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Petitioner, Giovanni Reid

COMMONWEALTH OF PENNSYLVANIA	:	COURT OF COMMON PLEAS
	:	PHILADELPHIA COUNTY
v	:	CRIMINAL
	:	TRIAL DIVISION
	:	
GIOVANNI REID	:	CP-51-CR-0933203-1991
	:	
	:	CHARGES: Murder 2nd Degree,
	:	Conspiracy

AMENDED PETITION FOR POST CONVICTION COLLATERAL RELIEF

TO THE HONORABLE JUDGES OF THE COURT OF
COMMON PLEAS OF PHILADELPHIA COUNTY:

Petitioner/Defendant, Giovanni Reid, by his attorney Jared Kasher, Esquire, in conformity with the Superior Court's Judgment Order in No. 2122 EDA 2007, dated April 27, 2009, hereby files this Amended Petition for Post Conviction Collateral Relief, requesting that the Court set aside his judgment of sentence and grant a new trial and/or other appropriate relief under the Post Conviction Relief Act, 42 Pa.C.S.A. §9641 *et seq.* In support of his Amended Petition, Petitioner states as follows:

1. Petitioner is currently incarcerated in the State Correctional Institution at Graterford, Pennsylvania (Inmate No. CA-0466), serving a sentence of life imprisonment as a result of the prosecution complained of herein.

2. The victim, Robert Janke, was shot to death at 5:30 a.m. on the morning of August 9, 1991 on 17th Street near Kater Street in South Philadelphia. Although a

young man named Dwayne Bennett was undisputedly the actual shooter, Petitioner and Carlton Bennett were also charged with murder, on the strength of (1) testimony by Commonwealth witness Lorraine Hill that Janke was shot by one man while being physically restrained by two other youths, after been dragged down the street by all three of them, and (2) testimony by two other young men from the group, Richard King and Tyrone Mackey, tending to show that the victim was both robbed and shot by Dwayne Bennett with Petitioner and Carlton Bennett nearby. Specifically:

a. Lorraine Hill testified that she was walking down South Street, crossing 17th Street from the direction of 18th towards 16th Street, when she observed the victim, Mr. Janke, sitting on the corner of South and 17th with the killer in front of him and two other men, one on either side of them. At the killer's demand, the other two lifted Mr. Janke up bodily, locked arms with him and marched him south on 17th Street while the killer followed, poking him with his gun. According to Ms. Hill, Mr. Janke was shot by the killer while still being held by the other two men. N.T. 1/22/93, pp. 57-69, 80, 87-92, 94-95, 112, 128, 130, 132-133.

b. Richard King testified that he was part of a group of six young men walking south on 17th Street. He, along with Tyrone Mackey and DeJuan Bennett, were walking well ahead of the other three, Dwayne Bennett, Carlton Bennett and Petitioner. King, Mackey and DeJuan Bennett saw Janke and passed him by; Dwayne Bennett, however, robbed Janke of several dollars and then grabbed him by the collar and dragged him down the street to the silver metal garage door in front of which he shot him. At certain points in his testimony, King stated that Carlton Bennett was standing close behind Janke and that Petitioner was standing close in front of and

facing Janke, while Dwayne Bennett was dragging him down the street. This testimony was variable, however – at some points putting Petitioner inches away, at other points, a couple of feet, and at other points, all the way down at the corner of 17th and Kater, some 20 feet away. N.T. 1/21/93, pp. 123-127, 129-133, 135-136, 146, 148, 150-152, 159-161, 176, 188, 192-193.

c. Tyrone Mackey testified that as he, King and DeJuan Bennett walked on ahead, he looked back once to see Dwayne and Carlton Bennett and Petitioner crossing together from the northwest corner to the southwest corner of the intersection at 17th and South, and another time, to see Dwayne Bennett crossing back over again, alone. He did not turn around again until, just as he reached the corner of Bainbridge Street, he heard the gunshot. Turning then, he observed Dwayne Bennett lowering Mr. Janke to the ground. Although his testimony on the point was somewhat equivocal, he also claimed to have seen Petitioner and Carlton Bennett out of the corner of his eye, just a few steps away from the victim. N.T. 1/22/93, pp. 150-157, 162-164, 167-168, 204-207.

3. Contrary to all the above, the defense maintained that Petitioner and Carlton Bennett were both some distance away from Dwayne Bennett at the time he committed both the robbery, if any, and the murder, and that Dwayne Bennett acted alone.

4. Dwayne Bennett pled guilty to first degree murder prior to trial on January 20, 1993, and in his plea colloquy, stated that both Petitioner and Carlton Bennett actively participated in the robbery/killing. See Commonwealth v. Dwayne Bennett, September Term 1991, Nos. 3320-3326, N.T. 1/20/93, pp. 16-29 (Appendix 1 hereto).

5. Petitioner and Carlton Bennett chose to stand trial by jury (the Honorable David N. Savitt presiding), and on January 27, 1993, each was convicted of second degree murder, robbery, and conspiracy.¹ N.T. 1/27/93, pp. 5.69-5.73.

6. On June 23, 1993, after denying post verdict motions, Judge Savitt sentenced Mr. Reid to life imprisonment for second degree murder and 5-10 years concurrent time on the conspiracy charge. The conviction for robbery merged. N.T. 6/23/93, pp. 21-22.

7. Petitioner was represented by Michael Wallace, Esquire, at trial and sentencing.

8. Since the imposition of sentence by Judge Savitt, Petitioner has taken the following steps in an effort to obtain relief from his conviction and sentence:

a. Still represented by Mr. Wallace, Petitioner took a direct appeal to the Superior Court of Pennsylvania, challenging the denial of his motion for severance, the questioning of a witness by the trial court, as well as the sufficiency and weight of the evidence. The Superior Court, however, affirmed. See Opinion of the Honorable David N. Savitt, July 9, 1992 (Appendix 2 hereto) and Superior Court Memorandum, No. 2151 PHL 93, February 17, 1994 (Appendix 3 hereto).

b. Petitioner did not seek allowance of appeal to the Pennsylvania Supreme Court on direct appeal.

c. On January 17, 1996, Petitioner filed a *pro se* PCRA petition, raising various ineffectiveness claims. Subsequently, he was able to retain Daniel Silverman, Esquire, who on January 22, 1997 filed an amended petition.

¹ Reid was acquitted, and Bennett convicted, of possessing an instrument of crime.

d. Several months thereafter, Mr. Silverman received a telephone call from Commonwealth witness Tyrone Mackey who, in the course of the conversation revealed that he and Mr. King (and briefly, DeJuan Bennett) had received free housing and cash stipends for a period of time prior to their testimony. This resulted in Petitioner filing, on April 28, 1997, a supplemental claim under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), for failure to disclose these matters to the defense.

e. The Brady claim quickly became the focus of the PCRA litigation. However, after hearing testimony on April 6, 1998, Judge Savitt denied the petition, finding that the information withheld from the defense was not material under Brady. See Opinions of the Honorable David N. Savitt, February 11, 1998 and June 30, 1998 (Appendices 4-5 hereto).

f. Petitioner again appealed to the Superior Court, which appeal was docketed at No. 1725 PHL 98.

g. During the pendency of that appeal, however, Mr. Silverman (now court-appointed) discovered serendipitously during his leisure-time reading, a passage in a book by journalist Buzz Bissinger entitled "A Prayer for the City," which described an encounter between prosecutor Michael McGovern and Mr. Mackey just prior to Mackey's testimony at Petitioner's trial. The book recounted that Mr. Mackey had intended to recant his original statement to the police (which placed Petitioner right next to Janke at the time he was killed by Dwayne Bennett) and testify instead that Petitioner was uninvolved and standing 15 feet away at the time. This statement, according to Bissinger, elicited a strong, coercive-sounding response from Mr. McGovern, with the

result that Mr. Mackey did not recant and instead testified at trial to the prosecution's preferred version of events.

h. Perceiving the failure to advise defense counsel of Mackey's abortive recantation as an additional material Brady issue, and after obtaining a confirmatory statement from Mr. Mackey that Mr. Bissinger's account was accurate, Mr. Silverman sought a remand from the Superior Court. The Court, however, denied the motion and ultimately rejected all issues on appeal, holding (a) that the evidence concerning accommodations for King and Mackey was immaterial under Brady, and (b) that the proffered evidence concerning the prosecutor's interactions with Mackey would not have changed the results of trial. See Superior Court Memorandum, No. 1725 PHL 98, July 20, 1999 (Appendix 6 hereto), pp. 10-12.

i. On May 14, 2001, Mr. Reid then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania (C.A.01-2385), based on both the conversation between McGovern and Mackey, and the accommodations and cash payments provided to Mackey and King in the weeks before the preliminary hearing. j. Discovery was ordered, and a evidentiary hearing was held on July 22, 2003, after which the District Court denied relief on grounds that the previously unrevealed evidence was not material under Brady because (a) the information concerning the accommodations afforded Mackey and King would have been counter-productive to the defense since it would reveal that the witnesses were being housed as part of a witness protection program, and even then, only prior to the preliminary hearing, and (b) the District Court concluded, after hearing testimony from Mackey, Bissinger and the prosecuting attorney, that the

prosecutor did not improperly place words in the victim's mouth, but rather, no doubt angrily, demanded that he conform his testimony to his sworn statements at the preliminary hearing. See Reid v. Vaughn, 2003 WL 924080 (E.D.Pa., March 4, 2003) and Reid v. Vaughn, 279 F.Supp.2d 636, 645-646 (E.D.Pa, August 27, 2003) (Appendices 7-8 hereto).

k. Petitioner appealed to the United States Court of Appeals for the Third Circuit, which affirmed – concluding that the combined effect of the errors considered by the District Court in the habeas petition before it at that time, did not rise to constitutional levels. See Reid v. Vaughn, 109 Fed. Appx. 500, 2004 WL 2203967 (3d Cir., September 29, 2004) (Appendix 9 hereto).

l. On May 2, 2005, shortly after the United States Supreme Court's decision in Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), Petitioner filed the instant, second PCRA petition, arguing that, as a juvenile, he did not have the capacity to commit second degree murder as a matter of federal constitutional law, that he could not lawfully be sentenced to life imprisonment without parole, and that his trial before a death qualified jury violated due process. See Motion for Post Conviction Collateral Relief, filed *pro se* May 2, 2005; Petitioner's Supplemental Petition to the Original PCRA Petition, filed *pro se* September 6, 2005 and Application for Permission to File Supplemental Pleading to Petitioner's Pro Se Petition, filed by counsel September 22, 2005.

m. As Judge Savitt was no longer sitting, the case was reassigned to the Honorable Denis P. Cohen.

n. On February 16, 2006, the Commonwealth filed a Motion to Dismiss, asserting that the petition was untimely.

o. Argument was heard on March 24, 2006 – Kevin V. Mincey, Esquire now appearing for Mr. Reid – after which the Court issued a notice pursuant to Pa.R.Crim.P. 907, announcing its intention to dismiss the petition as being without merit and having been untimely filed.

p. Meanwhile, however, counsel became aware of a new piece of evidence strongly suggestive of Petitioner's innocence – that is, an unsolicited proffer by Mr. Janke's roommate, Wayne Richman, that he did in fact witness the killing and that Janke was accosted and killed by *one* gunman, acting alone – and not by three men acting in concert as the Commonwealth alleged. On March 31, 2006, Mr. Mincey filed supplemental documents seeking relief based upon the newly discovered evidence, pursuant to 42 Pa.C.S.A. §§ 9543(a)(2)(vi), 9545(b)(1)(ii). See Petitioner's Brief in Support of Post Conviction Relief Pursuant to 42 Pa.C.S.A. §9541, filed March 31, 2006 (Appendix 10 hereto).

q. Said documents were filed within 60 days of Mr. Richman's first, unsolicited email communication with Mr. Reid's supporters' website on February 6, 2006. See email from Wayne Richman to giovanni@giovannireid.com, February 6, 2006 (Exhibit C to the March 31, 2006 filing – Appendix 10 hereto).

r. Prior to receipt of this email, Petitioner had no reason to believe that Mr. Richman had any information relevant to the manner in which Mr. Janke was killed, since the police Investigation Interview Record did not disclose that Mr. Richman

saw the murder take place. See Investigation Interview Record, August 10, 1991 (Exhibit A to the March 31, 2006 filing – Appendix 10 hereto).

s. Upon receipt of Mr. Richman's email, however, Mr. Mincey did take Mr. Richman's sworn deposition, in which he stated that he witnessed the encounter which resulted in Mr. Janke's death, and that Mr. Janke was accosted and killed by one man acting alone while two other men were already some 20 feet ahead and uninvolved. In fact, Mr. Janke related, he heard one of the other men say "don't" just before the killer shot Janke in the head. After witnessing the killing, Richman, scared to death – and drunk from activities earlier that evening – went home and passed out. Richman Deposition 3/13/06 (Exhibit B to the March 31, 2006 filing – Appendix 10 hereto), pp. 6-12, 20-21.

Prior to coming across Mr. Reid's website, Mr. Richman had not told anyone what he had seen, and was satisfied to have heard that a young man had admitted to the killing and was in jail. It was not until years later that, in the course of attempting to locate an old friend from Philadelphia, Mr. Richman came across Mr. Reid's website and learned that three men, rather than one, had been convicted. He was also disturbed to read the account of Lorraine Hill's testimony because, if she had been in the middle of the intersection of 17th and South where she said she was, he would have seen her – but he did not. Accordingly, after talking it over with a friend, he decided to try to do the right thing and contact Mr. Reid's supporters, which he did, by means of the February 6, 2006 email referred to above. Richman Deposition 3/13/06 (Exhibit B to the March 31, 2006 filing – Appendix 10 hereto), pp. 13-18, 21-23.

Mr. Richman also indicated, in his deposition, that he moved from Philadelphia four months after the killing, remained out of state for six months after that, then relocated back to the Fishtown section of Philadelphia. In September of 1992, he moved to Bucks County where he resided until sometime in 1994, when he moved to Browns Mills, New Jersey. In December, 1995 he moved to his present location in Crossville, Tennessee. Richman Deposition 3/13/06 (Exhibit B to the March 31, 2006 filing – Appendix 10 hereto), pp. 14-16.

t. In response to Mr. Mincey's filing, the Commonwealth, on June 27, 2006, filed another Motion to Dismiss (Appendix 11 hereto) arguing that Richman's testimony could have been discovered earlier in the exercise of reasonable diligence, and that his testimony was not of sufficient quality to have changed the result of Mr. Reid's trial.

u. After oral argument, the Honorable Court concluded that "even assuming *arguendo* there is newly-discovered evidence, it is not of such a nature and character to compel a different verdict." N.T. 6/29/06, p. 22. Accordingly, on July 5, 2006, the Court issued a new Notice Pursuant to Pennsylvania Rule of Criminal Procedure 907 (Appendix 12 hereto) of its intent to dismiss the petition and deny relief – assigning as the sole reason therefore that "[t]he issues raised in the Post Conviction Relief Act petition are without merit."

v. At this point, Mr. Silverman re-entered the case, requested additional time to respond to the Rule 907 notice, and on August 7, 2006, filed formal objections to the proposed dismissal, pointing out that the newly proffered testimony of Wayne Richman needed to be evaluated in conjunction with the previous recantation by

Tyrone Mackey and the previously considered evidence concerning the accommodations granted to both Mackey and King in preparation for their testimony at the preliminary hearing. Specifically, Mr. Silverman argued on behalf of Petitioner that Mr. Richman's evidence could not have been discovered earlier in the exercise of due diligence, and also that Richman's evidence lent previously unavailable support to Mackey's recantation claims, while that previously considered evidence, similarly, lent credibility to Richman's more recent exoneration of Petitioner. See Objections to Rule 907 Notice of Intention to Dismiss Prior to Evidentiary Hearing and Supporting Memorandum of Law, filed August 7, 2006 (Appendix 13 hereto).

w. Subsequently, the Commonwealth's attorney agreed to an evidentiary hearing "where we can put everything on the record and have an on-the-record determination." N.T. 12/14/06, p. 6.

x. Concerned that the Court had previously made a determination of lack of merit in the petition with respect to Richman's evidence, without actually hearing the testimony live, Mr. Silverman filed a Motion for Recusal, which was denied by order dated October 24, 2006, and again argued and denied in open court on December 14, 2006. Accordingly, a date of March 14, 2007 was set for hearing Mr. Richman's testimony. N.T. 12/14/06, p. 9.

y. In anticipation of the March, 2007 court date, Mr. Silverman spoke several times by telephone with Mr. Richman, whom he described as a "good witness" who was "perfectly willing" to come and testify, and who had made arrangements to attend the PCRA hearing and to meet with Petitioner's expert prior to his testimony. See email communication from Daniel Silverman, Esquire to LaTasha Williams, dated

January 3, 2007 (Appendix 14 hereto); see also letter from Daniel Silverman, Esquire to the Honorable Denis Cohen, dated March 18, 2007 (Appendix 15 hereto).

z. In conformity with the above, on January 4, 2007, Ms. LaTasha Williams procured a round trip air travel reservation for Mr. Richman, leaving Nashville, Tennessee for Philadelphia on March 11, 2007 and returning to Nashville on the evening of March 15, 2007. The departure date was subsequently changed to March 8, 2007 to allow time for Mr. Richman to meet with Petitioner's psychiatric expert prior to the trial. See reservation confirmations as of January 4, 2007 and March 2, 2007, attached hereto as Appendix 16.

aa. On March 7, 2007, the day before Mr. Richman's scheduled departure for Philadelphia, Detectives Cahill and Lynch of the Philadelphia Police Department confronted him at his place of business in Crossville, Tennessee, with the result that Mr. Richman subsequently refused to come to Philadelphia for the hearing. Specifically, Mr. Richman indicated that these detectives (a) went to his residential neighborhood and spoke to neighbors insinuating that he was "hiding" in Tennessee because he had been involved in a murder, and (b) then went on to confront him personally at his place of business, stating, among other things that he would be charged with perjury if he testified for Petitioner, that the detectives would be waiting for him with handcuffs when he arrived in Philadelphia, and that once he was in their car, they couldn't guarantee that he would make it to the station. He also indicated that references were made to his son's residence in New Jersey, proximate to Pennsylvania, in a threatening manner – and that ADA D'Aguanno was on the phone with the detectives during part of their visit. See Affidavit of LaTasha Williams, dated

December 3, 2007, with annexed partial transcript of recorded conversation with Wayne Richman on March 17, 2007 (Appendix 17 hereto).

bb. In fact, Mr. Richman was so frightened by the behavior of the Philadelphia detectives that he placed a call to 911, as a result of which Lieutenant Tony Davis of the Crossville Police Department responded to his place of business (the Cash N Go Pawn Shop, 675 West Avenue, Crossville, Tennessee). See Cumberland County 911 CAD Incident Detail, March 7, 2007 (attached hereto as Appendix 18).

cc. According to a May 23, 2007 notarized statement by Lieutenant Davis (attached hereto as Appendix 19), he was met on arrival by Mr. Richman, who complained that the two Philadelphia detectives had been “threatening him (the best I can remember) about something to do with perjury.” After displaying their credentials, the detectives informed Lieutenant Davis that they had come down to speak with Mr. Richman about a murder that took place in 1991. Mr. Richman meanwhile complained excitedly about them going to his residence and speaking to his neighbors, and declared that he had nothing else to say to the detectives, who eventually left.

dd. Following his encounter with the Philadelphia detectives, Mr. Richman was fearful of what would happen to him and his family if he came to Philadelphia to testify at Petitioner’s PCRA hearing, as has been attested to by Lieutenant Tony Davis of the Crossville Police Department, who did not personally witness any threats but who clearly observed that Petitioner was excited as a result of their visit, and went on to relate that after the detectives left:

I gave Mr. Richman time to calm down and later went back to speak with him. I tried to convince him to go to catch his plane and do the right thing. Mr. Richman’s friend and fellow employee tried to talk him into going while I was there. Mr. Richman said he was not going due to

fearing for his and his family's safety, saying that he has a son that lives somewhere around Philadelphia.

Notarized statement of Lieutenant Tony Davis, Crossville, Tennessee Police Department, May 23, 2007 (Appendix 19 hereto), p. 2. See also, to similar effect, Affidavit of LaTasha Williams, December 3, 2007 (Appendix 17 hereto), relating conversations with Lieutenant Davis, Wayne Richman, and Mr. Richman's co-worker Roger McCartt.

ee. Petitioner's attorney, Mr. Silverman, first learned of the visit of the Philadelphia detectives to Mr. Richman in Tennessee, after ADA Emily D'Aguanno telephoned him at his home on March 7, 2007 to inform him that Richman would not be appearing to testify as expected. On that day and the following day, Mr. Silverman spoke to both Mr. Richman and Mr. McCartt, both of whom reported to him that the Philadelphia detectives had threatened Richman with jail if he came to Philadelphia and that this frightened him enough that he decided not to board his flight. See Letter from Daniel Silverman, Esquire to the Honorable Denis Cohen, March 18, 2007 (Appendix 15 hereto).

ff. As a result of the event related above, Mr. Richman did not appear to testify at the scheduled hearing on March 14, 2007, and that hearing was continued until June 8, 2007.

gg. Unfortunately, it appears that notes of testimony for March 14, 2007 are not available. It was Mr. Silverman's perception, however, that without having heard any evidence on the subject, the Court had nevertheless expressed "a certain level of incredulity" and "displeasure" directed at Mr. Silverman for having suggested that the detectives and prosecutor had engaged in misconduct.

Accordingly, Mr. Silverman filed a Supplemental Motion for Recusal on May 24, 2007 (Appendix 20 hereto). The docket does not disclose any ruling thereon.

hh. Following Mr. Richman's failure to appear, Ms. Williams flew to Tennessee unannounced and interviewed Mr. Richman, who reiterated his claims to have been threatened by the Pennsylvania detectives. See Affidavit of LaTasha Williams, dated December 3, 2007, with annexed partial transcript of recorded conversation with Wayne Richman on March 17, 2007 (Appendix 17 hereto).

ii. ADA Emily D'Aguanno, on the contrary, advised the Court by letter that the detectives did nothing more than inquire as to certain discrepancies between Richman's deposition and other evidence at the trial, remind Richman that he could be arrested for perjury if he lied on the stand, and advise him to come to court anyway and tell the truth. See letter to the Honorable Denis Cohen from Assistant District Attorney Emily D'Aguanno, Esquire dated April 30, 2007 (attached hereto as Appendix 21). Notably, although Ms. D'Aguanno offered in her letter to supply the testimony of Detectives Cahill and Lynch, as well as Crossville, Tennessee Police Lieutenant Tony Davis by teleconference – no such testimony was ever produced.

jj. The Commonwealth also failed to produce discovery requested by the defense, namely certain photographs critical to Petitioner's attempt to disprove the Commonwealth's theory as to how the murder occurred. Specifically, Mr. Silverman had informally requested the six photographs of the crime scene which were introduced as Commonwealth Exhibits C-1 through C-6. Although a number of photographs were ultimately provided, the packet was missing Exhibits C-3 and C-4, both of which, according to the testimony at trial, depicted a spattering of blood on the garage door in

front of which Mr. Janke's body was found. See N.T. 1/21/93, pp. 73-74; see also email correspondence from Daniel Silverman, Esquire to Assistant District Attorney Emily D'Aguanno, Esquire, January 26, 2007 and February 14, 2007 (Appendix 22 hereto). Despite Mr. Silverman's February 14, 2007 follow-up request, the missing photographs were never produced and Mr. Silverman did not take any further action to compel their production. Petitioner believes and therefore avers that these two missing photographs, if subjected to expert analysis, would demonstrate that the shooting could not have occurred with Petitioner and Carlton Bennett holding Mr. Janke as testified by Ms. Hill, in which case the spattering of blood on the garage door behind would have been fully or partially blocked. (See Lawrence A. Presley's March 9, 2007 letter to Mr. Silverman attached as Appendix 22 hereto).

kk. Eventually, both the Commonwealth and Mr. Silverman served subpoenas on Mr. Richman for the June 8, 2007 hearing. He did not, however, appear.

ll. Instead of taking steps to enforce the subpoena, or seeking a continuance, or offering evidence in support of Petitioner's claim that Richman's non-appearance was due to police or prosecutorial misconduct, Mr. Silverman opened his presentation to the Court (in Petitioner's absence, as he had not yet arrived from Graterford²), with the following remarks:

² See discussion on the record concerning whether Petitioner should be brought up to the courtroom, culminating in information by the Court Crier to the effect that Mr. Reid had not yet arrived from Graterford. N.T. 6/8/07, pp. 4-5. Accordingly, Mr. Silverman's representations to the court were made without his having ever consulted with Petitioner about his options for seeking enforcement of the subpoena.

MR. SILVERMAN: Judge, my witness is not here. I have no explanation. I'm not going to play games with counsel or the Court any longer.

THE COURT: Any longer?

MR. SILVERMAN: No. Yeah. Well, put it this way: I'm not going to let him play games – any more games with the Court.

N.T. 6/8/07, p. 2. Indeed, several times throughout the ensuing colloquy, the Court inquired what counsel were asking the Court to do, and Mr. Silverman either remained mute while the Commonwealth seized upon his failure to request a further continuance to suggest immediate dismissal of the petition, or actively indicated that he was not asking for anything further on Mr. Reid's behalf. N.T. 6/8/07, pp. 3-7.

mm. As a result of Mr. Silverman's failure to pursue compulsory process directed at Mr. Richman, or a discovery order directed at the missing photographic evidence, and his failure to obtain and utilize the available evidence concerning the behavior of the Philadelphia detectives in procuring Mr. Richman's absence, the Honorable Court dismissed Petitioner's PCRA by Order dated June 8, 2007.

nn. Petitioner was never in fact brought to the courtroom on that date, and remained ignorant of the disposition of his PCRA petition until he received a letter dated June 9, 2007 from Mr. Silverman. In said letter (Appendix 23 hereto), Mr. Silverman indicated merely that the Court had dismissed the petition because of Mr. Richman's failure to appear, but failed to disclose Mr. Silverman's own failure to request a continuance or enforcement of the subpoena, or his false representation to the Court that Richman's non-appearance was unexplained and the result of game-playing by Petitioner.

oo. After receiving Mr. Silverman's letter of June 9, 2007, Petitioner then prepared and filed a *pro se* motion for reconsideration, seeking to make the arguments abandoned by Mr. Silverman, namely, that Mr. Richman's failure to appear was the result of police and prosecutorial misconduct, amounting to "government interference" and a denial of due process and the right to compulsory process – referencing the previously described letters of counsel to the Court and the notarized statement of Lieutenant Tony Davis of the Crossville, Tennessee Police Department. See Motion to Reconsider the Court's Order to Dismiss Petitioner's Motion for Post-Conviction Relief, filed June 21, 2007 (attachments omitted as duplicative of Appendices 15, 19 and 21, above) (Appendix 24 hereto). In his motion, Petitioner also pointed out that the testimony which would have been given by Mr. Richman would have directly corroborated the recantation previously given by Mr. Mackey at Petitioner's habeas proceeding, described above – a recantation in which Mr. Mackey, like Mr. Richman, claimed to have been intimidated by the prosecution.

pp. By order dated July 5, 2007, the Court denied the petition for reconsideration without a hearing.

qq. On July 6, 2007, Petitioner filed his timely, *pro se* notice of appeal to the Superior Court, which was docketed at 2122 EDA 2007. Carole L. McHugh, Esquire subsequently entered an appearance for Petitioner.

rr. It was only after Petitioner was provided with notes of testimony for June 8, 2007 (see letter from Erin Book, Esquire, Law Clerk to the Honorable Denis P. Cohen, to Giovanni Reid, dated November 28, 2007, Appendix 25 hereto) that Petitioner realized that Mr. Silverman had not made any attempt to enforce the

subpoena sent to Mr. Richman, had failed to even request a further continuance, had made derogatory statements implying that Petitioner was playing games with the Court and had effectively invited dismissal of the action. Accordingly, the first opportunity for raising Mr. Silverman's ineffectiveness in these regards occurred during the pendency of the appeal, in the Supplemental Statement of Errors Complained of on Appeal, filed by leave of Court on January 7, 2008 (exhibits omitted as duplicative of Appendices 10, 15, 17 and 19-21 hereto) (Appendix 26 hereto).

ss. On January 18, 2008, the Honorable Court filed an opinion in support of the order denying PCRA relief, holding (a) that the petition was properly denied because of the non-appearance of Mr. Richman, (b) that in any event, his testimony would not have been credible and did not sufficiently contradict the prosecution's case, and would not, therefore, have likely compelled a different verdict, (c) that Petitioner's claims related to the intimidation of Mr. Richman by the Philadelphia detectives were waived because not separately pleaded as a separate ground for PCRA relief, (d) that Petitioner's motions for recusal were properly denied, and (e) that Petitioner's claim of ineffectiveness by Mr. Silverman was "picayune and patently frivolous" and waived for failure to include them as separate grounds in an amended petition during Mr. Silverman's tenure. Additionally, despite the fact that the Rule 907 notice (Appendix 12 hereto) indicated that the sole ground for dismissal would be denial on the merits, the Court also held that both the ineffectiveness claim and the newly discovered evidence claim had been untimely filed. See Opinion of the Honorable Denis P. Cohen, filed January 18, 2008 (Appendix 27 hereto).

tt. During the pendency of the appeal in the Superior Court, Ms. McHugh received an unsolicited letter communication postmarked January 8, 2008, from Dwayne Bennett, the actual shooter (Appendix 28 hereto), recanting his prior statements implicating Petitioner in the murder. Counsel was, at the time, occupied with the last illness and subsequent death of her father, and did not immediately reply to this letter. Mr. Bennett, however, pursued the matter and sent counsel a follow-up letter dated February 7, 2008 with an enclosed affidavit to the same effect (Appendix 29 hereto).

uu. Specifically, Mr. Dwayne Bennett's affidavit indicates (1) that his original statement to police implicating Petitioner and Carlton Bennett was false, (2) that he informed the prosecutor at Petitioner's trial that he had in truth acted alone, but that he was required to testify as he did to seal his plea bargain under which the prosecution would refrain from seeking the death penalty, and (3) that he had decided to come forward with the truth after hearing that Mr. Richman had come forward. See Appendix 29 hereto.

vv. In the interest of avoiding further piecemeal litigation – and believing that the significance of Dwayne Bennett's recantation or Wayne Richman's deposition could not be properly evaluated without reference to each other and also the evidence received in the previous PCRA and federal habeas action – Petitioner filed a motion in the Superior Court seeking a summary remand for the purpose of further amending the PCRA petition and considering Dwayne Bennett's recantation as part of this whole, growing body of evidence supporting Petitioner's claim of actual innocence. In this Application, Petitioner noted, *inter alia*, that there had now been allegations of

intimidation by three different witnesses who sought to testify favorably to Petitioner, including Mr. Mackey, Mr. Bennett and Mr. Richman. Accordingly, he requested that the case “be remanded to the Court of Common Pleas for formal amendment of the PCRA petition, effective as of the filing date of this Application, with directions to hold an additional evidentiary hearing concerning the evidence recently proffered by Dwayne Bennet, the claimed ineffectiveness of previous PCRA counsel, and the claimed governmental interference with the testimony of Dwayne Richman, and to permit [Petitioner] to attempt to employ the available interstate processes to obtain Richman’s testimony.” See Application for Remand, Superior Court of Pennsylvania, No. 2122 EDA 2007, filed March 10, 2008 (exhibits omitted as duplicative of Appendices 7-9, 26 and 28-29 hereto), and Correction to Application for Remand, filed March 24, 2008 – attached hereto collectively as Appendix 30.

ww. On April 23, 2008, the Superior Court issued a *per curiam* order that “[t]he Appellant’s ‘Application for Remand’ is deferred to the panel assigned to decide the merits of this appeal.”

xx. Petitioner requested reconsideration of his motion for remand, however, after learning that his co-defendant, Carlton Bennett, had been granted a remand for the very same purpose, that is, for the purpose of addressing Dwayne Bennett’s recantation. In this request for reconsideration, Petitioner again repeated his request that Dwayne Bennett’s recantation be considered together with the other evidence previously adduced on Petitioner’s behalf, and that the ineffectiveness of prior PCRA counsel and the alleged governmental interference with respect to Mr. Richman be remedied by permitting on remand, a further opportunity to seek compulsory process

to obtain his testimony. See Request for Reconsideration of Application for Remand in Light of Remand Recently Ordered in Co-Defendant's Case on Similar Grounds, in the Superior Court of Pennsylvania, No. 2122 EDA 2007, filed May 23, 2008 (Exhibits A-B omitted as duplicative of Appendices 26 and 29 hereto), attached hereto as Appendix 31.

yy. This renewed motion was denied in a *per curiam* order dated June 25, 2008, with the stipulation that "[t]he Prothonotary is directed to provide the panel assigned to decide the merits of this appeal with a copy of the instant petition for reference purposes." Subsequently, the appeal was fully briefed and submitted to a panel for consideration of the merits and the application for remand.

zz. On April 27, 2009, the Superior Court panel issued the following order (Appendix 32 hereto):

JUDGMENT ORDER FILED APRIL 27, 2009

After reviewing the "Application for Remand" filed on behalf of Giovanni Reid ("Reid"), the Application is hereby **GRANTED**.¹ Within thirty (30) days from the date of this Order, Reid shall file an amendment to his current Petition under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546, to include the information described in Reid's Application.

This case is **REMANDED** to the PCRA court for further proceedings as it considers appropriate following the filing of Reid's amended PCRA petition, including, if necessary, the filing of a new 1925(a) opinion.

Superior Court jurisdiction relinquished.

PER CURIAM

¹We note that this Court granted the Application for Remand filed by Reid's co-defendant, Carlton Bennett ("Bennett"). ***Commonwealth v. Bennett***, No. 468 EDA 2007 (Pa.Super. filed April 24, 2008). Bennett's Application averred a claim of after-discovered facts substantially similar to the claim set forth in Reid's Application.

9. In conformity with the foregoing Order, Petitioner files this Amended Petition for Post Conviction Collateral Relief asserting the following grounds for relief under 42 Pa.C.S.A. §9543:

a. Unavailability at the Time of Trial Of Exculpatory Evidence That Has Subsequently Become Available and Would Have Changed the Outcome of the Trial If It Had Been Produced – Testimony of Wayne Richman and Recantation by Dwayne Bennett.

Relief may be granted under Post Conviction Relief Act where a petitioner's conviction 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 if it had been introduced." 42 Pa.C.S.A. § 9543(a)(2)(vi). To obtain relief based on this provision, it is necessary to establish that: (1) the evidence has been discovered after trial and it could not have been obtained at or prior to trial by due diligence; (2) the evidence is not cumulative; (3) it is not being used solely to impeach credibility; and (4) it would likely compel a different verdict. Commonwealth v. D'Amato, 579 Pa. 490, 519, 856 A.2d 806, 823 (2004). The proffered testimony of Wayne Richman, as described in ¶8 (p)-(s), (aa), (ee) above and as contained in his recorded statements (Appendices 10 & 17 hereto) constitutes critical newly discovered evidence under this test.

First of all, the explanation offered for the witness now coming forward after many years is understandable. Richman indicated at his deposition that for years he was satisfied, having been told that "the person" who had killed Mr. Janke and confessed and was in jail, and that it was only after stumbling upon Mr. Reid's website

and learning that two others were also in jail, that he felt the need to tell the truth because the right thing had not happened. Richman Deposition, 3/13/06, pp. 15-16, 23 (Exhibit B to March 31, 2006 filing – Appendix 10 hereto); see also Appendix 17 (transcript portion), p. 5. As for Petitioner’s attorneys, there was nothing in Richman’s statement to the police to put them on notice that Richman might have been an eye-witness, so as to require that he be found and interviewed in the exercise of due diligence. Compare, e.g., Commonwealth v. Bonaccorso, 625 A.2d 1187, 1200 (Pa.Super. 1993) (holding that witness’ testimony was previously “unavailable” for purposes of making out an after-discovered evidence claim, where the witness left the murder scene and lied to police about whether he had seen anything); Commonwealth v. McCracken, 540 Pa. 541, 659 A.2d 541 (1995) (recantation of sole eyewitness constituted after-discovered evidence warranting new trial where recantation was credible, other evidence supportive of guilt was weak, and witness’ consistent statements to police and at the preliminary hearing and trial indicated no chance that recantation would have been available prior to or during the trial); Commonwealth v. Fiore, 780 A.2d 704 (Pa.Super. 2001) (co-defendant was unavailable to testify at time of trial, due to invoking Fifth Amendment, and his subsequent credible testimony exonerating defendant of conspiracy constituted after-discovered evidence warranting a new trial)._

With regard to the second and third prongs, Richman’s evidence is not cumulative, nor is its purpose merely to impeach credibility. On the contrary, Richman’s account in his deposition constitutes an actual eyewitness account which *differs* from that given by some of the Commonwealth witnesses, as to whether or not

Petitioner and Carlton Bennett participated in the robbery/murder. Accordingly, if similar testimony had been presented at trial, it could not have been considered cumulative, nor merely for purpose of impeachment.

Finally, Richman's testimony clearly would have compelled a different result, if put before the jury. According to Richman, Petitioner was approximately 20 feet away from Dwayne Bennett, *not* holding Mr. Janke's arms as reported by Lorraine Hill, *not* just inches or feet from the unfolding murder as reported by Mackey (sometimes) and King. Furthermore, since Richman heard Petitioner say "no" as Bennett went to shoot, this would have been further evidence in support of the defense that Reid was "merely present," was *not* participating in the robbery or the murder, and in fact, was asking Dwayne Bennett to stop it. It would moreover, seriously call into question Lorraine Hill's claim to have been in a position to see what she says she saw – that is, Petitioner and Carlton Bennett physically moving Mr. Janke into position to be murdered. For Hill to have been where she said she was, observing the whole incident, while *s l o w l y* crossing 17th Street, never stopping but never reaching the curb for a whole 5-6 minutes (N.T. 1/22/93, pp. 89-92, 94-95, 112, 128, 132-133), she would necessarily have had to have been in plain view for Richman who was looking down 17th Street from a point north of South Street. Richman, however, saw no one on the street except the six young men involved in the incident.³

³ Hill's account, especially when considered together with that put forth by King and Mackey, is inconsistent in other respects as well. For example, when asked just 48 hours after the incident to describe the three men she saw attack Janke, she described all three of them as dark-complected (see N.T. 1/22/93, pp. 105-106, 108, 122-124, 140-142) but admitted categorically at trial that she would not apply that description to either Petitioner *or* Mr. Carlton Bennett (Id., p. 142).

Second, the claim that Janke was physically held by two men with interlocking arms, while Dwayne Bennett executed him, was also, in fact, a new claim put forth for the very first time by Ms. Hill at the actual trial. Significantly, there was nothing in Ms. Hill's statement to the police about this very important detail; at that time she merely indicated that the man with gun was "pushing" Mr. Janke up the street. *Id.*, pp. 119-122. Neither King nor Mackey nor Carlton Bennett's statement report anyone walking arm in arm with Janke – and Mackey, specifically, denies that such a thing happened. *Id.*, pp. 223, 228. With Mr. Richman's proffered testimony in the balance – the testimony of someone without potential accomplice liability or other signs of bias – would most probably have been the deciding factor in achieving a verdict in Mr. Reid's favor.

Third, in contrast to the nearly uniform testimony of the other witnesses, Ms. Hill emphatically denied that Dwayne Bennett ever grabbed Janke by the collar or neck, or that the killer was the person physically moving him down the street. *Id.*, p. 130. She also claimed to have been able to see and hear everything going on, but never saw anything taken from Janke and never heard any demand made for money, as related by Mr. King. Compare , e.g., N.T. 1/21/93, pp. 131, 135-136, 150 with N.T. 1/22/93, pp. 92, 101, 131-132, 134.

Thus, Richman's testimony goes straight to the heart of the Commonwealth's contention that Dwayne Bennett did not act alone, and directly contradicts the witnesses offered by the Commonwealth. As far as credibility goes, moreover, it is important to remember that Richman came forward, unsolicited, after learning that three instead of one had been convicted. He, like Hill, with whose testimony the Commonwealth is so enamored, has no friendship or familial ties to any of the defendants or Commonwealth witnesses. In fact, if any bias were to be suspected, it would be a bias *against* rendering assistance to the supposed killers of his friend and roommate. Finally, it must be noted that Richman's deposition (Exhibit B to Appendix 10 hereto) contains details such as the apartment in which he was living, the defect in the corner of the building which allowed him to stand and watch the incident without detection, which would lend credence to the account. It is certainly probable, therefore, that if it had been offered at the trial, Richman's testimony would be preferred to, and cast doubt upon, the mutually contradictory and at times self-contradictory testimony of the Commonwealth's witnesses, two of whom were obviously potential defendants themselves. Compare, e.g., Commonwealth v. Cobbs, 759 A.2d 932, 934 (Pa.Super. 2000) (postconviction petitioner was entitled to new trial based upon after-discovered evidence, where police officers' identification testimony during deposition in civil action subsequent to conviction differed from testimony in criminal trial, and where evidence was not cumulative, was not used solely to impeach credibility, and would likely compel a different verdict); Commonwealth v. Mosteller, 446 Pa. 83, 89-90, 284 A.2d 786, 788-789 (1971) (where defendant was convicted of incest and statutory rape on strength of testimony by the prosecutrix alone, recantation by that

witness constituted after-discovered evidence warranting new trial, where recantation was corroborated by medical and other evidence); Commonwealth v. McCracken, *supra* (recantation of sole eyewitness constituted after-discovered evidence warranting new trial where recantation was credible, other evidence supportive of guilt was weak, and witness' consistent statements to police and at the preliminary hearing and trial indicated no chance that recantation would have been available prior to or during the trial).

In sum, nearly every substantive opinion issued by the Pennsylvania Courts in the long history of this case, upholding this verdict, has relied upon Hill's description of *three men* dragging the decedent along and participating in the robbery and actual set-up of the murder. The testimony offered by Mr. Richman to the contrary was clearly material, sufficient to overturn the Commonwealth's verdict, highly credible, non-cumulative, and newly discovered.

Nor is Mr. Richman's testimony the only new evidence to be evaluated by the Court. The recent recantation by Dwayne Bennett is similarly important, because it corroborates Wayne Richman's observation that Dwayne Bennett acted alone. See ¶ 8(tt)-(uu) above and Appendices 28-29 hereto. The effects of both pieces of newly discovered evidence must be evaluated, moreover, in light of the previous recantation by Tyrone Mackey. Although Mr. Mackey's testimony, standing alone, has been previously found insufficient to warrant relief, the Court cannot close its eyes to the fact that there are now *three* witnesses claiming that Dwayne Bennett acted alone. Furthermore, all three

of these witnesses have stated in unequivocal terms that the Commonwealth has, in one way or another, intimidated them from testifying truthfully.

Clearly, if the jury had heard these witnesses – and particularly the decedent's own roommate who has no conceivable reason to lie for the defense – there is a great likelihood that this testimony would have outweighed the self-contradictory and shifting testimony given by Mr. King, and the incredible testimony given by Ms. Hill to what she supposedly saw while walking across 17th Street, while conveniently invisible to observers such as Mr. Richman. This is especially true when one considers the probable effect on the jury of learning that the Commonwealth sent its detectives to frighten Mr. Richman away from testifying for Petitioner, and also threatened Dwayne Bennett and Tyrone Mackey when they proposed to testify for the defense back at the time of trial.

b. Constitutional Violation Undermining the Truth-Determining Process – Prosecutorial Interference With Defense Witnesses

Under 42 Pa.C.S.A. § 9543(a)(2)(I), relief may be had where a constitutional violation, 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. Based on the evidence which has been detailed above in 8(p)-(s), (y)-(ii), (uu) above and Appendices 10, 15-21, Petitioner asserts that he has been denied due process by virtue of prosecutorial interference and intimidation of defense witnesses. While Petitioner believes and therefore avers that this claim is not necessarily required to be pleaded and proven as a separate, independent cause under the PCRA – since it relates to the fairness of instant PCRA proceedings themselves, which are ongoing,

and is capable of being remediated by the Court in the exercise of its ordinary jurisdiction over the conduct of the proceedings – this claim is separately presented herein under § 9543(a)(2)(l), in an abundance of caution, to avoid any future claims of waiver, however lacking in merit.

To recapitulate briefly, Petitioner previously litigated a claim that Tyrone Mackey was improperly intimidated and dissuaded from giving testimony at the trial which would have placed Petitioner at some distance from, and uninvolved in the murder. This was found to be, in and of itself, insufficient to warrant relief. In his recent affidavit, however, Dwayne Bennett now asserts that he was similarly dissuaded from telling the truth about Petitioner's non-involvement during his guilty plea colloquy, by being threatened with the death penalty if he did not implicate Petitioner before the Court. Obviously, if Bennett had exonerated Petitioner in his plea, Petitioner would have been on notice to use Bennett's testimony at his own trial, in direct contradiction of Mackey and King. Had both Mackey *and* Bennett testified truthfully, moreover, the Commonwealth's case would have been substantially weakened.

This pattern of prosecutorial overreaching has continued with respect to Mr. Richman's proposed testimony in Petitioner's PCRA. As previously described, Richman approached Petitioner's supporters out of the blue with his important evidence. He was not solicited, and he had no reason besides his conscience for offering to help Petitioner, who stands convicted of helping to murder his former roommate. According to Petitioner's attorney at the time, according to the affidavit of Petitioner's supporter LaTasha Williams, and according to the statements given by Mr.

Wayne Richman himself – Richman was ready, prepared and willing to fly to Philadelphia for the PCRA hearing.

It is an undeniable fact, however, that the day before Richman was to board his flight, he was accosted *in Tennessee* by two Philadelphia detectives, and that, thereafter, he was too frightened to come. This fact is attested not merely by Mr. Richman in his statements and not merely by Ms. Williams in her affidavit – but also by Petitioner’s attorney, Mr. Silverman, and by the local Tennessee policeman who responded to Richman’s *911 call* as a result of the detectives’ visit. These facts, which cannot reasonably be denied, lend serious credibility, therefore, to the claim by Richman and his co-worker Mr. McCartt, that Richman was threatened and intimidated by the Philadelphia detectives. According to Richman, the threatening behavior and other harassment included making embarrassing insinuations to his neighbors, suggesting that he would be arrested for perjury immediately upon setting foot in Philadelphia, suggesting that he would come to physical harm at the hands of police, and insinuations relating to his son’s vulnerability, by virtue of living in the neighboring state of New Jersey. See ¶ 8(p)-(s), (y)-(ii), (uu) above and Appendices 10, 15-21.

While the making of such threats is denied by the prosecution, there has never been an adequate explanation given as to why a mere polite reminder about his duty to come and tell the truth would have produced such fear that the witness would fail to board his plane despite the urgings of his conscience, the local police, and Petitioner’s attorney, and despite having been served with subpoenas. Nor, despite the prosecutor’s offer to do so, has any evidence been produced from the detectives involved or the Tennessee policeman to shed light on this conundrum. Respectfully,

the documentary evidence and the affidavits and depositions described above give more than enough credence to Petitioner's claim of witness intimidation, to warrant a full evidentiary hearing.

As the United States Supreme Court has stated, "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense This right is a fundamental element of due process of law." Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967). See also Commonwealth v. Terry, 393 A.2d 490, 492 (Pa.Super. 1978) (to similar effect). Furthermore, as the Superior Court has observed:

Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed.214 (1942), established that abuse by the state of its prosecutorial prerogative could constitute a denial of due process for an accused when the threats of prosecution are directed at potential witnesses for the defense. The threats were considered to be constitutionally improper attempts to suppress evidence favorable to the accused.

Commonwealth v. Jennings, 311 A.2d 720, 722 (Pa.Super. 1973) [holding that due process was violated by prosecutor's remarks which had effect of convincing witness that the price of his testimony was arrest, regardless of the nature of that testimony, thus effectively suppressing material evidence under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)]. Perjury warnings, while not necessarily improper *per se*, can nevertheless cause denial of due process when given in a coercive or intimidating manner. This is especially true "[w]here, under the totality of the circumstances, the substance of what the prosecutor communicates is a threat over and above what the record indicates is necessary," in which case the inference is strong that the prosecutorial intent was to coerce the witness. United States v. Vavages, 151 F.3d 1185, 1190 (9th Cir. 1998), quoting United States v. Pierce, 62 F.3d

818, 832 (6th Cir. 1997), quoting United States v. Jackson, 935 F.2d 832, 847 (7th Cir. 1991). Thus, in United States v. Morrison, 535 F.2d 223 (3d Cir. 1976), for example, the Third Circuit Court of Appeals held that due process was violated by the actions of a prosecutor, who repeatedly sent perjury warnings to a witness through counsel, and then subpoenaed the witness to appear in his office, where, in the presence of several detectives, he again issued warnings to the effect that what she testified to could be used against her in potential drug charges, and if proven to be false, could expose her also to potential prosecution for perjury. See also, Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972) (due process violated when judge did not stop at simply warning witness of the right to refuse to testify and the necessity to tell the truth, but engaged in lengthy admonition regarding dangers of perjury, implying that he expected the witness to lie and assuring him that if he did so he would be prosecuted and convicted); United States v. Hammond, 598 F.2d 1008, 1012 (5th Cir. 1979) (due process violated where FBI agent told defense witness that he would have “nothing but trouble” in pending state prosecution if he persisted in testifying).

Here, of course, the coercive nature of the Philadelphia detectives’ communications can hardly be denied. The threat of being arrested, and potentially suffering bodily harm, for merely setting foot on Pennsylvania soil with the intent of testifying for the Petitioner is not the kind of measured admonition tolerated under the Due Process Clause. Indeed, the whole notion of a possible perjury prosecution was far-fetched and unreal, given that Richman had *never testified for the prosecution, and had never, before his March, 13, 2006 deposition said **anything** about how the murder happened one way or another, and certainly not under oath.* Particularly disturbing,

moreover, is the fact that the detectives were sent to Tennessee to confront the witness on the day before he was to board a flight for Philadelphia, when he could have been interviewed while in Philadelphia under far less disturbing and intrusive circumstances – or admonished by the Court, if admonitions were necessary. See Jennings, supra (disapproving of prosecutor’s warnings to witness regarding possible self-incrimination and observing that such warnings, where necessary, were the responsibility of the court).

Considering all of the above, it is clear that Petitioner has a very serious and well-supported claim of prosecutorial overreaching and intimidation of this witness. As the Superior Court observed in Jennings, supra, the accused is entitled to protection from the state’s abuse of its prosecutorial machinery which tends to effectively drive the witness from the stand. 311 A.2d at 722. Just such abuse is alleged with respect to Mr. Richman and Dwayne Bennett, and accordingly, a hearing should be held to determine the extent of the prosecutorial misconduct and the proper relief, and Petitioner should be afforded sufficient opportunity to (a) attempt to procure the witnesses’ voluntary appearance, (b) obtain and execute a bench warrant under 42 Pa.C.S.A. §5905, (c) use the compulsory procedures available under 42 Pa.C.S.A. § 5961 *et seq.* and Tennessee Code Annotated § 40-17-201 *et seq.* (Uniform Act to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings), (d) take the out-of state deposition of the witness under 42 Pa.C.S.A. §§ 5919 & 5325. (providing for the taking of the deposition of an out-of-state witness in a criminal proceeding). The Commonwealth, moreover, should be directed to take immediate measure to ameliorate the witness’s fear of returning to the Commonwealth.

Furthermore, if the witness cannot be procured by reasonable effort, it would be appropriate for the Court to permit use of the witness's hearsay declarations, pursuant to the hearsay exception provided under Pa.R.E. 804(b)(6), for statements offered "against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

c. Ineffective Assistance of Former PCRA Counsel, Daniel Silverman, Esquire

PCRA relief is also available, under 42 Pa.C.S.A. § 9543(a)(2)(ii) for "[i]neffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place."

While Petitioner believes and therefore avers that this claim is not necessarily required to be pleaded and proven as a separate, independent cause under the PCRA – since it relates to the right to competent counsel in the instant PCRA proceedings themselves, which are ongoing, which right is capable of being vindicated by the Court in the exercise of its ordinary jurisdiction over the future conduct of the proceedings – this claim is separately presented herein under § 9543(a)(2)(ii) in an abundance of caution, to avoid any future claims of waiver, however lacking in merit.

In order to prove an ineffectiveness claim, it is necessary to show that the underlying claim is of arguable merit, that counsel had no reasonable strategic basis for his act or omission, and that counsel's ineffectiveness worked to the petitioner's prejudice (in other words, but for the unprofessional performance of counsel, there is a reasonable probability that the outcome of the proceedings would have been different). Commonwealth v. Pierce, 567 Pa. 186, 786 A.2d 203, 213 (2001). See also Strickland v. Washington, 466 U.S. 668, 690, 694, 104 S.Ct. 2052, 2066, 80

L.Ed.2d 674 (1984) (“A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance [t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome”). When evaluating whether or not the defendant was prejudiced, a court must consider the totality and strength of the evidence in the trial as a whole. Strickland, *supra*, 466 U.S. at 696, 104 S.Ct. at 2069.

A “claim of PCRA counsel’s ineffectiveness is subject to the traditional tests of ineffective assistance of counsel If on such a claim [the court] determine[s] that there is a reasonable probability that, but PCRA counsel’s act or omission, the result of the PCRA proceeding would have been different, [the court] would be required to remand for a new PCRA hearing.” Commonwealth v. Lauro, 819 A.2d 100, 109 (Pa.Super. 2003).

Clearly, under these criteria, Mr. Silverman rendered ineffective assistance in the prosecution of Petitioner’s PCRA, by failing to effectively support the after-discovered evidence claim with respect to Mr. Richman, by failing to effectively pursue the developing issue of prosecutorial interference with that witness, and by failing to pursue to a conclusion Petitioner’s discovery request concerning the blood spatter photographs (trial exhibits C-3 and C-4).

First of all, Mr. Silverman failed to take the necessary steps to ensure the attendance of Wayne Richman at the hearings scheduled for the taking of his critically

needed testimony on March 14, 2007 and June 8, 2007. No subpoena was issued for March 14, 2007, for example. Additionally, once it was clear that Mr. Richman had failed to appear on June 8, 2007, despite having been subpoenaed, Mr. Silverman failed to request (a) a further continuance so that his attendance could be voluntarily procured or compelled, (b) the issuance of a bench warrant under 42 Pa.C.S.A. § 5905 to compel his testimony, (c) an opportunity to use the compulsory procedures available under 42 Pa.C.S.A. § 5961 *et seq.* and Tennessee Code Annotated § 40-17-201 *et seq.* (Uniform Act to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings) or (d) the opportunity to proceed under 42 Pa.C.S.A. §§ 5919 & 5325 (providing for the taking of the deposition of an out-of-state witness in a criminal proceeding).

Additionally, under Pa.R.E. 804(b)(6), a hearsay exception exists for statements offered
“against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.” Thus, Mr. Silverman, clearly, could have attempted to lay a foundation for the use of Mr. Richman’s deposition and other hearsay statements, by putting on testimony from Ms. Williams, Lieutenant Davis and Mr. McCartt, or even questioning the Philadelphia detectives involved. This, also, he failed to do.

On the contrary, however, and despite the growing body of evidence suggesting police intimidation of the witness which has been described above – and without so much as waiting until Petitioner could be brought up into the courtroom for the discussion – counsel effectively consented to the outright dismissal of the action and

introduced the totally unwarranted notion that the Court was being “played with” by Mr. Reid or his witness.

Such behavior was completely antagonistic to Mr. Reid’s interests and had no reasonable relation to any conceivably beneficial strategy. It was obvious to all concerned that Mr. Reid’s claim for PCRA relief was utterly dependent upon the production of Mr. Richman, whose testimony *constituted* the after-discovered evidence at issue. Therefore, given the choice between throwing Mr. Reid’s petition in the trash can, on the one hand, and attempting to procure Mr. Richman’s evidence by any one of these coercive means, on the other, there was really only one avenue at all consistent with functioning as Mr. Reid’s *advocate* – and that was to seek to enforce the subpoena in one way or another. Mr. Silverman, however, without explanation, instead chose the trash can. This choice was clearly ineffective assistance. Compare, e.g., Commonwealth v. Beckham, 525 A.2d 782 (Pa.Super. 1987) (counsel was ineffective where the failure to seek compulsory process to obtain a key alibi witness’ testimony was the result of lack of diligence and not tactical decision); Coss v. Lackawanna County District Attorney, 204 F.3d 453 (3d Cir. 2000) (failure to subpoena witnesses who would have testified that defendant did not commit the assault with which he was charged, held ineffective assistance of counsel), rev’d other grounds, 532 U.S. 394 (2001);⁴ Commonwealth v. McMaster, 666 A.2d 724 (Pa.Super. 1995) (remand necessary to address claim of counsel’s ineffectiveness where counsel had failed to make any effort to obtain the

⁴ The Supreme Court ultimately reversed Coss on grounds that the petitioner was no longer in custody as a result of the particular prosecution he was challenging. The Supreme Court opinion did not in any way question the Third Circuit holding that counsel had been ineffective.

testimony of Canadian doctors who could attest that defendant was free of gonorrhea at the time he supposedly infected his daughter – attempting instead in rely upon inadmissible hearsay records).

Counsel, moreover, was fully aware of the assertions that had been made by Mr. Richman concerning the fear that had been instilled in him by the detectives who visited from Philadelphia, and the corroborating circumstances, as have been previously set forth in ¶¶ 8(y)-(ii) and 9(b) above. Accordingly, the representation that counsel had “no explanation” for Mr. Richman’s absence was particularly harmful to Petitioner’s interests. Nor did counsel make any attempt to obtain, for example, the testimony of the Crossville, Tennessee police, or to present the testimony of LaTasha Williams concerning the efforts to produce Mr. Richman and their results, or the recorded statement of Mr. Richman taken after he missed the March 14, 2007 court date, or even to take up the assistant district attorney on her offer to produce the detectives involved for questioning. Nor did counsel did file any formal pleadings referencing the witness intimidation issue that had arisen.

All of the above served no strategic purpose in aid of Petitioner’s PCRA claim, which depended utterly upon Mr. Richman’s newly acquired testimony. Furthermore, Petitioner was gravely prejudiced, because the expected testimony of Mr. Richman, as per his March 13, 2006 deposition, would , as previously argued in ¶ 9(a) above, have produced a different result at trial.

Finally, counsel ineffectively failed to pursue a court order to supply the gaps in the voluntary discovery given by the prosecutor’s office with respect to crime scene photos, which Petitioner sought to have examined by a scientific expert (in

corroboration of the description of events given by witness Richman in his March 13, 2006 deposition), as opposed to the description of events presented by the prosecution at the trial. As previously described in ¶ 8(jj) above, some of the photographic exhibits used at trial were produced at Mr. Silverman's request; however, the crucial exhibits showing the blood-spatter pattern on the garage door behind where the victim was found, Exhibits C-3 and C-4, were not produced, thus completely stymying Petitioner's efforts to have the blood spatter pattern examined by a competent expert to determine its consistency or inconsistency of Lorraine Hill's testimony that Petitioner and Carlton Bennett were holding the victim at the time he was shot.

In all of the above, previous PCRA counsel ineffectively neglected the proper presentation of Petitioner's claims, without having any valid or even colorable strategic reason therefore. Furthermore, this ineffectiveness clearly prejudiced Petitioner by completely abandoning Petitioner's meritorious PCRA issues, the proper presentation of which would have resulted in a grant of relief.

10. The issues raised herein have not been waived for purposes of 42 Pa.C.S.A. § 9544(b). The after-acquired evidence claims were raised in a timely fashion during the pending proceedings, within 60 days after each piece of evidence was discovered, as required under 42 Pa.C.S.A. §9545(b)(2). The governmental interference issue was brought to the Court's attention contemporaneously with its occurrence, and has been formally added to this amended petition pursuant to the Superior Court's order. The ineffectiveness of Mr. Silverman has been raised at the first opportunity after Petitioner became represented by counsel other than Mr. Silverman.

11. The issues raised herein have not been previously litigated for purposes of 42 Pa.C.S.A. § 9544(a)(2)-(3) – nor could the failure to previously litigate them have been the result of any “rational, strategic or tactical decision by counsel” per 42 Pa.C.S. § 9543(a)(4).

12. From the evidence and issues set forth above, Petitioner has made a strong *prima facie* showing that he is actually innocent of the crime of second degree murder and that the proceedings were so unfair due to prosecutorial overreaching that a miscarriage of justice has occurred.

13. Petitioner is submitting herewith his request for an evidentiary hearing with a number of listed witnesses relevant to the issues being raised herein, which will be supplemented as necessary. Rule 908 of the Pennsylvania Rules of Criminal Procedure requires the court to hold an evidentiary hearing on all material issues of fact raised by a PCRA petition, and Petitioner respectfully represents that there are numerous issues of material fact, as set forth above, requiring such a hearing.

14. Petitioner also requests that the Court direct the Commonwealth to turn over to Petitioner’s attorney for expert examination the missing trial exhibits C-3 and C-4. Such discovery is appropriate and necessary because (a) the Commonwealth had informally agreed to turn over all trial exhibits to Mr. Silverman, but omitted these two critical photographs, and (b) the examination of these blood-spatter photographs by Petitioner’s expert witness, to determine their consistency or inconsistency with the claim that Mr. Janke was being held by Petitioner and Carlton Bennett at the time he was killed, has become critically important now that there is mounting eyewitness

testimony disputing that particular version of events, as an aid to evaluating the probable effect of the newly discovered evidence had it been offered at the trial.

WHEREFORE, Petitioner respectfully requests that the Honorable Court

- (a) direct that the Commonwealth file a response to the within amended petition;
- (b) grant an evidentiary hearing;
- (c) direct that the Commonwealth immediately provide to Petitioner's counsel Exhibits C-3 and C-4 from Petitioner's trial, and allow Petitioner's expert witness all necessary access to the originals for the purpose of preparing a report;
- (d) allow Petitioner the opportunity to produce Mr. Richman and his other witnesses first by voluntary means, and in the event that any such witnesses fail to appear, issue the appropriate bench warrants and allow Petitioner the necessary continuances and opportunity to obtain the opportunity to use the compulsory procedures available under 42 Pa.C.S.A. § 5961 *et seq.* and Tennessee Code Annotated § 40-17-201 *et seq.* (Uniform Act to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings) or under 42 Pa.C.S.A. §§ 5919 & 5325 (providing for the taking of the deposition of an out-of-state witness in a criminal proceeding);
- (e) in the event that the testimony of Mr. Richman cannot be procured by any of the above means, permit the introduction of evidence as to his various statements attached hereto and/or referred hereto, pursuant to Pa.R.E. 804(b)(6) (forfeiture by wrongdoing); and
- (f) after a full and fair hearing, vacate Petitioner's judgment of sentence and grant him a new trial, or such other relief as may be equitable and proper.

HOCKFIELD, HASNER & KASHER, P.A.

Attorney for Defendant/Petitioner

BY: _____

JARED N. KASHER, ESQUIRE

Date: May 22, 2009

VERIFICATION

I, Giovanni Reid, hereby verify:

(1) I am the Defendant/Petitioner in the foregoing Amended Petition for Post Conviction Collateral Relief;

(2) The statements contained therein are true and correct to the best of my personal knowledge or information and belief;

(3) I understand that any false statements therein are made subject to the penalties of the Crimes Code, 18 Pa.C.S.A. § 4904, relating to unsworn falsification to authorities; and

(4) Jared N. Kasher, Esquire, my attorney of record, is authorized by me to file this Amended Petition on my behalf, and will represent me in these proceedings.

Dated: _____

GIOVANNI REID

**APPENDICES TO AMENDED PETITION
FOR POST CONVICTION COLLATERAL RELIEF**

1. Commonwealth v. Dwayne Bennett, Sept.Term 1991, Nos. 3320-3326, N.T. 1/20/93, 16-29
2. Opinion of the Honorable David N. Savitt, July 9, 1992 (direct appeal)
3. Superior Court Memorandum, No. 2151 PHL 93, February 17, 1994 (direct appeal)
4. Opinion of the Honorable David N. Savitt, February 11, 1998 (first PCRA)
5. Opinion of the Honorable David N. Savitt, June 30, 1998 (first PCRA)
6. Superior Court Memorandum, No. 1725 PHL 98, July 20, 1999 (first PCRA)
7. Reid v. Vaughn, 2003 WL 924080 (E.D.Pa., March 4, 2003) (habeas)
8. Reid v. Vaughn, 279 F.Supp.2d 636, 645-646 (E.D.Pa, August 27, 2003) (habeas)
9. Reid v. Vaughn, 109 Fed. Appx. 500, 2004 WL 2203967 (3d Cir., 9/29/04) (habeas)
10. Petitioner's Brief in Support of Post Conviction Relief Pursuant to 42 Pa.C.S.A. §9541, filed March 31, 2006 (current PCRA), with –

Exhibit A – Investigation Interview Record, Wayne Richman, August 10, 1991
Exhibit B – Transcript of Video Deposition of Wayne Richman, March 13, 2006
Exhibit C – Email from Wayne Richman to giovanni@giovannireid.com, February 6, 2006
11. Commonwealth's Motion to Dismiss, filed June 27, 2006 (current PCRA), with –

Exhibit 1 – Telephone and Radio Tape Transmittal, South Division, 8/10/91
12. Notice Pursuant to Pennsylvania Rule of Criminal Procedure 907, dated July 5, 2006
13. Objections to Rule 907 Notice of Intention to Dismiss Prior to Evidentiary Hearing and Supporting Memorandum of Law, filed August 7, 2006 (current PCRA)
14. Email from Daniel Silverman, Esquire to LaTasha Williams, dated January 3, 2007
15. Letter from Daniel Silverman, Esquire to the Honorable Denis Cohen, dated March 18, 2007

16. Air travel reservation confirmations as of January 4, 2007 and March 2, 2007
17. Affidavit of LaTasha Williams, dated December 3, 2007, with annexed partial transcript of recorded conversation with Wayne Richman on March 17, 2007
18. Cumberland County 911 CAD Incident Detail, March 7, 2007
19. Notarized statement of Lieutenant Tony Davis, Crossville, Tennessee Police Department, May 23, 2007
20. Supplemental Motion for Recusal, filed May 24, 2007 (current PCRA)
21. Letter to the Honorable Denis Cohen from Assistant District Attorney Emily D'Aguanno, Esquire dated April 30, 2007
22. Email correspondence from Daniel Silverman, Esquire to Assistant District Attorney Emily D'Aguanno, Esquire, January 26, 2007 and February 14, 2007
23. Letter from Daniel Silverman, Esquire to Petitioner, dated June 9, 2007.
24. Motion to Reconsider the Court's Order to Dismiss Petitioner's Motion for Post-Conviction Relief, filed June 21, 2007 (current PCRA) (attachments omitted as duplicative of Appendices 15, 19 and 21, above)
25. Letter from Erin Book, Esquire, Law Clerk to the Honorable Denis P. Cohen, to Giovanni Reid, dated November 28, 2007
26. Supplemental Statement of Errors Complained of on Appeal, filed January 7, 2008 (current PCRA) (exhibits omitted as duplicative of Appendices 10, 15, 17 and 19-21, above)
27. Opinion of the Honorable Denis P. Cohen, filed January 18, 2008 (current PCRA)
28. Letter from Dwayne Bennett to Carole L. McHugh, Esquire, undated, postmarked 1/8/08
29. Letter from Dwayne Bennett to Carole L. McHugh, Esquire, dated February 7, 2008, with Affidavit by Dwayne Bennett, dated February 6, 2008
30. Application for Remand, in the Superior Court of Pennsylvania, No. 2122 EDA 2007, filed March 10, 2008 (current PCRA appeal) (exhibits omitted as duplicative of Appendices 7-9, 26 and 28-29 above) and Correction to Application for Remand, filed March 24, 2008
31. Request for Reconsideration of Application for Remand in Light of Remand Recently Ordered in Co-Defendant's Case on Similar Grounds, in the Superior Court of Pennsylvania, No. 2122 EDA 2007, filed May 23, 2008 (current PCRA appeal) (Exhibits A-B omitted as duplicative of Appendices 26 and 29 hereto).

32. Judgment Order of the Superior Court of Pennsylvania, No. 2122 EDA 2007, filed April 27, 2009 (current PCRA)

33. Certificate of Service

JARED N. KASHER, ESQUIRE
Attorney for Defendant/Petitioner
Giovanni Reid