IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SAMUEL RANDOLPH,	:	
Petitioner,	:	CIVIL ACTION
v.	:	No. 1:06-CV-0901
JEFFREY BEARD, Commissioner, Pennsylvania Department of Corrections; LOUIS B. FOLINO, Superintendent of the State Correctional Institution at Greene; and FRANKLIN J. TENNIS, Superintendent of the State Correctional Institution at Rockview,	:	**THIS IS A CAPITAL CASE**
	:	Christopher C. Conner, CJ
Respondents.	:	

PETITIONER'S MEMORANDUM OF LAW
AND PROFFER IN SUPPORT OF EVIDENTIARY HEARING

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Dated: September 25, 2013

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Petitioner, Samuel Randolph, is a state prisoner under sentence of death whose petition for writ of habeas corpus (Doc. 10) is now pending before this Court. Mr. Randolph files this memorandum of law and proffer in support of an evidentiary hearing in response to this Court's Order of May 13, 2013 (Doc. 76). Mr. Randolph submits that the claims and factual allegations discussed below: 1) were exhausted in state court and are not procedurally barred, or are otherwise reviewable due to exhaustion or procedural bar defenses; 2) create genuine issues of material fact upon which an evidentiary hearing is both permissible and necessary; and 3) represent serious constitutional violations upon which this Court should grant relief following full factual development. In support, Mr. Randolph states the following:

INTRODUCTION

Mr. Randolph respectfully submits that an evidentiary hearing is necessary in order to properly resolve his habeas claims, as they contain numerous disputed material facts. Because Mr. Randolph submits that a hearing is necessary, and in order to provide context for the constitutional claims, Mr. Randolph begins this pleading with a proffer in support of an evidentiary hearing. Mr. Randolph then proceeds to discuss the claims at issue in these proceedings, which include

discussion of the various issues identified by the Court in its Orders of May 13, 2013 and September 12, 2013.

The Commonwealth's case against Samuel Randolph has always been extraordinarily weak. The Commonwealth's trial theory was that Mr. Randolph was responsible for three separate shooting incidents spanning nearly three weeks, based upon the flimsiest of motives: supposed retaliation in the wake of a brief fistfight. To connect Mr. Randolph to these crimes, the Commonwealth relied almost entirely upon the testimony of a handful of suspect witnesses. No physical evidence tied Mr. Randolph to these crimes.

Despite the weakness of the Commonwealth's case, it was ultimately able to secure a death sentence against Mr. Randolph because the case was not subjected to meaningful adversarial testing. Mr. Randolph's trial attorney performed virtually no work prior to trial and by the time of trial there had been a complete breakdown in the attorney-client relationship. Mr. Randolph's family was able, shortly before trial, to finally secure the funds necessary to retain counsel of Mr. Randolph's choice who would have prepared the case as it should have been prepared, but the trial court denied retained counsel's motion for a short continuance and rejected his entry of appearance.

I. Procedural History

A. State Court Proceedings

Mr. Randolph was tried for murder and related charges in the Dauphin County Court of Common Pleas in May, 2003. Mr. Randolph's charges arose out of three separate shooting incidents in September, 2001, the third of which resulted in two deaths. The three incidents were joined in a single trial before the Honorable Todd A. Hoover and a jury.

As discussed more fully below, the breakdown in the relationship between Mr. Randolph and his appointed attorneys, Allen Welch and Anthony Thomas, is catalogued in numerous on-the-record pretrial discussions, and evidence of that breakdown continued to accumulate throughout the trial proceedings. Shortly before trial, Mr. Randolph retained Samuel Stretton to represent him. Mr. Stretton entered his appearance on May 1, 2003 and filed a motion for a continuance due to pre-existing scheduling conflicts with the trial dates, his need to get up to speed on the case, and appointed counsel's failure to provide Mr. Stretton with discovery and other preparatory materials. The trial court denied the continuance request and Mr. Randolph was forced to proceed to trial with his appointed attorneys.

On May 14, 2003, the jury convicted Mr. Randolph of two counts of first-degree murder, two counts of criminal attempt, three counts of aggravated assault,

two counts of firearms violations, and reckless endangerment. *Commonwealth v. Randolph*, 873 A.2d 1277, 1280 (Pa. 2005).

Following the verdict, but prior to the sentencing proceeding, Mr. Randolph stated that he wished to forego the presentation of mitigating evidence. NT 5/14/03 at 26. After an overnight recess, Mr. Randolph reiterated his desire to waive the presentation of mitigating evidence and requested the ability to conduct his sentencing pro se. NT 5/15/03 at 6, 12-13, 18. The court granted Mr. Randolph's request to proceed pro se, and Mr. Randolph then declined to present testimony or argument at the penalty phase. *Id.* at 18, 28, 29, 36. The jury found two aggravating circumstances and no mitigating circumstances and sentenced Mr. Randolph to death, as mandated by Pennsylvania's sentencing statute under such circumstances. *Id.* at 54-55; *see also* 42 Pa. C.S. § 9711(c)(1)(iv).

Mr. Stretton was permitted to represent Mr. Randolph at the formal sentencing proceeding on July 10, 2003. During that hearing, Judge Hoover formally imposed death sentences for the murder counts, and sentenced Mr. Randolph to a term of years on the remaining counts. Following the formal sentencing and after conducting some investigation on his own, Mr. Stretton filed a series of motions for new trial. These motions raised claims that a new trial was warranted based upon newly-discovered evidence, and that the prosecution

improperly withheld evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. The trial court held a post-trial hearing on September 5, 2003, which was limited to the *Brady* issue. The court denied a hearing on the other post-trial motions, and on November 18, 2003, the court denied the motions.

The Pennsylvania Supreme Court affirmed Mr. Randolph's convictions and sentences on direct appeal September 6, 2005. *Randolph*, 873 A.2d 1277 (Pa. 2005). The United States Supreme Court denied certiorari on April 3, 2006. *Randolph v. Pennsylvania*, 547 U.S. 1058 (2006).

On September 27, 2006, Mr. Randolph filed a pro se PCRA petition. PCRA counsel from the Federal Community Defender for the Eastern District of Pennsylvania then filed a counseled, amended petition on February 13, 2007. In the ensuing year, counsel for Mr. Randolph filed multiple amendments to the PCRA petition, along with two motions for discovery. On March 18, 2008, the Commonwealth filed its answer to Mr. Randolph's amended PCRA petition, and on May 28, 2008, the Commonwealth filed a reply to Mr. Randolph's second discovery motion. On November 12, 2008, counsel for Mr. Randolph filed an additional supplement to his PCRA petition.

On December 5, 2008, Judge Hoover conducted a status conference. Following that conference, on December 19, 2008, counsel for Mr. Randolph filed

a supplemental certification of witnesses, which included Assistant District Attorney Chardo as an additional witness in support of his PCRA petition. On February 9, 2009, counsel filed a motion to recuse the Dauphin County District Attorney's Office, and again supplemented his witness certification to include Dauphin County District Attorney Edward Marsico as a witness. On March 24, 2009, counsel for Mr. Randolph filed a summary judgment motion.

On May 18, 2009, there was an altercation between Mr. Randolph and correctional officers at the State Correctional Institution at Greene. Mr. Randolph was severely injured during that altercation and has been unable to walk since that time. On July 1, 2009, Mr. Randolph wrote a letter to Judge Hoover in which he indicated a desire to forgo state post-conviction review.

The ensuing three and a half years were consumed by litigation relating to Mr. Randolph's injuries sustained while in DOC custody and to Mr. Randolph's desire to waive state post-conviction review. This litigation involved disputes over the DOC's failure to turn over Mr. Randolph's institutional records to counsel, over counsel's access to Mr. Randolph while in prison, and over Mr. Randolph's decision to waive post-conviction review.

Pursuant to Mr. Randolph's desire to waive PCRA review, the PCRA court appointed new counsel for Mr. Randolph, Heidi Eakin, Esquire, and the Federal

Community Defender Office withdrew from representing Mr. Randolph in state court.[1] The end result was that on February 13, 2013, the Court of Common Pleas issued an order deeming Mr. Randolph's post-conviction petition withdrawn. The Court of Common Pleas did not make any substantive ruling on any claim, nor did it rule on Mr. Randolph's discovery motions, summary judgment motion, or recusal motion.

B. Federal Court Proceedings

Mr. Randolph, through counsel, filed his petition for a writ of habeas corpus on February 5, 2007. The court appointed the capital habeas units of the Federal Community Defender for the Eastern District of Pennsylvania and the Federal Public Defender for the Middle District of Pennsylvania to represent him. Mr. Randolph also filed a motion to stay federal proceedings pending exhaustion in state court of some of his claims. On February 8, 2007, this Court issued a Memorandum Order granting Mr. Randolph's motion to stay the federal proceedings and directing Mr. Randolph to file his application for relief in state court within 30 days. As noted above, Mr. Randolph did so on February 13, 2007.

[1] Immediately prior to appointing Ms. Eakin, the PCRA court appointed Steven Zawisky, Esquire, to represent Mr. Randolph, however Mr. Zawisky was permitted to withdraw.

On December 21, 2009, Mr. Randolph sent a letter to this Court maintaining his innocence of these capital charges, indicating his frustration with continuing delays in the state court proceedings, and stating that it was his desire to proceed immediately in federal court. The Court conducted a status conference regarding Mr. Randolph's letter on January 5, 2010.[2]

The ensuing two years of litigation in this Court largely paralleled the proceedings in the Court of Common Pleas. Specifically, the parties litigated issues relating to the DOC's provision of Mr. Randolph's institutional records and to undersigned counsel's ability to maintain appropriate contact with their client. During that time period, Mr. Randolph additionally filed a motion to reactivate habeas proceedings on August 5, 2010, to excuse exhaustion of state remedies under *Frisbie v. Collins*, 342 U.S. 519 (1952), in light of special circumstances, and to address the merits of all of Mr. Randolph's habeas claims. The Court denied this motion on November 3, 2010.[3]

On January 24, 2012, Mr. Randolph filed a pro se motion for the appointment of federal habeas counsel, requesting this Court appoint Samuel

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[2] Mr. Randolph sent a second letter, similar in content, on April 30, 2010.

[3] Mr. Randolph also filed a motion asking the Court to reconsider its order denying the motion to reactivate on November 12, 2010, which the Court denied on January 5, 2011.

Stretton or Royce Morris to represent him. On February 14, 2012, following a telephonic conference, the Court issued an order directing counsel respond to Mr. Randolph's pro se filing, which counsel did on March 1, 2012. On April 10, 2012, this Court issued an Order denying Mr. Randolph's motion and instructing counsel to file periodic status reports regarding the litigation over Mr. Randolph's decision to waive PCRA proceedings that was then taking place in state court.[4]

On February 25, 2013, habeas counsel filed a final status report on the state court proceedings, which apprised the Court of Judge Hoover's order deeming Mr. Randolph's post-conviction claims withdrawn. In this status report, counsel requested habeas proceedings be reactivated. On May 7, 2013, the Court ordered the Respondents to indicate their position on the reactivation request. On May 10, 2013, Respondents indicated that they concurred in Mr. Randolph's request.

On May 13, 2013, this Court issued an order reactivating habeas proceedings, and setting a schedule for the filing of documents in support of the February 5, 2007, petition for writ of habeas corpus. This pleading follows.

[4] On April 20, 2012, Mr. Randolph filed a motion asking this Court to reconsider its order denying his request for new habeas counsel. On May 2, 2012, the Court denied reconsideration.

II. Proffer In Support of Evidentiary Hearing

By the time of trial, there had been a complete breakdown in the relationship between Mr. Randolph and his court-appointed attorney, Allen Welch. Mr. Randolph submits, and intends to prove at an evidentiary hearing, that this breakdown was due in large measure to Mr. Welch's preoccupation with his campaign for District Attorney for Perry County and general lack of attention to Mr. Randolph's case. Mr. Welch devoted a substantial amount of time to that campaign, abdicating his constitutional responsibilities to investigate and prepare for this capital trial. This is evident from Mr. Welch's failure to visit with Mr. Randolph, to file appropriate motions, to review police discovery, or to conduct any investigation at all into the guilt or penalty phase issues in preparation for trial. By the time of trial, Mr. Welch's abdication of his responsibilities and unwillingness to consult with Mr. Randolph had resulted in a complete deterioration in the attorney-client relationship and justifiable panic on the part of Mr. Randolph that Mr. Welch was not prepared to try the case.

Mr. Welch's unpreparedness caused Mr. Randolph to take action to secure private counsel. Mr. Randolph's mother owned a bar, which served as her livelihood. Mr. Randolph's mother sold her bar in order to pay for private counsel for her son, although she was not able to finalize the sale of her bar until shortly

before trial. When Mr. Randolph's mother did sell the bar, Mr. Randolph's counsel of choice, Samuel Stretton, immediately entered his appearance and filed a motion for a short continuance of the trial date. During a telephonic hearing on Mr. Stretton's continuance motion, Mr. Stretton indicated that he had preexisting court dates that conflicted with the beginning of the trial and that he would need a short time in order to obtain discovery and prepare for trial. Mr. Stretton specifically indicated that he could get up to speed quickly and would require only a brief continuance of the trial date.

The trial court rejected Mr. Stretton's entry of appearance and denied his motion, forcing Mr. Randolph to proceed with Mr. Welch as counsel. Mr. Welch, who had not even read much of the police discovery, put on a halfhearted defense that did not include evidence pointing to other viable suspects with the means, motive, and opportunity to commit this crime. Mr. Randolph was convicted and sentenced to death.

At an evidentiary hearing, Mr. Randolph intends to prove the following:

A. Mr. Welch's Abdication of his Responsibilities and the Resulting Conflict between Mr. Randolph and Mr. Welch.

Mr. Welch was appointed as Mr. Randolph's attorney on August 30, 2002, approximately one year after the shooting incidents at issue, and eight months prior to Mr. Randolph's trial. Throughout the time that Mr. Welch represented

Mr. Randolph, he was running for District Attorney in Perry County, which adjoins Dauphin County. The primary election in the District Attorney's race was held on May 22, 2003, approximately one week following the conclusion of Mr. Randolph's trial.

The first hearing in which Mr. Welch participated occurred on December 9, 2002, a little more than three months following his appointment.[5] During that hearing, Mr. Welch requested a continuance of the trial date. Mr. Welch's stated reason for needing a continuance was that he had just received a copy of prior counsel's file the previous week and did not "even know what's in it."[6] NT 12/9/02 at 3. Mr. Welch indicated that while he would like to be able to try the case in January, 2003 (one month later), he hesitated to commit to that date because he was in the process of moving his office from Harrisburg to Mechanicsburg, which was "becoming quite a nightmare." *Id.* As a result, the court continued the trial date until February, 2003. *Id.* at 4-5.

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[5] Mr. Randolph was not present for this hearing. NT 12/9/02 at 4. It is not clear from the record whether Mr. Welch informed Mr. Randolph that the hearing would be taking place.

[6] Roger Laguna, Esquire was briefly appointed to represent Mr. Randolph in July and August of 2002, but withdrew once Mr. Welch was appointed. Mr. Laguna withdrew because he "didn't feel he was in a place to try a capital case." NT 1/3/03 at 19.

The first hearing at which Mr. Randolph and Mr. Welch were both present took place on January 3, 2003. From the very beginning, Mr. Randolph expressed his concerns to the court about Mr. Welch's lack of preparation and communication. Mr. Randolph noted that, despite Mr. Welch having been appointed for several months at that point, he had only visited Mr. Randolph in jail once. NT 1/3/03 at 6; *id.* at 11 ("he never established no communication, no nothing. I'm facing the death penalty"). For his part, Mr. Welch acknowledged that he had not been communicating with Mr. Randolph because he believed such communication would be useless until he had gathered all of the documents he needed. *Id.* at 11-12 ("Your Honor, what I've tried to explain to Sam and I would say it again, I can sit out at the jail and he can talk to me all day long and night. That doesn't accomplish anything. You've got to gather everything that's on the case.").

Mr. Randolph also expressed concern at the hearing that Mr. Welch wanted Mr. Randolph to plead insanity, that they "can't agree on how [they are] going to trial," and that Mr. Welch "doesn't have [his] best interest at hand." *Id.* When Mr. Randolph noted that Mr. Welch had yet to file any motions, Mr. Welch responded defensively, notifying the court that Mr. Randolph must be instructed that decisions on motions are the attorney's and that a defendant's choices are

limited to a few limited areas, such as how to plead, whether to testify, and whether to request a jury trial. *Id.* at 8-9. Counsel further expressed concern that his decisions about what motions to file would be scrutinized at a future PCRA proceeding. *Id.* at 8.

Mr. Randolph's dissatisfaction with Mr. Welch eventually led Mr. Chardo, the prosecutor, to inform Mr. Randolph that, in addition to sticking with his appointed counsel, he also had the right to retain counsel or to proceed pro se. *Id.* at 18 ("You also have the right to retain counsel of your choice, any lawyer of the bar that you can reach an arrangement with who would be willing to take your case. You have that right. And he would take Mr. Welch's place"); *see also id.* ("And third, you have the right to represent yourself, and that's an absolute right"). At the conclusion of this hearing, the court indicated that it would permit Anthony Thomas to participate as second chair counsel, so long as he was willing to do so on a voluntary basis. *Id.* at 19-20, 23-24.

Mr. Thomas did not appear on the record at any subsequent pretrial hearings and did not actually file an entry until the first day of voir dire, where he made it clear that he was appearing only "in a supporting role to Mr. Welch." NT 5/5/03 at 8. Mr. Welch was unclear as to why an appearance from Mr. Thomas was even necessary, but acquiesced because Mr. Chardo was insisting upon one. *Id.* Mr.

Welch made clear, however, that Mr. Thomas "clearly does not feel that he's qualified to try a capital case." *Id.* Mr. Thomas had no training in capital litigation and had no experience working on a capital case prior to this trial. Thomas Declaration at 1. Mr. Thomas got involved in the case "with the understanding and full expectation that Samuel Stretton would represent Mr. Randolph at trial." *Id.*

The next pretrial hearing took place in chambers on January 31, 2003. Mr. Randolph again was not present for this hearing, and Mr. Welch admitted that Mr. Randolph had not been advised that the hearing was taking place. NT 1/31/03 at 2. In view of the fact that Mr. Welch had not informed his client that the hearing was taking place, the court stated that it was "not going to require [Mr. Randolph's] presence because there's nothing going to be done or said or decisions made. It's just a matter of you two have agreed on certain things, I think, and some things you just need to make part of the record so the Court can consider those." *Id.* Despite the court's characterization of this hearing, the entire proceeding involved substantive arguments on the pre-trial motions that Mr. Welch had, by that point, filed. *Id.* at 2-17.

During the course of this hearing, Mr. Welch again displayed his complete lack of preparation for the case or knowledge of Mr. Randolph. Mr. Chardo had

previously given Mr. Welch notice that he intended to introduce evidence of a prior conviction of Mr. Randolph's that was more than ten years old, because there was a Pennsylvania case suggesting this was permissible where a defendant was imprisoned for part of that ten year period. *Id.* at 9-10. Mr. Chardo indicated that Mr. Randolph had received a sentence of one to four years during that ten year window, and inquired of Mr. Welch how much time Mr. Randolph actually spent in prison. Mr. Welch responded: "I have no idea, absolutely none." *Id.* at 10.

The court also took up Mr. Welch's motions for funds to hire a DNA expert and an investigator at this hearing. *Id.* at 12. Mr. Welch indicated that, regarding the investigator, he "would like to get one out real fast." *Id.* In his view, this was important because "[o]bviously, at the bare minimum I'm not about to just presume that everything that the police say they were told is a hundred percent correct. I would like somebody to go out and talk to at least the primary witnesses who were involved here and say, look, I would like to talk to you about what was said, now what did you see." *Id.* at 12-13. Regarding the DNA expert, Mr. Welch indicated that he would not "push that motion any further" so long as Mr. Chardo would confirm that the Commonwealth DNA analyst did not find Mr. Randolph's DNA on a mask that was seized by the police. *Id.* at 13-15. Mr. Welch did not seek to have any other physical evidence examined by a DNA expert.

Towards the end of this hearing, Mr. Welch made a series of on the record comments in the presence of the prosecution about privileged and confidential communications with his client. He noted for example, that Mr. Randolph had discussed with him that he did not want to be evaluated by a psychologist or present mitigating evidence. *Id.* at 15. Mr. Welch also offered the unsolicited comment that:

> my way of working with Sammy, quite frankly, if he's pushing for a motion and I don't think the motion is appropriate or needed, I'll take a sheet of paper out, write in my own handwriting on such and such a date he wanted me to file this motion, I'm refusing to do it, here is why, state the reason, sign it and give it to him. He can have that if he wants to come in yelling somewhere that I was ineffective for not doing it.

Id. at 16. Finally, and most significantly, Mr. Welch indicated on the record that he had not filed an alibi notice yet because in his view, some of the alibi witnesses contradicted each other. *Id.* at 16-17.[7]

[7] Although not clear from the record, it appears that the alibi witnesses to whom Mr. Welch was referring were two witnesses presented by Mr. Thomas at the preliminary hearing pertaining to the September 2, 2001, non-fatal shooting. *See* NT 4/1/02 at 35-55 (testimony of Marlin Williams and Christian Woodson). There is no indication that Mr. Welch actually did any investigation into any alibi witnesses himself. To the contrary, he indicated that one of his reasons for wanting an investigator was "because I would like to have some people spoken to, to determine whether or not an alibi exists." NT 1/31/03 at 17.

The next hearing took place on March 27, 2003. At the beginning of this hearing, Mr. Welch indicated that he had yet to retain an investigator, despite his earlier professed need to begin his investigation "real fast." NT 3/27/03 at 8; *see also* NT 1/31/03 at 12. Although Mr. Welch blamed his frustration in this regard on the President Judge of the Dauphin County Court of Common Pleas, it is clear that he had done virtually nothing to effectuate his acknowledged need for an investigator. First, despite indicating in late January that he needed an investigator right away, Mr. Welch did not bother to file his petition for funds until February 19. Randolph Docket at 6. This petition was denied without prejudice by the President Judge on February 24, because it did not contain an hourly rate or a total not to exceed amount, as required by local administrative order. *Id.* at 7. Instead of refiling a compliant petition with the President Judge immediately, Mr. Welch waited until March 27 – over a month later – to complain to Judge Hoover.

The reasons provided by Mr. Welch for why he did not simply re-file his petition were nonsensical. He first stated that he did not want to include too much detail in his petition so as not to tip the prosecution off as to what his investigation would entail. NT 3/27/03 at 9, 14. But as both the prosecutor and the court pointed out, nothing in the President Judge's order required him to do so; it simply required an hourly rate and an overall cap amount. *Id.* at 14-15. Mr. Welch then

complained that he could not possibly estimate the number of hours that his investigator would require. *Id.* at 11 (claiming that he did not know "if it's going to take 10 [hours] or if it's going to take a thousand"). But again, Mr. Chardo proposed an easy solution: "If I might suggest, I think that if you could just start high, maybe 50 hours, 100 hours; and then if you need more, you could always ask for supplemental funds." *Id.* Finally, Mr. Welch offered his third reason for not re-filing the petition, which was that "[t]here's no doubt in my mind, Your Honor, that the President Judge is not about to give me what I want." *Id.* The court correctly noted that he will never know until he asks. *Id.* In sum, Mr. Welch offered a series of flimsy and inconsistent excuses to cover up his own lack of effort. Mr. Welch ultimately obtained funds for an investigator on April 4, 2003, a month before trial. Randolph Docket at 8. Mr. Welch subsequently acknowledged that he never utilized these resources. NT 9/5/03 at 16.[8]

There was a complete breakdown in the relationship between Mr. Welch and Mr. Randolph. Towards the end of the March 27 hearing, the fact that there

[8] Counsel blamed Mr. Randolph for his failure to utilize the investigative funds, claiming that, because the information Mr. Randolph provided to counsel did not yield any results, he saw no need to conduct an independent investigation. NT 9/5/03 at 16. Apparently, in counsel's view, the need to test the prosecution's case evaporated, notwithstanding that Mr. Welch himself had provided this reason as the basis for requesting investigative funds.

was a complete breakdown could not be denied. After Mr. Randolph noted that he was not even informed by Mr. Welch that pretrial motions had been filed on his behalf, the following exchange took place:

Mr. Randolph:	I'm the Defendant and I don't have a right to take part in my own defense?
The Court:	Nobody is saying you can't take part in your own defense.
Mr. Randolph:	I don't even know what motion was filed on my – he won't come see me. He won't tell me or give me a copy of nothing. I don't even know what's going on, Your Honor.
Mr. Welch:	That's untrue. I haven't gone out and I haven't spent hours with Sam because frankly, Your Honor, until I've gotten an investigator, that's not getting me anything. Research and preparing the motions is and that's what I've been working on.
The Court:	And your brief that you filed.
Mr. Welch:	Wasn't I out there with Tony Thomas? Didn't we give you a big stack of papers, discovery stuff?
Mr. Randolph:	I'm doing research now. If he said he's constantly turning over to you evidence.
Mr. Welch:	Let's you and I understand. You're not doing my research, Sam.
Mr. Randolph:	My life is the one that's in the balance. I'm going to do my own research, too.

Mr. Welch:	If you want to do your research, you can do your research, but I'm doing the research in this case.
The Court:	There's no 600 [statutory speedy trial] motions here. That's not even – it's really not.
Mr. Randolph:	To settle all this, I would like to go pro se on the record right now.
The Court:	You want to proceed pro se?
Mr. Randolph:	Yes.
The Court:	I'm going to deny your motion at this time.
Mr. Chardo:	Judge, I think that under the Star case with that state of the record, I think the Defendant since he has a constitutional right to represent himself, we're under an obligation to at least conduct a colloquy.
Mr. Randolph:	I want to go pro se on the record. I'm being forced to go pro se. I'll go pro se.
Mr. Chardo:	Nobody is forcing you, sir.
Mr. Randolph:	I'll go pro se.

NT 3/27/03 at 34-35. Following this exchange, the court indicated it would hold a hearing in the next week or two on Mr. Randolph's desire to go pro se and instructed Mr. Randolph to put his request in writing. *Id.* at 39-40.

On April 3, 2003, the court held its hearing on Mr. Randolph's request to proceed pro se. The court indicated that it wanted to afford Mr. Randolph time to reflect on his decision because, in the court's view, Mr. Randolph was responding

more out of frustration than a genuine desire to proceed pro se. NT 4/3/03 at 2. Mr. Randolph responded that the court was correct, that he "didn't want to waive [his] right to counsel, but [he] did want to change [his] appointed counsel." *Id.* at 3. The court summarily denied that request and refused to consider Mr. Randolph's complaints about counsel's conduct, informing Mr. Randolph that he could raise Mr. Welch's ineffectiveness later. *Id.* at 4-5. After Mr. Randolph's request for new counsel was denied, Mr. Randolph began asking the court about the circumstances in which he would be permitted to proceed pro se. *Id.* at 5-9.

The court eventually expressed its view that it was Mr. Randolph who was pushing the proceedings back by requesting new counsel and/or the ability to proceed pro se. *Id.* at 9.[9] Mr. Randolph reiterated that he wants the trial "to be as prompt as possible," and that his "whole thing was Mr. Welch's performance." *Id.* Ultimately, following a recess and further exchange between Mr. Randolph and the court regarding the conditions of proceeding pro se, Mr. Randolph informed the court that he did not wish to proceed without counsel. *Id.* at 19.

By the time of trial, communication between Mr. Welch and Mr. Randolph was virtually nonexistent. NT 5/5/03 at 11 (Mr. Welch stating that "I have at this

[9] The trial court was well aware that Mr. Randolph had been complaining for months about Mr. Welch's woeful performance and near total lack of communication, but simply ignored all of this.

point absolutely a complete breakdown of communication with my client, which is largely why Mr. Thomas is here, so somebody can – he acts as a translator for us I guess is the best way to put it. It's a very difficult situation"); *see also* Thomas Declaration at 2-3. Indeed, Mr. Welch was not communicating with even his co-counsel leading up to trial. Despite the fact that Mr. Thomas "wanted to sit down with Mr. Welch to go over in detail all of the paperwork, the discovery documents, and to map out a defense," Mr. Welch "always seemed to have some scheduling conflict." Thomas Declaration at 3. Mr. Welch and Mr. Thomas "only ever spoke generally about the case and certainly never discussed specific trial strategy." *Id.*

Mr. Thomas shares Mr. Randolph's view that Mr. Welch was completely unprepared for trial. *Id.* A big part of the reason that Mr. Welch was unprepared was that he prioritized his campaign for District Attorney over his responsibilities to his client. *Id.* ("I recall that on at least two occasions when I wanted to discuss his trial strategy, Mr. Welch had other obligations, specifically, campaign duties"). In fact, when Mr. Welch ultimately lost his campaign, he told Mr. Thomas that he lost because of "*this damn trial*," and Mr. Thomas could sense Mr. Welch's bitterness. *Id.*

Despite Mr. Thomas's inexperience, Mr. Welch depended on Mr. Thomas to tell him who the defense witnesses were and what to ask on his cross of several

Commonwealth witnesses. *Id.* at 6. This was a surprise to Mr. Thomas because Mr. Welch never even bothered to inform him that this was his plan ahead of time. *Id.* After the prosecution rested, Mr. Welch informed Mr. Thomas for the first time that Mr. Thomas would be examining the defense witnesses on the stand because he was the one who had spoken with them. *Id.* Mr. Thomas told him he wasn't prepared to handle the examination of the witnesses, particularly with no advance warning. *Id.* Up to that point, Mr. Thomas believed that Mr. Stretton would be conducting the trial. *Id.* Mr. Thomas never prepared any of the witnesses before they actually testified. *Id.* At most, when he spoke with each of them initially, he may have told them they would be called as witnesses at some point, and to just tell the court the same story they told him. *Id.*

When Mr. Thomas expressed concern to Mr. Welch about his unpreparedness to examine any of the witnesses, he distinctly remembers Mr. Welch telling him that he had to "wing it," and that "now's a good time to get your feet wet." *Id.* at 6-7. Mr. Thomas was still conducting his own limited investigation during trial and gathering names of witnesses the night before and the day the defense case started. *Id.* at 7. Mr. Thomas presented witnesses at the last minute without adequate preparation or plan to show how they fit into the defense theory, to the extent there was one. *Id.* Defense counsel ultimately only

presented one alibi witness. Counsel never provided any formal alibi notice. NT 5/13/03 at 6. Instead, counsel simply sent an email to the prosecution at 6:09 p.m. on the day before the defense case was to start listing several possible alibi witnesses. *Id.* at 6-7. Mr. Thomas candidly acknowledged that the reason he was so late in providing the notice was that he "was still in the process of trying to identify all the information that was necessary." *Id.* at 7. Without reservation, Mr. Thomas acknowledges that he was unprepared to handle and should not have been solely responsible for the defense witnesses. Thomas Declaration at 7. Still, he felt compelled to do so at Mr. Welch's direction, and his decision to proceed in this manner was consistent with what Mr. Thomas perceived as Mr. Welch's careless and reckless attitude towards Mr. Randolph's trial. *Id.*

B. The Court's Rejection of Mr. Stretton's Entry of Appearance and Denial of His Motion for Continuance.

Mr. Randolph retained Mr. Stretton during the last week of April, 2003. Mr. Stretton entered his appearance and filed a motion for a continuance on May 1, 2003. The trial court scheduled a telephonic hearing on Mr. Stretton's entry of appearance and continuance motion for later that same day. During that telephonic hearing, Mr. Stretton informed the court that he had received communications from Mr. Randolph and his family about potentially retaining him as early as January 26, 2003. NT 5/1/03 at 8. Mr. Randolph's ability to retain Mr.

Stretton was dependent on his mother's ability to sell the family bar. Although the family thought the sale would occur in February or March of 2003, it did not, and, as a result, the family was unable to obtain the funding to retain Mr. Stretton until the last week of April. *Id.* at 8-9; *see also* Thomas Declaration at 1 (describing difficulties relating to the sale of the bar).

Mr. Stretton noted that the relationship between Mr. Welch and Mr. Randolph had broken down and that Mr. Randolph no longer had confidence in Mr. Welch in his request for a brief continuance. NT 5/1/03 at 3-5. Mr. Stretton also advised the court that Mr. Randolph expressed his intent to cooperate in working with defense experts and in presenting mitigation evidence if the penalty phase were reached. *Id.* at 11-12.

For his part, Mr. Randolph advised the court that he never refused to submit to expert examinations; he was simply no longer willing to work with Mr. Welch. *Id.* at 13. Mr. Randolph further indicated that he wanted to work with Mr. Stretton and felt comfortable doing so. *Id.* What followed was proof of what Mr. Stretton had described: that the relationship between Mr. Randolph and Mr. Welch had completely broken down. Mr. Welch claimed that no alibi notice had been filed because Mr. Randolph's family would not help him. *Id.* at 14. Mr. Randolph contradicted counsel's characterization and insisted that he had given Mr. Welch

the alibi information *months* earlier. *Id.* Mr. Welch and Mr. Randolph then argued about whether or not Mr. Randolph was cooperating. Mr. Randolph denied that he was uncooperative, but stated that he felt Mr. Welch was coercing him into pleading insanity. *Id.* at 17-18.

When it became clear that the court would deny the request for a continuance, Mr. Stretton asked the court if it would consider a recess after jury selection to give him the time to adequately prepare. The court refused to rule. *Id.* at 19. As a result, Mr. Stretton advised the court that he was reluctant to come into the case unprepared. *Id.* at 20. Mr. Stretton reiterated that he was counsel at a disciplinary hearing scheduled for Monday, May 5, and attorney disciplinary trials took priority in Pennsylvania. He noted he also had a scheduled Commonwealth Court hearing and a second attorney disciplinary trial on Wednesday. *Id.* at 21. Immediately following the teleconference, Mr. Stretton contacted Mr. Chardo to request a copy of the discovery. Stretton Declaration at 2.

The court denied the continuance and pressed forward without Mr. Stretton. NT 5/1/03 at 13-14. On May 5, 2003, the first day of jury selection, Mr. Chardo stated he had received a telephone call from Mr. Stretton in which Mr. Stretton indicated that he had not yet received the requested discovery material and, as such, could not prepare to try the case. NT 5/5/03 at 3. The court indicated that

the case was going to go forward with or without Mr. Stretton. *Id.* at 7. Mr. Chardo again indicated that Mr. Stretton had called him and told him he could not get the discovery from Mr. Welch and could not be prepared without the discovery. *Id.* at 8. Mr. Thomas also informed the court that Mr. Stretton said he would be willing to participate and select a jury, but was unavailable that morning. *Id.* at 9. Again, the court denied any additional time and formally declined to accept Mr. Stretton's entry of appearance. *Id.* at 9-10. Even Mr. Welch requested that the court reconsider and permit Mr. Stretton to take over Mr. Randolph's representation:

> I think, as I told you privately this morning, I think it is an appropriate request given the fact that I am court appointed, that I have at this point absolutely at this point a complete breakdown of communication with my client, which is largely why Mr. Thomas is here, so someone . . . he acts as a translator for us I guess is the best way to put it. It is a very difficult situation. And I think having Mr. Stretton there weighing any delay that would accrue, I just think it is a mistake on the part of the Court.

NT 5/5/03 at 11. Nevertheless, the court refused and Mr. Randolph was forced to proceed with appointed counsel.

C. Mr. Stretton's Eventual Entry of Appearance and Representation of Mr. Randolph.

Mr. Stretton eventually was permitted to enter his appearance during Mr. Randolph's formal sentencing. Mr. Stretton had by then been given a copy of Mr.

Welch's file, which included the discovery received from the Commonwealth and the trial transcripts. Stretton Declaration at 3. Mr. Stretton promptly reviewed the entire file and retained C-1 Investigations to assist him with investigation into issues that should be raised on post-verdict motions and on appeal. *Id.*

Mr. Stretton's "review of the discovery provided by the Commonwealth revealed several significant weaknesses in their theory." *Id.* Mr. Stretton noted that "there were many different and conflicting reports of how these shootings took place, including wildly varied descriptions of the shooter." *Id.* at 4. Mr. Stretton noted that all of the witnesses who identified Mr. Randolph as the shooter in each of the three incidents had motives to fabricate their testimony. *Id.* Mr. Stretton also observed that several police reports and witness statements pointed to viable alternative suspects, but Mr. Welch's file did not reveal any attempts that were made to investigate the alternate suspects. *Id.* Mr. Welch's file was also "devoid of any records, including critical criminal and probationary histories, on the witnesses who ended up testifying for the Commonwealth." *Id.*

Mr. Stretton ultimately filed a series of motions for new trial following Mr. Randolph's formal sentencing. Several of the new trial motions dealt with evidence discovered by Mr. Stretton in the course of his investigation that had not been investigated by Mr. Welch at the time of trial. Specifically, Mr. Stretton had

located a series of witnesses who all informed him that the sole eyewitness to one of the three shootings could not possibly have observed the shooting, given where he was located. Mr. Stretton also filed a motion based upon previously undisclosed information from the prosecution that another individual had admitted to the homicides.

Had Mr. Stretton been permitted to represent Mr. Randolph at trial, he would have been a responsible, effective counsel, undertaking numerous tasks, including several that he ultimately did undertake during the formal sentencing and post-trial stage. Mr. Stretton would have reviewed all of the Commonwealth-provided discovery and conducted a full investigation of any witness the Commonwealth intended to call. *Id.* at 6. Mr. Stretton would have employed an investigator, much like C-1 Investigations. *Id.* Mr. Stretton would have compiled an extensive witness list, and requested any relevant criminal or probationary histories on each witness. *Id.* Mr. Stretton then would have employed his investigator to track down and interview the witnesses on his witness list, including interviewing the supposed eyewitnesses to the shootings. *Id.* Having taken these steps, Mr. Stretton would have been prepared to present a vigorous defense of Mr. Randolph. *Id.* at 6-7.

D. Mr. Welch's Failure to Develop and Present Readily Available Evidence Demonstrating that Others Had Motive, Means, and Opportunity to Commit the Murders.

Mr. Welch did none of the things that an effective attorney, such as Mr. Stretton, would have done in preparation for Mr. Randolph's case. Mr. Randolph was ultimately convicted of murder and other assault charges arising out of three shooting incidents occurring on September 2, 2001, September 3, 2001, and September 19, 2001. During the September 2 incident (hereinafter referred to as the "Roebuck Bar" incident), no one was hurt. During the September 3 incident (hereinafter referred to as the "McClay Street" incident), Gary Waters was injured; and during the September 19th incident (hereinafter referred to as the "Todd and Pat's Bar" incident), Thomas Easter and Anthony Burton were killed and Alister Campbell, Lakisha Warren, Tameka Jackson, John Brown, and Reginald Gillespie were injured.

Although the prosecution contended that Mr. Randolph was responsible for all three shootings, the Commonwealth ballistics expert "was unable to establish a link between any of the three scenes" in terms of the firearms that were used. NT 5/9/03 at 31. The expert further stated that had the same gun been used at each scene, he believes that he would have been able to establish a link. *Id.*

It was the prosecution's theory that these shootings were intended as revenge for a fistfight that occurred in Ronald Roebuck's bar, the Baby Grand. That fight occurred in the early morning hours of August 31, 2001. During that fight, Mr. Campbell hit Mr. Randolph over the head with a bottle. Thus, it was the prosecution's theory that three weeks after the fistfight, Mr. Randolph entered Todd and Pat's Bar and fired two weapons at Mr. Campbell, Mr. Easter, and Mr. Burton, as well as other patrons of the bar. Although evidence existed that others had a stronger and more recent motive to shoot the decedents, counsel presented none of that evidence to the jury.

No physical evidence connected Mr. Randolph to any of the three shootings. Nor did any disinterested witness identify Mr. Randolph as being involved in these incidents. The Commonwealth's case rested on the testimony of five biased witnesses who identified Mr. Randolph as being involved in these incidents: Ronald Roebuck, who testified that Mr. Randolph was the shooter in the Roebuck's Bar incident; Gary Waters and Syreeta Clayton (Mr. Waters' girlfriend), who testified that Mr. Randolph was the shooter in the McClay Street shooting; Alister Campbell, whose preliminary hearing testimony identifying Mr. Randolph as the shooter in the Todd and Pat's Bar incident was admitted at trial (because Mr. Campbell, despite grant of immunity, refused to testify); and Amahl

Scott, who testified that Mr. Randolph was the shooter in the Todd and Pat's Bar incident.

While there were other patrons inside Todd and Pat's Bar during the incident, none was able to identify the shooter. Moreover, they gave descriptions of the shooter that: varied in height from 5-foot-6 to 6-foot-2; varied in weight from skinny to stocky; varied on whether the shooter was wearing a mask (which was described in drastically different ways for those who did claim to see a mask); and varied in the description of the shooter's clothing, variously describing sweat clothes, fatigues, or jeans. Not surprisingly, the prosecution presented only those witnesses who gave a description close to Mr. Randolph's height and weight.

Each of the five witnesses who provided testimony purporting to directly connect Mr. Randolph to these shootings had significant and compelling reasons to present false or misleading testimony favorable to the prosecution. Yet counsel did not present any evidence to the jury demonstrating these witnesses' biases, motives to lie, or unreliability. Moreover, significant evidence existed – much of it turned over by the prosecution in discovery – that multiple other individuals had the motive, means, and opportunity to commit these shootings.

1. Evidence of Others With Motive, Means and Opportunity to Commit the Murders

The decedents in the Todd and Pat's bar incident, Mr. Easter and Mr. Burton, maintained lifestyles that included robberies, thefts, assaults, drugs, and weapons. As a result, these individuals had numerous enemies with various motives to cause them harm.

a. Evidence Connecting Quendell Oliver and his Associates to the Shootings

Evidence of irregularities surrounding the Todd and Pat's Bar shooting surfaced from the very beginning of the police investigation. Police learned that persons associated with a decedent, Mr. Burton, and a survivor, Mr. Campbell, had taken weapons from the scene before the police arrived. Ahmal Scott eventually admitted to the police that as Mr. Campbell was fleeing the bar after the shooting, he (Campbell) gave Mr. Scott a 9 millimeter gun.[10] Kahlil Williams ultimately admitted that, directly after the shooting, he moved Mr. Burton's car and removed items from that car. Scott Statement 10/10/01 at 2; Williams Statement 9/26/01 at 3-4.

[10] Mr. Scott told the police that he, in turn, gave that gun to Kemyah Washington. Scott Statement 10/10/01 at 2. According to Mr. Scott, Mr. Washington kept the gun to put it in the decedent's coffin. Scott Statement 9/19/01 at 2.

During the course of the investigation, the police learned that Mr. Easter and Mr. Campbell had robbed Quendell Oliver and Kevin Pitts shortly before the murders. When the police contacted Mr. Oliver on September 20th, he verified the robbery but denied being in the vicinity of Todd and Pat's Bar on the 19th. Officer Carter Report 9/20/01 at 1. He instead claimed that he was at the home of a friend playing video games before heading back to his own home. *Id*. Mr. Oliver also told the police, however, that he was happy that Mr. Easter was killed and that he wanted to prosecute Mr. Campbell for the robbery. *Id.*

On September 21st, Mr. Pitts admitted to police that he, Mr. Oliver, Adeleno Horton, and Thomas Logan were searching for Mr. Easter, Mr. Campbell, and Mr. Scott on the evening of September 19, 2001, from 9:00 or 9:45 pm until 11:15 pm. Pitts Statement 9/21/01 at 2-4. Mr. Pitts admitted that their purpose was to take revenge for multiple assaults and robberies that Mr. Easter, Mr. Campbell, and Mr. Scott had committed against Mr. Pitts and his friends. *Id.* at 5. Contrary to what Mr. Oliver told police, Mr. Pitts admitted that their search took them in the area of Todd and Pat's Bar and that they drove right by the bar. *Id*. at 4. Mr. Pitts further admitted that Mr. Oliver, Mr. Horton, and Mr. Logan were armed and that they were involved in a shootout at 4th and Woodbine Streets with

Mr. Scott and Mr. Washington around the time of the Todd and Pat's Bar shooting.[11]

On September 22nd, the police executed a search warrant for Mr. Oliver's home. That search resulted in the seizure of an AK-47 rifle, numerous bullets of various calibers (including the calibers used in these incidents), gun holsters, $3,800.00 in cash, drugs (cocaine and marijuana), and – in the washing machine – a black hooded sweat shirt, a pair of black jeans, and a pair of black sweat-pants.[12] After conducting the search, the police arrested Mr. Oliver and Mr. Horton, each of whom gave statements to the police.

Mr. Horton's statement corroborated Mr. Pitt's version of events; namely, that Mr. Oliver's group was out looking for Mr. Easter's group on the evening of September 19th to exact revenge. Horton Statement 9/22/01 at 3. Mr. Horton also acknowledged that he was armed and that he was involved in a shoot-out with Mr. Washington and Mr. Scott. *Id*. at 2-3. When asked what he was wearing on the 19th, Mr. Horton admitted that he had been wearing the black sweat-pants that the

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[11] The route Pitts told the police that they took to get home took them very near 1500 Arsenal Boulevard, where police found a mask shortly after the shootings. *Id*. at 5.

[12] There is no indication in the police paperwork provided to trial counsel that these clothes were ever tested, or even submitted for testing.

police seized, that others with him were wearing hooded sweat-shirts, and that Mr. Oliver wore a grey hat. *Id*. at 3.

When Mr. Oliver was questioned following his arrest, he contradicted what he originally told police and gave a statement much more in line with those of Mr. Pitts and Mr. Horton. Specifically, Mr. Oliver stated that on September 17th between 12 am and 12:20 am, he and Mr. Pitts were approached by Mr. Easter, Mr. Campbell, and Mr. Scott. Oliver Statement 9/22/01 at 2. Mr. Easter put a gun to Mr. Oliver's head and told him to empty his pockets and that "he was not playing." *Id*. Mr. Campbell took Mr. Oliver's cell phone, Mr. Scott took Mr. Oliver's car keys from Mr. Pitts, and then Mr. Easter grabbed Mr. Oliver around the neck and started to drag Mr. Oliver to the car. *Id*. Mr. Oliver broke free and ultimately escaped, but Mr. Easter's group took Mr. Oliver's car, his cell phone, and the contents of his pockets. *Id*. at 2-4. The same evening, Mr. Oliver called his stolen cell phone at around 1:00 or 1:30 am. *Id*. at 4. Mr. Easter answered and told Mr. Oliver where his car was and also told Mr. Oliver that he (Oliver) could not go on 9th Street unless he paid Mr. Easter $1,000.00. *Id*.

Mr. Oliver also told police about his efforts to locate and retaliate against Mr. Easter's group. Mr. Oliver stated that on September 18th from 8:00 until 10:00 pm, he, Mr. Horton, and Mr. Pitts searched for Mr. Scott and Mr. Easter, but

did not locate them. *Id*. at 5. The next evening (September 19th) at around 8:30 pm, Mr. Oliver received a call notifying him that members of his group were fighting with members of Mr. Easter's group. *Id*. When Mr. Oliver arrived, he found Mr. Logan, who told him that Mr. Easter's group had robbed him. *Id*. at 5-6.

At that point (approximately 9:00 pm), Mr. Oliver's group resumed their search for Mr Easter's group. *Id*. at 6. According to Mr. Oliver, he and his group rode around in the vicinity of Todd and Pat's Bar from approximately 9:00 pm until they returned home at 11:15 or 11:20 pm. *Id*. at 7. Mr. Oliver admitted that he was armed with a 9 millimeter handgun; that Mr. Horton was armed with a .22 caliber handgun; and that Mr. Logan was armed with a 30/30 rifle. Mr. Oliver claimed that around 10:50 or 10:55 pm, they saw Mr. Scott and Mr. Washington at 4th and Woodbine Streets (less than six full blocks from Todd and Pat's Bar), and engaged in a shoot-out in the alley by Woodbine Street after Mr. Oliver saw Mr. Washington brandish a handgun. *Id*. at 6-7.

Thus, the evidence available to trial counsel *in the police discovery* demonstrates that:

- Mr. Oliver and his group were in what can best be described as an ongoing battle with Mr. Easter and his group from at least September 17th until and including September 19th;

- Mr. Oliver and his group were searching for Mr. Easter and his group at the time of the Todd and Pat's incident, in the area of Todd and Pat's Bar, and were admittedly at Todd and Pat's Bar at or around the time of the shooting;

- Mr. Oliver and his group were carrying multiple guns when they were driving around seeking revenge against Mr. Easter and his group;

- Mr. Oliver and his group had access to a large array of weapons (as demonstrated by the sheer number and variety of caliber of bullets found in the search of Mr. Oliver's home) and, thus, were capable of discarding the actual murder weapons without fear of not having arms to continue their campaign of revenge; and

- Members of Mr. Oliver's group were admittedly wearing clothing that matched some descriptions of the perpetrator's clothing that had been given by the bar patrons.

The ongoing animosity, robberies, assaults, and gun battles between Mr. Oliver's group and Mr. Easter's group immediately prior to the Todd and Pat's Bar shooting makes Mr. Randolph's supposed motive – a three-week-old fistfight – seem trivial. Had the jury heard about this alternative motive, along with the fact that Mr. Oliver's group was admittedly armed to the teeth and in the vicinity of Todd and Pat's Bar seeking revenge against Mr. Easter's group, there is an extremely high likelihood that a reasonable juror would have harbored a reasonable doubt about Mr. Randolph's guilt and voted to acquit.

Further, this unpresented evidence would have countered the prosecution's theory that Mr. Randolph committed the McClay Street and Roebuck's Bar

shootings. Mr. Oliver's statements to police acknowledged a history of animosity between his group and Mr. Easter's group from before the September 17th assault and robbery incident. According to Mr. Oliver, the robbery was revenge for an alleged assault on one of Mr. Easter's associates, Stanley Patterson, that occurred earlier that day. *Id.* at 2-3 Thus, it is reasonably probable that a jury exposed to the strong possibility that Mr. Oliver's group was involved in the Todd and Pat's Bar incident would have held a reasonable doubt regarding Mr. Randolph's involvement in the other two incidents, particularly in light of the Commonwealth's theory that the three incidents were connected.

b. Evidence connecting Eddie Capers to the Shootings

During the homicide investigation, police interviewed family members and friends of Mr. Burton. Mr. Burton's girlfriend, Denise Romaine, told police that it was possible that Eddie Capers was involved because Mr. Capers had accused Mr. Burton of stealing $40,000.00 from him. Romaine Statement 9/22/01 at 1. Ms. Romaine also acknowledged that Mr. Burton sold drugs. *Id*. at 2.

A review of Mr. Capers' history includes involvement in drugs, weapons, and assaults that spans from 1994 to the present. *See* Capers Criminal Extract. It is reasonably probable that a jury presented with this evidence would have

concluded that Mr. Capers had the means, opportunity, and motive to commit these crimes.

c. Evidence Connecting Alexander Bush, Jr. to the Todd and Pat's Bar Shooting

Following trial and sentencing, the prosecution turned over to Mr. Stretton documents indicating that the Johnstown Police had notified the Harrisburg Police of evidence of another potential suspect in the Todd and Pat's Bar shooting. Andrew Stanko had notified the Johnstown Police that he and Alexander Bush, Jr. had a conversation in which Mr. Bush admitted to committing a shooting in a bar in Harrisburg. Stanko Statement 10/4/01 at 1. Although the report was in the custody of the Harrisburg Police Department, it was never turned over to the defense. The police did not follow-up on the report until after the prosecution had obtained Mr. Randolph's conviction and death sentence.[13]

[13] Although Mr. Stanko backed down from his original statement to the Johnstown Police when he testified on post-trial motions, that occurred only after interrogation by Investigator David Lau and Officer Donald Heffner. The conduct by Investigator Lau and Officer Heffner in this case is described in greater detail below.

d. Evidence Exculpating Samuel Randolph and Connecting Another Individual to the Todd and Pat's Bar Shooting

During post-conviction proceedings, Mr. Randolph has obtained evidence that exculpates him and connects another individual to the Todd and Pat's Bar shooting. Doc. 35. That evidence was provided by an informant whose identity was provided to the court and to the Commonwealth in a filing that has been sealed to protect that individual because of fear of reprisals. That informant provided an affidavit that was filed anonymously, and indicated that the witness, who has known Amahl Scott since childhood, was at home on the night of the shooting at Todd and Pat's Bar. The informant reported as follows:

> Amahl came to my apartment right after the shooting at Todd and Pat's. He had a gun with him when he got there. It was obvious that he very nervous and agitated. He was pacing back and forth and sweating. His voice also sounded scared and nervous. This was very different from the way he usually is when we talk to each other.
>
> Amahl put the gun down next to the air conditioning unit. Amahl told me that he had just been at Todd and Pat's and that there was a shooting. He said he had been sitting at the bar with Anthony Burton and John Straining, when a man wearing a mask came in to the bar and just started shooting. Amahl said he had a gun with him, and he (Amahl) jumped up, pulled his gun, and shot back at the man.
>
> Amahl said that Anthony and Johnny jumped up when the other man started shooting, but that Anthony had somehow gotten in the way. He said that right after he fired at the man in the mask, Anthony turned and looked at him. Amahl said Anthony had a look

> of complete surprise on his face. Amahl told me he looked at Anthony, realized he had just shot his friend, and said "Oh, shit."
>
> Amahl told me he hadn't meant to shoot Anthony, it was an accident. He said he immediately ran out of the bar, and he didn't know if Anthony was alive or dead. He said he couldn't go back to the bar to find out, and he asked me to go to the bar to find out for him.
>
> I left and went over to Todd and Pat's and found out that Anthony was dead. When I got back, the gun was gone. I don't know what happened to the gun and I didn't ask. I told Amahl that Anthony was dead.
>
> Amahl told me that he didn't know who the man in the mask was who started shooting in the bar. But he knows what Sam Randolph looks like, including his height and his build. Ahmad told me that Sam Randolph was not the man in the mask who was shooting in the bar. There was a running joke in the neighborhood after this that the way to get out of charges against you was to pin it on Sam.
>
> I am not the only person who saw Amahl come to my house and put the gun down there. Another man who lived nearby also saw this. To protect him, I am not including his name in this statement but am willing to give that information to the Court and the District Attorney.
>
> I didn't go to the police with what Amahl told me because I am close with him and didn't want to get him in trouble. Then, shortly after I had mentioned what I heard, my house was broken into. But it has always bothered me that an innocent man was on death row being blamed for something I know he did not do. I am a Christian and it is against my faith and conscience to stay silent.

Mr. Randolph submits that this evidence further demonstrates his innocence of the murders for which he has been convicted and sentenced to death.

2. The Purported Identifying Eyewitnesses to the Todd and Pat's Bar Incident

As described above, the sole witnesses from the Todd and Pat's Bar incident to identify Mr. Randolph as the perpetrator were Mr. Campbell and Mr. Scott, friends of the decedents. Each had his own baggage, yet none of the evidence directly disputing either individual's reliability and credibility was presented to the jury.

Both Mr. Campbell and Mr. Scott were involved in criminal activities, including assaults, robberies, and weapons offenses in the time period leading up to the shootings. Both were involved in tampering with and removing evidence from the scene of the shooting. Both had their own outstanding charges and offenses for which they were facing significant prison time. And, finally, the history of the activities of both in the weeks prior to the shootings demonstrates that each had their own reasons to keep any knowledge they had about the actual perpetrator to themselves so that they could exact their own form of street revenge. In Mr. Campbell's case, these considerations are even more significant in light of the trial court's order permitting the admission of Mr. Campbell's preliminary hearing testimony in lieu of live testimony.

a. Unpresented Evidence Regarding Mr. Campbell's Credibility

The police learned shortly after the Todd and Pat's Bar shooting that Mr. Campbell was armed during the incident and gave his weapon to Amahl Scott for disposal prior to the police's arrival. Scott Statement 10/10/01 at 2. His desire to ensure that the police did not obtain possession of that gun speaks volumes. Similarly, as described above, prior to the Todd and Pat's Bar shootings, Mr. Campbell and his associates were involved in multiple robberies and assaults against others, thus creating a plethora of individuals with motive to exact revenge.

Moreover, everything about Mr. Campbell's conduct following the shooting weighs against the credibility of his preliminary hearing testimony identifying Mr. Randolph as the shooter. Immediately after the shootings, Harrisburg Police Officer Thomas Ryan interviewed Mr. Campbell at the hospital. In that interview, Mr. Campbell told Officer Ryan that the person who committed the shootings was wearing a mask, a jean jacket and pants. Ryan Report 9/19/01. Mr. Campbell also told Officer Ryan that he did not remember anything after he was shot. *Id.*

On September 20, 2001, Harrisburg Police Officer Richard Pickles reported that Mr. Campbell stated that the person who committed the shooting was shorter than he (described as being 5'11"), wearing a mask and a hooded sweatshirt.

Pickles Report 9/20/01. Mr. Campbell also told Officer Pickles that the shooter him in the chest, he immediately covered his face, was hit in the leg, and then fell to the floor. *Id*. Mr. Campbell was still unable to identify anyone. On the same date, Investigator Timothy Carter of the Harrisburg Police reported that Mr. Campbell described the shooter as having a thin build. Carter Report 9/20/01. Investigator Carter's report indicates that Mr. Campbell stated that he was shot in the chest, put his arms up to his face, was shot again in the arm, and fell to the floor. *Id*. Investigator Carter's report further indicates that Mr. Campbell stated that he did not recognize the shooter.[14] *Id.*

On September 24, 2001, Investigator Carter again interviewed Mr. Campbell. Mr. Campbell again stated that he could not identify the shooter and, *when specifically asked if Mr. Randolph was the shooter, stated that he did not know and would not identify him if he was not sure*. Carter Report 9/24/01 at 1. When Investigator Carter asked if Mr. Randolph had previously dated Mr. Campbell's current girlfriend, Mr. Campbell denied any knowledge of that. *Id*.

[14] Mr. Campbell also told Investigator Carter that he did not want to prosecute, purportedly because he just wanted to forget the whole thing. *Id*. As described below, however, statements he made to others indicate a completely different motive for not wanting to identify the actual shooter.

Mr. Campbell told Investigator Carter to speak with John Brown, who was standing near him during the shooting.[15] *Id*.

Following Mr. Campbell's September 24th interview with police, Officer Heffner obtained information that Mr. Campbell and Ronald Collins returned fire during the Roebuck's Bar incident.[16] Heffner Report 2/11/02. At that point, Officer Heffner obtained permission from the Dauphin County District Attorney's Office to file charges against Mr. Collins and Mr. Campbell stemming from that shooting. *Id.* On March 26, 2002, Officer Heffner arrested Mr. Campbell on the outstanding assault charges arising out of the Roebuck's Bar incident. *Id*. Mr. Campbell was in possession of drugs and a 9 millimeter handgun when he was arrested, and was therefore additionally charged with drug and weapons offenses. *Id*.

On March 26, 2002, at 9:40 am (immediately following his arrest), Mr. Campbell told Officer Heffner that he would not talk without a deal. Heffner Report 3/26/02 at 1. At 2:15 pm that same day, Mr. Campbell gave a written statement to Investigator Carter suddenly recalling that Mr. Randolph was the

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[15] Mr. Brown gave a description of the shooter as tall and thin and wearing a mask and, thus, not identifiable. Carter Report 9/20/01.

[16] Mr. Collins is another associate of Mr. Easter, Mr. Campbell, and Mr. Scott.

shooter in the Todd and Pat's Bar incident. Campbell Statement 3/26/02 at 13-14. Mr. Campbell also suddenly recalled phone calls from Mr. Randolph prior to the fight in Roebuck's regarding Mr. Campbell dating his former girlfriend, although in prior statements Mr. Campbell had denied even knowing Mr. Randolph or of any connection between Mr. Randolph and his (Campbell's) girlfriend. *Id*. at 2.

Although there is no police report regarding what happened between 9:40 am and 2:15 pm, what happened next speaks volumes. The preliminary hearing for the aggravated assault and gun charges arising out of Mr. Campbell's conduct during the McClay incident was scheduled for April 15, 2002. On that date, the felony charges were dismissed. Campbell Charge Document. The next day, April 16, 2002, Mr. Campbell gave his testimony before the grand jury, stating that Mr. Randolph was the shooter in the Todd and Pat's Bar incident and that he and Mr. Randolph had a dispute regarding Mr. Campbell's current girlfriend.[17] Campbell Grand Jury Testimony 4/16/02 at 11,15. On May 23, 2002, Mr. Campbell gave

[17] During the grand jury proceedings, the prosecution also called Daryl Parker in an apparent attempt to elicit testimony from Mr. Parker that Mr. Randolph made inculpatory statements while they were incarcerated together. Although Mr. Parker did not give the hoped-for testimony, he did testify that he had learned from Mr. Campbell's cellmate that Mr. Campbell intended to identify Mr. Randolph as the shooter so that Mr. Campbell could "take care of" the actual shooter on his own. Parker Grand Jury Testimony 9/4/02 at 4.

similar testimony at Mr. Randolph's preliminary hearing. NT 5/23/02 at 19, 22, 13.

During the preliminary hearing, Mr. Chardo conducted direct examination and, before turning Mr. Campbell over for cross-examination, orally informed defense counsel that Mr. Campbell had recently filed a bail motion as a result of unspecified threats Mr. Campbell had received, and that Mr. Chardo would likely not oppose the motion.[18] NT 5/23/02 at 23. Mr. Chardo also handed defense counsel (Mr. Thomas) Mr. Campbell's criminal history, his statement of September 27, 2001, his statement of March 26, 2002, and an order (signed by Judge Hoover and issued that day) granting Mr. Campbell immunity. *Id.* at 23-24. Mr. Chardo handed over these documents "with the proviso they be returned to [him] immediately following the cross examination." *Id.* at 24. Mr. Thomas was given five minutes to review these materials before cross-examination. *Id.* When the trial court attempted to force Mr. Thomas to conduct cross-examination at the end of these five minutes, Mr. Thomas protested that he had not even had a chance to finish reading the documents, which contained "some very important

[18] No charges were ever filed against Mr. Randolph arising out of these purported threats, nor is there any indication in the police paperwork disclosed to counsel during the pretrial proceedings that the prosecution ever obtained the source of these threats or even confirmed that such threats were actually made.

information." *Id.* at 24-25. Mr. Thomas was then permitted two additional minutes to finish reading. *Id.* at 25.

Mr. Chardo did not indicate why he was turning over these documents at that time (on the condition that they be returned immediately) other than to note cryptically that he wanted defense counsel "for legal reasons to have a full opportunity to cross-examine the witness." *Id.* at 24. It is plain, however, that Mr. Chardo anticipated that Mr. Campbell would ultimately refuse to testify, and thus fully intended to introduce Mr. Campbell's preliminary hearing testimony at Mr. Randolph's trial.

While Mr. Chardo turned over two written statements by Mr. Campbell, at no point before cross-examination did Mr. Chardo turn over the multiple statements Mr. Campbell gave to the police prior to September 27, 2001. Nor did Mr. Chardo turn over the statement Mr. Campbell made at 9:40 a.m. on March 26, 2002 that he would not talk without a deal in place. Nor did Mr. Chardo notify defense counsel that the felony charges against Mr. Campbell were dropped the day before his grand jury testimony.

In September, 2002, Mr. Campbell was charged with homicide arising out of an incident that occurred on September 11, 2002. Campbell criminal extract. Mr. Campbell was ultimately convicted of third degree murder and related

charges. *Id.* The circumstances of those charges bear striking resemblance to Mr. Campbell's feud with Mr. Oliver's group. Leading up to the 2002 homicide, Mr. Campbell and others robbed Keyattha Duncan at gunpoint. Campbell's Pro Se 1925(b) Statement at 1-2. Mr. Duncan and others subsequently searched for, found, and confronted Mr. Campbell. *Id.*. A shoot-out ensued and Robert Mitchell, an associate of Mr. Duncan, was killed. *Id*. Thus, even after the shooting at Todd and Pat's Bar, Mr. Campbell continued the lifestyle and conduct described above by Mr. Oliver and his associates.

At Mr. Randolph's trial, Mr. Campbell predictably refused to testify, despite a grant of immunity, and was found in contempt. NT 5/9/03 at 38-48. The trial court permitted the prosecution to admit the preliminary hearing notes of Mr. Campbell's testimony. *Id*. at 49. This preliminary hearing testimony came into evidence despite the fact that substantial impeachment material was not turned over prior to the preliminary hearing and despite the fact that defense counsel was obviously not able to cross-examine Mr. Campbell about his subsequent murder charges.

In sum, substantial evidence affecting Mr. Campbell's credibility was not placed before the jury. This evidence was not adduced for multiple reasons, including: because Mr. Campbell did not testify at trial; because defense counsel

was not given full impeachment evidence at the time of the preliminary hearing; because defense counsel was given inadequate time to read and digest the evidence was turned over at the preliminary hearing; because significant impeachment evidence arose following the preliminary hearing; and because defense counsel failed to utilize the full range of impeachment evidence he did have access to at the preliminary hearing. Among the evidence the jury never heard was:

- that Mr. Campbell had engaged in robberies and assaults against others (Mr. Oliver and his group) shortly before the shootings that gave those others a clear motive for revenge and those others admitted that they were searching for Mr. Campbell in the vicinity of Todd and Pat's Bar in order to exact that revenge;

- that Mr. Campbell gave no identification of the shooters in either the Roebuck's Bar shooting or the Todd and Pat's Bar shootings, despite repeatedly talking to police, until after he told the police he would not cooperate without a deal;

- that Mr. Campbell was specifically asked on September 24, 2001, if Mr. Randolph was the shooter, and Mr. Campbell stated that he did not know because he could not identify the shooter;

- that Mr. Campbell never acknowledged knowing that Mr. Randolph previously dated his girlfriend or that he had altercations with Mr. Randolph until after he told the police that he would not cooperate without a deal;

- that Mr. Campbell had aggravated assault and weapons charges that were reduced to misdemeanor weapons and criminal mischief charges the day before his grand jury testimony;

- that, at the time of trial, Mr. Campbell was facing homicide charges with circumstances very similar to the circumstances surrounding his feud with Mr. Oliver's group at the time of the Todd and Pat's Bar incident;[19] and,

- that the police had uncovered evidence that Mr. Campbell possessed a 9 millimeter gun during the Todd and Pat's Bar incident and gave it to Amahl Scott for disposal prior to the police arrival.

b. Unpresented Evidence Regarding Mr. Scott's Credibility

The only other witness to identify Mr. Randolph as the shooter in the Todd and Pat's Bar incident was Amahl Scott. In addition to identifying Mr. Randolph, Mr. Scott also told the jury that shortly before the shootings, he saw Shariff Layton ("Dooger") enter the bar, buy a 40 ounce bottle of beer, and leave. NT 5/9/03 at 66-67.[20]

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[19] During a pretrial hearing, the prosecution moved to preclude the defense from admitting the evidence of this open homicide charge unless Mr. Campbell actually testified. Without disclosing the striking similarity between the circumstances of that homicide and the circumstances in this case, the prosecution contended that, if Mr. Campbell refused to testify at trial, there was no bias or motive issue. Having heard the prosecution's limited version without any response by Mr. Welch, the court agreed that evidence of the charge was inadmissible unless Mr. Campbell testified. NT 3/27/03 at 26-27.

[20] Although it was the prosecution's theory that Mr. Layton was the lookout who told Mr. Randolph whether or not the purported victims were in the bar, Mr. Layton was never charged with conspiracy or anything else arising out of this incident.

Although Mr. Welch cross-examined Mr. Scott on various inconsistencies in his descriptions and did raise Mr. Scott's pending charges, at no time did Mr. Welch confront Mr. Scott with his criminal conduct leading up to the Todd and Pat's Bar incident, his connections with Mr. Easter's group, or evidence of the interactions between Mr. Easter's group and Mr. Oliver's group in the time leading up to the shootings that included the assaults against the Oliver crew and the subsequent hunt for the Easter group by the Oliver group for revenge.

Nor did Mr. Welch cross-examine Mr. Scott on his illegal conduct directly following the shootings. As described above, Mr. Scott admitted to the police that Mr. Campbell gave him a 9 millimeter handgun as Mr. Campbell was exiting Todd and Pat's Bar just after the shootings. Mr. Scott further admitted that he left the shooting location, despite his possession of evidence directly related to that incident, and ultimately gave that gun to Kemyah Washington for disposal. Thus, in addition to the outstanding charges the prosecution did file against him, Mr. Scott had a separate and distinct motive to testify in a manner consistent with the prosecution's theory: to ensure that he did not get charged with tampering with evidence.

3. The Purported Identifying Eyewitness to the Roebuck's Bar Incident

The only witness that connected Mr. Randolph to the Roebuck's Bar incident was Ronald Roebuck, the owner of the bar. According to Mr. Roebuck, at the time of the shooting he was able to see the individual who was shooting at people across the street from the bar. NT 5/8/03 at 130. Mr. Roebuck claimed that he was able to see Mr. Randolph through the driver's side rear window that was "cracked" open. *Id*. Mr. Roebuck did not see Mr. Randolph's face but claimed to know it was him because they made "eye-contact." *Id.* Mr. Roebuck also claimed that after the shooting he had a conversation with Mr. Randolph wherein Mr. Randolph purportedly told him he would pay for the damage to one of Mr. Roebuck's friend's cars. *Id.*

On cross-examination, Mr. Roebuck admitted that he did not give the police this information at the time of the shooting; that he was attempting to purchase Mr. Randolph's mother's bar license; and that he did not give the police the information until "several weeks or maybe a month after the shooting."[21] *Id.* at 135-36. Although counsel asked whether or not Mr. Roebuck had issues with

[21] Actually, the first statement from Mr. Roebuck in the police reports turned over to counsel pretrial indicates that his statement was not until February 13, 2002, during an interview with Investigator Lau and Officer Heffner.

either the prosecution or liquor control board hanging over his head, Mr. Roebuck denied having any such issues. *Id.* at 140.

Had counsel conducted a constitutionally adequate investigation, they would have learned that there were witnesses who directly disputed Mr. Roebuck's version of events and his ability to identify the shooter. Counsel would have learned that there were witnesses available at the time of Mr. Randolph's trial who would have testified that Donald Roebuck (Ronald's brother) was at the door with bouncers Heath Wells and Sean Sellers on the night of the shooting. Donald Roebuck Statement 10/27/03. Counsel would have learned that witnesses available at the time of trial (including Donald Roebuck, Mr. Sellers, Heath Wells, and bartender Shannon Taylor), would have testified that Ronald was working at the bar with Ms. Taylor and was in no position to see the shooting. Donald Roebuck Statements; Sellers Statement; Taylor Statement 10/29/03. Despite pressure and coercion, described below, Donald Roebuck consistently told the police that, while he did see a black car drive down the street just before the shooting, the windows were tinted and there was no way anyone at the bar could see who the occupants were. Donald Roebuck Statement 10/27/03. This is precisely what Mr. Stretton uncovered during post-trial motions. *Randolph*, 873 A.2d at 1283-84.

Moreover, Mr. Thomas did in fact perform some investigation into this shooting incident and interviewed Ronald Roebuck prior to trial. Thomas Declaration at 4. Ronald Roebuck told Mr. Thomas that he didn't see anything relating to the drive-by shooting on 6th Street outside of his bar on September 2, 2001, because he was inside his bar at the time and not physically in a position to see the car or anyone in it. *Id.* When Mr. Thomas questioned why he was named as a witness of the shooting in the police report, Ronald Roebuck told him that the only reason police put his name in the report was because he was the only credible witness on the scene at the time. *Id.* Ronald Roebuck also told him he had a good relationship with local police, including Investigator Lau and Officer Heffner, but was frustrated that his name was in the report. *Id.* Ronald Roebuck expressed serious concern with the possibility of testifying to something he didn't see, but was equally concerned that local authorities were constantly "hassling" him because of code violations at his bar.[22] *Id.* Ronald Roebuck told Mr. Thomas that there was an apparent effort to make him close or move Roebuck's Baby Grand

[22] Had counsel conducted a constitutionally adequate investigation, they would have uncovered additional corroborating evidence demonstrating that, contrary to his testimony, Ronald Roebuck was indeed facing code violations at the time of Mr. Randolph's trial. *See Commonwealth v. Ronald Roebuck*, NT-000383-03; *Commonwealth v. Ronald Roebuck*, NT-0000275-03.

because of the state's plan to erect a state building on the property directly behind his bar. *Id.*

Mr. Thomas also learned that Ronald Roebuck had a bias against the Randolph family, based on a financial dispute. *Id.* at 5. Mr. Randolph's mother wanted to sell Big Jay's, the family bar, to raise money for Mr. Stretton's retainer. *Id.* Ronald Roebuck had a serious interest in purchasing Big Jay's because of pressure against him from the Commonwealth at his own bar. *Id.* When the real estate was unavailable for sale for tax reasons, Ronald Roebuck eventually agreed to buy the liquor license from the family. *Id.* The sale required payment of a ten thousand dollar ($10,000) deposit and scheduled payments of the balance. *Id.*

When Ronald Roebuck stopped making the required payments, he lost his entire deposit after Judge Hoover signed an order granting a declaratory judgment related to the contract and sale of the liquor license. *Id.* Ronald Roebuck was extremely upset with the Randolph family after the loss of his ten thousand dollar deposit. *Id.* He told Mr. Thomas that he was in the midst of his own financial troubles and didn't have anything to show for the loss. *Id.*

Mr. Thomas shared all of this information with Mr. Welch, and fully expected it to be used at the time of trial to impeach Ronald Roebuck's testimony, if he was called as a witness, and to demonstrate police misconduct through their

investigator's fabrication of non-existent facts. *Id.* Unfortunately, that didn't happen. Mr. Thomas told Mr. Welch what Ronald Roebuck told him about not actually seeing anything related to the shooting outside of his bar. *Id.* Mr. Thomas remembers asking Mr. Welch to let him cross-examine Ronald Roebuck at trial, but Mr. Welch refused. *Id.* Mr. Welch would not even acknowledge Mr. Thomas when he tried to get him to ask Ronald Roebuck specific questions on cross-examination. *Id.* at 5-6.

Had counsel conducted a constitutionally adequate investigation, they also would have learned that people who knew Ronald Roebuck knew that he was an informant for the police. Michael McMullen Statement; Donald Roebuck Statements. They would have learned that he had a longstanding arrangement with police that involved his giving the police favorable testimony and information in exchange for the authorities' turning a blind eye to his own criminal activity. *Id*. Counsel would have learned that Ronald Roebuck was a crack-cocaine user who regularly charged persons crack-cocaine for favors, including illegal conduct. *Id*. Counsel would have learned that Ronald Roebuck was known to engage in illegal gambling and drug use with his select associates in the bar after it closed. *Id*.

Had counsel conducted a constitutionally adequate investigation, they also would have learned that there were witnesses available who could have told the jury that Donald Roebuck, Heath Wells, and Sean Sellers were subpoenaed to the Dauphin County Prison to testify against Mr. Randolph. Sellers Statement, Donald Roebuck Statement 10/27/03. They were met by Officer Heffner and Investigator Lau outside the prison. Officer Heffner told them that they had to identify Mr. Randolph as the shooter in the Roebuck's Bar incident. *Id*. When Donald Roebuck, Mr. Wells, and Mr. Sellers denied seeing Mr. Randolph, Officer Heffner became angry and verbally assaultive and the three were told to leave. *Id*.

Counsel would have learned that police officers, including Officer Heffner, told witnesses that they had to connect Mr. Randolph to the prior shootings because "one plus one equals two," meaning that once they did that, they would be able to connect Mr. Randolph to the murders. *Id*. Counsel would have learned that members of the investigative team, including Officer Heffner, used coercion and threats to attempt to obtain testimony connecting Mr. Randolph to these shootings and that these officers and prosecution personnel were determined to obtain a conviction for murder against Mr. Randolph, no matter what the truth was. *Id*.

Donald Roebuck was arrested on March 13, 2003, for drug and weapons charges following execution of a search warrant on the basis of a confidential informant. *Id.* Just after Donald Roebuck's arrest on these charges, Officer Heffner attempted once again to get Donald Roebuck to implicate Mr. Randolph, stating that this was "his last chance."[23] *Id*.

4. The Purported Identifying Eyewitnesses to the McClay Street Shooting.

a. Unpresented Evidence Regarding Gary Waters' Credibility

Prior to February 7, 2002, Gary Waters vehemently denied knowing who had shot him during the McClay Street shooting. Mr. Waters never told police about the ongoing animosity between his associates (Mr. Easter, Mr. Campbell, and Mr. Scott) and the Oliver group. Even after the police sent him notice that they would close the case if he did not provide information on the perpetrators in the shooting, Mr. Waters failed to come forward with any information identifying the shooters.

What changed on February 7, 2002, was Mr. Waters' arrest for drugs and related offenses. The officers who arrested Mr. Waters were Officer Heffner and

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[23] Police intimidation did not end with the trial. Following trial, after subsequent counsel filed a motion that included an affidavit from Donald Roebuck, Investigator Lau visited Donald Roebuck in prison and pressured him to recant.

Investigator Lau. Lau Report 2/7/02. Once Investigator Lau and Officer Heffner had Mr. Waters on felony drug charges, they were able to obtain a statement from Mr. Waters that he now somehow recalled that Mr. Randolph was the McClay Street shooter. *Id.*

In addition to failing to investigate the available evidence demonstrating that Investigator Lau and Officer Heffner engaged in misconduct in order to obtain false and misleading testimony against Mr. Randolph, counsel also failed to investigate and develop other evidence directly disputing the reliability of Mr. Waters' testimony. That testimony included the above-described evidence describing the relationship between Waters and the Easter group and their activities in the weeks prior to the shootings. In addition, even when Mr. Waters gave a statement helpful to the prosecution, there were substantial contradictions and inconsistencies that counsel failed to present to the jury.

In his statement to the police, Mr. Waters did not recall seeing an individual nicknamed "Muzz" on the street prior to the McClay Street shooting. Waters Statement 9/2/01. His girlfriend, Syreeta Clayton, however, claimed that Waters was talking to Muzz at the time of the shooting. Clayton Statement 2/14/02 at 2. By the time of trial, Mr. Waters changed his story to include Muzz to make his version consistent with his girlfriend's.

More importantly, Mr. Waters claimed that others would back up his story that Mr. Randolph was the shooter, including Yahimba Cooper. Lau Report 2/7/02. When the police questioned Ms. Cooper, however, she denied ever saying that Mr. Randolph was involved and specifically stated that she could not identify the shooter. Cooper Statement 2/9/02 at 4. Although she was located at a similar vantage point to Ms. Clayton, Ms. Cooper stated that the only thing she could see was the hand of the assailant. *Id.*

b. Unpresented Evidence Regarding Syreeta Clayton's Credibility

Ms. Clayton, Mr. Waters' girlfriend, did not give a statement to the police about this shooting until February 14, 2002, after her boyfriend had been arrested and incarcerated for drugs and after he had given his statement to the police that Mr. Randolph was the shooter. Clayton Statement 2/14/02. She gave her statement to Officer Heffner. *Id*. Ms. Clayton claimed to be able to see a great deal, despite the inability of others in similar positions to see anything. She testified that she saw the driver and identified him as Jerome Britton. She further testified that Mr. Randolph was the shooter. NT 5/8/03 at 147.

On cross-examination, Ms. Clayton acknowledged that she did not tell the police about her observations until she contacted Officer Heffner. *Id* at 15. Unfortunately, counsel failed to establish for the jury that Ms. Clayton did not

contact Officer Heffner until *after* Mr. Waters had given his statement to the police following his arrest. A jury could have reasonably inferred that the timing of Ms. Clayton's sudden recollection that Mr. Randolph was the shooter was nothing more than an effort to help her boyfriend get out from under the charges against him.

III. Statement on Exhaustion

State prisoners are generally required to exhaust their constitutional claims in state court before they are able to obtain federal review of those claims. *See* 28 U.S.C. §§ 2254(b), ©; *see also Rose v. Lundy*, 455 U.S. 509, 515-16 (1982). The general duty to exhaust, however, is not absolute. Even where a federal claim has not been exhausted in state court, a habeas petitioner may overcome procedural default, and thus have his claim heard in federal court, by demonstrating that his confinement constitutes a "miscarriage of justice." *House v. Bell*, 547 U.S. 518, 536 (2006) (citing *Schlup v. Delo*, 513 U.S. 298, 324 (1995)); *see also Schlup*, 513 U.S. at 324 ("the fundamental miscarriage of justice exception seeks to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case"). A habeas petitioner can demonstrate a miscarriage of justice by demonstrating that he is actually innocent.

This exception to procedural default exists because "avoiding the injustice of executing one who is actually innocent" is a matter of "paramount importance" in habeas law. *Schlup*, 513 U.S. at 326. To establish a miscarriage of justice, the "petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 513 U.S. at 327. Stated differently, "[a] petitioner's burden at the gateway stage is to demonstrate . . . that more likely than not any reasonable juror would have reasonable doubt." *House*, 547 U.S. at 538.[24] Where a habeas petitioner is able to establish his innocence, and thus pass through the miscarriage of justice gateway, a federal court may then proceed to consider his underlying constitutional claims. *Schlup*, 513 U.S. at 314-15. The extensive evidence set forth above and in Mr. Randolph's habeas petition demonstrates that he is innocent, and thus satisfies the miscarriage of justice

[24] The *Schlup* standard "does not require absolute certainty about the petitioner's guilt or innocence." *Id.* Indeed, the Supreme Court in *House* found the *Schlup* standard satisfied even though it was "not a case of conclusive exoneration," "[s]ome aspects of the State's evidence . . . still support an inference of guilt," and the alternative perpetrator evidence was "by no means conclusive" and "[i]f considered in isolation, a reasonable jury might well disregard it." *Id.* at 552, 553-54; *see also Wolfe v. Johnson*, 565 F.3d 140, 155-56 (4th Cir. 2009) (remanding *Schlup* issue for an evidentiary hearing even though the essential affidavit relied upon by petitioner to demonstrate his innocence was subsequently disavowed by the affiant and the district court had previously found the affiant incredible).

exception to procedural default. Thus, all of the claims listed below are properly before this Court.

In addition to Mr. Randolph's innocence, some of the claims below may be considered by the Court because they were exhausted on direct appeal. Where a claim has been exhausted in state court, there is, of course, no issue of procedural default.

IV. Claims for Relief

A. Mr. Randolph was Denied his Counsel of Choice in Violation of the Sixth, Eighth, and Fourteenth Amendments.

1. Mr. Randolph's Constitutional Rights were Violated.

Included within the Sixth Amendment right to counsel is the right of a criminal defendant to choose who that counsel will be. *United States v. Gonzales-Lopez*, 548 U.S. 140, 144 (2006) (citing *Wheat v. United States*, 486 U.S. 153 (1988)); *cf. Powell v. Alabama*, 287 U.S. 45, 53 (1932) ("It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice").

The right to choose one's counsel does have certain limitations. For example, an indigent defendant does not have the right to select who his appointed counsel will be. *Gonzalez-Lopez*, 548 U.S. at 144. Nor may a criminal defendant insist on representation by an individual who is not a member of the bar, by an

attorney who refuses to represent him, by an attorney who has a previous or ongoing relationship with an opposing party, or by an attorney who has a conflict of interest. *Wheat*, 486 U.S. at 159, 162.

None of those situations applies here. Mr. Randolph was not asking for new appointed counsel, but had retained Mr. Stretton. Mr. Stretton, for his part, was willing to represent Mr. Randolph and entered his appearance as soon as a fee arrangement was reached. Appointed counsel had been abysmal, prompting Mr. Randolph to retain Mr. Stretton. There is no indication on the record that Mr. Stretton was laboring under any conflict of interest or had any sort of relationship with the Commonwealth that would have prevented him from representing Mr. Randolph. There is simply nothing that legitimately prohibited Mr. Randolph from insisting on his constitutionally mandated right to select who would represent him while on trial for his life.

In addition to the fact that Mr. Randolph was constitutionally entitled to Mr. Stretton's representation, it was clearly the most prudent course of action. The record could not have been more clear that Mr. Randolph and Mr. Welch had suffered a total and debilitating breakdown in the attorney-client relationship. This was undisputed: Mr. Stretton, Mr. Thomas, Mr. Welch, and Mr. Randolph all attested to this fact. The relationship was so bad that Mr. Welch and Mr.

Randolph were not even on speaking terms by the time of trial. This breakdown in communications resulted primarily from the fact that Mr. Welch had almost totally failed to communicate with Mr. Randolph or to prepare for trial.

The trial court was aware of the breakdown and Mr. Stretton's availability. However, the trial court prevented Mr. Stretton from representing Mr. Randolph without ever meaningfully considering Mr. Randolph's entitlement to choose his counsel or the undisputed breakdown in his relationship with appointed counsel. Instead, the trial court's singular focus was to proceed forthwith. This was error, as a "myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964).

The *Ungar* Court's words are an extraordinarily apt description of the circumstances of Mr. Randolph's trial. First, this was not an old case at the time it went to trial. As described above, Mr. Randolph was tried approximately eight months after Mr. Welch was appointed. For a capital double homicide trial that also included charges stemming from two separate shooting incidents, eight months is not a long period of time for even a diligent attorney to properly prepare. Second, Mr. Randolph's retained counsel did not ask for a lengthy continuance. Instead, he requested either a short continuance or a recess after the

jury was selected in order to properly prepare, or at least receive and review the discovery. Mr. Stretton suggested multiple reasonable alternatives and demonstrated an uncommon level of flexibility and willingness to ensure that the trial was not substantially delayed.

Where the Sixth Amendment right to counsel of choice has been denied, prejudice is presumed. *Gonzalez-Lopez*, 548 U.S. at 146. This is because "the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation 'complete.'" *Id.* While prejudice is presumed, even if proof of prejudice were necessary, Mr. Randolph can satisfy that burden, and urges that the Court permit a hearing so that he may present his proof.

Indeed, the Sixth Amendment entitles a defendant to effective representation, unfettered by any conflict of interest or irreconcilable differences. *Strickland v. Washington*, 466 U. S. 668, 686 (1984) (right to effective assistance of counsel); *Holloway v. Arkansas*, 435 U. S. 475, 481-82 (1978) (right to conflict-free counsel); *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980) ("In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance").

Thus, while the right to counsel does not guarantee an accused appointment of counsel of choice, he is entitled to effective representation, unfettered by any irreconcilable differences or conflict of interest.

When a defendant requests new counsel because of ineffective assistance of counsel or irreconcilable differences, the court must hold a careful and complete hearing regarding the allegations in order to ensure the Sixth Amendment right to counsel. As the Supreme Court stated in *Cuyler*, "[u]nless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." *Cuyler*, 446 U.S. at 347. The flip side of this, of course, is that when a trial court *does* know or reasonably should know that a conflict exists, it does have a duty to initiate an inquiry. *See*, *e.g.*, *Glasser v. United States*, 315 U.S. 60, 71 (1942) ("Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused . . . . The trial court should protect the right of an accused to have the assistance of counsel."). In cases where the counsel in question takes an adversarial or antagonistic position against the defendant, appointment of counsel for purposes of conducting that hearing is required. *See United States v. Wadsworth*, 830 F.2d 1500 (9th Cir. 1987); *United States v. Weaver*, 882 F.2d 1128, 1143, n.9 (7th Cir. 1989).

Despite the fact that there existed cause for inquiry here as to, at least, the existence of serious questions of a conflict of interest, inadequate assistance of appointed counsel, and irreconcilable attorney-client differences, the trial court did not hold a hearing to consider whether new counsel should be appointed. Nor did the court appoint counsel to represent Mr. Randolph in this inquiry, although the record clearly shows that – during the limited and insufficient inquiry conducted by the court – Mr. Randolph's counsel shifted from the role of advocate to that of adversary. Mr. Randolph was thereby denied his federal constitutional rights to due process and effective assistance of counsel.

As described above, during pretrial proceedings, Mr. Randolph repeatedly requested new counsel, alleging that counsel was ineffective and that there was no working attorney-client relationship. Counsel several times acknowledged the underlying facts supporting Mr. Randolph's view that appointed counsel was unprepared; appointed counsel also agreed that the attorney-client relationship had deteriorated. Counsel, however, did not request a hearing on Mr. Randolph's allegations, did not request that new counsel be appointed to represent Mr. Randolph at such a hearing, and did not otherwise make any legal argument as to why such steps were needed to adequately protect Mr. Randolph's rights. Counsel did not take the steps necessary to protect Mr. Randolph's rights at what was

likely the most critical stage of these capital proceedings. Neither did the trial court take such steps.

Thus, it is clear that, by the time the trial began, the attorney-client relationship was so shattered that failure to provide new counsel denied Mr. Randolph his federal rights to due process and counsel. Mr. Randolph had no faith that his attorney was prepared to try his capital case, that counsel would endeavor to become prepared, or that counsel was in any way working in Mr. Randolph's interests. Throughout the pretrial proceedings, Mr. Randolph repeatedly and consistently expressed his doubts about counsel's performance.

In short, Mr. Randolph "was forced into a trial with the assistance of a particular lawyer with whom he was dissatisfied, with whom he would not cooperate, and with whom he would not, in any manner whatsoever, communicate." *Brown v. Craven*, 424 F.2d 1166, 1169 (9th Cir. 1970).

This was not simply a matter of a lack of communication. The disagreements between counsel and Mr. Randolph went to the very core of the constitutional right to counsel. Counsel acknowledged that the attorney-client relationship had disintegrated before trial. Indeed, the record establishes that the already damaged relationship went from irreconcilable differences to open hostility and a complete conflict of interest. Communication between Mr.

Randolph and counsel had become, even at its best, disparaging. Mr. Randolph was voicing his objections to counsel at every available opportunity. Counsel, on the other hand, felt compelled to make representations to the court which were to the detriment of his client. Under these circumstances, forcing Mr. Randolph to stand trial with this lawyer deprived Mr. Randolph of his rights to due process, a fair trial, and effective assistance of counsel.

Similarly, the trial court was obligated to conduct a thorough and adequate hearing to explore the bases for Mr. Randolph's allegations. In order to pass constitutional muster, the court must conduct a probing inquiry into the basis for the objections to present counsel and withhold any ruling until those reasons are made known. *McMahon v. Fulcomer*, 821 F.2d 934, 942 (3d Cir. 1987). In short, the court must engage in a careful inquiry sufficient to allow the court to "understand the extent of the breakdown." *United States v. Moore*, 159 F.3d 1154, 1160 (9th Cir. 1998). The court is not relieved of its duty to make such a careful inquiry even when it suspects that the request for change of counsel is motivated by improper considerations. *See McMahon*, 821 F.2d at 942 ("Even when the trial judge suspects that the defendant's contentions are disingenuous, and motives impure, a thorough and searching inquiry is required").

While the record reflects that the trial court "heard" some of Mr. Randolph's complaints, there was no "hearing" in the constitutional sense, which requires that both counsel and Mr. Randolph have a chance to air their views and respond to their respective claims. Instead, the court deferred to counsel's representations and views – including those representations that operated to Mr. Randolph's detriment – each time Mr. Randolph objected to trial counsel's conduct and effectiveness. In order to conform with due process, a hearing must necessarily include presence of the parties and a reasonable opportunity to be heard. *Powell v. Alabama*, 287 U.S. 45, 67 (1932); *Armstrong v. Manzo*, 380 U.S. 545, 550 (1948). Neither occurred in Mr. Randolph's case. Thus, the trial court's determination of this important matter did not comport with due process standards.

When Mr. Randolph raised his complaints about counsel's performance, appointed counsel responded by advocating against his client. Under the Sixth Amendment right to counsel, appointed counsel owes the client a duty of loyalty. Indeed, counsel's loyalty to his client is "perhaps the most basic of counsel's duties." *Strickland*, 466 U.S. at 692. Here, however, Mr. Randolph's own counsel changed from advocate to adversary in violation of Mr. Randolph's constitutional rights. It is well-settled that the right to counsel attaches at all "critical stages" of the proceedings. *E.g.*, *Coleman v. Alabama*, 399 U.S. 1, 6 (1970). At a critical

stage, appointed counsel took "an adversary and antagonistic position on a matter concerning his client's right to counsel and to prepare for trial," and the court should have appointed different counsel at least for purposes of determining Mr. Randolph's request for new counsel. *United States v. Wadsworth*, 830 F.2d 1500, 1511 (9th Cir. 1987). Thus, the Court of Common Pleas deprived Mr. Randolph of his right to an adequate hearing on his motion to change counsel, and also erred when it deprived Mr. Randolph of his right to counsel at the hearing on that motion.

Finally, as described throughout Mr. Randolph's habeas petition and memorandum of law, the court's failure to grant Mr. Randolph's request for new counsel resulted in prejudice. Counsel's ineffectiveness permeated every aspect of Mr. Randolph's capital trial, and prejudiced Mr. Randolph in this capital case.

2. This Claim was Exhausted at Trial and on Direct Appeal, and it is not Procedurally Defaulted.

This claim was exhausted in state court, as it was aggressively litigated pre-trial, throughout trial itself, at formal sentencing, and on direct appeal. Mr. Randolph repeatedly informed the trial court during pre-trial proceedings of the severe breakdown in his relationship with appointed counsel and of the fact that appointed counsel was doing virtually nothing to prepare for trial. Mr. Stretton first entered his appearance in the case and filed a motion for continuance as soon

as Mr. Randolph was able to secure the funds to retain him, which was on May 1, 2003. NT 5/1/03 at 9-10. The trial court summarily denied the continuance request at a telephonic conference later that day, and formally declined to accept Mr. Stretton's entry of appearance on the first day of voir dire. *Id.* at 13-14; *see also* NT 5/5/03 at 9-10. Mr. Stretton was ultimately permitted to enter his appearance at Mr. Randolph's formal sentencing, during which he again raised the issue by way of motion for extraordinary relief. NT 7/10/03 at 5-7. Mr. Stretton then raised the issue again on direct appeal, where it was denied by the Pennsylvania Supreme Court. *Randolph*, 873 A.2d at 1281-82.

Although this claim was exhausted at trial and on direct appeal, and thus is not procedurally defaulted, this Court is additionally able to consider it because Mr. Randolph has made a showing that this case involves a miscarriage of justice, as described above. *See Schlup*, 513 U.S. at 327.

3. The Pennsylvania Supreme Court's Opinion Denying Relief was Unreasonable Under 28 U.S.C. § 2254(d).

The Pennsylvania Supreme Court's opinion on direct appeal does not constitute a merits ruling on multiple aspects of this claim. To the extent it does constitute a merits ruling, it was both contrary to and an unreasonable application of clearly established federal law, and represents an unreasonable determination of

the facts in light of the state court record. 28 U.S.C. § 2254(d)(1), (2). The state court opinion is infirm in multiple respects.

First, the Pennsylvania Supreme Court did not address anywhere in its opinion issues raised as to Mr. Welch's ineffectiveness and as to the trial court's failure to address the debilitating conflict of interest between Mr. Randolph and Mr. Welch. These issues were argued at length in the direct appeal brief. *See*, *e.g.* Direct Appeal Brief at 37 ("As the trial progressed, the defense was totally unprepared as evidenced by the fact that they were still interviewing and looking for alibi witnesses even when the defense was being presented."); *see also id.* ("Suffice it to say the record was clear that there had been a major breakdown in communication and trust between Mr. Welch and Mr. Randolph. Mr. Thomas, who was brought in to assist Mr. Welch by Judge Hoover at the very end, was a very fine lawyer but inexperienced and had never tried a homicide case before. Further, Mr. Welch was running for District Attorney in Perry County in the primary election that was scheduled for the end of May of 2003."); *id.* at 41 ("Mr. Randolph had repeatedly complained his trial counsel had not met with him and also complained repeatedly his trial counsel had not investigated the case. The post trial hearing confirmed the complete lack of real trial preparation"); *id.* at 44 ("the record was replete with the fact that Mr. Welch and Mr. Randolph were not

getting along and there was no cooperation. The record was replete that Mr. Welch was not prepared and had not interviewed witnesses or even utilized his investigator. Post trial motions on after discovered evidence clearly demonstrates the lack of trial preparation."). Despite the presence of these arguments, neither Mr. Welch's performance nor the conflict between Mr. Randolph and Mr. Welch garners even a single mention in the Pennsylvania Supreme Court opinion. As such, there is no merits ruling on those issues and this Court must review them de novo. *Appel*, 250 F.3d at 211.

To the extent that the Pennsylvania Supreme Court's opinion could theoretically be considered a merits ruling regarding Mr. Welch's ineffectiveness or the conflict of interest, it is unreasonable under both § 2254(d)(1) and (d)(2). The Pennsylvania Supreme Court's opinion is contrary to and an unreasonable application of clearly established federal law under § 2254(d)(1) because the state court neither cites, nor discusses, any law relevant to ineffective assistance of counsel or conflicts of interest; it does not even mention those concepts. Moreover, it is an unreasonable determination of the facts under § 2254(d)(2) insofar as it completely ignores every fact that is pertinent to these issues. Nowhere does the Pennsylvania Supreme Court address the fact that Mr. Welch: was running for District Attorney of a neighboring county at the time of Mr.

Randolph's trial; did not employ an investigator until shortly before trial, and then did not use him; performed virtually no work on the case, and then passed off his responsibilities to Mr. Thomas at the last moment; did not communicate with his client, and by the time of trial was not even on speaking terms with him; and got into numerous on the record arguments with his client where he openly disparaged Mr. Randolph in the presence of the court and the prosecutor. Moreover, the Pennsylvania Supreme Court also makes no mention of the fact that the trial court made no inquiry into the reasons behind the breakdown in the relationship between Mr. Randolph and Mr. Welch. It is difficult to imagine how a court could reasonably decide a constitutional claim based upon those facts without making even passing reference to the facts themselves.

On those issues the Pennsylvania Supreme Court did address, the opinion was unreasonable under both § 2254(d)(1) and (d)(2). The Pennsylvania Supreme Court first treated the denial of counsel of choice issue as if it were simply a matter of the denial of Mr. Stretton's motion for a continuance. *Randolph*, 873 A.2d at 1281. The Pennsylvania Supreme Court treated the matter as one that was fully within the trial court's discretion and could not be overturned absent an abuse of discretion. *Id.* To the extent this analysis played a role in the Pennsylvania Supreme Court's decision, it is both contrary to and an unreasonable

application of federal law, as it has nothing to do with Mr. Randolph's Sixth Amendment right to counsel of choice. Williams *v. Taylor*, 529 U.S. 362, 414 (2000) ("It is impossible to determine . . . the extent to which the [state court's] error . . . affected its ultimate finding that [the petitioner] suffered no prejudice"); *cf. Appel v. Horn*, 250 F.3d 203, 211 (3d Cir. 2001) (granting habeas relief under de novo review where "because the Pennsylvania Supreme Court recharacterized Appel's claim as arguing that 'stand-by counsel' were ineffective . . . it failed to adjudicate Appel's denial of counsel claim on the merits.").

The Pennsylvania Supreme Court did proceed to analyze the issue of counsel of choice, but in doing so it unreasonably allowed the trial court's singular focus on its schedule to trump a criminal defendant's Sixth Amendment right. Citing its own prior case law, the state court determined that "the right of the accused to choose his own counsel, as well as the lawyer's right to choose his clients, must be weighed against and may be reasonably restricted by the state's interest in the swift and efficient administration of criminal justice." *Id.* at 1282 (citing *Commonwealth v. Robinson*, 364 A.2d 665, 674 & n.13 (Pa. 1976)). A criminal defendant's bedrock constitutional rights cannot be so easily and casually swept aside out of preemptive considerations for the court's calendar and the convenience of the prosecution. Moreover, the Pennsylvania Supreme Court did

not actually conduct the balancing test it purported to apply. The only consideration cited by the court was that of convenience to the trial court. Thus, the Pennsylvania Supreme Court here again issued a ruling that was both contrary to and an unreasonable application of clearly established federal law.

The Pennsylvania Supreme Court's opinion was also unreasonable in light of the record facts, which it unreasonably considered. *See Williams v. Taylor*, 529 U.S. 362, 398 (2000) (finding state court unreasonable and granting habeas relief where the state court "failed to evaluate the totality of the available" evidence). In affirming what it perceived as a discretionary decision by the trial court, the Pennsylvania Supreme Court ruled as follows:

> The trial court denied appellant's request for a continuance but gave private counsel the opportunity to participate and was willing to accommodate his schedule and allow him time to prepare following jury selection. However, private counsel never showed up at trial or during sentencing.

Randolph, 873 A.2d at 1282.

The Pennsylvania Supreme Court's recitation of facts is simply not supported by the record. The trial court absolutely was *not* "willing to accommodate [Mr. Stretton's] schedule and allow him time to prepare following jury selection." *Id.* After stating that the dates for jury selection were "etched in stone," and thus would not be moved despite Mr. Stretton's competing court dates,

the court simply stated that he would "consider" building in a few days between the conclusion of jury selection and the beginning of the guilt phase for Mr. Stretton to get up to speed. NT 5/1/03 at 19-20. But on the first day of jury selection, at a time when the court knew Mr. Stretton would be otherwise occupied with his previously scheduled court date, the trial court entered an order refusing to accept Mr. Stretton's entry of appearance because he was not present at that time. NT 5/5/03 at 9-10. The court then simply stated that if Mr. Stretton were to show up later and re-file his entry of appearance, it would reconsider the matter at that point. *Id.* at 10.

The Pennsylvania Supreme Court's decision was thus counterfactual and failed to take into account the full circumstances surrounding Mr. Stretton's entry of appearance, making its ruling unreasonable. *Williams*, 529 U.S. at 398. Expressing a willingness to accommodate someone's schedule, but then plowing ahead in their absence with foreknowledge that they would be unavailable does not constitute an accommodation. Indeed, Mr. Stretton, who eventually represented Mr. Randolph on direct appeal, filed a petition for reconsideration following the Pennsylvania Supreme Court's opinion that reiterated precisely this point. In the petition, Mr. Stretton noted that he has represented numerous clients in front of the Pennsylvania Supreme Court in his thirty-two years of practice, and

"has never been as upset with the rationale in a decision as in this case." Pet. for Reargument at 6.

Moreover, had the trial court ultimately granted its limited "accommodation" of a couple of extra days to prepare, even that would have been a severe curtailment of Mr. Randolph's constitutional right. Permitting an attorney, no matter how skilled, a matter of just a few days in order to get up to speed on a capital double homicide trial is patently unreasonable. It is even more unreasonable given that this case involved two additional shooting incidents and over a thousand pages of discovery. It is simply not possible to provide constitutionally adequate representation in such a serious case in such a compressed time frame.

For all of the above reasons, this Court should rule that the state court decision was unreasonable and thus does not serve as a barrier to habeas relief.

4. Federal Review is not Barred by *Teague v. Lane* Because Mr. Randolph's Claim does not Rely on a New Constitutional Rule.

The Supreme Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989), discusses the circumstances under which new constitutional rules may be given retroactive effect. Under *Teague*, new rules may only be given retroactive effect if they meet one of two narrow exceptions. *Teague*, 489 U.S. at 307 (setting forth

two exceptions). *Teague* only comes into play, however, in the context of *new* rules. A "case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Id.* at 301. In other words, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* (emphasis in original).

Federal review of this claim is not barred by *Teague* because the claim does not rely on a new rule. The rule that the Sixth Amendment guarantees a criminal defendant the right to be represented by his counsel of choice was firmly established at the time of his trial and direct appeal. It was beyond dispute at the time of Mr. Randolph's trial that the Sixth Amendment protects the right to one's counsel of choice. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-25 (1989) ("Nor does the Government deny that the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds"); *Powell*, 287 U.S. at 53. Given that the rule relied upon by Mr. Randolph is not new, analysis of the *Teague* exceptions is not required.

5. An Evidentiary Hearing is Permitted and Warranted.

A federal evidentiary hearing is appropriate when a habeas petition alleges facts which, if proven, would entitle the petitioner to relief, and there is a material dispute about those facts. *See Townsend v. Sain*, 372 U.S. 293, 312-19 (1963), *overruled in part on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). In deciding whether to grant a hearing, a court must accept a petitioner's factual allegations as true, and view those "factual assertions in the light most favorable to him." *Zilich v. Reid*, 36 F.3d 317, 321 (3d Cir. 1994). Where the petitioner makes a prima facie showing that the facts (assumed to be true) entitle him to relief, an evidentiary hearing should be granted. *Siehl v. Grace*, 561 F.3d 189, 198 (3d Cir. 2009). All of these requirements are satisfied for the reasons set forth above.

Section 2254(e)(2) does not prevent this Court from granting an evidentiary hearing. Under section 2254(e)(2), a habeas petitioner must demonstrate that he was not at fault for failing to develop in state court the evidence he is now requesting the federal court to consider, or demonstrate that he can meet two narrow exceptions before an evidentiary hearing may be held.[25] *See Williams v.*

[25] If the petitioner was at fault, he must satisfy one of the two exceptions identified in the statute. Because Mr. Randolph was not at fault, the applicability of those exceptions is irrelevant to this Court's analysis.

Taylor, 529 U.S. 420, 430 (2000) (holding that a petitioner is at fault if he failed to exercise diligence in developing and presenting evidence). Here, section 2254(e)(2) does not apply because Mr. Randolph diligently attempted to develop the factual basis of his claims in state court. He continuously attempted to place his concerns regarding Mr. Welch's representation on the record throughout pre-trial and trial proceedings, yet was stymied at every turn by the trial court.[26]

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[26] An example of Mr. Randolph's efforts being stymied took place at the pre-trial hearing on April 3, 2003:

Mr. Randolph:	With all respect, I was going to ask you if tonight if I can prepare a whole reason why and give you proof that Mr. Welch can't be my counsel, would you accept that if I give it to you tomorrow? I got a whole list. Could you please do that?
The Court:	I think we've been through this, that you – what I have seen in this case, I just don't think I would take Mr. –
Mr. Randolph:	There's a lot of things you probably don't even know.
The Court:	And I may not know lots of things about the case.
Mr. Randolph:	That would be my whole reason of going back and preparing that for you tonight, and you can bring me down tomorrow. And that would be my whole thing why Mr. Welch really shouldn't be in on my case.
The Court:	You'll have all those reasons that you're going to show me, that you want to show me tomorrow, you're going to have those reasons and you can present those in a proper time in a proper place but right now –

When Mr. Stretton was ultimately permitted to take over Mr. Randolph's representation during formal sentencing, he immediately attempted to develop an additional record, but was again shut down by the trial court. Mr. Stretton made a proffer regarding trial counsel's unpreparedness, regarding what he (Stretton) would have done had he been permitted to represent Mr. Randolph, and regarding the breakdown in communication between Mr. Randolph and Mr. Welch. NT 7/10/03 at 5-6. Mr. Stretton specifically requested the ability to develop a fuller record at this hearing. *Id.* at 5 ("it's our request also that Your Honor continue the sentencing hearing until I can get the notes of testimony so I can be more precise in these motions for extraordinary relief."). The trial court denied Mr. Stretton's motion, and denied his request to make a fuller record. *Id.* at 12 (trial court stating that "we had a phone conference on the record with Mr. Stretton and counsel. And

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Mr. Randolph:	I'm not trying to –
The Court:	You can do those – you can file those at a later stage in the proceedings. Those claims will always be there for you. But I am at this point –
Mr. Randolph:	What if –
The Court:	No. The answer is no. I'm not going to have some other proceeding. I've made the decision.

NT 4/3/03 at 17-18.

we denied the continuance. We made a record. I can't make it any more of a record."); *see also id.* at 14 ("I think the record will speak for itself. I can't make any more of a record than I believe we did in this case. By delaying or granting the petition for extraordinary relief, I don't think it's going to be an additional aid to the Court in ultimately those issues."). *See Hardcastle v. Horn*, 368 F.3d 246, 261 n.6 (3d Cir. 2004) ("[P]ost-AEDPA, evidentiary hearings are permitted where, as here, the state courts fail[] to resolve the factual issue on which [the petitioner's] habeas petition rests. In such cases the failure to develop the factual record would not be [petitioner's] fault." (citations omitted) (internal quotation marks omitted)). As noted above, Mr. Stretton also raised the claim, with a detailed factual presentation, on direct appeal.

Finally, this Court may grant a hearing to address questions of procedural default, and whether Mr. Randolph overcomes any procedural default through proof that his convictions and death sentences represent a miscarriage of justice. *See Holloway v. Horn*, 355 F.3d 707, 716 (3d Cir. 2004) (district court "has authority to grant a hearing on a petitioner's ability to establish cause to excuse a procedural default, and therefore § 2254(e)(2) is inapplicable to those hearings."); *Cristin v. Brennan*, 281 F.3d 404, 412-13 (3d Cir. 2002).

In sum, Mr. Randolph is entitled to an evidentiary hearing to establish all material disputed facts which, if proved, would entitle him to relief.

B. As a Result of Court Error, Police and Prosecutorial Misconduct, and Ineffective Assistance of Counsel, Compelling and Substantial Evidence of Petitioner's Innocence Was Not Presented to the Jury in Violation of Petitioner's Sixth, Eighth and Fourteenth Amendment Rights.

1. Mr. Randolph's Constitutional Rights were Violated.

As discussed above, and as counsel intends to establish at an evidentiary hearing, Mr. Randolph is innocent. A combination of trial counsel's poor performance, trial court error, and prosecutorial misconduct served to violate Mr. Randolph's constitutional rights and prevent the jury from being able to consider evidence supporting his innocence.

a. Counsel was Ineffective in Failing to Develop and Present Readily Available Evidence Demonstrating that Others Had Motive, Means, and Opportunity to Commit the Murders.

One of defense counsel's most fundamental duties in any case is "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691; *see also* ABA STANDARDS FOR CRIMINAL JUSTICE, 4-4.1 (2d ed. 1982 Supp.) ("[i]t is the duty of

the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case").[27]

Moreover, a criminal defendant may not be denied the right to a fair opportunity to defend against the state's accusations. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process."); *Davis v. Alaska*, 415 U.S. 308 (1974); *United States v. Cronic*, 466 U.S. 648, 656 (1984); *California v. Trombetta*, 467 U.S. 479, 485 (1984); *Rock v. Arkansas*, 483 U.S. 44, 51 (1987). Whether by court error or trial counsel's ineffectiveness, the denial of these fundamental rights requires relief.

The evidence described above was placed in the lap of trial counsel through the police reports of the investigation following the Todd and Pat's Bar shooting. The police gave Mr. Welch substantial evidence demonstrating that: (1) the Easter group's assaultive and other criminal activities gave numerous individuals motives

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[27] This precise national standard of conduct was referenced by the United States Supreme Court in *Strickland*, 466 U.S. at 688-89, *Wiggins v. Smith*, 539 U.S. 510, 524 (2003), and *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) as national guides to determining what constitutes reasonable attorney conduct. *See also Marshall v. Cathel*, 428 F.3d 452, 467 (3d Cir. 2005).

to harm them; (2) at least one other group, the Oliver group, was admittedly in the vicinity of Todd and Pat's Bar at or around the time of the shootings, looking for the Easter group, armed, and wearing clothing similar to that described by witnesses to the shootings; and (3) at least one other individual, Eddie Capers, had a motive and means to arrange or commit these shootings. Despite this, Mr. Welch presented little or nothing in defense of these charges.

One of the most basic defenses to any crime is that somebody else actually did it. Here, counsel had at their disposal substantial and compelling evidence which strongly suggested that persons other than Mr. Randolph actually committed the murders. Mr. Welch's performance in failing to marshal this evidence at trial is deficient to its core.

The second prong of the *Strickland* analysis requires a demonstration of prejudice. Here, prejudice is manifest as the prosecution had no physical evidence connecting Mr. Randolph to these crimes and relied upon unreliable, tainted, and specious witness testimony to support its charges. Indeed, as the evidence set forth above (and that counsel will present at an evidentiary hearing) demonstrates that Mr. Randolph is innocent. Under these circumstances, relief is required.

b. As a Result of Court Error, Prosecutorial and Police Misconduct, and Ineffective Assistance of Counsel, Substantial and Compelling Evidence Directly Disputing the Key Prosecution Witnesses Was Not Presented to the Jury in Violation of Mr. Randolph's Sixth, Eighth, and Fourteenth Amendment Rights.

Although there were many others who witnessed the shootings in each of the three incidents, only five witnesses total identified Mr. Randolph as being involved (2 witnesses to the Todd and Pat's shooting, 2 to the McClay shooting, and one to the Roebuck's Bar shooting). The prosecution had no physical evidence connecting Mr. Randolph to any of these incidents. Thus, the prosecution's case rose and fell on the reliability and veracity of these five witnesses. Each of these witnesses had motives to lie, yet those motives were not disclosed to the jury.

First, counsel was ineffective for failing to investigate the circumstances of any of the three shootings, including failing to interview any witnesses, although evidence was available that would have undercut the credibility of all five witnesses who testified. As described in the factual proffer, *supra*, each of these five witnesses had serious weaknesses in their testimony that any competent counsel would have placed in front of the jury. Appointed counsel's performance constituted deficient performance. *Strickland*, 466 U.S. at 691 (failure to

investigate constitutes deficient performance). As the extensive proffer makes clear, Mr. Randolph was prejudiced by this failing.

Further, Mr. Randolph's rights were violated by the introduction of Mr. Campbell's preliminary hearing testimony at trial. The Due Process Clause requires a prosecutor to disclose in a timely fashion evidence favorable to the accused that is material to either guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 153-56 (1972); *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). A prosecutor's duty to disclose is especially important in a capital case. *Kyles*, 514 U.S. at 422 (in assessing a *Brady* claim the court acknowledged that its "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case").

"Favorable evidence" under *Brady* includes evidence that impeaches the prosecution's theory or witnesses. *Bagley*, 473 U.S. at 676 (*Brady's* disclosure requirements apply to any materials that, whatever their other characteristics, can be used to develop impeachment of a prosecution witness); *Napue,* 360 U.S. at 269 ("[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence").

As the prosecution was well aware of the strong likelihood that it would be relying on Mr. Campbell's preliminary hearing testimony at trial (there is no other explanation for the prosecution's limited disclosure of the documents it did turn over prior to cross-examination), the failure to turn over, in a timely fashion, all the other exculpatory evidence described above violated Mr. Randolph's Sixth, Eighth, and Fourteenth Amendment rights.

Even if the prosecution was under no duty to turn over this evidence at the time of the preliminary hearing, and it was, counsel was again ineffective for failing to argue that this evidence precluded the admission of Mr. Campbell's preliminary hearing testimony or, at the least, failing to seek to admit the evidence described above once the court granted the prosecution's motion to admit the preliminary hearing testimony. Mr. Randolph was prejudiced by counsel's failings, as the significant weaknesses in Mr. Campbell's testimony were never disclosed to the jury.

c. As a Result of Police Misconduct, the Jury's Verdict Was Based on False and Misleading Evidence in Violation of Mr. Randolph's Sixth, Eighth, and Fourteenth Amendment Rights.

Members of the Harrisburg Police Department – specifically Investigator Lau and Officer Heffner – engaged in a pattern of coercive conduct in an attempt to bolster the Commonwealth's weak case against Mr. Randolph. The prosecution

withheld the true circumstances surrounding the police interrogations and coercion that resulted in false and misleading testimony. The prosecution's failure to disclose this evidence violated Mr. Randolph's due process rights as well as his rights to a fair trial, confrontation and cross-examination as guaranteed by the Sixth, Eighth, and Fourteenth Amendments. Additionally, the use of false, inaccurate or misleading prosecutorial testimony deprives a defendant of a fair trial if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." *Napue v. Illinois*, 360 U.S. 264, 271 (1959); *Giglio v. United States*, 405 U.S. 150 (1972); *Carter v. Rafferty*, 826 F.2d 1299 (3d Cir. 1987). For this reason as well, Mr. Randolph was denied his Sixth, Eighth and Fourteenth Amendment rights.

Mr. Welch, for his part, was ineffective for failing investigate and develop evidence of police misconduct at trial, although it could have been ascertained had Mr. Welch read the discovery, including witness statements, or performed any investigation. Counsel's constitutionally inadequate investigation constituted prejudicially deficient performance in violation of the Sixth, Eighth, and Fourteenth Amendments.

d. Mr. Randolph was Denied His Sixth, Eighth and Fourteenth Amendment Rights Because the Prosecution Failed to Disclose Evidence, Which Was in the Possession of the Prosecuting Police Department, of An Individual Who Confessed to the Todd and Pat's Bar Shooting.

Following trial and sentencing, the prosecution turned over to counsel documents indicating that the Johnstown Police had notified the Harrisburg Police of evidence of another potential suspect in the Todd and Pat's Bar shootings. Andrew Stanko notified the Johnstown Police that he and Alexander Bush, Jr. had a conversation in which Mr. Bush admitted to committing a shooting in a bar in Harrisburg. Although the report was in the custody of the Harrisburg Police Department, it was never turned over to the defense. The police did not follow-up on the report until after the prosecution had obtained Mr. Randolph's conviction and death sentence.[28]

The prosecution is constitutionally obligated to turn over exculpatory evidence. *Brady*, 373 U.S. at 87. Evidence that someone other than the accused committed the crimes is obviously exculpatory. The failure to disclose all material evidence favorable to an accused violates due process whether or not the

[28] Although Mr. Stanko backed down from his original statement to the Johnstown Police, that occurred only after interrogation by Investigator Lau and Officer Heffner.

prosecutor acted in good faith. *Brady*, 373 U.S. at 87. The prosecutor is responsible for "any favorable evidence known to the others acting on the government's behalf, including the police." *Kyles*, 514 U.S. at 437; *see also id.* at 438 (knowledge of favorable evidence "known . . . to police investigators and not to the prosecutor" is imputed to the trial prosecutor). A prosecutor is responsible for turning over evidence in the hands of other state agencies, even if the failure to disclose is legitimately inadvertent. *Strickler v. Greene*, 527 U.S. at 275 n.12 (1999) (citing *Kyles*, 514 U.S. at 437); *see also United States v. Risha*, 445 F.3d 298 (3d Cir. 2006) (finding that federal prosecutors were obligated under *Brady* to disclose favorable evidence arising out of state court prosecution of material witness). Further, evidence is considered suppressed under *Brady* either if it was never disclosed or if any disclosure was too late for the defendant to make use of the evidence. *Boss v. Pierce*, 263 F.3d 734, 740 (7th Cir. 2001). Accordingly, there is no question that the above-described evidence should have been disclosed pretrial under clearly established federal constitutional standards.

The withheld evidence was also material within the meaning of *Brady*. First, Mr. Randolph does not have to demonstrate that the evidence regarding the other suspects eliminates any and all other possibilities. Instead, materiality for purposes of a *Brady* violation is established when a defendant demonstrates:

> [A] 'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. Accordingly, a 'reasonable probability' of a different result is shown when the Government's evidentiary suppression 'undermines confidence in the outcome of the trial.'

Kyles at 434, *quoting United States v. Bagley*, 473 U.S. 667, 678 (1985).

Thus, materiality exists when the withheld evidence could have provided a "reasonable doubt" about a defendant's guilt. *California v. Trombetta*, 467 U.S. 479, 485 (1984) ("the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt"); *United States v. Hill*, 976 F.2d 132, 135 (3d Cir. 1992) (same); or when the withheld evidence had "any adverse effect" upon the defendant's ability to prepare for trial or present a defense. *Bagley***,** 473 U.S. at 683 ("the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case"). As the Third Circuit noted:

> A defendant is entitled to a new trial where there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is [defined as] a probability sufficient to undermine confidence in the outcome. This court has recognized that the Bagley inquiry requires consideration of the totality of the circumstances,

> including possible effects of non-disclosure on the defense's trial preparation.

United States v. Perdomo, 929 F.2d 967, 972 (3d Cir. 1991) (internal citations omitted).[29] Moreover, the determination of materiality as to undisclosed evidence cannot be considered in a vacuum. Instead, the courts are required to consider the "cumulative effect of all such evidence suppressed by the government." *Kyles* at 421. *See also Wilson v. Beard*, 589 F.3d 651, 659 (3d Cir. 2009) (citing *Kyles).*

Here, even if the jury did not believe that Mr. Bush was the actual murderer, there is at least a reasonable probability that the evidence would have caused the jury to doubt Mr. Randolph's guilt – especially in light of the above-described evidence further calling into question the credibility and reliability of the prosecution's case. *Cf. Kyles*, 514 U.S. at 436 (*Brady* materiality must be "considered collectively, not item by item."). The mountain of evidence that should have been, but was not, presented to the jury suggesting other potential suspects was overwhelming. In light of the fact that Mr. Randolph's convictions

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[29] *See also Wilson v. Whitley*, 28 F.3d 433, 438 (10th Cir. 1994) ("*Bagley* evidences concern with any adverse effect that the prosecutor's failure to respond [to the discovery request] might have had on the preparation or presentation of the defendant's case") (quotations and citations omitted); *United States v. Spagnoulo*, 960 F.2d 990, 994 (11th Cir. 1992) (*Brady* violation found when withheld evidence "could have" altered defense strategy); *Smith v. Secretary*, 50 F.3d 801, 827 (10th Cir. 1995) (same).

rest almost entirely on the dubious testimony of a small handful of suspect witnesses, the prejudice that flows from a withholding of this magnitude is substantial.

e. Mr. Randolph's Testimony

The available but unpresented evidence described in this pleading would have constituted a strong case for innocence. Because of trial counsel's failings, the denial of Mr. Randolph's counsel of choice, court error, and prosecutorial and police misconduct, it was not heard by the jury. Had Mr. Randolph been represented by his counsel of choice, the unpresented evidence would have well fit Mr. Randolph's own trial testimony,[30] which Mr. Stretton described on direct appeal as follows:

> Samuel Randolph then testified. (5/12/03 N.T. 77) He stated he was involved in an altercation on September 2, 2001 at Roebuck's Bar. (5/12/03 N.T. 77, 78) He indicated Jerome Britain was also in the bar at the time. (5/12/03 N.T. 79) He testified he was hit in the head with a bottle. (5/12/03 N.T. 80)
>
> After the altercation, he stated he went back to the bar his mother owns and which he operated. (5/12/03 N.T. 81) Mr. Randolph stated he was at his mother's bar again on the evening of September 2, 2001. (5/12/03 N.T. 85) He stated he had gone into Mr. Roebuck's bar briefly to talk to him and then came back. (5/12/03 N.T. 85)

[30] It is worth note that Mr. Randolph was examined by Mr. Thomas, rather than Mr. Welch, when he testified. NT 5/12/03 at 77.

> On September 19, 2001, Mr. Randolph stated he was working at his mother's bar. (5/12/03 N.T. 88) He stated he was at his mother's bar the evening of the murders, bartending and playing pool. (5/12/03 N.T. 88, 89 and 90) Mr. Randolph indicated he would speak to Mr. Layton (Dooger) several times each day. (5/12/03 N.T. 90, 91) Mr. Randolph testified he was not involved in the murders or shooting and had no reason to do so. (5/12/03 N.T. 93) On cross examination, Mr. Randolph indicated he fled from the police on October 24, 2001. (5/12/03 N.T. 95, 96) He stated he did not know why the police officers were there and when he saw their guns drawn, he then fled. (5/12/03 N.T. 96) He stated he left the jurisdiction because the police officers were harassing him. (5/12/03 N.T. 98) Mr. Randolph denied giving a statement to Detective Carter on December 13, 2001. (5/12/03 N.T. 100) Mr. Randolph denied knowing anything about the mask and did not know how any mask was found in his truck. (5/12/03 N.T. 111)

Direct Appeal Brief at 22. Mr. Randolph's testimony was obviously consistent with his own innocence, and consistent with the corroborating evidence of his innocence that should have been, but was not, presented.

2. This Claim was Partially Exhausted in State Court; However, this Court Should Consider the Claim in its Entirety Because Mr. Randolph is Can Demonstrate a Miscarriage of Justice.

This claim was only partially exhausted in state court; however, that does not preclude this Court from considering it in its entirety. As discussed above, exhaustion is excused where a habeas petitioner establishes that his execution would result in a fundamental miscarriage of justice because he is innocent. *House*, 547 U.S. at 536; *Schlup*, 513 U.S. at 324. This claim, and the extensive

factual proffer at the beginning of this pleading, have established that any reasonable juror would have harbored a reasonable doubt as to Mr. Randolph's guilt had they heard the unpresented evidence described herein.

3. 28 U.S.C. § 2254(d) Does not Apply to Most of this Claim, and Mr. Randolph Satisfies § 2254 (d) on the Portion of the Claim that the State Court Reached.

As Mr. Randolph satisfies the *Schlup* miscarriage of justice exception to exhaustion/procedural default, the merits of this claim are properly before this Court. Once a habeas petitioner has demonstrated his innocence under that standard, this Court's review of the underlying constitutional claims is de novo, and § 2254 prohibitions are inapplicable. *See Cone v. Bell*, 556 U.S. 449, 472 (2009) (de novo review where claim not adjudicated on the merits in state court). This is necessarily the case, given that the state court has not ruled upon the majority of this claim.

As to the portions that were ruled upon by the Pennsylvania Supreme Court, § 2254(d) still does not preclude relief. The first portion of this claim upon which the state court ruled was that the statements presented on post-trial motions from Ms. Taylor, Mr. Sellars, Mr. Wells, and Donald Roebuck does not warrant relief because it "did not constitute after-discovered evidence" because it "related only to credibility." *Randolph*, 873 A.2d at 1284. A decision that simply states that the

information did not constitute after-discovered evidence as a matter of state law does not resolve the constitutional question of whether counsel was ineffective in failing to marshal this evidence at trial, thus does not constitute an adjudication on the merits to which this Court must defer.

The state court also found no error with respect to the undisclosed evidence of Mr. Bush's statement to police, reasoning that Mr. Bush's statement would not have been admissible as a state evidentiary matter. *Randolph*, 873 A.2d at 1284. The state court's adjudication here also was contrary to or an unreasonable application of clearly established federal law. The question of whether the statement would have been admissible as a state evidentiary matter does not address the issue of whether it constituted material, exculpatory evidence within the meaning of *Brady*. Withheld evidence need not itself be admissible in order for it to be material within the meaning of *Brady*. *Bagley*, 473 U.S. at 683 (holding that the materiality analysis must consider not only the effect that the prosecutor's failure to disclose would have had on the presentation of the defendant's case, but the preparation of the defense as well). Because the Pennsylvania Supreme Court's opinion was unreasonable, this Court must review the claim de novo.

4. Federal Review is not Barred by *Teague v. Lane* Because Mr. Randolph's Claim does not Rely on a New Constitutional Rule.

Federal review of this claim is not barred by *Teague* because the claim does not rely on any new rule. Each of the cases and concepts relied upon in this claim was long-established at the time Mr. Randolph's conviction became final. Given that the rules relied upon by Mr. Randolph are not new, analysis of the *Teague* exceptions is not required.

5. An Evidentiary Hearing is Permitted and Warranted.

As demonstrated above, the Court may grant a hearing to address questions of procedural default, and whether Mr. Randolph overcomes any procedural default through proof that his convictions and death sentences represent a miscarriage of justice. *See Holloway v. Horn*, 355 F.3d 707, 716 (3d Cir. 2004) (district court "has authority to grant a hearing on a petitioner's ability to establish cause to excuse a procedural default, and therefore § 2254(e)(2) is inapplicable to those hearings."); *Cristin v. Brennan*, 281 F.3d 404, 412-13 (3d Cir. 2002).

C. Mr. Randolph is Entitled to Relief Because the Trial Court Precluded Him and His Counsel from Being Present During Communications with the Jury Regarding Possible Outside Influences, in Violation of the Sixth, Eighth and Fourteenth Amendments.

1. Mr. Randolph's Constitutional Rights were Violated.

Prior to commencing trial, the court spoke to the jurors, without counsel or Mr. Randolph present, to determine whether or not they had been exposed to outside influences that would impair their ability to be fair and impartial. *See* NT 5/9/03 at 4-5; *id.* at 97-103; NT 5/12/03 at 16-18. Precluding Mr. Randolph and his counsel from these proceedings to determine whether or not jurors were unduly influenced or incapable of rendering a fair and impartial verdict violated Mr. Randolph's Sixth, Eighth, and Fourteenth Amendment rights for a number of reasons.

First, it violated Mr. Randolph's due process rights to presence and an opportunity to be heard. *Powell v. Alabama*, 287 U.S. 45, 67 (1932); *Armstrong v. Manzo*, 380 U.S. 545, 550 (1948). Second, it violated Mr. Randolph's clearly established constitutional right to the assistance of counsel at all "critical stages" of the proceedings. *E.g.*, *Coleman v. Alabama*, 399 U.S. 1, 6 (1970). There is no question that a hearing to determine potential juror bias or outside influence is a "critical stage" of the proceedings. Third, it violated Mr. Randolph's Sixth and

Fourteenth Amendment rights to an impartial jury. *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Where a juror harbors prejudice against the defendant or in favor of the prosecution the impartiality of the jury is violated. In order to adequately protect the right to an impartial jury, there must be "an adequate voir dire to identify unqualified jurors," as "[w]ithout an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Morgan v. Illinois*, 504 U.S. 719, 729-30 (1992). Accordingly, denying adequate voir dire violates the accused's rights to an impartial jury, due process, and effective assistance.

By precluding Mr. Randolph and his counsel from attending the morning proceedings wherein the court inquired about outside influence, the court deprived Mr. Randolph of each of these fundamental rights. Moreover, as the record demonstrates, a number of jurors described exposure to various outside influences. *See*, *e.g.*, NT 5/9/03 at 5; NT 5/12/03 at 16-17. Counsel and Mr. Randolph were deprived of the constitutionally required voir dire in order to ensure that, despite such exposure, the jurors were capable of rendering a fair and impartial verdict.

Indeed, as described further below, one juror, Juror Number 3, expressed concern that she recognized persons seated with Mr. Randolph's family with

whom she had had contact as a result of her employment with Children and Youth Services. The circumstances involved removing a child from the home and animosity directed towards that juror as a result of agency decisions. NT 5/9/03 at 97-103. Although the court notified counsel of the issue, it nevertheless conducted inquiries of that juror without the presence of counsel or Mr. Randolph. *Id.* Thus, counsel was precluded from conducting voir dire of a juror who had expressed concern about her ability to be impartial as a result of her contacts with persons associated with Mr. Randolph's family. Under these circumstances, Mr. Randolph has demonstrated prejudice, and that the court's constitutional errors were not harmless. Relief is required.

2. This Court Should Consider this Claim Because Mr. Randolph Can Demonstrate a Miscarriage of Justice.

Mr. Randolph acknowledges that this claim was not exhausted in state court, however that does not preclude this Court from considering it. As discussed above, exhaustion is excused where a habeas petitioner establishes that his execution would result in a fundamental miscarriage of justice because he is innocent. *House*, 547 U.S. at 536; *Schlup*, 513 U.S. at 324. The extensive factual proffer at the beginning of this pleading establishes that any reasonable and impartial juror would have harbored a reasonable doubt as to Mr. Randolph's guilt had they heard the unpresented evidence described herein.

3. Federal Review is not Barred by *Teague v. Lane* Because Mr. Randolph's Claim does not Rely on a New Constitutional Rule.

As discussed above, *Teague* only comes into play where the constitutional rule relied upon is new. Each of the United States Supreme Court cases cited in this claim long predate Mr. Randolph's trial. As such, *Teague* again does not apply to this claim.

4. 28 U.S.C. § 2254(d) Does not Apply to this Claim.

As Mr. Randolph satisfies the *Schlup* miscarriage of justice exception to exhaustion/procedural default, the merits of this claim are properly before this Court. Once a habeas petitioner has demonstrated his innocence under that standard, this Court's review of the underlying constitutional claims is de novo, and § 2254 prohibitions are inapplicable. *See Cone*, 556 U.S. at 472. This is necessarily the case, given that the state court has not ruled upon the claim.

5. An Evidentiary Hearing is Permitted and Warranted Under 28 U.S.C. § 2254(e)(2).

As demonstrated above, the Court may grant a hearing to address questions of procedural default, and whether Mr. Randolph overcomes any procedural default through proof that his convictions and death sentences represent a miscarriage of justice. *See Holloway v. Horn*, 355 F.3d 707, 716 (3d Cir. 2004) (district court "has authority to grant a hearing on a petitioner's ability to establish

cause to excuse a procedural default, and therefore § 2254(e)(2) is inapplicable to those hearings."); *Cristin v. Brennan*, 281 F.3d 404, 412-13 (3d Cir. 2002).

D. As a Result of Court Error and Ineffective Assistance of Counsel, Jurors Who Were Biased and Incapable of Rendering a Fair and Impartial Verdict were Not Dismissed, in Violation of Mr. Randolph's Sixth, Eighth and Fourteenth Amendments.

1. Mr. Randolph's Constitutional Rights were Violated.

"It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury." *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors"); *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (juror must "be able impartially to follow the court's instructions and evaluate the evidence"). Where a single juror harbors a prejudice against the defendant or in favor of the prosecution, the impartiality of the entire jury is compromised. *Ross*, 487 U.S. at 85.

Bias may be actual or presumed. Actual bias is demonstrated when "the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). A "conclusive presumption of implied bias" exists where a juror has a close

relationship with a participant or the issues in the trial. *Smith v. Phillips*, 455 U.S. at 222 (O'Connor, J. concurring). Under these circumstances, regardless of the existence of an actual bias, the juror must be struck as a matter of law in order to preserve a defendant's rights to due process and a fair and impartial jury. *E.g. Leonard v. United States*, 378 U.S. 544 (1964) (per curiam) (automatic disqualification required where prospective jurors heard the defendant's guilty verdict in another trial); *Taylor v. Louisiana*, 379 U.S. 466, 473-74 (1965) (juror's association with deputy sheriffs who were also key prosecution witnesses deprived the defendant of his rights to due process and a fair and impartial jury).

After the trial began, Juror Number 3 notified the court that she had had contact with persons associated with Mr. Randolph's family, Roger and Marilyn Colbreth, through her employment at Children and Youth Services. The juror told the court (without counsel or Mr. Randolph present) that she knew that the Colbreths' son was incarcerated and that the agency had determined that the Colbreths were not appropriate care-givers for their son's child. The juror also told the court that Roger Colbreth was very angry about the agency's finding. NT 5/9/03 at 98-100. When asked, the juror acknowledged that she had concerns because these individuals knew how to contact her. *Id.* at 101. Rather than requesting counsel and Mr. Randolph's presence for purposes of conducting voir

dire, the court merely asked the juror to "think about it over the weekend." *Id.* When the juror returned on Monday, she told the court (this time in the presence of counsel), that she thought she could be fair, but felt uncomfortable and uneasy. NT 5/12/03 at 5. Counsel failed to ask any questions of the juror. The court told the juror it would make a decision on dismissal at a later date. *Id.* at 5-6.

The juror's relationship with persons who were closely associated with Mr. Randolph's family placed the inquiry in the presumed bias context of the constitutional inquiry. Even if bias is not presumed, the juror's relationship with the Colbreths required dismissal. Although the juror said that she could be impartial, that statement was qualified with her fear and concerns arising out of the contentious relationship between her, her agency, and the Colbreths. Every aspect of her answers bears against any conclusion that her determination would not be impacted and impaired. Accordingly, even under the actual bias standard, Mr. Randolph has demonstrated that he was denied his Sixth, Eighth and Fourteenth Amendment rights.

Moreover, counsel was ineffective for failing to pursue the concerns clearly expressed by this juror. Rather than clarifying what the juror meant when she

stated that she felt uncomfortable and uneasy, counsel remained silent.[31] Where, as here, the issue involved a juror's bias in a capital trial, counsel could have no reasonable strategic basis for failing to inquire further and object to the juror's remaining. Accordingly, counsel's conduct constituted prejudicially deficient performance in violation of the Sixth, Eighth and Fourteenth Amendments. Relief is required.

Juror Number 5 notified the court that she saw Mr. Randolph in the hallway of the courthouse surrounded by guards. NT 5/12/03 at 7-12. Permitting the juror to observe Mr. Randolph surrounded by guards denied him of his rights to a fair and reliable trial and jury because there is a danger that the juror perceived Mr. Randolph as dangerous and/or worthy of severe punishment. *See Holbrook v. Flynn*, 475 U.S. 560, 568-569 (1986) ("In the presence of the jury, [the defendant] is ordinarily entitled to be relieved of handcuffs, or other unusual restraints, so as not to mark him as an obviously bad man").

Counsel's failure to raise these issues constitutes prejudicially deficient performance in violation of the Sixth, Eighth and Fourteenth Amendments. Counsel could have no reasonable strategic basis for failing to ensure that Mr.

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[31] Of course, counsel's determination was hampered by the court's preclusion of counsel and Mr. Randolph during the first inquiry where the juror described the nature of the contacts with the Colbreths and the animosity from Mr. Colbreth.

Randolph's jury was fair and impartial. As the court's error in failing to dismiss these jurors goes to the heart of Mr. Randolph's right to a fair trial, prejudice is demonstrated and relief is required.

2. This Court Should Consider this Claim Because Mr. Randolph Can Demonstrate a Miscarriage of Justice.

Mr. Randolph acknowledges that this claim was not exhausted in state court, however that does not preclude this Court from considering it in its entirety. As discussed above, exhaustion is excused where a habeas petitioner establishes that his execution would result in a fundamental miscarriage of justice because he is innocent. *House*, 547 U.S. at 536; *Schlup*, 513 U.S. at 324. The extensive factual proffer at the beginning of this pleading establishes that any reasonable juror would have harbored a reasonable doubt as to Mr. Randolph's guilt had they heard the unpresented evidence described herein.

3. Federal Review is not Barred by *Teague v. Lane* Because Mr. Randolph's Claim does not Rely on a New Constitutional Rule.

As discussed above, *Teague* only comes into play where the constitutional rule relied upon is new. Each of the United States Supreme Court cases cited above regarding the right to an impartial jury long predate Mr. Randolph's trial. As such, *Teague* again does not apply to this claim.

4. 28 U.S.C. § 2254(d) Does not Apply to this Claim.

As Mr. Randolph satisfies the *Schlup* miscarriage of justice exception to exhaustion/procedural default, the merits of this claim are properly before this Court. Once a habeas petitioner has demonstrated his innocence under that standard, this Court's review of the underlying constitutional claims is de novo, and § 2254 prohibitions are inapplicable. *See Cone*, 556 U.S. at 472. This is necessarily the case, given that the state court has not ruled upon the claim.

5. An Evidentiary Hearing is Permitted and Warranted Under 28 U.S.C. § 2254(e)(2).

As demonstrated above, the Court may grant a hearing to address questions of procedural default, and whether Mr. Randolph overcomes any procedural default through proof that his convictions and death sentences represent a miscarriage of justice. *See Holloway v. Horn*, 355 F.3d 707, 716 (3d Cir. 2004) (district court "has authority to grant a hearing on a petitioner's ability to establish cause to excuse a procedural default, and therefore § 2254(e)(2) is inapplicable to those hearings."); *Cristin v. Brennan*, 281 F.3d 404, 412-13 (3d Cir. 2002).

CONCLUSION

The Commonwealth's case against Mr. Randolph was extremely weak and supported almost entirely by questionable evidence. As described in this pleading and in Mr. Randolph's habeas petition, it was also plagued by serious constitutional errors. This Court should grant an evidentiary hearing in order to give Mr. Randolph the opportunity to prove his claims. Should this Court believe that one or more of Mr. Randolph's claims has been established on the existing record, it should grant relief. Mr. Randolph respectfully submits, however, that the most prudent course of action would be for the Court to hear all of the evidence first. Mr. Randolph is confident that once the Court has done so, it will reach the conclusion that Mr. Randolph should be granted habeas relief.

Respectfully submitted,

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Dated: September 25, 2013

CERTIFICATE OF SERVICE

I, Billy H. Nolas, hereby certify that on this date, I caused the foregoing motion to be served on the following person at the location and in the manner indicated below:

VIA ECF

Francis Chardo, Esquire
First Assistant District Attorney
Dauphin County District Attorney's Office
Dauphin County Courthouse
Front and Market Streets
Harrisburg, PA 17101

/s/ BILLY H. NOLAS
BILLY H. NOLAS

Dated: September 25, 2013