presented." 42 Pa. C.S. § 9545(b)(2).[16]

[15] Indeed, as discussed above, until the CIU investigated Mr. Swainson's claims, the Commonwealth steadfastly argued that there was no evidence to show that Paul Presley was the man arrested and charged in connection with the case *Commonwealth v. Kareem Miller*, CP-51-CR-1024751-1988.

[16] The PCRA was amended in late 2018 to allow petitioners one year to file claims that invoke the new evidence and governmental interference exceptions to the PCRA's time bar.

95. Mr. Swainson filed his Third PCRA Petition on August 18, 2014, within 60 days of discovering on July 15, 2014 that the court computer was now listing "Kareem Miller" as a previously undisclosed alias of Paul Presley, as then required by the PCRA.

96. Mr. Swainson filed his first amendment to his Third PCRA Petition on July 13, 2017, within 60 days of gaining access to the partial homicide file produced in the Anthony Wright litigation on May 15, 2017. He also files this second amendment to his Third PCRA Petition within one year of gaining access to the complete Philadelphia Police Department Opher Homicide File through the CIU on March 21, 2019 and within one year of gaining access to the prosecution file through the CIU on July 2, 2019.

97. In addition and in the alternative, Mr. Swainson's credible claim of actual innocence provides a gateway to overcome any procedural bar to this PCRA petition.

98. The United States Supreme Court has recognized that "a credible showing of actual innocence may allow a person to pursue . . . constitutional claims . . . on the merits notwithstanding the existence of a procedural bar to relief." *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013). Actual innocence is thus a gateway for the courts to review claims that are otherwise procedurally barred. *Schlup v. Delo*, 513 U.S. 298, 315 (1995).

99. Though the Superior Court in *Commonwealth v. Brown*, 143 A.3d 418 (Pa. Super. 2016), rejected a similar argument, *Brown* is distinguishable because it dealt only with a *Brady* claim. By contrast, Mr. Swainson does not merely allege government misconduct. Rather, Mr. Swainson's claims involve new evidence of actual innocence, including Jacqueline Morsell's recantation that refutes and eviscerates the damning false trial testimony that the Commonwealth used to bolster Presley's dubious eyewitness testimony and to unjustly convict Andrew Swainson. When coupled with the cumulative impact of the wealth of undisclosed *Brady*

evidence and Paul Presley's recantation of his identification of Andrew Swainson, it is clear that there are material distinctions from *Brown.* Mr. Swainson's credible claim of innocence entitles him to the review of his claims notwithstanding any procedural bar.[17]

100. Finally, Mr. Swainson preserves two arguments regarding the Court's jurisdiction in the event of any potential appeal to the Pennsylvania Supreme Court.

101. First, while Pennsylvania's appellate courts have read a diligence inquiry into the governmental interference exception to the PCRA's time bar, the statutory language establishing that exception does not refer to diligence—unlike the plain language of the new facts exception. *Compare* 42 Pa. C.S. § 9545(b)(1)(i) ("the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States") *with* 42 Pa. C.S. § 9545(b)(1)(ii) ("the facts upon which the claim is predicated were unknown to the petitioner and *could not have been discovered earlier with the exercise of due diligence*" (emphasis added)). Mr. Swainson therefore preserves the argument that the cases importing a diligence analysis into the governmental interference exception are wrongly decided under basic principles of statutory construction. Moreover, Mr. Swainson notes that the federal courts have recognized that a diligence inquiry has no place in the context of a *Brady*/governmental interference claim. *See, e.g.*, *Banks v. Dretke*, 540 U.S. 668, 695-696 (2004) ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally

[17] The only cases in which the Superior Court has extended *Brown*'s reasoning to a new evidence claim resulted in unpublished, non-precedential opinions. *See, e.g.*, *Commonwealth v. DeMatteo*, No. 1741 EDA 2017, 2018 WL 6322045 (Pa. Super. Dec. 4, 2018), *pet'n for allowance of appeal* denied, 108 EAL 2019 (Pa. Aug. 27, 2019); *Commonwealth v. Johnson*, No. 1368 EDA 2017, 2018 WL 2295655 (Pa. Super. May 21, 2018); *Commonwealth v. Holiday*, No. 434 EDA 2016, 2016 WL 7339103 (Pa. Super. Dec. 19, 2016); *Commonwealth v. Pagan*, No. 821 EDA 2015, 2016 WL 2890328 (Pa. Super. May 3, 2016).

bound to accord defendants due process."); *Dennis v. Sec'y, Pa. Dep't of Corrections*, 834 F.3d 263, 290 (3d Cir. 2016) (*en banc*) ("*Brady*'s mandate and its progeny are entirely focused on prosecutorial disclosure, not defense counsel's diligence.").[18]

102. Second, Mr. Swainson also preserves the argument that the Pennsylvania Supreme Court should revisit its decisions holding that the PCRA's timing provisions are jurisdictional. The Supreme Court originally reached that conclusion in one sentence, with almost no analysis, in *Commonwealth v. Peterkin*, 722 A.2d 638 (Pa. 1988). That decision is contrary to: (1) legislative history showing that even the bill's sponsors characterized this provision as a "statute of limitations," *see* https://www.legis.state.pa.us/WU01/LI/SJ/1995/1/Sj19950613.pdf; and (2) the plain language and structure of the statute, in which only 42 Pa. C.S. § 9545(a) (titled "Original Jurisdiction"), and not any other subsection of § 9545, speaks to jurisdiction. Indeed, in *Burton*, a majority of the *en banc* Superior Court characterized the "current, jurisdictional understanding of the PCRA timeliness requirement" from *Peterkin* as a "bald" assertion. *See* 121 A.3d at 1071; *see also id.* at 1071 n.5 ("The jurisdictional interpretation of the timeliness requirement is longstanding. However, it is not without controversy."). Accordingly, *Peterkin* should be reconsidered. *See generally In re Carney*, 79 A.3d 490, 505 (Pa. 2013) (stating, "we have recognized that *stare decisis* cannot be used as an excuse to perpetuate erroneous rulings,"

[18] By presenting Presley and building its entire case around his testimony, the Commonwealth assumed an "affirmative duty," *Kyles v. Whitley*, 514 U.S. 419, 432 (1995), to disclose all exculpatory and impeachment evidence relating to Presley's testimony. *See Giglio v. United States*, 405 U.S. 150, 154 (1972) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [*Brady*'s] general rule."); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence[.]"). Thus, by presenting Presley, the Commonwealth ***expressly*** represented to the Court and Swainson that it disclosed all discoverable evidence to Swainson. This is the case because of the "special role played by the American prosecutor *in the search for truth in criminal trials*." *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (emphasis added). Similarly, as the Supreme Court has frequently stated about public officials: "Ordinarily, we presume that public officials have properly discharged their official duties." *Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (citation and internal quotations omitted).

and observing that a litigant's request that two previous Supreme Court decisions be reconsidered was "reasonable").

Eligibility for Relief

103. Mr. Swainson has also alleged a *prima facie* case of a miscarriage of justice, namely that "the proceedings which resulted in his conviction were so unfair that a miscarriage of justice occurred which no civilized society could tolerate, or that he was innocent of the crimes charged." *Commonwealth v. Morales*, 701 A.2d 516, 520-21 (Pa. 1997); *see also Commonwealth v. Romansky*, 702 A.2d 1064, 1066 (Pa. Super. 1997) (presenting a cognizable claim under the standard set forth in *Commonwealth v. Lawson*, 549 A.2d 107 (1988), where the Commonwealth obtained a conviction using uncorrected testimony the prosecution knew was false).

104. Andrew Swainson is currently serving a life term of imprisonment without the possibility of parole in the State Correctional Institution at Dallas (Inmate #AS2932)—meaning he has been sentenced to die in prison (for a crime he did not commit and for an unjust conviction that was secured through improper tactics by the Commonwealth). *See* 42 Pa. C.S. § 9543(a)(1)(i). He has always maintained his innocence, including rejecting the Commonwealth's pre-trial plea offer that would have permitted him to plead guilty to third-degree murder.

Claims

The Commonwealth's Elicitation of False Evidence Regarding Mr. Swainson's Alleged Flight Violated Mr. Swainson's Due Process Rights Under the Pennsylvania and United States Constitutions.

105. The PCRA provides for relief for a petitioner who proves by a preponderance of the evidence that his conviction resulted from "[a] violation of the Constitution of this Commonwealth or the Constitution or laws of the United States 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)(i).

106. The federal and state constitutions guarantee due process of law to criminal defendants. U.S. Const. Amends. V & XIV; Pa. Const. Art. 1 § 9.

107. Here, the Commonwealth violated Mr. Swainson's due process rights by eliciting false testimony in violation of *Napue v. Illinois*.

108. Under *Napue*, the Commonwealth has an obligation to correct false evidence and testimony in the record when it appears, including evidence that "goes only to the credibility of the witness." 360 U.S. 264, 269 (1959); *see also Commonwealth v. Strong*, 761 A.2d 1167, 1171 (Pa. 2000).

109. It also has an obligation not to knowingly use false evidence; if it does so, it violates a defendant's due process rights, requiring a new trial if the use of the false testimony "may have had an effect on the outcome of the trial." *Napue*, 360 U.S. at 272; *see also id*. at 269 ("[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment."); *United States v. Agurs*, 427 U.S. 97, 103-04 (1976) (due process is violated when the prosecution "achieves a conviction through the use of materially false or perjured testimony").

110. Despite these well-settled principles, in this case, the Commonwealth knowingly elicited false testimony from the detectives investigating Stanley Opher's murder about Andrew Swainson's alleged "fugitive" status.

111. Documents from the Opher Homicide File and the District Attorney's prosecution file that were only recently provided to Andrew Swainson's counsel by the CIU, demonstrate that the Commonwealth knew as early as February 15-19, 1988 that Mr. Swainson had gone to

Jamaica for a holiday and would be returning during the first week of March. *See* Attempts to Apprehend Log, Combined Excerpt of Philadelphia Police Department Opher Homicide File, Ex. 43, at AS(HF)000390, 392, 395.

112. The recently-disclosed evidence establishes that the Commonwealth knew that: (a) that Detective Santiago never told Mr. Swainson that he had to stay in Philadelphia during his January 22, 1988 interview or anytime thereafter; (b) that Mr. Swainson was not informed of the arrest warrant against him ***before*** he left for Jamaica, *id.* at AS(HF)000676; and (c) police were informed that Mr. Swainson went to Jamaica for a holiday and would be returning in the first week of March. Nevertheless, on February 20, 1988, Philadelphia Police Detective Bureau Chief Inspector, Robert Wolfinger, asked Deputy District Attorney Raymond Harley to seek a federal warrant charging Andrew Swainson with Unlawful Flight to Avoid Prosecution on the charge of Murder. *See* 2/20/88 letter, Combined Excerpt of Philadelphia Police Department Opher Homicide File, Ex. 43, at AS(HF)000389.

113. In his February 20, 1988 letter, Chief Inspector Wolfinger stated that Detective Santiago was assigned to the homicide investigation and the investigation "revealed that Andrew Swainson informed persons close to him that after the murder, he was going to flee to Jamaica." The "persons close to him" were never identified, and Detective Santiago did not include this supposed fact/statement by Andrew Swainson in the Affidavit of Probable Cause for Arrest Warrant No. 161451 (for which he was the sworn affiant). *See* Affidavit of Probable Cause for Arrest Warrant No. 161451, Combined Excerpt of Philadelphia Police Department Opher Homicide File, Ex. 43, at AS (HF) 000525-529. There is no evidence or documentation of the alleged statement in any of the discovery turned over to Mr. Swainson prior to trial, or anywhere within the Opher Homicide File.

114. Evidence that was never turned over to Andrew Swainson before trial indicates that Andrew Swainson called Detective Santiago at 12:40 a.m. on March 8, 1988 because he received a message to call Detective Santiago as soon as he returned home from Jamaica. In his summary of the call, Detective Santiago wrote: "Sw[a]inson stated that he was in New York at his parents[']] house. Sw[a]inson does not know that he was currently wanted for murder, and the information was not given to Sw[a]inson." *See* 3/8/88 Activity Sheet, Excerpt of Philadelphia Police Department Opher Homicide File, Ex. 43, at AS (HF) 000676.

115. Despite this knowledge, the Commonwealth elicited testimony from Detectives Cohen and Santiago in which they characterized Mr. Swainson as a fugitive. *See* N.T. 3/17/89, 176, 205.

116. The Commonwealth did nothing to correct this testimony after it was given. Indeed, the Commonwealth knowingly attempted to use such evidence to make it appear as if Mr. Swainson was hiding from the police and attempting to avoid prosecution.

(Sidebar discussion held on the record as follows:)

MR. DeMARCO: Judge, they are talking about Federal fugitive warrants and the names of these, they are trying to make it appear as if this guy was hiding -- which he wasn't. You know he wasn't, you heard the motions and everything.

MS. RUBINO: We don't know if he was or wasn't.

MR. DeMARCO: We all know he wasn't.

MS. RUBINO: How do I know why he went to Jamaica?

117. The Commonwealth then compounded the due process violation in two critical ways.

118. First, notwithstanding the fact that the Commonwealth knew that Mr. Swainson left for Jamaica on February 11, 1988—three weeks after he met with Detective Santiago and provided his photograph and fingerprints to the police—the prosecutor emphasized Mr. Swainson's alleged fugitive status to the jury during closing arguments:

> Now, once the police had questioned the Defendant on January 22nd and taken the picture and taken the photograph, and the fingerprints, what did he do? Well, he didn't stick around Philadelphia. He left, he went to Jamaica. And when he returned from Jamaica did he go back to Philadelphia? No, he went back to the Bronx. Well, he probably thought he was in the clear but he didn't want to stick around Philadelphia. See, there is extradition from Jamaica, there is extradition from New York, so there was no point in his staying in Jamaica if his family was in New York. He went there for whatever length of time, nobody came looking for him, so he came back to New York. But he didn't come back to Philadelphia. Now, you can consider that evidence too, the fact that once his picture was taken he was no longer in Philadelphia as evidence of intending to prove his consciousness of guilt.

N.T. 3/20/89, 70-71; *see also, e.g.*, *id.* at 75 ("And, ladies and gentlemen, all of that evidence put together . . . the fact of his leaving town.").

119. Second, the Commonwealth requested and obtained a jury charge regarding Mr. Swainson's alleged flight. The Commonwealth specifically asked Judge Sabo to charge the jury

"both on flight from the scene and the evidence that he left the country," stating that "[t]here is evidence that after he is picked up by the police on January 22nd and knew that they were considering him as a suspect, he left the country. And left the jurisdiction of Philadelphia entirely. He went to New York after he came back from Jamaica, he didn't return to Philly." N.T. 3/17/89, 223.[19]

120. The Court gave the requested charge on Mr. Swainson's "flight" from the country. *See* N.T. 3/20/89.

You also heard evidence that shortly after this shooting the Defendant allegedly went to Jamaica and was subsequently arrested in New York. The credibility, weight and effect of this evidence is for you to decide. Generally speaking, when a crime has been committed and a person thinks he is or may be accused of committing it, and he flees or conceals himself, such flight or concealment is a circumstance tending to prove the person is conscious of guilt. Such flight or concealment does not necessarily show consciousness of guilt in every case. A person may

[19] Ironically, with the information that has recently been uncovered we now know that the Commonwealth argued falsely that Swainson was a fugitive while simultaneously circumventing the Fugitive of Justice case for Presley (who was initially arrested running from the scene of the shooting) by having him arrested and stashed in a Philadelphia prison under the fictitious name "Kareem Miller" so it could prevent Presley from being extradited to New Jersey and could gain the leverage needed to coerce Presley into testifying falsely at trial.

flee or hide for some other motive and may do so even though innocent. Whether the evidence of flight or concealment in this case should be looked at as tending to prove guilt depends upon the facts and circumstances of this case and upon motives which may have prompted the flight or concealment. This may be shown by circumstantial evidence as well as by direct evidence. You may not find the Defendant guilty solely on the basis of evidence of flight or concealment. However, flight or concealment in connection with other proof may provide the basis for a guilty finding.

121. There can be no confidence in the outcome of a trial in which the jury was expressly instructed by the Court and urged by the Commonwealth to rely on false evidence of Mr. Swainson's alleged flight as evidence of the consciousness of his guilt.

122. A new trial is required.

The Commonwealth's Suppression of Exculpatory Evidence Regarding *Commonwealth v. Kareem Miller* and Paul Presley's Leniency Agreement Violated Mr. Swainson's Due Process Rights Under the Pennsylvania and United States Constitutions.

123. Here, the Commonwealth also violated Mr. Swainson's federal and state due process rights both by suppressing material exculpatory evidence in violation of *Brady v. Maryland*, and by again failing to correct the record in violation of *Napue v. Illinois* with respect to information about Paul Presley's charges under the fictitious name "Kareem Miller" and his leniency agreement. This also requires relief under 42 Pa. C.S. § 9543(a)(2)(i).

Brady Claim

124. Due process requires the prosecution to disclose material evidence favorable to the defense. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Commonwealth v. Weiss*, 986 A.2d 808, 814 (Pa. 2009).

125. The prosecution's duty to disclose under *Brady* extends to exculpatory evidence known to the police that is unknown to the prosecutor. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995); *see also Dennis*, 834 F.3d at 284; *Commonwealth v. Burke*, 781 A.2d 1136, 1141-42 (Pa. 2001).

126. There are three elements to a *Brady* claim: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching; (2) the government must have suppressed the evidence, whether intentionally or inadvertently; and (3) prejudice must have ensued. *Banks*, 540 U.S. at 691; *see also Burke*, 781 A.2d at 1141.

127. To establish prejudice, a petitioner "need not show that he 'more likely than not' would have been acquitted had the new evidence been admitted." *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (*per curiam*). Rather, evidence is material "when there is *any reasonable likelihood it could have affected the judgment of the jury*." *Id.* (citations and internal quotation marks omitted) (emphasis added). It follows that a petitioner can still prevail even if "the undisclosed information may not have affected the jury's verdict." *Id.* at 1006 n.6. The relevant question is whether, in the absence of the suppressed evidence, the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434; *see also Weiss*, 986 A.2d at 815.

128. Thus, the "touchstone of materiality is a reasonable probability of a different result." *Dennis*, 834 F.3d at 285 (internal quotation marks omitted). A different result "includes

not only an acquittal, but also a hung jury or a verdict on a lesser included offense." *Haskins v. Superintendent*, No. 17-2118, 2018 WL 5877124, *4 (3d Cir. Nov. 8, 2018) (*per curiam*) (citations omitted) (granting habeas relief where Pennsylvania court incorrectly required PCRA petitioner to prove that a jury would have acquitted him if he had access to suppressed evidence about an alternate perpetrator). A reasonable probability of a different result is established when the government's suppression of exculpatory evidence simply undermines confidence in the trial's outcome. *Id.*; *see also Commonwealth v. Johnson*, 174 A.3d 1050, 1056 (Pa. 2017).

129. In this case, the Commonwealth suppressed evidence that its recalcitrant star witness, Paul Presley, had been arrested and was being held in custody in connection with felony drug charges under a fictitious name in *Commonwealth v. Kareem Miller*, CP-51-CR-1024751-1988. The Commonwealth further suppressed the leniency agreement it had with Presley at the time he testified against Mr. Swainson. This suppression meets all the elements of a *Brady* claim

130. First, this evidence was favorable to Mr. Swainson's defense as it would have provided critical material with which to impeach Presley's credibility.

131. Second, the Commonwealth has conceded that this information was not disclosed to Mr. Swainson before his trial. 7/16/19 Letter from A. Wellbrock, attached as Ex. 44.

132. Third, there is no question that this evidence was material. Presley's testimony was the key to Mr. Swainson's conviction. Indeed, the Commonwealth devoted seventeen pages of argument during closing to covering Presley's testimony. *See* N.T. 3/20/89, 50-65, 73-74. During the course of that argument, the Commonwealth never disclosed the true nature of Presley's drug charges or that he expected leniency in exchange for his testimony. To the contrary, the Commonwealth hid the fact that it had arrested, charged and incarcerated Presley under the fictitious name "Kareem Miller" so it could apply pressure to coerce Presley into

providing false identification testimony and argued repeatedly that Presley "had nothing to gain by testifying and had asked for no deals." *Id.* at 51-54. Specifically, the Commonwealth argued:

> anything in connection with this case. He didn't have to say one word about what he had seen. To this day he has never asked for any consideration. He has made no deals.
>
> MR. DeMARCO: Objection.
>
> THE COURT: Go ahead. Proceed.
>
> MS. RUBINO: He is still in jail. He's in jail on a detainer from his probation violation for a drug charge. And as he explained to you, when he was arrested on the drug case, the possession case that is still open, not a conviction, the Probation Department lodged this detainer for the conviction he had in front of Judge Carson. Even though the case was open, he made bail on the drug case but the detainer is keeping him in. He never asked the Commonwealth, never asked Detective Santiago see if you can get the detainer lifted for me, see if you can let me get out since I am cooperating with you in this case. Never once in all of that time he spent in jail, before the preliminary hearing, after the preliminary hearing, before this trial, and even subsequent to this trial beginning he has never asked for anything.

Id. at 54.

133. Later in the closing the prosecutor argued: "Why would Paul Presley identify this Defendant unless in fact he was the man? His life is not going to change because of this incident. His sentence is going to be the same from Judge Carson no matter whether he testifies here or doesn't . . . He's never asked for anything, he has received nothing and he's still in jail where his reputation as a snitch is certainly not going to help him. It may even get him beaten up again." *Id.* at 74.

134. If Mr. Swainson's counsel had been able to impeach him with evidence of his arrest and incarceration (under the fictitious name "Kareem Miller") for dealing drugs in the same West Philadelphia neighborhood where the murder occurred and his leniency agreement with the Commonwealth, there is a reasonable probability that the jury, knowing the full context of Presley's incentives, would have reached a different result.

135. A new trial is required.

Napue Claim

136. The Commonwealth also violated its obligations under *Napue* and its progeny when it failed to correct the record regarding Presley's drug charges and his false testimony that he had not been promised anything in exchange for his testimony against Andrew Swainson.

137. Specifically, when Presley mentioned a drug possession case during his testimony, the Commonwealth never corrected the record to make clear that Presley had far more than a misdemeanor possession case; rather, he had pending felony drug charges against him at the time. The Commonwealth also did not inform the Court, the jury, or Mr. Swainson that Presley had been arrested for drug dealing in the same neighborhood where Opher's murder occurred.

This was information solely within the knowledge and control of the Commonwealth as Andrew Swainson and his trial attorney were never provided and never had access to information regarding Presley's arrest and incarceration under the fictitious name "Kareem Miller."

138. Then, when Presley testified that he had not been promised anything, the Commonwealth did not correct that testimony. In reality, however, Presley's felony drug charges under the fictitious name "Kareem Miller" were still pending at the time of that testimony and were *nolle prossed* shortly thereafter at the very first trial listing. At the very least, the *nolle prosse* raises the inference that the Commonwealth had promised Presley leniency for his testimony in Andrew Swainson's trial. Pennsylvania law makes abundantly clear that such information must be disclosed. For example, in *Commonwealth v. Strong*, the Supreme Court held that a firm agreement is not required: "Impeachment evidence which goes to the credibility of a primary witness against the accused is critical evidence and it is material to the case whether that evidence is merely a promise or an understanding between the prosecution and the witness. ***The absence of an ironclad, signed, sealed contract does not conclusively establish that no other information affecting the credibility of the witness exists***." 761 A.2d at 1175 (emphasis added).

139. The information found in the District Attorney's Office file for Andrew Swainson's trial, disclosed only recently, conclusively demonstrates that the Commonwealth had all of this information at the time of Presley's testimony against Mr. Swainson.

140. This failure to correct the record was material. If the jury had full information about Presley's drug case and his expectations regarding leniency in exchange for his testimony against Andrew Swainson, it would have had the necessary context to assess the credibility of his testimony, and there is a reasonable probability it would have reached a different result. As the

United States Supreme Court put it in *Napue*: "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." 360 U.S. at 269.

141. A new trial is required.

The Commonwealth's Suppression of Information from the Opher Homicide File Violated Mr. Swainson's Due Process Rights Under the Pennsylvania and United States Constitutions.

142. Under the basic due process principles discussed above, the Commonwealth also violated *Brady* and its progeny by failing to disclose significant exculpatory information from the Philadelphia Police Department Opher Homicide File to Mr. Swainson before his trial. *See generally* 42 Pa. C.S. § 9543(a)(2)(i). The suppressed evidence includes: evidence about the identity of the assailant who fired the shotgun that injured Presley; evidence about alternative suspects; alternative descriptions of the immediate aftermath of the crime; alternative theories of the motive for the murder; failed polygraph examinations of original suspects; and information about additional potential witnesses.

143. All of this is classic exculpatory evidence, particularly the suppressed evidence regarding potential alternate perpetrators. *See generally Commonwealth v. Boyle*, 368 A.2d 669 (Pa. 1977) ("It is well established that proof of facts showing the commission of the crime by someone else is admissible); *see also, e.g., Dennis*, 834 F.3d at 305 (granting federal habeas relief based on suppression of alternate perpetrator evidence); *Haskins*, 2018 WL 5877124, at *4 (same).

144. Moreover, even if detectives determined these leads to be fruitless, that does not transform it from exculpatory evidence required to be disclosed. "There is no requirement that a lead be fruitful to trigger disclosure under *Brady*, and it cannot be that if the Commonwealth fails

to pursue a lead, or deems it fruitless, that it is absolved of its duty to turn over to defense counsel *Brady* material." *Dennis*, 834 F.3d at 306.

145. Second, the Commonwealth has acknowledged that this information and material were never disclosed to Mr. Swainson or his counsel in pre-trial discovery, or otherwise, until counsel gained access to portions of the Opher Homicide File in May 2017 and the complete Philadelphia Police Department Opher Homicide File in March 2019.

146. Third, the suppressed evidence from the Opher Homicide File is material. Without this information, Mr. Swainson was deprived of the opportunity to investigate these leads, to interview potential witnesses, to present alternate suspect information to the jury, and to impeach Presley. Importantly, the effect of suppression of evidence on the defense's ability to investigate and formulate trial strategy must be considered as part of the materiality analysis. *See, e.g.*, *Commonwealth v. Cam Ly*, 980 A.2d 61, 76 (Pa. 2009) ("the protection of *Brady* extends to the defendant's ability to investigation alternate defense theories and to formulate trial strategy"); *Commonwealth v. Green*, 640 A.2d 1242, 1245 (Pa. 1994) ("In determining the materiality of the omitted evidence we must, therefore, consider any adverse effect that the prosecutor's failure to disclose might have had not on only on the presentation of the defense at trial, but the preparation of the defense as well."). Mr. Swainson could also have used this information to challenge the quality of the investigation. *See, e.g.*, *Kyles*, 514 U.S. at 446-51 (recognizing that "[a] common trial tactic of defense lawyers is to discredit the caliber of the investigation . . . and we may consider such use in assessing a possible *Brady* violation"); *Dennis*, 834 F.3d at 311 (holding that suppression of an alternate perpetrator lead was material because defense counsel "could have used the information contained in the . . . documents to

challenge detectives at trial regarding their paltry investigation of the lead," a use for the suppressed evidence that the Commonwealth did not dispute in that case).

147. If Mr. Swainson had been able to present alternate theories of the murder to the jury, there is a reasonable probability that the jury would have reached a different outcome. Certainly, Mr. Swainson's ability to investigate and prepare his defense was severely compromised by the suppression of this information.

148. A new trial is required.

The Cumulative Effect of the Commonwealth's Failure to Disclose Exculpatory Evidence Violated Mr. Swainson's Due Process Rights Under the Pennsylvania and United States Constitutions.

149. The Commonwealth's non-disclosures and eliciting of false evidence also cannot be considered in isolation. "The fourth and final aspect of *Bagley* materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item." *Kyles*, 514 U.S. at 436-37 (discussing *U.S. v. Bagley*, 473 U.S. 667 (1985)); *see also Wearry*, 136 S. Ct. at 1007 (holding state post-conviction court had "improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively").

150. If Mr. Swainson had a trial where: the Commonwealth had not elicited and asked the jury to rely on false evidence of Mr. Swainson's alleged flight; Mr. Swainson had been able to impeach Presley with the evidence regarding his drug charges under the name Kareem Miller and leniency agreement with the Commonwealth; the Commonwealth had presented correct information about Presley's drug charges; and where Mr. Swainson had been able to investigate and present to the jury the suppressed exculpatory material regarding alternate leads and additional witnesses from the Opher Homicide File, there is a reasonable probability that the outcome of the trial would have been different.

151. A new trial is required.

The Evidence From the Opher Homicide File Also Constitutes Newly-Discovered Evidence Requiring a New Trial

152. A PCRA petitioner is eligible for relief if he pleads and proves "by a preponderance of the evidence" that his "conviction or sentence resulted from . . . [t]he unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial had it been introduced." 42 Pa. C.S. § 9543(a)(2)(vi).

153. If the Court determines that the Commonwealth was not required to disclose the materials in the Opher Homicide File before trial, it should conclude that the material in that file regarding Mr. Swainson's alleged flight is newly-discovered exculpatory evidence requiring a new trial.

154. To be eligible for relief based on newly-discovered evidence, Mr. Swainson must demonstrate that the evidence: (1) "could not have been obtained prior to the conclusion of trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) would likely result in a different verdict if a new trial were granted." *Commonwealth v. Padillas*, 997 A.2d 356, 363 (Pa. Super. 2010). All of these elements are met here.

155. First, Mr. Swainson could not have obtained the previously-undisclosed information from the Opher homicide file before the conclusion of trial with the exercise of reasonable diligence. He requested discovery, and these materials were not provided; indeed, it took decades for them to be disclosed.

156. Second, this evidence is not merely corroborative or cumulative. Instead, it is affirmative evidence that the Commonwealth knew Mr. Swainson was **not** a fugitive, despite the Commonwealth's efforts to portray him as such throughout the trial.

157. Third, this evidence would not be offered solely for impeachment. The evidence would have deprived the Commonwealth of a core theme in its case against Mr. Swainson, his alleged flight.

158. Fourth, if the jury had heard this evidence, it is likely that the outcome of the trial would have been different. If the jury and trial judge had heard that detectives knew precisely where Mr. Swainson would be and when, the Commonwealth would not have been able to obtain a jury charge on flight and consciousness of guilt. Without that charge to tip the scale toward the Commonwealth, it is likely that the jury would have reached a different outcome as it would have had only the weak Presley and Morsell testimony to consider. This is particularly evident when the fact that, even with the charge, the jury deliberated over the course of two days is considered.

159. A new trial is required.

Jacqueline Morsell's Recantation Is Also Newly-Discovered Evidence Requiring a New Trial

160. Morsell's 2014 recantation is also newly-discovered evidence requiring a new trial under the test set forth in *Padillas* and pursuant to 42 Pa. C.S. § 9543(a)(2)(vi).

161. First, Andrew Swainson could not have obtained Morsell's recantation before the conclusion of trial with the exercise of reasonable diligence. Indeed, in Morsell's trial testimony, she implicated Mr. Swainson despite previously giving police a statement that did not implicate him. It is unrealistic to expect that she would have changed her testimony during trial.

162. Second, recantation evidence is "inherently non-corroborative and non-cumulative of the testimony recanted." *Commonwealth v. D'Amato*, 856 A.2d 806, 827 (Pa. 2004).

163. Third, this evidence would not be offered solely for impeachment. Rather, it negates all of Morsell's trial testimony and explains why she falsely implicated Mr. Swainson.

164. Fourth, if the jury had heard this evidence, it is likely that the outcome of the trial would have been different. Other than Presley, Morsell was the only witness tying Mr. Swainson to the crime. And, Presley had significant credibility problems even absent the now-disclosed information given that: he was the first person arrested for Opher's murder after fleeing the crime scene covered in blood; he flip-flopped in his identification of Mr. Swainson; and he has significant criminal history in New Jersey and Pennsylvania. If the jury had heard only Presley implicated Mr. Swainson, it is likely that at least one juror would have had a reasonable doubt, leading to a different outcome.

165. A new trial is required.

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

166. A claim of actual innocence may be a cognizable and free-standing basis for relief under the Eighth and Fourteenth 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). The Pennsylvania Constitution also provides two separate potential avenues for relief based upon actual innocence: Article 1, Section 13 and Article 1, Section 9.

167. Criminal punishment violates Article 1, Section 13, when it is so severe as to "shock the moral conscience of the community." *Commonwealth v. Sourbeer*, 422 A.2d 116, 123 (Pa. 1980) (effectively overruled on other grounds by *Miller v. Alabama*, 565 U.S. 1013 (2012)). 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 the Pennsylvania Constitution. *Cf. People v. Hamilton*, 979 N.Y.S.2d 97, 108 (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").

168. Article 1, 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.

169. 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.

170. 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).

171. 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)).[20]

172. Most recently, the Supreme Court of Iowa concluded that the due process and cruel and unusual punishment clauses of the Iowa constitution permit freestanding claims of actual innocence. *Schmidt v. State*, 909 N.W.2d 778, 795 (Iowa 2018). The court found the liberty interests of an incarcerated innocent person so compelling that it extended the right of a freestanding innocence claim to post conviction applicants who pleaded guilty. *Id.*

173. 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.

[20] *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 a 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).

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).

174. There is such clear and convincing evidence of Mr. Swainson's innocence here that it satisfies the "extraordinarily high" burden pondered in *Herrera*.

175. No physical evidence tied Mr. Swainson to this crime. The police paperwork in the Opher Homicide File demonstrates that (a) the investigation immediately focused on the individuals who worked in the drug house, (b) the police never requested or received any physical descriptions of the two gunmen seen on the porch at the time of the shooting, (c) it is unclear what criteria Detective Santiago used to create a photo spread of "brown skin dude(s)" to show to Presley, and (d) the police never made any attempts to identify the second gunman (even after Presley reportedly told police that he would recognize him).

176. It also appears that Mr. Swainson was not the first innocent person to be victimized by Detective Santiago's questionable procedures relating to photograph arrays or other improper investigative tactics. Instead, a series of cases show similar misconduct and bolster Mr. Swainson's innocence.

177. For example, on August 23, 2016, the Third Circuit Court of Appeals affirmed the District Court's grant of *habeas* relief to James Dennis, on the grounds that the Commonwealth denied Mr. Dennis his right to a fair trial by suppressing *Brady* material.

178. James Dennis was convicted based on the eyewitness testimony of individuals who did not know him, and who had only a very limited opportunity to observe the perpetrator during the commission of the crime. In the homicide investigation in the *Dennis* case, Detective Santiago prepared photo arrays to show to witnesses who had not provided detailed descriptions

of the shooter. Detective Santiago targeted the defendant based on "information" (rumors) heard throughout the neighborhood and did not arrange the photo arrays by including photos of individuals who generally matched the physical description provided by the witnesses; indeed, in this case Detective Santiago never even asked the eyewitness for a description of either of the gunmen.

179. Similarly, in the case of Percy St. George, Detective Santiago secured a bogus photo identification and a false statement from an individual who did not witness the shooting. When evidentiary hearings were sought regarding the circumstances underlying the false photo identification and statement, Detective Santiago, through his counsel, Jeffrey M. Kolansky, notified current First Assistant District Attorney and then Court of Common Pleas Judge Carolyn Temin of his intention to assert his Fifth Amendment rights against self-incrimination in order to avoid testifying about his role in obtaining the bogus identification and false statement in the homicide case *Commonwealth v. St. George*, CP-51-CR-1012571-1993. *See* 10/3/94 Kolansky Letter, attached as Ex. 46.

180. And, on August 23, 2016, in the case *Commonwealth v. Anthony Wright*, CP 51-CR-1131582-1991, a Philadelphia jury returned a verdict of not guilty in the Commonwealth's re-trial of Anthony Wright for the 1991 rape and murder of an elderly woman.

181. The jury's verdict was more than a mere "not guilty"; it was a resounding declaration by the jury that it completely disbelieved the testimony of and evidence presented by former Philadelphia Homicide Detectives Manuel Santiago, Martin Devlin and Frank Jastrzembski regarding their actions in obtaining a "confession" from Anthony Wright and their "investigation" of the case. According to local news reports, Grace Greco, the jury foreperson, spoke with reporters and described her anger with the Commonwealth for choosing to re-try the

case, stating: "The evidence was there that he did not commit this crime. The city should have never brought this case." *See* Joseph A. Slobodzian, PHILADELPHIA INQUIRER, *25 Years Later, Freed By DNA Evidence* (August 25, 2016) (available at, http://articles.philly.com/2016-08-25/news/75145233_1_louise-talley-anthony-wright-new-dna-testing), attached as Ex. 47. Ms. Greco reportedly declined to comment about the testimony of the two detectives (Santiago and Devlin) who took what she called Anthony Wright's "supposed confession," but the description of Wright's statement as a "supposed confession" and the jury's verdict speak volumes about the jury's reaction to Detective Santiago and Detective Devlin's testimony. *See* Joseph A. Slobodzian, PHILADELPHIA INQUIRER, *A day after murder acquittal, Anthony Wright rejoices in family, friends, freedom* (August 26. 2016) (available at, http://articles.philly.com/2016-08-26/news/75161034_1_anthony-wright-news-conference-louise-talley), attached as Ex. 48.

182. Detective Santiago—who swore under oath at the retrial of Anthony Wright that he had never tape-recorded a witness' statement—is the detective who twice tape-recorded the post-recantation statements of Presley in his attempts to walk back the recantation and prepare Presley for his testimony at trial.

183. Based on the facts and circumstances of the "confession" that Detective Santiago claimed to have obtained from Anthony Wright, the jury's resounding verdict—as well as public statements subsequently made by the jury's foreperson and other members of the jurydemonstrates that the jury concluded that Detective Santiago lied to them about the facts and circumstances of the "supposed confession." Indeed, the DNA evidence presented at the re-trial more than suggests that Detective Santiago fabricated the "confession" by using evidence already uncovered during the investigation and sprinkling the already-known details into the statement that he and Detective Devlin concocted and forced Anthony Wright to sign.

184. The discovery of Detective Santiago's role in the investigations and prosecutions of Anthony Wright, Percy St. George and James Dennis, coupled with the information and evidence that Andrew Swainson has uncovered in the Philadelphia Police Department's Homicide File regarding the "investigation" of the shooting of Stanley Opher and presented in this petition, establishes that a very troubling pattern of misconduct by Detective Santiago appears to be emerging.

185. The Commonwealth's only evidence to implicate Andrew Swainson came from Presley and Morsell. Presley's testimony and eyewitness identification of Mr. Swainson have now been shown to be thoroughly unreliable and the product of unscrupulous pressure, coercion and the previously-undisclosed incentives. Morsell has recanted every aspect of her testimony. Thus, no reliable evidence implicating Mr. Swainson remains. Moreover, the previously-undisclosed materials from the Opher Homicide File point to other more likely perpetrators.

186. As Andrew Swainson is actually innocent of the crimes for which he was convicted, he is entitled to relief under the U.S. and Pennsylvania Constitutions.

187. 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. *See* U.S. CONST. AMENDS. VIII & XIV; Pa. Const. Art. 1, §§ 9 & 13.

Waiver

188. 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" and that the failure to previously litigate the issues "could not have been the result of any rational, strategic, or tactical decision by counsel." 42 Pa. C.S. §§ 9543(a)(3) & (a)(4). Mr. Swainson has not previously litigated the claims in this petition. Nor has he waived the claims, as he is raising

them at the earliest opportunity. To the extent any claims are determined not to have been raised at the earliest opportunity, Mr. Swainson alleges ineffective assistance of his trial counsel, direct appeal counsel, and prior post-conviction counsel.

189. A PCRA claim is reviewable when the petitioner does not rely solely on previously litigated evidence. *See Commonwealth v. Miller*, 746 A.2d 592, 602 n.9 (Pa. 2000) (when PCRA "claim does not rest solely upon the previously litigated evidence, we will reach the merits of appellant's claim"). Mr. Swainson is not relying solely on previously litigated evidence; indeed, the evidence that forms the basis for this petition could not have been previously litigated as it was only recently disclosed.

Evidentiary Hearing

190. Mr. Swainson is entitled to an evidentiary hearing, unless the Commonwealth is willing to stipulate to the relevant facts.

191. The following witnesses would be presented on Mr. Swainson's behalf. A certification of witnesses is attached as Exhibit 49:

- Perry DeMarco
- Terrence Gibbs
- James Brown
- Russell Kolins
- Judith Rubino
- Frances Alperin
- Robert Campolongo
- Detective Fisher
- Police Officer Amaro

- Detective Miller
- Detective Santiago
- Tim Booker, Esq.
- Harold Randolph, Esq.
- Detective Fisher
- Detective Alexander
- Detective Cohen
- Detective Harmon
- Jacqueline Morsell
- Kevin Pearson
- Douglas Northern
- Karen Clark
- Tino Daniels
- Jonathan Young
- Craig Cooley
- Tracey Kavanagh

192. Mr. Swainson requests an evidentiary hearing to show the jurisdiction of this Court and to establish his claims. *See* Pa. R. Crim. P. 908(A)(2) (providing that PCRA court "*shall* order a hearing" "when the petition for post-conviction relief or the Commonwealth's answer, if any, raises material issues of fact") (emphasis added); *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).

193. Counsel who will represent Mr. Swainson in the Court of Common Pleas of Philadelphia County on this petition are:

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194. Andrew Swainson reserves the right to supplement his petition. *See* Pa. R. Crim. P. 905(a).

WHEREFORE, Andrew Swainson prays that this Honorable Court will grant relief in the form of an arrestment of judgment and/or a new trial.

Respectfully submitted,

/s/ _____

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Dated: November ___, 2019

Counsel for Andrew Swainson

IN THE PHILADELPHIA COUNTY COURT OF COMMON PLEAS
CRIMINAL DIVISION

Commonwealth of Pennsylvania,	:	
	:	
Respondent,	:	
	:	
v.	:	CP-51-CR-0431311-1988
	:	
Andrew Swainson,	:	
	:	
Petitioner.	:	
	:	

PROOF OF SERVICE

Nathan J. Andrisani, Esquire, being duly sworn according to law does hereby state and aver that he is counsel for the petitioner in the above-captioned matter and that he has served the foregoing by electronic filing and email delivery, upon

Andrew Wellbrock, Esquire
Conviction Integrity and Special Investigations Unit
Philadelphia District Attorney's Office
3 South Penn Square
Philadelphia, PA 19107

/s/_____
Nathan J. Andrisani

Counsel for Andrew Swainson

November ___, 2019

EXHIBIT G

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0431311-1988

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Andrew Swaison

CASE INFORMATION

Cross Court Docket Nos: 1236 EDA 2006, 1597 EDA 2010

Judge Assigned: Robins New, Shelley
Date Filed: 04/25/1988
Initiation Date: 04/25/1988

OTN: M 343667-2
LOTN:
Originating Docket No: MC-51-CR-0314231-1988

Initial Issuing Authority:
Final Issuing Authority:

Arresting Agency: Philadelphia Pd
Arresting Officer: Affiant

Complaint/Incident #:

Case Local Number Type(s)	Case Local Number(s)
District Control Number	8818003831
Police Incident Number	8818003831
Legacy Microfilm Number	99002028
Legacy Docket Number	C8804313111

STATUS INFORMATION

Case Status: Closed

Status Date	Processing Status
08/18/2014	Awaiting PCRA Decision
01/18/2012	Completed
06/11/2010	Awaiting Appellate Court Decision
05/14/2010	Completed
12/11/2008	Awaiting PCRA Decision
12/10/2007	Completed
04/13/2006	Awaiting Appellate Court Decision
03/14/2006	Completed
10/13/1989	Migrated Final Disposition
04/25/1988	Migrated Case (Active)

Arrest Date: 03/18/1988

Complaint Date: 04/25/1988

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0431311-1988

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Andrew Swaison

CALENDAR EVENTS

Case Calendar Event Type	Schedule Start Date	Start Time	Room	Judge Name	Schedule Status
Post Sentence	10/06/2004	9:30 am	1106	Judge D. Webster Keogh	Scheduled
Post Sentence	12/08/2004	9:30 am	1106	Judge D. Webster Keogh	Scheduled
Post Sentence	12/15/2004	9:00 am	1106	Judge D. Webster Keogh	Scheduled
Post Sentence	01/27/2005	9:30 am	1106	Judge D. Webster Keogh	Scheduled
Post Sentence	03/01/2005	9:30 am	1106	Judge D. Webster Keogh	Scheduled
Post Sentence	04/06/2005	9:30 am	1106	Judge D. Webster Keogh	Scheduled
Post Sentence	05/18/2005	9:30 am	1106		Scheduled
Post Sentence	06/21/2005	9:30 am	200		Scheduled
Post Sentence	07/19/2005	9:30 am	1106	Judge D. Webster Keogh	Scheduled
Post Sentence	09/21/2005	9:30 am	1106	Judge D. Webster Keogh	Scheduled
Post Sentence	11/15/2005	9:30 am	1106	Judge D. Webster Keogh	Scheduled
Post Sentence	01/25/2006	9:30 am	1106	Judge D. Webster Keogh	Scheduled
Post Sentence	03/13/2006	9:30 am	1106	Judge D. Webster Keogh	Scheduled
Post Sentence	03/14/2006	9:30 am	1106	Judge D. Webster Keogh	Scheduled
PCRA	06/02/2009	9:00 am	607	Judge Shelley Robins New	Continued
PCRA	09/03/2009	9:00 am	607	Judge Shelley Robins New	Continued
PCRA	11/06/2009	9:00 am	607	Judge Shelley Robins New	Continued
PCRA	12/04/2009	9:00 am	607	Judge Shelley Robins New	Continued
PCRA	02/25/2010	9:00 am	607	Judge Shelley Robins New	Continued
PCRA	03/29/2010	9:00 am	607	Judge Shelley Robins New	Continued
PCRA	05/14/2010	9:00 am	607	Judge Shelley Robins New	Scheduled
PCRA	07/30/2015	9:00 am	206		Moved
PCRA	08/18/2015	9:00 am	206		Moved
PCRA	10/29/2015	9:00 am	206		Moved
PCRA	01/12/2016	9:00 am	206		Moved
PCRA	04/14/2016	9:00 am	206		Moved
PCRA	06/23/2016	9:00 am	206		Moved
PCRA	07/22/2016	9:00 am	801	Judge Shelley Robins New	Moved
PCRA	09/23/2016	9:00 am	802	Judge Shelley Robins New	Continued
PCRA	01/06/2017	9:00 am	1108	Judge Shelley Robins New	Continued
PCRA	03/10/2017	9:00 am	602	Judge Shelley Robins New	Continued
PCRA	05/19/2017	9:00 am	907	Judge Shelley Robins New	Continued
PCRA	09/15/2017	9:00 am	1102	Judge Shelley Robins New	Continued
PCRA	11/17/2017	9:00 am	1001	Judge Shelley Robins New	Continued
PCRA	01/19/2018	9:00 am	905	Judge Shelley Robins New	Continued
PCRA	03/16/2018	9:00 am	904	Judge Shelley Robins New	Continued

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0431311-1988

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Andrew Swaison

CALENDAR EVENTS

Case Calendar Event Type	Schedule Start Date	Start Time	Room	Judge Name	Schedule Status
PCRA	05/25/2018	9:00 am	1101	Judge Shelley Robins New	Continued
PCRA	07/20/2018	9:00 am	702	Judge Shelley Robins New	Continued
PCRA	09/14/2018	9:00 am	1101	Judge Shelley Robins New	Continued
PCRA	11/16/2018	9:00 am	502	Judge Shelley Robins New	Continued
PCRA	01/25/2019	9:00 am	200	Judge Shelley Robins New	Moved
PCRA	02/22/2019	9:00 am	708	Judge Shelley Robins New	Continued
PCRA	07/19/2019	9:00 am	1007	Judge Shelley Robins New	Continued
PCRA	11/22/2019	9:00 am	707	Judge Shelley Robins New	Continued
PCRA	03/27/2020	9:00 am	200	Judge Shelley Robins New	Cancelled

CONFINEMENT INFORMATION

Confinement Known As Of	Confinement Type	Destination Location	Confinement Reason	Still in Custody
03/27/1989	State Correctional Institution	SCI Dallas		Yes

DEFENDANT INFORMATION

Date Of Birth: 05/04/1965 City/State/Zip: BRONX, NY 10416

CASE PARTICIPANTS

Participant Type	Name
Defendant	Swaison, Andrew

CHARGES

Seq.	Orig Seq.	Grade	Statute	Statute Description	Offense Dt.	OTN
4	4		**18 § 907**	POSSESSING INSTRUMENTS OF CRIME	01/17/1988	M 343667-2
8	8		**18 § 2502**	MURDER-1ST DEGREE	01/17/1988	M 343667-2
10	10		**18 § 903**	CRIMINAL CONSPIRACY	01/17/1988	M 343667-2

DISPOSITION SENTENCING/PENALTIES

Disposition
Case Event
Sequence/Description
Sentencing Judge
Sentence/Diversion Program Type
Sentence Conditions
Disposition Date
Offense Disposition
Sentence Date
Incarceration/Diversionary Period
Final Disposition
Grade Section
Credit For Time Served
Start Date

Migrated Disposition

Migrated Dispositional Event
4 / POSSESSING INSTRUMENTS OF CRIME
Sabo, Albert F.
10/13/1989
Guilty
10/13/1989
Final Disposition
18 § 907

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DISPOSITION SENTENCING/PENALTIES

Disposition

Case Event / Sequence/Description / Sentencing Judge / Sentence/Diversion Program Type / Sentence Conditions	Disposition Date / Offense Disposition / Sentence Date / Incarceration/Diversionary Period	Final Disposition / Grade / Section / Credit For Time Served / Start Date
Confinement	Min of 2.00 Years 6.00 Months Max of 5.00 Years	
8 / MURDER-1ST DEGREE	Guilty	18 § 2502
Sabo, Albert F.	10/13/1989	
Confinement	LIFE	
10 / CRIMINAL CONSPIRACY	Guilty	18 § 903
Sabo, Albert F.	10/13/1989	
Confinement	Min of 5.00 Years Max of 10.00 Years	

COMMONWEALTH INFORMATION

Name: Philadelphia County District Attorney's Office
Prosecutor
Supreme Court No:
Phone Number(s):
215-686-8000 (Phone)
Address:
3 South Penn Square
Philadelphia, PA 19107

ATTORNEY INFORMATION

Name: Nilam Ajit Sanghvi
Private
Supreme Court No: 209989
Rep. Status: Active
Phone Number(s):
Address:

ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
1	04/25/1988		Unknown Filer
Held for Court			
1	10/13/1989		Migrated, Filer
Migrated Automatic Registry Entry (Disposition) Text			
2	10/13/1989		Migrated, Filer
Disposition Filed			
3	10/13/1989		Migrated, Filer
Migrated Sentence			

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ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
1	05/20/2004		Migrated, Filer
PSS CASE ENTRY SUFFIX A			
2	05/20/2004		Migrated, Filer
PSS ATTORNEY DATA			
1	08/25/2004		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
1	10/07/2004		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
2	10/07/2004		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
2	12/08/2004		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
1	12/09/2004		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
2	12/15/2004		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
2	01/27/2005		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
2	03/01/2005		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
2	04/06/2005		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
2	05/18/2005		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
2	06/21/2005		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			

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ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
2	07/19/2005		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
2	09/21/2005		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
2	11/15/2005		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
2	01/25/2006		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
2	03/13/2006		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
2	03/14/2006		Keogh, D. Webster
Order Denying Motion for DNA Testing			
3	03/14/2006		Migrated, Filer
PSS NEXT ACT/DISP SUFFIX A			
1	04/13/2006		Unknown Filer
Notice of Appeal to the Superior Court			
1	04/20/2006		Migrated, Filer
APPL FILE MAINT SUFFIX C			
2	04/20/2006		Migrated, Filer
APPEAL CASE FILED SUFFIX C			
1	05/10/2006		Migrated, Filer
APPL FILE MAINT SUFFIX C			
1	05/12/2006		Migrated, Filer
APPL FILE MAINT SUFFIX C			
2	05/12/2006		Migrated, Filer
APPL FILE MAINT SUFFIX C			

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ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
1	05/15/2006		Migrated, Filer
APPL FILE MAINT SUFFIX C			
1	05/25/2006		Migrated, Filer
COURT APPOINTMENTS			
1	06/05/2006		Migrated, Filer
APPL FILE MAINT SUFFIX C			
1	06/08/2006		Migrated, Filer
APPL FILE MAINT SUFFIX C			
1	07/14/2006		Migrated, Filer
APPL FILE MAINT SUFFIX C			
1	02/16/2007		Court of Common Pleas - Philadelphia County
Certificate and Transmittal of Record to Appellate Court			
1	03/23/2007	03/21/2007	Superior Court of Pennsylvania - Eastern District
Superior Court Order			
1	06/01/2007		Court of Common Pleas - Philadelphia County
Certificate and Transmittal of Record to Appellate Court			
D41/D42/1	12/10/2007	10/23/2007	Superior Court of Pennsylvania - Eastern District
Affirmed - Superior Court			
D43/1	12/11/2008		Rodrigues, Sondra R.
Post-Conviction Relief Act Petition Filed			
D44/2	12/11/2008		Rodrigues, Sondra R.
Memorandum of Law			
D44A/1	04/22/2009		Woods-Skipper, Sheila
Judge Reassignment			

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ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
D45/1	08/20/2009		Rodrigues, Sondra R.
Motion for Admission Pro Hac Vice of Craig M. Cooley, Esquire			
1	08/21/2009		Robins New, Shelley
Order Granting Motion to Admit Pro Hac Vice			
D46/1	08/24/2009	08/21/2009	Robins New, Shelley
PCRA Order			
1	09/03/2009		Robins New, Shelley
PCRA HEARING CONTINUED			
3	11/06/2009		Robins New, Shelley
PCRA HEARING CONTINUED			
D47/1	12/03/2009		Commonwealth Court of Pennsylvania
Motion to Dismiss			
D48/1	12/04/2009		Commonwealth of Pennsylvania
Motion to Dismiss			
2	12/04/2009		Robins New, Shelley
PCRA HEARING CONTINUED			
3	02/25/2010		Court of Common Pleas - Philadelphia County
Defense Request			
D49/1	03/26/2010		Rodrigues, Sondra R.
Reply to the Commonwealth Letter Brief In Opposition to Petitioner's 2nd PCRA Petition			
3	03/29/2010		Robins New, Shelley
PCRA Order			
D50/1	05/14/2010		Robins New, Shelley
Order Dismissing PCRA Petition			
D51/1	06/11/2010		Rodrigues, Sondra R.
Notice of Appeal to the Superior Court			

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ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
Service To		Service By	
Issue Date	Service Type	Status Date	Service Status

Philadelphia County District Attorney's Office
06/11/2010 First Class
Robins New, Shelley
06/11/2010 First Class

D52/1 06/15/2010 Robins New, Shelley
Order Issued Pursant to Pa.R.A.P. 1925(b)
Philadelphia County District Attorney's Office
06/15/2010 First Class
Rodrigues, Sondra R.
06/15/2010 First Class

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1 07/27/2010 Court of Common Pleas - Philadelphia County
Preliminary Docket Entries Prepared

D53/1 08/09/2010 Robins New, Shelley
Order Issued Pursant to Pa.R.A.P. 1925(b)
Philadelphia County District Attorney's Office
08/09/2010 First Class
Rodrigues, Sondra R.
08/09/2010 First Class

D54/1 09/08/2010 Rodrigues, Sondra R.
Statement of Matters Complained on Appeal

D55/1 10/19/2010 Robins New, Shelley
Opinion

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2 10/19/2010 Court of Common Pleas - Philadelphia County
Appeal Docket Entries and Served

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ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
3	10/19/2010		Court of Common Pleas - Philadelphia County
Certificate and Transmittal of Record to Appellate Court			
1	12/02/2011		Superior Court of Pennsylvania - Eastern District
Appeal of Denial of PCRA Affirmed			
1	08/18/2014		Cooley, Craig Mitchell
Post-Conviction Relief Act Petition Filed			
1	08/19/2014		Cooley, Craig Mitchell
Memorandum of Law			
1	08/21/2015		Gorbey, Jacqueline Cecile
Entry of Appearance			
1	04/14/2016		Philadelphia County District Attorney's Office
Answer/Response			
1	07/22/2016		Cooley, Craig Mitchell Gorbey, Jacqueline Cecile
Answer/Response			
1	09/16/2016		Gorbey, Jacqueline Cecile
Motion for Discovery			
4	09/23/2016		Robins New, Shelley
PCRA Order			
1	12/20/2016		Philadelphia County District Attorney's Office
Answer to Motion for Discovery			
1	12/23/2016		Andrisani, Nathan Joseph
Answer/Response			
1	01/06/2017		Robins New, Shelley
Order Granting Motion for Continuance			

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ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
1	03/10/2017		Robins New, Shelley
Order Granting Motion for Continuance			
4	05/19/2017		Robins New, Shelley
PCRA Continued For Court's Interim Decision			
1	07/12/2017		Bluestine, Marissa Boyers
Entry of Appearance			
1	07/13/2017		Andrisani, Nathan Joseph
Motion for Leave			
2	07/13/2017		Andrisani, Nathan Joseph
PCRA - Amended PCRA Petition Filed			
1	07/14/2017		Gorbey, Jacqueline Cecile
Motion for Leave			
1	07/17/2017		Robins New, Shelley
Order Denying Motion to Seal			
1	09/12/2017		Gorbey, Jacqueline Cecile
Letter in Brief			
1	09/15/2017		Robins New, Shelley
Order Granting Motion for Continuance			
1	11/06/2017		Philadelphia County District Attorney's Office
Answer/Response			
1	11/15/2017		Gorbey, Jacqueline Cecile
Letter in Brief			
1	11/17/2017		Robins New, Shelley
PCRA Decision Held Under Advisement			
1	01/19/2018		Robins New, Shelley
PCRA Continued for Status			

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ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
1	03/16/2018		Robins New, Shelley
Joint Request For Continuance			
1	05/25/2018		Robins New, Shelley
PCRA Continued for Status			
4	07/20/2018		Robins New, Shelley
Order Granting Motion for Continuance			
1	09/14/2018		Robins New, Shelley
Order Granting Motion for Continuance			
1	11/16/2018		Robins New, Shelley
PCRA Continued for Further Investigation by Commonwealth			
3	01/07/2019		Court of Common Pleas - Philadelphia County
Hearing Notice			
4	02/22/2019		Robins New, Shelley
Joint Request For Continuance			
1	07/19/2019		Robins New, Shelley
PCRA Continued For Further Filings By Commonwealth			
1	09/27/2019		Sanghvi, Nilam Ajit
Entry of Appearance			
1	11/18/2019		Gorbey, Jacqueline Cecile
PCRA - Amended PCRA Petition Filed			
1	11/22/2019		Robins New, Shelley
Order Granting Motion for Continuance			
1	02/12/2020		Philadelphia County District Attorney's Office
Answer to Petition for Post Conviction Relief			

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ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
2	02/12/2020		Philadelphia County District Attorney's Office
Miscellaneous Motion Filed			
2	03/09/2020		Philadelphia County District Attorney's Office
Memorandum of Law			

CASE FINANCIAL INFORMATION

Last Payment Date: 11/20/2019 Total of Last Payment: -$12.50

Swaison, Andrew Defendant	Assessment	Payments	Adjustments	Non Monetary Payments	Total
Costs/Fees					
Motion Filing Fee (Philadelphia)	$12.50	($12.50)	$0.00	$0.00	$0.00
Motion Filing Fee (Philadelphia)	$12.50	($12.50)	$0.00	$0.00	$0.00
Costs/Fees Totals:	$25.00	($25.00)	$0.00	$0.00	$0.00
Grand Totals:	$25.00	($25.00)	$0.00	$0.00	$0.00

** - Indicates assessment is subrogated

EXHIBIT H

Andrisani, Nathan J.

From: Malmgren, Lynn <lynn.malmgren@courts.phila.gov>
Sent: Monday, March 9, 2020 9:42 AM
To: Andrisani, Nathan J.
Subject: Swainson hearing

Follow Up Flag: Follow up
Flag Status: Flagged

[EXTERNAL EMAIL]
Dear Counsel:

We have asked for a video-conferenced hearing for Andrew Swainson on **Friday, April 24, 2020**. I hope to know the exact time later today.

Please call if you have questions.

Lynn

_____
Lynn Malmgren, Esq.
Law Clerk to The Honorable Shelley Robins New
***Chambers CH 673*:**
Tel. 215-686-2961 Fax. 215-686-9547
***Court Room CH 625*:**
Tel. 215-686-4310 Fax. 215-686-3703

From: Andrisani, Nathan J.
Sent: Wednesday, March 4, 2020 12:37 PM
To: Malmgren, Lynn ; Andrew Wellbrock
Subject: RE: Voicemail

That works for me.

Have a great day.

Nate

Nathan J. Andrisani
Morgan, Lewis & Bockius LLP
1701 Market Street | Philadelphia, PA 19103-2921
Direct: +1.215.963.5362 | Main: +1.215.963.5000 | Fax: +1.215.963.5001
nathan.andrisani@morganlewis.com | www.morganlewis.com

Assistant: Donna M. Gappa | +1.215.963.4858 | donna.gappa@morganlewis.com

---

From: Malmgren, Lynn <lynn.malmgren@courts.phila.gov>
Sent: Wednesday, March 4, 2020 12:36 PM
To: Andrew Wellbrock <Andrew.Wellbrock@phila.gov>
Cc: Andrisani, Nathan J. <nathan.andrisani@morganlewis.com>
Subject: RE: Voicemail

[EXTERNAL EMAIL]
How about 3:30? I'll be sure to be at my desk.

Lynn

From: Andrew Wellbrock <Andrew.Wellbrock@phila.gov>
Sent: Wednesday, March 4, 2020 11:59 AM
To: Malmgren, Lynn <lynn.malmgren@courts.phila.gov>
Cc: Andrisani, Nathan J. <nathan.andrisani@morganlewis.com>
Subject: Voicemail

Lynn-

Nate and I just tried to three-way call over to you, but you were down in the courtroom.

Is there a good time today to call back? I'm available any time with the exception of 2pm to 3pm.

Thanks,

Andrew Wellbrock
Assistant District Attorney
Conviction Integrity Unit
District Attorney's Office
Three South Penn Square
Philadelphia, PA 19107
(o) 215-686-8738
(f) 215-686-8765
andrew.wellbrock@phila.gov

EXHIBIT I

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
CRIMINAL SECTION TRIAL DIVISION

COMMONWEALTH	:	
	:	
v.	:	CP-51-CR-0431311-1988
	:	
ANDREW SWAINSON	:	

STIPULATIONS OF FACT OF RESPONDENT COMMONWEALTH OF PENNSYLVANIA REGARDING VICTIM CONTACT AND NOTICE

LAWRENCE S. KRASNER, the District Attorney of Philadelphia County, by his assistant, Andrew Wellbrock, moves this Court to accept and adopt the following stipulations of fact[1] regarding victim contact and notice of these proceedings.[2]

[1] "A stipulation is a declaration that the fact agreed upon is proven." *Commonwealth v. Rizzuto*, 777 A.2d 1069, 1088 (Pa. 2001), *abrogated on other grounds by Commonwealth v. Freeman*, 827 A.2d 385 (2003). "Parties may by stipulation resolve questions of fact or limit the issues, and, if the stipulations do not affect the jurisdiction of the court or the due order of the business and convenience of the court they become the law of the case." *Id.* (quoting *Parsonese v. Midland National Ins. Co.*, 706 A.3d 814, 815 (Pa. 1998), *abrogated on other grounds by Sveen v. Melin*, 138 S. Ct. 1815 (2018)).

[2] In anticipation of the upcoming listing on March 27, 2020, the parties spoke to Lynn Malmgren, Esq., the clerk for this Honorable Court, on March 4, 2020. During that conversation, the Commonwealth was instructed to submit stipulations regarding victim contact and notice of these proceedings. Accordingly, these stipulations are being submitted pursuant to that instruction and to evidence

1. At the time of trial, the victim's family member identified to receive communication as provided for in the Crime Victim's Act was the victim's father, Stanley Arthur. 18 P.S. § 11.103 – Victim (4).
2. The Conviction Integrity Unit (CIU) did a Pennsylvania record search for Stanley Arthur and the only Stanley Arthur that met the search criteria (age, race and geographical location) died on May 9th, 1991.
3. In addition to attempting to locate Mr. Arthur, the CIU made efforts to locate other family members of the victim.
4. For instance, a review of the Medical Examiner Report, revealed that Catherine Walker, Arthur's wife, accompanied him to identify the victim's body.
5. A Pennsylvania record search for Catherine Walker was conducted by the CIU and the only Catherine Walker that met the search criteria (age, race and geographical location) died on March 25th, 2014.
6. According to further research conducted by the CIU, the victim was one of Ruth Opher's seven children (Ruth Opher died on June 30th, 1973).

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compliance with the Commonwealth's statutory duties as outlined in the Crime Victim's Act. *See generally* 18 P.S. § 11.101 et seq.

7. One of the victim's siblings, Ernestine Opher, was referenced frequently during the police investigation in this case because, before the victim died, he lived with her intermittently.
8. So, on November 18, 2019, the CIU attempted to contact Ernestine Opher.
9. During that attempt, the CIU spoke to Ernestine Opher's daughter, Te'era McFarland, who agreed to relay a message to her mother that the CIU needed to speak with her.
10. The CIU did not receive a return phone call from Ernestine Opher so on December 2, 2019, the CIU called Ernestine Opher again, however, this time no one answered the phone (as of today's date, the CIU has not received a return phone call from Ernestine Opher).
11. A second sibling of the victim, Antonio Opher, was interviewed by police at the time of the homicide.
12. On December 2, 2019, the CIU called and spoke with Antonia Opher about the CIU investigation into the case as well as preliminary findings made by the CIU as a result of its investigation (a follow up email was also sent reiterating the information provided during the call).
13. Then on December 9, 2019, the CIU spoke with Antonia Opher regarding the legal process, possible outcomes of the case and the upcoming court listing –

specifically discussing the right of the victim's family to be present in court for disposition of the case as well as the availability of the CIU to answer any questions the family might have about the case and the legal process.

14. On February 7, 2020, prior to filing its Answer, the CIU attempted to contact Antonia Opher again to inform her of the filing – however, that attempt was unsuccessful.

15. A follow up letter was written to Antonia Opher on February 12, 2020, explaining that the CIU's Answer conceded that Swainson is entitled to a new trial and that the next listing in the case is March 27th, 2020 at 9:00am at 1301 Filbert Street with the caveat that the case might not be heard that day.

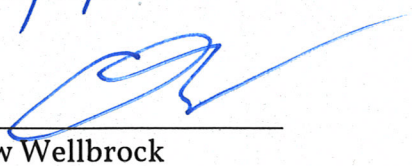
16. On March 5th, 2020, the CIU confirmed with Antonia Opher that she is aware of the next listing on March 27th, 2020 and that she, and other family members, are aware they have the right to be present.

17. During the March 5, 2020 call with Antonio Opher, the CIU also informed her that there is a possibility the court date may get rescheduled to April 24, 2020.

18. Antonia Opher stated that she will be present at the hearing when it occurs.

STIPULATED AND AGREED BY:

Dated: 3/9/2020



Andrew Wellbrock
Assistant District Attorney
CONVICTION INTEGRITY UNIT
PHILADELPHIA DISTRICT ATTORNEY'S OFFICE
Three South Penn Square
Philadelphia, PA 19107-3499
Telephone: (215) 686-8000

Counsel for the Commonwealth of Pennsylvania

VERIFICATION

The undersigned hereby verifies that the facts set forth in the foregoing motion are true and correct to the best of my knowledge, information, and belief. This verification is made subject to the penalties for unsworn falsification to authorities under 18 Pa. C.S. Section 4904.

Dated: March 9, 2020

Andrew Wellbrock
Assistant District Attorney
CONVICTION INTEGRITY UNIT
PHILADELPHIA DISTRICT
ATTORNEY'S OFFICE
Three South Penn Square
Philadelphia, PA 19107-3499
Telephone: (215) 686-8000

Counsel for the Commonwealth of Pennsylvania

AFFIDAVIT OF SERVICE

I, ANDREW WELLBROCK, Assistant District Attorney, hereby certify that, on March 9, 2020, I served a true and correct copy of the within motion for the above-captioned matter to the following via hand delivery or electronic delivery:

The Honorable Shelley Robins New
Criminal Justice Center Room 1213
1301 Filbert Street
Philadelphia, PA 19107

Nathan J. Andrisani
Jacqueline C. Gorbey
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921

Nilam A. Sanghvi
The Pennsylvania Innocence Project
Temple University Beasley School of Law
1515 Market St., Suite 300
Philadelphia, PA 19102

Craig Cooley
Cooley Law Office
1308 Plumdale Court
Pittsburgh, PA 15239

Andrew Wellbrock
Assistant District Attorney

EXHIBIT J

From: Andrisani, Nathan J.
Sent: Tuesday, March 31, 2020 5:44 PM
To: Malmgren, Lynn; lynn.malmgren@runbox.com
Cc: Andrew Wellbrock (andrew.wellbrock@phila.gov); Patricia Cummings; Brown, Patrick; Bonner, Michael; Paris, Kathleen O.
Subject: RE: Swainson hearing

Lynn,

Good afternoon. I hope this note finds you and your family well and managing through these very strange, stressful and trying times.

I am reaching out to you to let you know that given the current Court emergency and COVID-19-related health risks, the Commonwealth has contacted the DOC to retract the request to have Mr. Swainson transferred to SCI Phoenix so he can be brought to Court for the hearing scheduled on April 24. We understand from the DOC that all prisoner transfers and bring down orders have been suspended indefinitely. If it is possible for the Court to hold the hearing on April 24 via video-conference as indicated below – or by conference call – we will make arrangements to waive Mr. Swainson's presence and proceed in whatever manner Judge Robins New finds suitable. Given the rather unique circumstances of Mr. Swainson's pending motion, the Commonwealth's response, the COVID-19 health emergency and the heightened risk of widespread transmission if/when the virus invades a prison, as well as the overall uncertainty we are all confronting on a daily basis, I wanted to reach out to you to see if you would be available for a call with me and the Commonwealth's attorneys (ADAs Patricia Cummings and Andrew Wellbrock) to discuss how best to try to manage this situation and make preparations for the hearing on April 24 (or some other date).

Thank you very much for your continued attention to this matter and consideration of this request. Be well.

Have a great day.

Nate

Nathan J. Andrisani
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Assistant: Donna M. Gappa | +1.215.963.4858 | donna.gappa@morganlewis.com

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From: Malmgren, Lynn <lynn.malmgren@courts.phila.gov>
Sent: Monday, March 9, 2020 9:42 AM
To: Andrisani, Nathan J. <nathan.andrisani@morganlewis.com>
Subject: Swainson hearing

[EXTERNAL EMAIL]
Dear Counsel:

We have asked for a video-conferenced hearing for Andrew Swainson on **Friday, April 24, 2020**. I hope to know the exact time later today.

Please call if you have questions.

Lynn

_____

Lynn Malmgren, Esq.
Law Clerk to The Honorable Shelley Robins New
***Chambers CH 673*:**
Tel. 215-686-2961 Fax. 215-686-9547
***Court Room CH 625*:**
Tel. 215-686-4310 Fax. 215-686-3703

From: Andrisani, Nathan J.
Sent: Wednesday, March 4, 2020 12:37 PM
To: Malmgren, Lynn ; Andrew Wellbrock
Subject: RE: Voicemail

That works for me.

Have a great day.

Nate

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From: Malmgren, Lynn <lynn.malmgren@courts.phila.gov>
Sent: Wednesday, March 4, 2020 12:36 PM
To: Andrew Wellbrock <Andrew.Wellbrock@phila.gov>
Cc: Andrisani, Nathan J. <nathan.andrisani@morganlewis.com>
Subject: RE: Voicemail

[EXTERNAL EMAIL]
How about 3:30? I'll be sure to be at my desk.

Lynn

From: Andrew Wellbrock <Andrew.Wellbrock@phila.gov>
Sent: Wednesday, March 4, 2020 11:59 AM
To: Malmgren, Lynn <lynn.malmgren@courts.phila.gov>

Cc: Andrisani, Nathan J. <nathan.andrisani@morganlewis.com>
Subject: Voicemail

Lynn-

Nate and I just tried to three-way call over to you, but you were down in the courtroom.

Is there a good time today to call back? I'm available any time with the exception of 2pm to 3pm.

Thanks,

Andrew Wellbrock
Assistant District Attorney
Conviction Integrity Unit
District Attorney's Office
Three South Penn Square
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(o) 215-686-8738
(f) 215-686-8765
andrew.wellbrock@phila.gov

EXHIBIT K

TEMPLE UNIVERSITY

Nilam Sanghvi <tuf33066@temple.edu>

Fwd: State Civil Section RE: Judge New Requests Input

Riley H. Ross III <riley@minceyfitzross.com> Tue, Apr 7, 2020 at 3:10 PM
To: Nilam Sanghvi <nilam.sanghvi@temple.edu>

Riley H. Ross III, M.A., J.D.

MINCEY FITZPATRICK ROSS, LLC
Two Penn Center
1500 JFK Blvd, Suite 1525
Philadelphia, PA 19102
215.587-0006 (o)
215.703-8480 (c)
215.587-0628 (f)
minceyfitzross.com

Begin forwarded message:

From: Jordan Strokovsky <jordan@actionafterinjury.com>
Subject: State Civil Section RE: Judge New Requests Input
Date: April 7, 2020 at 1:25:09 PM EDT
To: "State_Civil_Litigation@Listserve.Philabar.org" <State_Civil_Litigation@Listserve.Philabar.org>

Dear Section Members,

Yesterday about 50 members joined our town hall meeting via Zoom to discuss the current COVID-19 situation. Thank you to all who attended. Supervising Judge New was present and stressed although the courts are closed to the public, "the legal system should be moving forward," and we should do our best under the circumstances to take remote depositions and exchange written discovery.

Judge New explained that the judges are working on a remote system themselves, but currently their staff and resources are limited. As such, the Court must prioritize. Judge New asked the Bar for input as to what our most pressing concerns are, so we ask for your input.

1. What are your questions regarding the Court's present situation?

2. Because it will likely be a gradual return, what should be the Court's priorities, and/or what is most important to the Bar? Pre-Trial Conferences, Settlement Conferences, Discovery Court, Motions, Deadlines, etc.

Our emails are jordan@actionafterinjury.com and jim.tolerico.uc1r@statefarm.com. Please send us your feedback by 5:00 p.m. this Wednesday as we would like to get this information to the Court by the end of the week.

Thank you and take care everyone.

Jordan and Jim (co-chairs)

Strokovsky LLC
1500 Market Street
12th Floor, East Tower
Philadelphia, PA 19102
215.317.6545
www.actionafterinjury.com

"Serving the Seriously Injured"

EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CHRISTOPHER SMITH,	:	Case No. 1:12-cv-425
Petitioner,	:	Judge Timothy S. Black
vs.	:	Magistrate Judge Michael R. Merz
WARDEN, Toledo Correctional Institution,	:	
Respondent.	:	

DECISION AND ENTRY ADOPTING THE REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE (Doc. 115) AS MODIFIED HEREIN

This case is before the Court pursuant to the Order of General Reference to United States Magistrate Judge Michael R. Merz.

Pursuant to such reference, the Magistrate Judge reviewed the pleadings and, on November 7, 2019, issued a Report and Recommendation, recommending that this Court issue a conditional writ of habeas corpus as to Petitioner Christopher Smith ("Petitioner"). (Doc. 115).

On November 20, 2019, Respondent filed objections to the Report and Recommendation. (Doc. 116). And, on November 26, 2019, Petitioner filed a response in opposition to the objections. (Doc. 117). The Court also has before it the relevant trial court documents relating to Petitioner's criminal conviction.[1]

[1] The transcripts of the state trial proceedings are filed on the docket of this case at Doc. 12-2 through 12-12. Additionally, the state court record is filed on the docket of this case at Doc. 75.

I. BACKGROUND[2]

A. State Trial Proceedings

In 2007, the Hamilton County Grand Jury returned an indictment, charging Petitioner with the following offenses: aggravated robbery in violation of Ohio Revised Code § 2911.01(A)(1) with specifications (Count 1); robbery in violation of Ohio Revised Code § 2911.02(A)(2) (Count 2); and having weapons while under disability in violation of Ohio Revised Code § 2923.13(A)(2) (Count 3). (Doc. 75 at 7–10).

In 2008, Petitioner's case proceeded to a bench trial, conducted by Judge Robert P. Ruehlman.[3] (*See* Doc. 12-2). At the bench trial, evidence was presented that, on October 17, 2007, an armed robber, wearing sunglasses, a facemask, and a wig, took $700 to $800 from a wireless telephone store in Cincinnati, Ohio. (Doc. 12-3 at 10–14, 28–32, 36). Evidence was also presented that, after the robbery was complete, the robber ran to a Ford Expedition, parked at a nearby apartment complex, and climbed into the passenger seat. (*Id.* at 49–52).

Two eyewitnesses identified Petitioner as the alleged robber.

The first eyewitness was an individual named Thomas Moore ("Moore"). (*Id.* at 46). Moore testified that he noticed the robbery in progress while passing by the wireless telephone store, and that he followed the Ford Expedition from the nearby apartment complex. (*Id.* at 47–52, 62–65). Moore further testified that he saw Petitioner in the

[2] *Smith v. Warden, Toledo Corr. Inst.*, 780 F. App'x 208 (6th Cir. 2019), contains a full recitation of the facts applicable to this case. This Court incorporates those facts herein by reference.

[3] Petitioner waived his right to a jury trial. (Doc. 75 at 40).

passenger side of the vehicle while in pursuit. (*Id.* at 62–67, 72–77). Moore testified that he called 911 while the robbery was ongoing to provide the police with a partial license plate number. (*Id.* at 77–78).

The second eyewitness was an individual named Charles Allen ("Allen").[4] (Doc. 12-8 at 2). Allen testified that he rode with Petitioner to the nearby apartment complex, unaware of Petitioner's alleged intent to rob the wireless telephone store, then waited in the Ford Expedition while Petitioner made a "phone call." (*Id.* a 26–27, 77–78). Allen further testified that, after about five minutes, Petitioner ran back to the car, and told Allen to "drive, drive." (*Id.* at 26–29). Allen testified that he obliged (*i.e.*, drove), then left Petitioner and the vehicle at a different apartment complex.[5] (*Id.* at 26–29, 37–38).

The State also proffered the testimony of Tracy Sundermeier ("Sundermeier"), a serologist employed by the Hamilton County Coroner's Crime Laboratory, who presented a DNA lab report at the bench trial. (Doc. 12-4 at 9–10, 14). Sundermeier testified that she had swabbed a wig found near the Ford Expedition; had created a profile from the DNA recovered; and had compared the DNA profile created to Petitioner's and Allen's DNA. (*Id.* at 27, 45–46). Further, Sundermeier testified that, based on her analysis: Petitioner was excluded from the DNA profile; Allen could not be excluded from the DNA profile; and the portion of the population that could not be excluded from

[4] In exchange for his testimony, the State promised Allen that he would not be prosecuted for this crime. (Doc. 12-8 at 2–3).

[5] The Ford Expedition was later determined to belong to Petitioner's girlfriend, and the apartment complex at which it was left, along with the wireless telephone store, were in the vicinity of Petitioner's home. (Doc. 12-3 at 96–99, 155–62).

the DNA profile was 1 in 3.44 million. (*Id.* at 45–46). In other words, Sundermeier testified that, based on her analysis, while Petitioner's DNA was not on the wig, in all likelihood, Allen's was.[6] (*See id.* at 45–49).

Petitioner maintained his innocence throughout the criminal proceedings, including the bench trial. (*See* Doc. 12-9 at 95–96). At trial, the defense's position was that Petitioner was not involved in the robbery and that Allen was in fact the robber. (*Id.* at 21–27, 75–76, 88). Indeed, Petitioner asked the State to "run the [DNA] test" in an effort to prove that he played no part in the crime. (*Id.* at 29–30).

At the conclusion of the bench trial, the state trial court commented on the DNA evidence presented by Sundermeier as follows:

> [W]hen you touch something, sometimes your cells come off, sometimes they don't, you know, sometimes—I don't have a problem with the fact that [Petitioner] put the wig on but his DNA was not found on it but [] Allen's was, because he was in the car, too, he touched it also.

(*Id.* at 91).

After commenting on the DNA evidence, and notwithstanding the defense's theory that Allen, rather than Petitioner, was the real culprit, the state trial court found Petitioner guilty on all counts, and sentenced Petitioner to 26 years in prison. (*Id.* at 118–19). The state trial court asserted that, when Moore's testimony, Allen's testimony, and

[6] Sundermeier also tested a t-shirt and sunglasses, both of which were found with the wig, at the apartment complex where the Ford Expedition was left. (Doc. 12-4 at 20, 28). Sundermeier obtained a DNA profile from the t-shirt. (*Id.* at 19–20). Petitioner was excluded from the DNA profile; Allen could not be excluded from the DNA profile. (*Id.*) Sundermeier claimed that she could not recover any DNA from the sunglasses. (*Id.* at 28).

the DNA results were considered cumulatively, all the evidence "add[ed] up to one thing[—]that [Petitioner] did in fact commit this offense." (*Id.* at 92).

B. State Post-trial Proceedings

After the conclusion of the bench trial, the State disclosed new evidence to Petitioner: the laboratory notes underlying Sundermeier's DNA testing. (Doc. 75 at 93). Upon receipt of the laboratory notes, Petitioner moved for a new trial under Ohio Rule of Criminal Procedure 33.[7] (Doc. 75 at 92–96). In his new trial motion, Petitioner explained that, while the State had disclosed Sundermeier's laboratory report to Petitioner prior to trial, the State had failed to disclose Sundermeier's laboratory notes to Petitioner prior to trial. (*See id.*). And Petitioner argued that, by failing to so disclose the laboratory notes, the State had withheld material evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). (Doc. 75 at 92–96). Petitioner also sought relief on various other grounds. (*Id.* at 54–78).

On August 11, 2009, the state trial court held a hearing on Petitioner's new trial motion. (Doc. 12-11). Dr. Julie Heinig ("Dr. Heinig"), a DNA expert, testified for Petitioner. (*Id.* at 3). Dr. Heinig explained that, while the laboratory report was sufficient to show the type of DNA on the wig, the laboratory notes were necessary to determine the amount of DNA on the wig. (*Id.* at 6–10, 32–34, 39–40). Dr. Heinig explained that, only by reviewing the laboratory notes, was she able to determine that

[7] To be precise, Petitioner moved to supplement a previous motion for a new trial under Ohio Rule of Criminal Procedure 33. (Doc. 75 at 54, 93).

alleles consistent with Allen's DNA were present at almost every locus tested on the wig.[8] (*Id.* at 15).

Dr. Heinig testified that the amount of DNA found on the wig was likely not consistent with Allen briefly touching the wig, but actually wearing it. (*Id.* at 17–18, 32–34). And Dr. Heinig asserted that, while it was possible that Petitioner had worn the wig without leaving behind DNA, and while it was possible that someone else's DNA had "masked" Petitioner's DNA (such as in a "quick touch situation"), the longer someone wears an item, the more likely it is that he/she will deposit identifiable DNA. (*Id.* at 23–27, 37–38, 47).

At the end of the new trial hearing, Petitioner's counsel presented an extensive oral argument, citing both Dr. Heinig's testimony and analogous cases, which focused "[f]irst, and most importantly" on Petitioner's *Brady* claim. (*Id.* at 48–58). In response, the state trial court presented the following thoughts:

> [Y]ou might have an argument if you're trying [the case] to a jury, but you're trying the case to me, and I'm also deciding this motion for [a] new trial. I think I made it clear in my findings initially that when I talked about this, I have no doubt that both these guys were involved in this.
>
> [. . .]
>
> [I]t could very possibly be that [] Allen wore this outfit and had this on numerous occasions on other robberies, or even that day wore it and gave it to [Petitioner] to wear, that's why he has a

[8] In addition to examining the laboratory notes, Dr. Heinig conducted her own DNA testing of the wig, t-shirt, and sunglasses. (Doc. 12-11 at 10–11). Dr. Heinig's DNA testing largely aligned with Sundermeier's. (*See id.*). However, unlike Sundermeier, Dr. Heinig was able to obtain a DNA profile from the sunglasses. (*Id.* at 21). Petitioner was excluded from that DNA profile; Allen was not. (*Id.*)

> heavy presence of DNA on it, and that would mask [Petitioner's] DNA when he wore it.

(*Id.* at 58–59, 61).

The state trial court then informed the parties that it needed "a couple weeks to look this [all] over" and adjourned the hearing on Petitioner's new trial motion. (*Id.* at 64, 68). Subsequently, on September 10, 2009, the state trial court denied Petitioner's new trial motion in a written entry stating in full as follows: "The defendant's Rule 33 motion for New Trial is hereby denied." (Doc. 75 at 102).

On September 15, 2009, Petitioner filed a notice of direct appeal to the First District Court of Appeals (the "First District"). (*Id.* at 103). Petitioner's direct appeal did not include any reference to the alleged *Brady* violation. (*Id.* at 104–23). On review, the First District affirmed the state trial court's judgment but remanded for resentencing. (*Id.* at 146–51).

On August 3, 2010, Petitioner filed a Rule 26(B) application to reopen his direct appeal. (*Id.* at 182). The Rule 26(B) application asserted that Petitioner's appellate counsel was ineffective for, *inter alia*, failing to raise on appeal the state trial court's rejection of Petitioner's *Brady* claim, in its denial of Petitioner's motion for a new trial. (*Id.* at 182–92).

Thereafter, of February 7, 2011, the First District entered a decision, finding that Petitioner had failed to present a colorable ineffective assistance of appellate counsel claim. (*Id.* at 200–02). Specifically, the First District found that the state trial court had not abused its discretion in denying Petitioner's motion for a new trial and noted that,

with regard to the *Brady* claim, the undisclosed laboratory notes "could not 'reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" (*Id.* at 201 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995))).

C. Federal Habeas Proceedings

While his state court proceedings were ongoing, Petitioner applied for a writ of habeas corpus in this Court. (Doc. 1). Petitioner raised seven grounds for relief, only two of which—Grounds I and VII—remain relevant to this Order. (Doc. 80 at 1–2). The first ground asserted that the State had committed a *Brady* violation by failing to disclose the laboratory notes to Petitioner prior to the commencement of the bench trial ("ground one" or the "*Brady* claim"). (*Id.* at 1). The seventh ground asserted that Petitioner's appellate counsel had rendered ineffective assistance by failing to raise, *inter alia*, a *Brady* claim on direct appeal ("ground seven" or the "IAAC claim"). (*Id.* at 2, 22).

On August 29, 2016, the Magistrate Judge issued a Report and Recommendation, recommending that this Court dismiss Petitioner's petition in its entirety. (*Id.* at 26). The Magistrate Judge concluded that grounds one through six of Petitioner's petition were either procedurally defaulted or not cognizable. (*See id.* at 10–22). And the Magistrate Judge concluded that, to the extent that it was not procedurally defaulted, ground seven of Petitioner's petition failed on the merits. (*See id.* at 22–26).

On February 8, 2017, this Court issued a Decision and Entry, adopting the Report and Recommendation. (Doc. 85). However, the Court also issued a certificate of appealability. (Doc. 98). With regard to ground one (the *Brady* claim), the certificate of appealability encompassed "whether the Court was correct in finding a procedural

default, whether the Court was correct in finding no excuse to the procedural default exists, and whether the Court was correct in not considering the merits of this claim." (*Id.* at 13). With regard to ground seven (the IAAC claim), the certificate of appealability also included "whether the Petition state[d] a valid claim for ineffective assistance of appellate counsel." (*Id.* at 17).

On March 10, 2017, Petitioner filed a notice of appeal with the United States Court of Appeals for the Sixth Circuit. (Doc. 92). And thereafter, on June 18, 2019, the Sixth Circuit issued an Opinion on Petitioner's appeal. (Doc. 99).

In its Opinion, the Sixth Circuit concluded that grounds one through six of Petitioner's petition were procedurally defaulted. (*Id.* at 17). However, the Sixth Circuit also concluded that ineffective assistance of appellate counsel excused the procedural default with regard to ground one (the *Brad*y claim). (*Id.* at 32).

In reaching this conclusion, the Sixth Circuit performed an initial analysis of Petitioner's *Brady* claim, and the Sixth Circuit concluded that Petitioner's *Brady* claim was "significant," "obvious," and material. (*Id.* at 30–32; *see also id.* at 31("In a case with stronger evidence, the suppressed evidence might not be enough to create a reasonable probability of a different outcome. But, here, it is sufficient to undermine[] confidence in the outcome of the trial." (quotation marks and citation omitted)). Moreover, the Sixth Circuit noted that, by denying Petitioner's *Brady* arguments, post-trial, the state trial court likely "misapprehend[ed] and misappl[ied] Supreme Court precedent." (*Id.* at 30).

After setting forth this analysis, the Sixth Circuit remanded the case to this Court for a merits-based consideration of Petitioner's *Brady* and IAAC claims. (*Id.* at 32, 35).

With regard to Petitioner's *Brady* claim, the Sixth Circuit stated as follows:

> We . . . remand [Petitioner]'s *Brady* claim to the district court to consider on the merits. In so doing, the district court is first required to determine whether this claim was "adjudicated on the merits in [s]tate court proceedings." 28 U.S.C. § 2254(d). If it was, the district court must review the adjudication of this claim under the deferential standard required by AEDPA. *See id.*

(*Id.* at 32).

And, with regard to Petitioner's IAAC claim, the Sixth Circuit stated as follows:

> [Petitioner] made only the most barebone of arguments for why he should prevail on th[e] [IAAC] claim on the merits. . . . Because this issue was not adequately briefed before us and its analysis will necessarily overlap with the analysis required for the *Brady* claim, we remand the IAAC claim for the district court to address in light of the above discussion.

(*Id.* at 34–35).

In short, the Sixth Circuit instructed this Court to engage in three points of inquiry on remand: (A) a consideration of whether the state courts had adjudicated Petitioner's *Brady* claim on the merits; (B) a consideration of the merits of Petitioner's *Brady* claim; and (C) a consideration of the merits of Petitioner's IAAC claim. (*Id.* at 32, 35).

On November 7, 2019, the Magistrate Judge issued a Report and Recommendation, addressing each of the Sixth Circuit's points of inquiry. (Doc. 115). At the end of the Report and Recommendation, the Magistrate Judge recommended that this Court issue a conditional writ of habeas corpus, requiring the State to release

Petitioner unconditionally or retry Petitioner within six months of the date of judgment. (*Id.* at 13).

Thereafter, on November 20, 2019 Respondent filed objections to the Report and Recommendation. (Doc. 116). And, on November 26, 2019, Petitioner filed a response in opposition to the objections. (Doc. 117). This case is now ripe for this Court's review.

II. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs habeas applications. 28 U.S.C. § 2254. A habeas application does not provide a petitioner with an opportunity to retry his state court conviction in federal court. *Herrera v. Collins*, 506 U.S. 390, 401–02 (1993). Instead, a habeas application provides a petitioner with an opportunity to show that his state court conviction violates federal law. 28 U.S.C. § 2254(a).

If the claim set forth in the habeas application has already been adjudicated by the state courts "on the merits," then a highly deferential standard of review applies. 28 U.S.C. § 2554(d). As set forth in AEDPA, the district court can only grant habeas relief if the state court conviction (1) unreasonably applied Supreme Court precedent; or (2) turned on unreasonable factual findings. *Stewart v. Trierweiler*, 867 F.3d 633, 636 (6th Cir. 2017) (citing 28 U.S.C. § 2554(d)).

If, however, the claim set forth in the habeas petition has not been adjudicated by the state court, "on the merits," then a more plenary standard of review applies. *Cone v. Bell*, 556 U.S. 449, 472 (2009). As set forth in *Marion*, the district court must review questions of law under a *de novo* standard and questions of fact under a clear error

standard. *Marion v. Woods*, 663 F. App'x 378, 381 (6th Cir. 2016) (citing *Robinson v. Howes*, 663 F.3d 819, 823 (6th Cir. 2011)).

III. ANALYSIS

On review, this Court agrees, in large part, with the Magistrate Judge's Report and Recommendation and ultimate conclusions. (Doc. 115). For purposes of this Order, the Court will analyze each of the Sixth Circuit's points of inquiry. (Doc. 99). Thereafter, this Court will address the remaining objections submitted by Respondent, as well as whether it is appropriate to issue a conditional versus an unconditional writ of habeas corpus. (Doc. 116).

A. Decision on the Merits

First, the Sixth Circuit instructed this Court to consider whether the state courts adjudicated Petitioner's *Brady* claim on the merits. (Doc. 99 at 32). This threshold inquiry determines whether the deferential standard set forth in AEDPA will govern this Court's subsequent analysis. 28 U.S.C. § 2554(d); *Marion*, 663 F. App'x at 381.

In the Report and Recommendation, the Magistrate Judge concluded that the First District's February 7, 2011 decision did not adjudicate Petitioner's *Brady* claim on the merits. (Doc. 115 at 4–6). This Court concludes that, while the Magistrate Judge's thoughtful analysis of the First District's February 7, 2011 decision is correct, there is nonetheless more work to be done. (*Id.*) This is because, while the First District did not decide Petitioner's *Brady* claim on the merits, the state trial court did. (Doc. 75 at 102).

"When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits

in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 99 (2011) (citing *Harris v. Reed*, 489 U.S. 255, 265 (1989)); *Richardson v. Palmer*, 941 F.3d 838, 848 (6th Cir. 2019) (same). This presumption applies regardless of whether the state court articulated the rationale underlying its decision. *Harrington*, 562 U.S. at 98–99. But this "presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely." *Id.* at 99–100.

Here, the state trial court adjudicated Petitioner's *Brady* claim on the merits.

Petitioner presented his *Brady* claim to the state trial court in a new trial motion. (Doc. 75 at 92–96). Thereafter, the state trial court denied Petitioner's *Brady* claim, along with the rest of his new trial motion, in a September 10, 2009 decision. (*Id.* at 102). The September 10, 2009 decision does not explain why the state trial court denied Petitioner's *Brady* claim. (*Id.*) To the contrary, it states in full as follows: "The defendant's Rule 33 motion for New Trial is hereby denied." (*Id.*) Nonetheless, Supreme Court precedent requires this Court to presume that the state trial court denied Petitioner's *Brady* claim on the merits. *Harrington*, 562 U.S. at 99 (presuming that a summary order constituted an adjudication on the merits for AEDPA purposes); *Hynes v. Birkett*, 526 F. App'x 515, 519 (6th Cir. 2013) (same).

On this Court's review, no evidence in the record overcomes the presumption set forth in *Harrington*. 562 U.S. at 99. To the contrary, the new trial hearing, which took place prior to the issuance of the September 10, 2009 decision, strongly indicates that a merits-based decision occurred. At the new trial hearing, Petitioner's counsel presented

an extensive oral argument, focusing "most importantly" on Petitioner's *Brady* claim. (Doc. 12-11 at 48–58). After the oral argument, the state trial court addressed the merits of the case, including the *Brady* claim, and told the parties that it needed "a couple weeks to look this [all] over[.]" (*Id.* at 58–64). These proceedings therefore show that the merits of Petitioner's *Brady* claim, rather than its procedural nature, were at issue leading up to the September 10, 2009 decision.[9] (Doc. 75 at 102).

Based upon the foregoing, with regard to the Sixth Circuit's first point of inquiry, this Court concludes that the state courts adjudicated Petitioner's *Brady* claim on the merits.

B. Merits of the Brady Claim

Next, the Sixth Circuit instructed this Court to consider the merits of Petitioner's *Brady* claim. (Doc. 99 at 32). As the state courts—specifically, the state trial court—adjudicated Petitioner's *Brady* claim on the merits, the deferential standard set forth in AEDPA governs this Court's analysis of the same. 28 U.S.C. § 2554(d).

In the Report and Recommendation, the Magistrate Judge concluded that Petitioner's *Brad*y claim was meritorious, and that habeas relief was appropriate. (Doc. 115 at 6–13). The Magistrate Judge reached this conclusion after noting that the Sixth

[9] In his briefing on remand, Petitioner claims that this Court should analyze the First District's February 7, 2011 decision to determine whether the state courts have adjudicated Petitioner's *Brady* claim on the merits. (Doc. 102 at 1 n.1 (citing the "last explained decision" rule set forth in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991)). But this Court disagrees. As the Magistrate Judge correctly noted in the Report and Recommendation, Petitioner's *Brady* claim was not actually before the First District in the February 7, 2011 decision—Petitioner's IAAC claim was. (Doc. 115 at 4–6). Thus, it makes little sense to this Court to look to that decision to see whether a merits-based adjudication of Petitioner's *Brady* claim occurred.

Circuit's June 18, 2019 Opinion had effectively analyzed Petitioner's *Brady* claim—albeit in the context of an ineffective assistance of appellate counsel analysis. (*Id.*) Thus, the Magistrate Judge adopted the Sixth Circuit's conclusions as his own under the law of the case doctrine. (*Id.*) On review, this Court agrees with the Magistrate Judge's ultimate conclusion. And, as set forth *infra*, this Court reaches that same ultimate conclusion upon review of Petitioner's *Brady* claim, even under the deferential standard set forth in AEDPA.

In this case, Petitioner asserts that, while the State disclosed Sundermeier's laboratory report timely, the State failed to disclose Sundermeier's laboratory notes until after the bench trial concluded and Petitioner was convicted. (Doc. 75 at 92–96). And Petitioner argues that, by failing to disclose the laboratory notes to Petitioner, the State committed a *Brady* violation. (*See id.*).

On review, as explained *infra*, this Court agrees. In response to the Sixth Circuit's inquiry, the Court will first consider the merits of the *Brady* claim, then the Court will consider the state trial court's decision under the AEDPA standard.

1. *Brady*

Under *Brady*, the State's failure to disclose "evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. Disclosure of impeachment evidence, as well as exculpatory evidence, is required under *Brady*. *Bagley*, 473 U.S. at 676. Further, "there are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to

be disclosed even without a specific request." *United States v. Agurs*, 427 U.S. 97, 110 (1976).

As an initial matter, the Court finds that the State withheld material evidence from Petitioner. Evidence is "material" when "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone*, 556 U.S. at 469–70. A reasonable probability exists "when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678).

Here, the laboratory notes were material to Petitioner's case.

At the bench trial, the state trial court concluded that Petitioner, rather than Allen, was the wig-clad robber who held up the wireless telephone store on October 17, 2007. (Doc. 12-9 at 92). The state trial court reached this conclusion notwithstanding the fact that, according to the laboratory report, DNA consistent with Allen, rather than Petitioner, was on the wig. (Doc. 12-4. at 45–49). In rationalizing its verdict, the state trial court stated as follows: "I don't have a problem with the fact that [Petitioner] put the wig on but his DNA was not found on it but [] Allen's was, because [Allen] was in the car, too, [Allen] touched [the wig] also." (Doc. 12-9 at 91 (emphasis added)).

While the state court's rationale may have been consistent with the evidence in the laboratory report, the state court's rationale falls apart when considered in light of the evidence in the laboratory notes. Dr. Heinig's testimony at the new trial hearing confirms this point. Specifically, Dr. Heinig testified that, while the laboratory *report* was sufficient to show the type of DNA on the wig, the laboratory *notes* were necessary to

show the amount of DNA on the wig. (Doc. 12-11 at 6–10, 32–34, 39–40). Dr. Heinig explained that, based on the laboratory notes, alleles consistent with Allen's DNA were present at almost every locus tested on the wig. (*Id.* at 15). And Dr. Heinig testified that, when the amount, not just the type, of DNA on the wig was considered, it became clear that Allen had most likely worn the wig, not just touched it. (*Id.* at 17–18, 32–34). This evidence directly undercuts the rationale articulated by the state trial court at the bench trial.

To be sure, the laboratory notes do not conclusively prove that Allen, rather than Petitioner, wore the wig on the day of the robbery. Dr. Heinig, herself, testified that it was possible for Petitioner to have worn the wig without leaving behind any identifiable DNA. (*Id.* at 23–27, 37–38). But when the fact that DNA consistent with Allen was heavily present on the wig, is considered together with the fact that DNA consistent with Petitioner was completely absent from the same, a natural inference arises—that Allen, rather than Petitioner, was the wig-clad robber who held up the wireless telephone store on October 17, 2007. (*See id.* at 15, 17–18, 32–34; Doc. 12-4. at 45–49). Of course, this natural inference strongly supports Defendant's theory of the case: that Allen rather than Petitioner committed the crime.[10]

The Court concludes that, had the laboratory notes been disclosed, there is a reasonable probability that the result of the proceeding would have been different. *Cone*,

[10] And, of course, this natural inference gains even greater force when it is considered in light of the fact that Petitioner was also excluded as a contributor to the DNA found on the t-shirt and sunglasses, whereas Allen was not. (Doc. 12-4 at 20; Doc. 12-11 at 10–11, 21).

556 U.S. at 469–70; *see also Kyles*, 514 U.S. at 434. Accordingly, the laboratory notes constitute material evidence, and the State's failure to disclose them pre-trial amounts to a *Brady* violation.[11]

2. *AEDPA*

Having found that Petitioner's *Brady* claim has merit, this Court must still consider whether the state trial court's rejection of the same survives the highly deferential standard set forth in the AEDPA. *Harrington*, 562 U.S. at 105. A federal court can only grant habeas relief under the AEDPA if the state court conviction: (1) unreasonably applied Supreme Court precedent; or (2) turned on unreasonable factual findings. *Stewart*, 867 F.3d at 636 (citing 28 U.S.C. § 2554(d)).

Here, the state trial court unreasonably applied both law and facts.[12]

As an initial matter, based on the transcript of the new trial hearing, the state trial court misapplied *Brady*. (*See* Doc. 12-11). At the new trial hearing, Petitioner's counsel presented an extensive oral argument, focusing "most importantly" on Petitioner's *Brady* claim. (*Id*. at 48–58). In response, the state trial court stated as follows: "[Y]ou might have an argument if you're trying [the case] to a jury, but you're trying the case to me,

[11] Were this Court reviewing the *Brady* claim under a *de novo* standard, the Court's consideration would end here, having found that a meritorious *Brady* claim exists. Thus, even if this Court should have considered the First District's decision—which did not adjudicate the *Brady* claim on the merits (*see* Doc. 115 at 4-6)—Petitioner would still prevail.

[12] As the state trial court rejected Petitioner's *Brady* claim in a summary entry (Doc. 75 at 102), the state trial court's comments at the new trial hearing present the sole explanation of the rationale underlying its decision. (Doc. 12-11 at 58–59, 61); *cf. Harrington*, 562 U.S. at 102 (confirming that, "[u]nder § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision" (emphasis added)).

and I'm also deciding this motion for [a] new trial. . . . I have no doubt that both these guys were involved in this." (*Id.* at 58–59). In other words, the state trial court indicated that, while an average juror might find the withheld evidence material, the presiding judge was not persuaded. (*See id.*).

But *Brady* does not ask whether the withheld evidence persuades a particular judge; it asks whether "there is a reasonable probability that, had the [withheld] evidence been disclosed, the result of the proceeding would have been different." *Cone*, 556 U.S. at 469–70. And whether such a reasonable probability exists does "not depend on the idiosyncrasies of the particular decisionmaker . . . ." *Strickland v. Washington*, 466 U.S. 668, 695 (1984) (elaborating on *Brady* standard) (emphasis added). Moreover, "[a] reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[ ] confidence in the outcome of the trial.'" *Smith v. Cain*, 565 U.S. 73, 75–76 (2012) (quoting *Kyles*, 514 U.S. at 434).

Here, the state trial court expressly admitted that the withheld evidence might have been sufficient to result in a different outcome before a jury. Nonetheless, the state trial court judge denied Petitioner a new trial, on the basis that the withheld evidence did not personally persuade him. By analyzing Petitioner's *Brady* claim under a subjective rather than an objective standard, the state trial judge misapplied federal law on Petitioner's post-conviction *Brady* claim. This finding alone warrants habeas relief.

Additionally, however, based on transcript of the new trial hearing, the state trial court's decision relied on facts that were not in evidence. At the new trial hearing, Dr.

Heinig testified that, according to the laboratory notes, alleles consistent with Allen's DNA were heavily present on the wig, and that, based on this heavy presence, Allen had likely worn the wig, rather than merely touched it. (*Id.* at 15, 17–18, 32–34). In order to square this testimony with its previous theory of liability—that Petitioner had actually worn the wig and Allen had merely touched the wig on the day of the robbery—the state trial court mused as follows: "[I]t could very possibly be that [] Allen wore this outfit . . . on other robberies . . . , that's why [Allen] has a heavy presence of DNA on it, and that would mask [Petitioner's] DNA when he wore it." (Doc. 12-11 at 61).

To be sure, Dr. Heinig testified that it is possible for one's DNA to mask another's—for instance in a "quick touch situation." (*Id.* at 24–27, 37–38, 47). Thus, in theory, Allen's use of the wig on prior robberies could explain both a heavy presence of Allen's DNA and could possibly account for the complete absence of Petitioner's DNA. But the problem is that no testimony was presented at the bench trial that Allen had worn the wig on previous occasions. By assuming the opposite, the trial court unreasonably relied on facts not in evidence. Thus, the state trial court's rejection of Petitioner's *Brady* claim was unreasonable under the AEDPA standard.

3. *Relief*

Based upon the foregoing, with regard to the Sixth Circuit's second point of inquiry, this Court concludes that, upon an analysis of the merits of Petitioner's *Brad*y claim, habeas relief is appropriate.

C. Merits of the IAAC Claim

Finally, the Sixth Circuit instructed this Court to consider the merits of Petitioner's IAAC claim. (Doc. 99 at 35).

With regard to this final point of inquiry, the Magistrate Judge concluded that it was not necessary to reach the merits of both Petitioner's *Brady* claim and Petitioner's IAAC claim:

> The remedy for the *Brady* violation will be the issuance of a conditional writ of habeas corpus. In obedience to that writ, the State will either release [Petitioner] or retry and reconvict him. In either even[t], the judgment of conviction will be vacated. Whether it is replaced with an unconditional release or a new judgment of conviction which will then be appealable, the question of whether [Petitioner] received ineffective assistance of appellate counsel on his first direct appeal will be moot.

(Doc. 115 at 12–13).

In other words, the Magistrate Judge concluded that, as the remedy for the State's *Brady* violation is a writ of habeas corpus, and as a writ of habeas corpus will invalidate Petitioner's prior conviction, it is not necessary to determine whether, on appeal from that prior conviction, Petitioner's appellate counsel was ineffective. (*See id.*). On review, this Court completely agrees with the Magistrate Judge's conclusion. *See also Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) ("Because we conclude that the Louisiana courts' denial of Wearry's *Brady* claim runs up against settled constitutional principles, and because a new trial is required as a result, we need not and do not consider the merits of his ineffective-assistance-of-counsel claim.").

D. Respondent's Remaining Objections

Most of Respondent's objections deal with the fact that the Magistrate Judge relied on the Sixth Circuit's June 18, 2019 Opinion and on the law of the case doctrine, as opposed to conducting his own review, in determining whether Petitioner's *Brady* claim was meritorious. (Doc. 116 at 1 (claiming that the Magistrate Judge did not perform the analysis required by the Sixth Circuit on remand); *id.* at 5 (claiming that it would be "manifestly unjust" to apply the law of the case doctrine in this case)). However, as this Court has conducted a thorough review of Petitioner's *Brady* claim, and as this Court has reached the same conclusion as the Magistrate Judge (and the Sixth Circuit, for that matter), these objections are now moot.

Respondent does raise three other objections. (*See id.*). However, as set forth *infra*, the Court does not find any of them persuasive.

First, Respondent argues that the laboratory notes are neither exculpatory nor impeachment evidence under the standard set forth in *Brady*. (*Id.* at 2, 6–10). More specifically, Respondent claims that neither the laboratory notes nor Dr. Heinig's testimony supports Petitioner's theory of the case: "that Allen and not [Petitioner] wore an incriminating wig to commit the offenses." (*Id.* at 2).

But this Court disagrees. As an initial mater, this Court has already concluded that both the laboratory notes and Dr. Heinig's testimony support Petitioner's theory of the case for the reasons set forth in section III.B.1, *supra*. And, to the extent that Respondent suggests that the laboratory notes and Dr. Heinig's testimony must prove that Petitioner is innocent to qualify as *Brady* material, Respondent misconstrues the *Brady* standard. *See*

Kyles, 514 U.S. at 434 (stating that the *Brady* standard "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal" (citing *Bagley*, 473 U.S. at 682)).

Second, Respondent argues that the First District has already adjudicated Petitioner's *Brady* claim in its February 7, 2011 decision and found that the undisclosed evidence was not material. (Doc. 116 at 3, 5). Respondent points to the portion of the First District's decision, which states that the undisclosed laboratory notes "could not 'reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" (*Id.*; Doc. 75 at 201 (quoting *Kyles*, 514 U.S. at 435)).

However, as properly set forth in the Report and Recommendation, while the First District considered the *Brady* issue in the resolving the IAAC claim, the First District did not actually render a decision on Petitioner's *Brady* claim. (*Accord* Doc. 115 at 4–6). Indeed, as the Sixth Circuit has already noted in the context of this case: "that a state court [has] in fact rejected an IAAC claim brought under Rule 26(B) as meritless is not dispositive of [the merits of the underlying claim]." (Doc. 99 at 28).

Thus, as set forth in Section III.A, *supra*, the state trial court's decision (not the First District's) is before this Court for AEDPA review. And as set forth in Section III.B, *supra*, the state trial court unreasonably applied the law/facts while adjudicating Petitioner's *Brady* claim. Accordingly, Petitioner is entitled to habeas relief—regardless of the statements, made by the First District, in passing, while adjudicating the IAAC claim.

Finally, Respondent claims that, based on the Sixth Circuit's remand instructions, this Court must conduct a review of Petitioner's IAAC claim as well as Petitioner's *Brady* claim. (Doc. 116 at 2–5). And, in the course of its argument, Respondent makes the rather cryptic statement that "this petition [cannot] be decided without reviewing the *Brady* claim in the context of the [IAAC claim]." (*Id.* at 5).

This Court disagrees. To be sure, the Sixth Circuit remanded the case to this Court for a consideration of the merit of Petitioner's *Brady* and IAAC claims. (Doc. 99 at 32, 35). However, Petitioner's *Brady* and IAAC claims are two separate grounds, which offer two separate remedies. As Petitioner has prevailed on the first ground (the *Brady* claim), there is no need to consider the merits of the seventh ground (the IAAC claim), because the relief provided for in the first ground (a writ of habeas corpus with the possibility of retrial), is superior to and entirely moots the relief provided for in the seventh ground (a writ of habeas corpus unless the State reopens the appeal). (*Accord* Doc. 115 at 12–13); *Wearry*, 136 S. Ct. at 1006 (declining to consider an ineffective-assistance-of-counsel claim where the petitioner had already prevailed on a Brady claim and was therefore entitled to a new trial). Thus, requiring this Court to reach a determination as to whether Petitioner would also prevail on the IAAC claim would serve no added purpose.[13]

[13] It bears noting that this Court's resolution of the *Brady* claim would drive any merits-based decision as to the IAAC claim. *See Goff v. Bagley*, 601 F.3d 445, 466–67 (6th Cir. 2010) (holding that the Supreme Court of Ohio's conclusion that appellate counsel was not ineffective for failing to raise "an obviously winning claim" on direct appeal was "an unreasonable application of federal law").

E. Conditional v. Unconditional Writ of Habeas Corpus

Having determined that a writ of habeas corpus is required, the Court must consider whether to issue the writ conditionally or unconditionally.

> By its terms, § 2254 empowers the district court to achieve a single end: to terminate the petitioner's unconstitutional custody. A district court can achieve that end by granting an absolute [*i.e.*, unconditional] writ, which itself vacates the unconstitutional judgment and orders the petitioner immediately released. *Satterlee v. Wolfenbarger*, 453 F.3d 362, 370 (6th Cir. 2006). Or, as an "accommodation[]" to the state, the court can grant a conditional writ, which requires the state either to vacate the unconstitutional judgment or to replace it with a constitutional one (by retrying him) within a certain period of time. *Id.* at 369.

Gillispie v. Warden, London Corr. Inst., 771 F.3d 323, 329 (6th Cir. 2014).

To be clear, the issuance of a writ, whether conditional or not, does not bar re-prosecution absent "extraordinary circumstances, such as when the state inexcusably, repeatedly, or otherwise abusively fails to act within the prescribed time period or if the state's delay is likely to prejudice the petitioner's ability to mount a defense at trial . . . ." *Satterlee*, 453 F.3d at 370 (quotation marks and citation omitted); *Eddleman v. McKee*, 586 F.3d 409, 413 (6th Cir. 2009) ("The power to 'release' a prisoner under § 2254 normally is not a power to release him forever from the underlying charge. It is the power, instead, only to release him from custody pursuant to the unconstitutional judgment."). Rather, the issuance of a conditional writ serves to "delay the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court." *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (emphasis added).

District courts generally favor conditional writs of habeas corpus out of a "concern for comity among the co-equal sovereigns." *Gentry v. Deuth*, 456 F.3d 687, 692 (6th Cir. 2006). Nevertheless, "federal courts have been given broad discretion in fashioning [habeas corpus] relief." *Id.* at 696 (quotation marks and citation omitted); *see also Irvin v. Dowd*, 366 U.S. 717, 728–29 (1961). Indeed, "[f]ederal courts are authorized, under 28 U.S.C. § 2243, to dispose of habeas corpus matters 'as law and justice require.'" *Hilton*, 481 U.S. at 775 (emphasis added).

Here, the Magistrate Judge recommended that this Court issue a conditional writ of habeas corpus, requiring the State to retry Petitioner within six months of the date of judgment, or otherwise release Petitioner unconditionally. (Doc. 115 at 13). At the time the Magistrate issued the Report and Recommendation, the proposed remedy was entirely appropriate. (*Accord* Doc. 99 at 35 n.5 (citing the same remedy)).

However, after the Magistrate Judge issued the Report and Recommendation, an unprecedented situation enveloped the country. The United States fell victim to the COVID-19 pandemic.

On April 4, 2020, Petitioner filed a notice informing this Court that a staff member at the Toledo Correctional Institution ("TCI")—the correctional facility in which Petitioner is housed—has recently tested positive for COVID-19 (the "Notice"). (Doc. 122 at 1). In the Notice, Petitioner states that he has a preexisting condition which renders him particularly susceptible to becoming critically ill from COVID-19. (*Id.* at 2). Thus, Petitioner asserts that, given his particular vulnerability to serious illness, as well as

"the compelling nature of his case," his continued detention, "is not in the interests of justice, health, or safety . . . ." (*Id.* at 3).

Upon receipt of Petitioner's Notice, this Court issued a Notation Order, ordering the parties to:

> **[C]onfer** by telephone on the following issue: whether, **if** this Court **were** to issue a conditional writ of habeas corpus as to Petitioner, the parties could agree that, during the conditional period, Petitioner would be released on the condition that he remain on home incarceration (with any other appropriate conditions or monitoring requirements), instead of remaining detained at TCI.

(Not. Order, Apr. 6, 2020 (emphasis added)). The Notation Order specifically explained that, "[s]uch a stipulation would allow the State of Ohio to have a full six-month period (subject to reasonable extension if sought and granted by this Court) in which to determine whether to retry Petitioner, while also affording Petitioner the benefit of a custodial environment that would be conducive to his own health and safety during this unprecedented pandemic." (*Id.*)

The parties were given a deadline of April 8, 2020 at 12:00 p.m. by which to complete the required telephone conference and apprise the Court as to whether some agreement could be reached between the parties. (*Id.*)

On April 8, 2020 at 9:47 a.m., this Court received an email from Petitioner's counsel, stating that despite her many attempted calls and emails, Respondent's counsel had been unresponsive. In other words, notwithstanding this Court's clear Notation Order, Respondent's counsel wholly failed to participate in the required telephone conference. Regardless, Petitioner's counsel offered the Court suggested bond

conditions, and alternative proposals by which the Court could release Petitioner with appropriate bond restrictions.[14]

At 10:02 a.m.—*i.e.*, within fifteen minutes of Petitioner's counsel's email—Respondent's counsel also submitted an email to the Court, stating merely that: "The Warden will submit a response shortly." Then, at 10:53 a.m., Respondent filed a written response in opposition to Petitioner's Notice (the "Response"). (Doc. 123). In the Response, Respondent mischaracterized the Court's Notation Order as "**suggest[ing]** that the parties stipulate to the conditions of [Petitioner]'s release **pending a decision on his petition** . . . ." (*Id.* at 1 (emphasis added)). Respondent further asserted that he could not enter into such a stipulation, as to do so would be both unnecessary under the circumstances and outside of his authority. (*Id.* at 4). Respondent also argued, *inter alia*: that there have been no confirmed COVID-19 cases in TCI inmates; that TCI is taking measures to ensure its inmates' health; and that Petitioner would likely be safer at TCI than on home incarceration. (*See id.*). At 11:05 a.m., Respondent sent the Court another email reiterating the position proffered in the Response, *i.e.*, that he was unable to enter

[14] Petitioner's counsel also suggested that, in absence of a stipulation between the parties, this Court could consider Petitioner's release in the context of a motion for bond (following appropriate briefing). Based on this Court's decision to issue an unconditional writ of habeas corpus, *infra*, Petitioner's suggestion is moot. Nonetheless, the Court will note that, having considered the factors applicable to a motion for release on bond under Federal Rule of Appellate Procedure 23, the Court concludes that Petitioner's would very likely prevail on such a motion, separate and apart from the analysis set forth *infra*. *See O'Brien v. O'Laughlin*, 557 U.S. 1301, 1302 (2009) ("There is a presumption of release pending appeal where a petitioner has been granted habeas relief," which can only be overcome if the party opposing release prevails on the following factors: (1) whether the party opposing release has made a strong showing that he is likely to succeed on the merits; (2) whether the party opposing release will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the petitioner; and (4) where the public interest lies. (citing *Hilton*, 481 U.S. at 774)).

into such a stipulation and that Petitioner's "release is not necessary, and not legally justified."[15]

Finally, on April 8, 2020 at 12:00 p.m., Petitioner filed a reply in support of Petitioner's Notice (the "Reply"). (Doc. 124). In the Reply, Petitioner disputed Respondent's contentions regarding Petitioner's safety at TCI, and asked this Court to order Petitioner's release from TCI within 24 hours. (*See id.*).

As the Court has decided that it is proper to issue a writ of habeas corpus as to Petitioner (*see* Section III.B, *supra*), and as the parties have not been able to reach an agreement as to home incarceration, this Court must now decide whether it is appropriate, under the exigent circumstances posed by the COVID-19 pandemic, to issue a conditional or an unconditional writ of habeas corpus.

Here, the Court concludes that the issuance of an unconditional writ of habeas corpus is proper and wholly warranted. The COVID-19 pandemic presents a real and substantial risk to the health and safety of every person, not just in Ohio or the United States, but all over the world.[16] And the threat is particularly significant—indeed,

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[15] Notably, neither Respondent's filed response nor his emails to the Court fulfill the obligation to abide by this Court's duly entered Notation Order, which required the parties to confer by telephone on whether, if this Court were to issue a conditional writ of habeas corpus, the parties could agree that Petitioner would remain on home incarceration during the conditional period. Respondent's failure to abide by this Court's Order could effectively be construed as a waiver of any argument that the issuance of an unconditional, as opposed to a conditional, writ of habeas corpus is appropriate. (Not. Order, Apr. 6, 2020). Nonetheless, given this Court's ultimate decision under the law, as set forth *infra*, the Court need not reach the waiver issue.

[16] As of April 8, 2020, there were at least 1.4 million confirmed cases globally, with at least 86,000 deaths resulting—suggesting a fatality rate of approximately 6%. *Coronavirus Map: Tracking the Spread of the Outbreak*, The New York Times (April 8, 2020), available at https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html (updated regularly).

critical—as to those individuals who suffer from preexisting conditions—including Petitioner, who has hypertension.[17] (Doc. 122 at 2). Indeed, Petitioner states that his health results in him being "designated as a 'critical care' inmate at TCI, which means that he is evaluated by medical staff at TCI twice a month." (*Id*.)

While the Court appreciates that TCI is doing all it can to maintain the safety of all inmates and staff, there is no question that any close-quartered environment, particularly prisons, poses a significantly heightened risk for the spread of infectious diseases.[18]

For these reasons, the Court concludes that, under the unique circumstances of this case, and pursuant to the Court's broad discretion to "dispose of habeas matters 'as law and justice require,'" Petitioner's unconditional release from custody is required. *Gentry*, 456 F.3d at 696 (quoting 28 U.S.C. § 2243).

In granting this relief, this Court by no means precludes the State from recharging and retrying Petitioner in accordance with the applicable law.

[17] *See, e.g., New data on New York coronavirus deaths: Most had these underlying illnesses; 61% were men,* USA Today, available at https://www.usatoday.com/story/news/health/ 2020/04/07 new-york-coronavirus-deaths-data-shows-most-had-underlying-illnesses/2960151001/ (last updated April 7, 2020) ("The majority of New York's more than 4,700 deaths due to coronavirus were among men, and 86% of all deaths were among people who had underlying illnesses, such as hypertension and diabetes, new state data shows. . . . The leading underlying illness was hypertension, which showed up in 55% of the deaths.").

[18] *See, e.g., Prisons And Jails Change Policies To Address Coronavirus Threat Behind Bars,* NPR, available at https://www.npr.org/2020/03/23/818581064/prisons-and-jails-change-policies-to-address-coronavirus-threat-behind-bars (March 23, 2020) (stating that "jails and prisons are considered perfect incubators for the coronavirus to potentially take hold").

IV. CONCLUSION

As required by 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b), the Court has reviewed the comprehensive findings of the Magistrate Judge and considered *de novo* all of the filings in this matter. Upon consideration of the foregoing, the Court finds that the Report and Recommendation should be and is hereby adopted, subject to the modifications stated herein.

Accordingly:

1. Respondent's Objections (Doc. 116) are **OVERRULED**;

2. The Report and Recommendation (Doc. 115) is **ADOPTED** as modified, *supra*; and

3. The Court **ISSUES** an **unconditional** writ of habeas corpus, requiring the State to immediately release Petitioner from custody, whereupon the State can decide whether to retry Petitioner in accordance with applicable law.

IT IS SO ORDERED.

Date: April 9, 2020

Timothy S. Black
United States District Judge