

**THE PENNSYLVANIA INNOCENCE PROJECT
BY:**

**Charlotte Haldeman Whitmore
Staff Attorney
Attorney No. 208724
Temple University Beasley School of Law
1719 N. Broad Street
Philadelphia, PA 19122**

**RECEIVED
FEB 03 2012
APPEALS/POST TRIAL**

**Frank DeSimone
Volunteer Attorney
Attorney No. 12359
Suite 600
1880 JFK Boulevard
Philadelphia, PA 19103**

COMMONWEALTH OF PENNSYLVANIA : PHILADELPHIA COURT OF
Respondent : : COMMON PLEAS
: : CRIMINAL TRIAL DIVISION
: :
v. : CP-51-CR-0408371-1998
: :
EUGENE GILYARD :
Petitioner : :

**FOURTH AMENDED PETITION FOR POST-CONVICTION RELIEF PURSUANT TO
42 Pa. C.S. § 9543**

TO THE HONORABLE JUDGE, PRESIDING IN THE COURT OF COMMON PLEAS
CRIMINAL TRIAL DIVISION FOR THE COUNTY OF PHILADELPHIA:

Petitioner, Eugene Gilyard, through his attorneys, Charlotte Haldeman Whitmore and Frank DeSimone, files this *Fourth Amended Petition for Post-Conviction Relief Pursuant to 42 Pa.C.S. §9543*. Mr. Gilyard seeks vacation of his conviction, a new trial, or such relief as is just and proper, and in support thereof represents:

INTRODUCTION

1. On January 8, 1998, Eugene Gilyard was arrested for the murder of Thomas Keal. On December 10, 1998, Mr. Gilyard was convicted of murder in the second degree, robbery, possession of an instrument of crime, and criminal conspiracy and was sentenced to life imprisonment.

2. Thomas Keal was shot in North Philadelphia on August 31, 1995, over two years before Mr. Gilyard was implicated in the crime. N.T. 11/20/98, 59.¹ The shooting occurred around 2:30 a.m. as Mr. Keal was leaving the seafood store he owned. N.T. 11/20/98, 59. Mr. Keal suffered three gunshot wounds to the head and one gunshot wound to the leg. N.T. 11/30/98, 390-391.

3. Tonya Keal, the decedent's daughter, witnessed her father's murder and saw the perpetrators for a few seconds from her second-story window across the street from where her father was shot. N.T. 11/23/98, 203, 290-291. Ms. Keal failed to identify Mr. Gilyard at the time of the crime, but selected his picture from a photo array two years after the murder. N.T. 12/1/98, 554. Mr. Gilyard's conviction was based exclusively on Ms. Keal's eye-witness identification.²

¹ The initials "N.T." followed by a date and page number refer to the transcript of the criminal trial in this matter, which was held from November 19 to December 10, 1998, before the Honorable David N. Savitt in the Philadelphia Court of Common Pleas.

² The Supreme Court of Pennsylvania has long recognized the difficulties surrounding eyewitness identifications, especially when an identification is the sole basis for conviction. See e. g., Commonwealth v. Sexton, 485 Pa. 17, 25 (1979); Commonwealth v. Mouzon, 456 Pa. 230 (1974); Commonwealth v. Kloiber, 378 Pa. 412 (1954). Indeed, eyewitness misidentification is the single greatest cause of wrongful convictions in the United States, playing a role in almost 75% of convictions that were later overturned through DNA testing. There were 175 instances of eyewitness misidentification in the first 239 DNA exonerations in the United States. Understand the Causes: Eyewitness Misidentification, Innocence Project, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited June 29, 2011).

4. Mr. Gilyard has maintained his absolute innocence of this crime since his arrest.

BACKGROUND

5. Early on the morning of August 31, 1995, Tonya Keal awoke to take her young son to the bathroom. N.T. 11/23/98, 191. Ms. Keal looked out of her second-floor bedroom window and saw a man pacing back and forth across the street. N.T. 11/23/98, 191-95. The man was pulling a red bandana up and down over his face. N.T. 11/23/98, 192. Ms. Keal saw this man for approximately ten seconds,³ and for five of those seconds, the bandana was not covering his face. N.T. 11/23/98, 196. At trial, Ms. Keal identified this man as Eugene Gilyard. N.T. 11/23/98, 196-97.

6. As she was heading back to bed, Ms. Keal heard a loud gunshot and immediately went to another window. N.T. 11/23/98, 202. Her view from that window was partially obstructed by a screen and a window fan. N.T. 11/23/98, 210. Ms. Keal had to peer between the blades of the fan, which was turned off, in order to see out of the window. N.T. 11/23/98, 281. Ms. Keal saw a man standing over Mr. Keal and holding a handgun to the back of Mr. Keal's head.⁴ N.T. 11/23/98, 206-207. She identified this man at trial as Lance Felder (aka Tyree Wells⁵), Mr. Gilyard's co-defendant. N.T. 11/23/98, 207. Ms. Keal testified that she saw Lance Felder shoot Mr. Keal once in the head and that she heard another shot after leaving the window to call 911. N.T. 11/23/98, 208-209.

³ During the preliminary hearing Ms. Keal said that she only saw the man with the bandana for "a couple seconds." N.T. 11/23/98, 235.

⁴ Ms. Keal indicated at trial that the gun was approximately one inch away from Mr. Keal's head when it was fired. N.T. 11/23/98, 210-211. An expert testified that there was no evidence of close-range firing, and that the gun was likely at least two feet away from Mr. Keal's head when it was fired. N.T. 11/30/98, 396-397.

⁵ Mr. Gilyard's co-defendant's true name is Lance Felder, but his docket sheet says Tyree Wells. He is referred to as Lance Felder throughout this petition. The Pennsylvania Innocence Project does not represent Lance Felder and has had no contact with him.

7. Ms. Keal testified that the man she had previously seen pacing and wearing a bandana, identified at trial as Mr. Gilyard, was holding a shotgun and standing behind Mr. Keal. N.T. 11/23/98, 207-208.

8. Ms. Keal's description of the perpetrators at trial differed from the statements she originally gave to the police. Two days after the murder, Ms. Keal told police that the man who shot her father in the head was a black male with a lighter complexion who was wearing a baseball cap and a bandana. See Police Investigation Interview of Tonya Keal, September 2, 1995, attached as Exhibit A. At that time she also told police that she saw a black male with a darker complexion and a sawed-off shotgun standing on the pavement. N.T. 11/23/1998, 330. At trial, Ms. Keal testified that the lighter-skinned male, Mr. Gilyard, was the one with the bandana and the shotgun, and the darker-skinned male, Mr. Felder, was the man who stood over her father and shot him in the head. N.T. 11/23/98, 208.

9. It was disputed at trial whether or not Ms. Keal was shown a photo array in 1995 that included a picture of Mr. Gilyard, from which she failed to identify him. Detective Dennis Dusak originally testified that Ms. Keal was not shown a photo array containing Mr. Gilyard's photo in 1995. N.T. 12/01/98, 555, 586-89. However, Detective Dusak then testified that at least four photo arrays, identified as DF3, DF4, DF5, and DF6, were shown to Ms. Keal shortly after the murder, on September 2, 1995. N.T. 12/01/98, 578. Photo array DF5 contained a photograph of Mr. Gilyard. N.T. 12/01/98, 579. Detective Dusak testified that on September 2, 1995, Ms. Keal did not identify Mr. Gilyard after looking at his picture in photo array DF5.⁶ N.T. 12/01/98, 579.

⁶ Delay between the incident and the identification is a "major factor" affecting the accuracy of eyewitness identifications. See Eyewitness Identification in Actual Criminal Cases: An Archival Analysis, Law and Human Behavior, Vol. 25, No. 5 at 481 (October 2001), available online at <http://www.springerlink.com/content/k751j065w762ujxv/>. It is highly unlikely that Ms. Keal would

10. The case was cold from September 1995 until late 1997, when it was assigned to the Special Investigations Unit and Detective Dusak began re-interviewing witnesses. N.T. 12/01/98, 542. More than two years after the murder, on December 31, 1997, Ms. Keal identified Mr. Gilyard from a photo array that was marked C-37 at trial. N.T. 12/01/98, 552, 554, 556. This array contained a photograph of Mr. Gilyard that was different from the photograph used in the 1995 photo array labeled DF5. N.T. 21/01/1998, 581. The 1997 photo array used to identify Mr. Gilyard (Mr. Gilyard's PP# is 782271) and the 1995 photo array (Mr. Gilyard is second from the left on the bottom row) are attached to this Petition collectively as Exhibit B.

11. On March 15, 1998, Ms. Keal was taken to a lineup. When Ms. Keal identified Mr. Gilyard in that lineup, she said, "Yeah, 2...I am not sure." N.T. 12/01/98, 601. However, by the time Ms. Keal testified at Mr. Gilyard's trial she was "absolutely sure"⁷ that Mr. Gilyard was the man she saw holding a shotgun at the crime scene. N.T. 11/23/98, 197.

12. Commonwealth witness Keith Williams testified that he saw two black males running away from the crime scene. N.T. 12/01/98, 440. Mr. Williams identified Mr. Felder as

mistakenly *fail* to recognize Mr. Gilyard in a photo just days after the crime, and then *succeed* in identifying him over two years later.

⁷ A well-documented phenomenon called "post-identification feedback effect" occurs when an eyewitness receives confirming feedback that her identification is correct. When a person identified by a witness is then further investigated, arrested, or put on trial, this confirms to the witness that she has identified the "right" person.

...[C]onfirming feedback does not merely inflate how confident the witness feels after the feedback; it distorts eyewitnesses' recollections of how confident they recall having been at the time of the identification. Even more surprising is that confirming feedback also distorts the eyewitnesses' recollections of their witnessing conditions (e.g., how good of a view did you have of the perpetrator?) as well as eyewitnesses' recollections of their identification behaviors (e.g., how long did it take you to make the identification?). Simply put, feedback has effects on eyewitnesses' recollections of a wide array of variables. We refer to this as the post-identification feedback effect.

Gary L. Wells and Amy L. Bradfield, Distortions in Eyewitnesses' Recollections: Can the Post-identification Feedback Effect be Moderated?, *Psychological Science* (1999).

one of the males, but he was not able to identify Mr. Gilyard and testified that he had never seen Mr. Gilyard before in his life. N.T. 12/01/98, 519, 521.

13. Aside from Ms. Keal's testimony, there was no evidence that linked Mr. Gilyard to the crime in any way.

14. On March 18, 2011, Ricky Welborn, a.k.a. "Rolex," confessed to participating in Mr. Keal's murder and stated that Mr. Gilyard was not involved. Mr. Welborn, who is currently incarcerated at SCI Frackville, gave a sworn statement to an investigator hired by Mr. Gilyard.⁸ On June 20, 2011, Ricky Welborn provided a signed certification to Pennsylvania Innocence Project staff members in which he confessed in detail to participating in Mr. Keal's murder with an unnamed friend who was not Mr. Gilyard. See Mr. Welborn's June 20, 2011 certification and certification from Pennsylvania Innocence Project staff investigator Shaina Tyler attached collectively as Exhibit C. The 1995 photo array containing Mr. Gilyard's photo (Mr. Gilyard is second from the left on the bottom row), the 1997 photo array containing Mr. Gilyard's photo (Mr. Gilyard's PP# is 782271), and an arrest photo of Ricky Welborn taken in October 1995, less than two months after the murder, are attached collectively as Exhibit D. Mr. Gilyard's 1997 photo bears a striking resemblance to Mr. Stokes' 1995 photo, while the 1995 photo of Mr. Gilyard (*i.e.* what Mr. Gilyard actually looked like at the time of the crime) is very different.

15. On June 14, 2011, Michael Griddle provided a signed certification to Pennsylvania Innocence Project staff members explaining that he was with Mr. Gilyard on the night that Mr. Keal was murdered and that Mr. Gilyard was not involved in Mr. Keal's murder. Mr. Griddle's statement corroborates Mr. Welborn's confession because he saw two men he knew as "Rolex" and "Tizz" shoot Mr. Keal. See Mr. Griddle's June 14, 2011 certification attached as Exhibit E.

⁸ Mr. Gilyard quickly moved to amend his pending PCRA petition on March 31, 2011, alleging the discovery of new evidence supporting his claim of innocence.

16. Police interviewed a woman named Donita Mickeals on September 2, 1995. Ms. Mickeals stated that she saw three men running away from the crime scene, and recognized two of them as men she knew as “Tizz” and “Rolex.” See Police Investigation Interview of Donita S. Mickeals, September 2, 1995, attached as Exhibit F. Counsel for Mr. Gilyard sent Ms. Mickeals a subpoena, but she could not be located to testify at trial. N.T. 12/02/1998, 636. In 2006, Ms. Mickeals signed an affidavit stating that she never received a subpoena for Mr. Gilyard’s trial, but that she would have testified, and is still willing to testify. See Donita Mickeals’ August 10, 2006 affidavit, attached as Exhibit G. On June 21, 2011, Donita Mickeals provided a signed certification to Pennsylvania Innocence Project staff members corroborating Mr. Welborn’s confession by confirming that she saw “Tizz” and “Rolex” running away from the crime scene. See Ms. Mickeal’s June 21, 2011 certification, attached as Exhibit H.

17. On July 7, 2011, Kenyatta Felder provided a signed certification to Pennsylvania Innocence Project staff members, corroborating Mr. Welborn’s confession and explaining that Mr. Gilyard was not involved in Mr. Keal’s murder. Kenyatta Felder stated that he was with a group of males, including Mr. Gilyard, when the crime occurred. Shortly before Mr. Keal was murdered, “Rolex” and “Tizz” approached the group, told them that they were planning on robbing a bar, and then walked toward where Mr. Keal was murdered. Kenyatta Felder then heard gunshots and saw “Rolex” and “Tizz” running away from the crime scene. See Kenyatta Felder’s July 7, 2011 certification, attached as Exhibit I.

18. On July 25, 2011, Eugene Gilyard’s mother, Christine Gilyard, provided a signed certification to Pennsylvania Innocence Project staff members, which also corroborates Mr. Welborn’s confession. Ms. Gilyard stated that on the night of Mr. Keal’s murder, immediately after hearing the gunshots, she found her son walking with Kenyatta Felder toward the crime scene. Ms. Gilyard also stated that she and her son stayed at the crime scene for about forty-five

minutes. This corroborates Mr. Welborn's statement that he and his friend, the true perpetrators, ran from the scene immediately after shooting Mr. Keal and that Mr. Gilyard was not involved.

See Christine Gilyard's July 25, 2011 certification, attached as Exhibit J.

19. On October 5, 2011, Pennsylvania Innocence Project staff members spoke to Donnell Wiggins. Mr. Wiggins grew up in the same neighborhood as Mr. Gilyard, but they were not close friends. Mr. Wiggins stated that in the late nineties, at SCI Graterford, a man he knew only as "Tizz" confessed to shooting Mr. Keal and acknowledged that Mr. Gilyard and Mr. Felder were doing time for a crime that he, "Tizz," committed. See Donnell Wiggins' October 5, 2011 certification and certification from Pennsylvania Innocence Project staff investigator Shaina Tyler attached collectively as Exhibit K.

20. On October 11, 2011, Pennsylvania Innocence Project staff members spoke to Anthony Stokes. Mr. Stokes confirmed that, as stated in Mr. Welborn's confession, Mr. Welborn shot Mr. Stokes with a sawed-off shotgun. This shooting occurred merely hours before Mr. Welborn shot Mr. Keal with a sawed-off shotgun.⁹ See Anthony Stokes October 11, 2011 certification, a certification from Pennsylvania Innocence Project staff investigator Shaina Tyler, and Mr. Stokes' discharge summary from the Hospital of the University of Pennsylvania, attached collectively as Exhibit L.

21. Since his arrest, Mr. Gilyard has steadfastly maintained his innocence of and complete lack of involvement in the crime for which he is currently serving a life sentence.

⁹ Mr. Stokes stated that Mr. Welborn shot him with a sawed-off shotgun on August 30, 1994, but that the case was never prosecuted because Mr. Stokes refused to identify his attacker. Mr. Keal was killed at 2:30 a.m. on August 31, 1995. On January 18, 2012, the Pennsylvania Innocence project received copies of Mr. Stokes' medical records from the Hospital of the University of Pennsylvania. These records confirm that Mr. Stokes was admitted to the hospital for multiple gunshot wounds on **August 30, 1995**, merely hours before Mr. Welbon shot Mr. Keal. See Exhibit L.

PROCEDURAL HISTORY

22. Mr. Gilyard's trial took place in the Philadelphia Court of Common Pleas before the Honorable David N. Savitt, from November 19, 1998 to December 10, 1998.
23. Judge Savitt sentenced Mr. Gilyard to life in prison on December 10, 1998.
24. Judge Savitt presided over Mr. Gilyard's post-verdict motions and his PCRA petitions.
25. Bernard Seigel represented Mr. Gilyard for his trial, post-verdict motions, and on direct appeal. Gary S. Server was appointed to represent Mr. Gilyard for his first PCRA petition.
26. Mr. Gilyard has taken the following steps in order to obtain relief from his convictions and sentences:

- 1) **Post-Verdict Motions:** On December 21, 1998, Mr. Gilyard filed a motion for new trial, arguing that the verdict was against the great weight of the evidence. Judge Savitt denied the motion on January 4, 1999.
- 2) **Direct Appeal:** On August 6, 2001, Mr. Gilyard appealed to the Superior Court of Pennsylvania.¹⁰ Mr. Gilyard argued that the trial court erred in denying a defense motion for a jury view of the scene of the crime, and that the verdict reached was against the great weight of the evidence. On December 26, 2002, the Superior Court affirmed the judgment of the trial court. On January 21, 2003, Mr. Gilyard petitioned for allowance of appeal to

¹⁰ On January 20, 1999, Mr. Gilyard filed a notice of appeal of his conviction and sentence with the Superior Court of Pennsylvania. On October 22, 1999, the Superior Court dismissed the appeal without prejudice because of counsel's failure to file a brief. On May 2, 2000, Mr. Gilyard filed a motion to reinstate the right of direct appeal *nunc pro tunc*. This motion was granted. On May 3, 2000, Mr. Gilyard filed a second notice of appeal to the Superior Court. The Superior Court dismissed the appeal without prejudice because of counsel's failure to file a brief. On June 25, 2001, Mr. Gilyard filed his second PCRA petition for the right to appeal *nunc pro tunc*. This petition was granted on July 10, 2001. On August 6, 2001, Mr. Gilyard filed a third notice of appeal to the Superior Court.

the Supreme Court of Pennsylvania. On September 17, 2003, the Supreme Court of Pennsylvania denied the petition.

- 3) **First PCRA Petition:** On October 30, 2003, Mr. Gilyard filed a *pro se* petition under the Post-Conviction Relief Act, arguing ineffectiveness of trial counsel for failing to provide photographs of the crime scene, and for failing to request that the jury be re-instructed to receive eyewitness testimony with caution. On March 9, 2004, Gary S. Server was appointed as Mr. Gilyard's PCRA counsel. On June 24, 2004, Mr. Server filed a "no merit" letter. The court dismissed the petition on October 28, 2004. On November 4, 2004, Mr. Gilyard appealed the dismissal of his PCRA petition and included a request for trial transcripts.¹¹ On January 11, 2005, the Superior Court granted the request for transcripts, vacated the briefing schedule, and remanded to the PCRA Court for Mr. Gilyard to be provided with documents. On June 4, 2007, the record was transmitted to the Superior Court. On October 5, 2007, the Superior Court affirmed dismissal of the PCRA petition and relinquished jurisdiction. On October 30, 2007, Mr. Gilyard petitioned for allowance of appeal in the Supreme Court of Pennsylvania. On May 7, 2008, the Supreme Court of Pennsylvania denied review.
- 4) **Second PCRA Petition:** On July 9, 2010, Mr. Gilyard filed a second PCRA petition, arguing that he was improperly sentenced as a juvenile to life without parole. On March 31, 2011, Mr. Gilyard amended this PCRA petition, alleging new evidence that establishes his actual innocence. On August 17, 2011, Mr. Gilyard filed a second amended petition, including additional

¹¹ Mr. Gilyard had requested the trial transcripts from his case three times before November 4, 2004.

evidence of innocence. On August 19, 2011, counsel for Mr. Gilyard sent a letter to Mr. Ed McCann, First Assistant District Attorney, asking his office to investigate Mr. Gilyard's case in light of the new evidence presented in the second amended petition. See letter to Ed McCann, attached as Exhibit M. The victim's daughter and sole eyewitness to her father's murder, Tonya Keal, co-signed this letter. On December 2, 2011, Mr. Gilyard filed a third amended petition, including additional evidence of innocence. The instant Petition is filed as an amendment to the pending initial petition, and thus is labeled "Fourth Amended Petition."

JURISDICTIONAL REQUIREMENTS

27. Eugene Gilyard is currently incarcerated at SCI-Mahanoy, 301 Morea Road, Frackville, PA 17932 (Inmate #DV0222), serving the prison sentence imposed as a result of the conviction at issue here.

28. Mr. Gilyard maintains his absolute innocence of all charges against him.

29. Mr. Gilyard is indigent and cannot afford representation or investigative expenses.

30. 42 Pa.C.S.A. §9545(b) states in pertinent part:

(b) Time for filing petition.

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

[or]

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; ...

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

31. Mr. Gilyard's conviction became final with the exhaustion of his direct appellate rights over seven years ago. This Petition has not been filed within one year of that date. Thus, Mr. Gilyard must show that he meets one of the three exceptions to the one-year limitation.

32. Mr. Gilyard meets the requirements of exception (b)(1)(ii). In the instant Petition, Mr. Gilyard alleges newly discovered facts which he could not have known at the time of trial with the exercise of due diligence, and which, if presented to the jury in his case, would have changed the outcome of his trial.

33. This claim is raised within sixty days "of the date the claim could have been presented." See 42 Pa.C.S.A. §9545(b)(2). The information supporting this claim was initially discovered on March 18, 2011, and an amended petition was filed on March 31, 2011. Corroborating information was discovered on June 20, 2011, and an amended petition was filed on August 17, 2011. The newly discovered evidence forming the basis for the third amendment was discovered on October 5 and 11, 2011 and the third amendment was filed within 60 days of October 5, 2011. The newly discovered evidence forming the basis for the fourth amendment was discovered on January 18, 2012 and this petition is being filed within 60 days of that date.

34. Relief requested is as follows:

- 1) Arrest of judgment and discharge and/or grant of a new trial based upon the claims raised herein.

NEWLY DISCOVERED EVIDENCE:

Ricky Welborn's Confession

35. On June 20, 2011, staff members from the Pennsylvania Innocence Project spoke with Ricky Welborn (Inmate #DF4934), aka "Rolex," at SCI Frackville, 1111 Altamont Boulevard, Frackville, PA. Mr. Welborn confessed to shooting Thomas Keal and confirmed that Eugene Gilyard was not involved in the crime. Mr. Welborn's confession included the following

relevant facts. A certification from Mr. Welborn and a certification from Pennsylvania Innocence Project staff investigator Shaina Tyler are attached collectively as Exhibit C.

- 1) Mr. Welborn is from West Philadelphia, specifically, 810 South Allison Street, and goes by the nickname “Rolex.”
- 2) Around the time of Mr. Keal’s murder, Mr. Welborn had been feuding with a man named Anthony Stokes. A few days prior to the murder, Stokes stole a gun from Welborn. Welborn then borrowed a shotgun from a friend. Approximately twelve hours before Mr. Keal was killed, Mr. Welborn got into an altercation with Stokes at 58th and Christian Streets. Mr. Welborn shot Anthony Stokes in the face with a double-barrel sawed-off shotgun, the same gun that Welborn later used to rob and shoot Mr. Keal. Stokes shot back at Welborn, but Welborn was not hit by any of the bullets. Stokes survived this shooting but went to the hospital.
- 3) A few hours after shooting Mr. Stokes, Mr. Welborn went to North Philadelphia with a “friend¹².” Mr. Welborn wanted to get out of West Philadelphia because of the incident with Stokes, and he also wanted to buy some drugs. Welborn and his friend stopped at 17th Street and Jefferson to get marijuana, Xanax, and syrup before parking their car, a light blue Audi 5000, near 16th and Venango Streets.
- 4) Mr. Welborn and his friend went to hang out with a man named Rob and Rob’s friends at the Chinese store on 17th Street between Venango and Tioga Streets. Rob told Mr. Welborn and his friend that if they want money, they could rob a man who owned a bar on 17th Street between Erie and Venango

¹² Mr. Welborn would not reveal this “friend’s” name or nickname, but he stated that it was not Mr. Gilyard.

and kept \$50,000 in his house. Rob gave a .22 caliber firearm to Mr. Welborn's friend to use in the robbery. Rob was supposed to get some of the proceeds.¹³

- 5) Sometime between midnight and 2 a.m. on August 8, 1995, Mr. Welborn and his friend approached Mr. Keal as he was crossing the street.
- 6) Mr. Welborn approached Mr. Keal from the front with a double-barreled sawed-off shotgun, and his friend approached from behind with a .22 revolver that was silver and had tape around the handle.
- 7) Mr. Welborn's friend held the .22 revolver to the back of Mr. Keal's head. Mr. Keal had a chrome .357 revolver with a black grip. Mr. Keal pulled out his gun and said, "I ain't givin' you shit." Mr. Welborn then shot Mr. Keal in the leg, and Mr. Keal fell to the ground.
- 8) Mr. Welborn's friend stood over Mr. Keal and fired three or four shots at Mr. Keal's head. Mr. Welborn began going through Mr. Keal's pockets, but stopped because a woman across the street started screaming. Mr. Welborn then pried Mr. Keal's .357 revolver out of Mr. Keal's hand. The two men began running towards 16th and Venango.
- 9) Mr. Welborn said to his friend, "what the fuck did you do that for?" His friend replied, "Man, you shoot everybody, I want to shoot somebody too."
- 10) Mr. Welborn's friend tossed the .22 into an abandoned house near 16th and Venango, but Welborn kept the shotgun. The two men got into Mr. Welborn's car and drove to West Philadelphia.

¹³ Mr. Welborn and his friend never took any money from Mr. Keal.

- 11) Mr. Welborn used the same shotgun with which he shot both Mr. Stokes and Mr. Keal to commit a robbery in November of 1995 near 46th and Walnut.¹⁴
- 12) Mr. Welborn later gave Mr. Keal's .357 revolver to a friend named "Chink," whose grandmother lived on 57th and Catherine. "Chink" is currently incarcerated.
- 13) About nine to ten months after the murder, Mr. Welborn shot Mr. Stokes a second time, this time with a 10mm gun.¹⁵
- 14) In June 2006, Mr. Welborn told his lawyer, Daniel Greene, about his participation in Mr. Keal's murder. At that time Mr. Welborn was on trial for a different murder, and told Mr. Greene that if he was sentenced to life in prison he would want to confess to Mr. Keal's murder.
- 15) Eugene Gilyard had nothing to do with the murder of Thomas Keal.

36. On October 11, 2011, Pennsylvania Innocence Project staff members spoke with Anthony Stokes. (Inmate #KB8445), at SCI Camp Hill, 2500 Lisburn Street, Camp Hill, PA. Mr. Stokes confirmed that Mr. Welborn shot him with a sawed-off shotgun. Mr. Stokes' statement included the following relevant facts. A certification from Mr. Stokes, a certification from Pennsylvania Innocence Project Investigator Shaina Tyler, and Mr. Stokes' discharge summary from the Hospital of the University of Pennsylvania, are attached collectively as Exhibit L.

¹⁴ On April 7, 1997, Mr. Welborn pled guilty to robbery, possession of an instrument of crime, and criminal conspiracy arising out of an armed robbery that occurred on October 19, 1995. The facts of that incident are similar to the robbery of Mr. Keal, except for the fact that the victim fortunately was not injured. Welborn and two co-defendants robbed a man at gunpoint and stole \$30.00 and a gold ring. Two weapons were used in the commission of that crime: a handgun and notably, a sawed off shotgun. See charging information from CP-51-CR-1107551-1995 attached as Exhibit N.

¹⁵ On August 15, 1996, Welborn walked into a Chinese store at 642 S. 56th Street and shot at a man, but missed. Welborn pled guilty to aggravated assault, possession of an instrument of crime, and carrying a firearm on a public street. See Court Summary for Ricky Welborn, attached as Exhibit O.

- 1) Mr. Stokes knew Ricky Welborn (“Rolex”) because they lived in the same neighborhood. In the mid-1990s, they had an ongoing feud. In August of 1994, Stokes stole a pistol from Welborn.
- 2) On August 30, 1994 (this was actually August 30, 1995, as confirmed by Mr. Stokes’ medical records¹⁶), Ricky Welborn asked Stokes to meet him at 58th and Catherine Street. Welborn fired one shot at Anthony Stokes with a sawed-off shotgun. The pellets got lodged in Stokes’ chest, arms, face, and neck. Stokes shot back at Welborn but missed.
- 3) After shooting Mr. Stokes, Mr. Welborn ran away with his friends, including a man whom Mr. Stokes knew as Timothy “Tizz” Goodman.
- 4) Mr. Stokes went to the Hospital of the University of Pennsylvania to seek treatment for his wounds. He was hospitalized for 13 days. Mr. Stokes refused to identify his attacker for police, so no charges were ever brought against Mr. Welborn for the shooting. About a year later, Mr. Welborn shot Mr. Stokes again with a 10mm firearm. Mr. Stokes did not seek medical treatment for this incident.
- 5) Mr. Stokes never revealed to law enforcement who had shot him because of the “code of the street.”
- 6) Mr. Stokes knew Ricky Welborn to be a habitual robber, drug dealer, and drug user.

¹⁶ Mr. Keal was killed at 2:30 a.m. on August 31, 1995. On January 18, 2012, the Pennsylvania Innocence Project received Mr. Stokes’ medical records from the Hospital of the University of Pennsylvania and confirmed that Mr. Stokes’ was admitted for multiple gunshot wounds on August 30, 1995. See Exhibit L.

“Tizz’s”¹⁷ Confession

37. On October 5, 2011, staff members from the Pennsylvania Innocence Project spoke with Donnell Wiggins. Mr. Wiggins had been incarcerated at SCI Graterford in the late 1990s with a man he knew as “Tizz.” “Tizz” admitted to Mr. Wiggins that Mr. Gilyard and Mr. Felder were serving time for a crime that “Tizz” had committed, and “Tizz” described the circumstances of the crime to Mr. Wiggins. Mr. Wiggins’ statement includes the following relevant facts. A certification from Mr. Wiggins and a certification from Pennsylvania Innocence Project Investigator Shaina Tyler are attached collectively as Exhibit K.

- 1) Mr. Wiggins knew both Lance Felder and Eugene Gilyard from growing up in the same neighborhood. He was friends with Mr. Felder, but only acquaintances with Mr. Gilyard.
- 2) Mr. Wiggins first met “Tizz” about a month before Mr. Keal was killed.¹⁸ Mr. Wiggins ran into Mr. Gilyard and “Tizz” on 17th Street when they were on their way to buy Xanax and syrup. A few days later, Mr. Wiggins saw “Tizz” and “Rolex” in the neighborhood. “Tizz” and “Rolex” were not from Mr. Wiggins’ neighborhood; they were from southwest Philadelphia. Mr. Wiggins thought that “Rolex” and “Tizz” lived on Allison Street.

¹⁷ While “Tizz” remains unidentified, it is likely that Tizz’s true name is Timothy Tyler (DOB 8/7/1977) (aka Timothy Gooden). Anthony Stokes identified “Tizz” as “Timothy Goodman” and numerous witnesses identified “Tizz” as living in Southwest Philadelphia, likely around Christian St. Tyler lived at 5844 Christian Street, Philadelphia, PA 19143, is approximately the same age as Mr. Welborn, and was incarcerated in the late 1990s. Tyler pled guilty to robbery, carrying a firearm on a public street, possession of an instrument of crime, and lesser charges arising out of an incident that occurred at 2:30 a.m. on September 12, 1996. The facts of that robbery are quite similar to Mr. Keal’s. The victim in that case stated that he was walking on the street when Tyler pulled a gun on him and demanded money. Tyler took the victim’s wallet and pager after making the victim lie down and telling the victim that if he ran he would be shot. Tyler was sentenced on May 30, 1997, to seven to fourteen years’ incarceration. See Court Summary for Timothy Gooden, warrant for his arrest, and factual summary of the case from Tyler’s Amended PCRA Petition, attached collectively as Exhibit P.

¹⁸ Mr. Wiggins estimated that this was in 1996, but Mr. Keal was actually killed in August 1995.

- 3) Mr. Wiggins was not present when Mr. Keal was killed. A few days or a week after the murder, Mr. Wiggins “heard” that Mr. Keal had been killed and that “Rolex” and “Tizz” were responsible for Mr. Keal’s death.
- 4) Sometime in 1998 or 1999, Mr. Wiggins was incarcerated with “Tizz” at SCI Graterford. Mr. Wiggins and “Tizz” began “reminiscing” about the past. Mr. Wiggins told “Tizz” that it was messed up that Gilyard and Lance Felder were serving life sentences for “Tizz’s” “work.” “Tizz” replied, “it is what it is man. That’s what happens when you play the game.”
- 5) Mr. Wiggins then asked “Tizz” how the whole thing happened. “Tizz” said that he and “Rolex” saw the “old head” come out of his bar and cross the street. “Rolex” and “Tizz” went over to try to rob him. “Tizz” said that the “old head” pulled out a gun and “Rolex” shot him with a shotgun. “Tizz” then took the gun that the “old head” had and shot him with it. “Tizz” said they shot the “old head” in the leg and head.

ADDITIONAL EVIDENCE CORROBORATING MR. WELBORN AND “TIZZ’S” CONFESSIONS

38. On June 14, 2011, staff members from the Pennsylvania Innocence Project spoke with Michael Griddle, who was with Mr. Gilyard when the crime occurred and confirms his non-involvement. Mr. Griddle’s statement corroborates Mr. Welborn’s confession, and includes the following relevant facts. A certification from Mr. Griddle is attached as Exhibit E.

- 1) Eugene Gilyard did not shoot Thomas Keal.
- 2) Mr. Gilyard was with Mr. Griddle when the shooting occurred. They were standing with a group of people, including Phillip Pratt and Lance Felder, in front of a Chinese restaurant on the corner of 17th and Atlantic. After hearing

shots, they walked over to the crime scene and saw Mr. Keal lying on the ground.

- 3) Soon after the crime, Mr. Griddle told the police that Mr. Gilyard was with him when the shooting occurred, and that Mr. Gilyard was not involved. However, Mr. Griddle did not tell the police that he knew who had committed the murder.
- 4) On the night of the murder, two men he had previously met through Rob Felder, who he knew as “Tizz” and “Rolex,” told Mr. Griddle that they were planning to rob the Bee Hive Bar. Mr. Griddle told them not to, since he and his friends hung out there. Approximately ten minutes after the conversation, “Tizz” and “Rolex” went down the street and shot and robbed Mr. Keal.
- 5) After committing the crime, “Tizz” and “Rolex” got into a car with a third person and drove away. Mr. Griddle knows the identity of the third participant but would reveal it only if absolutely necessary to prove Mr. Gilyard’s innocence.
- 6) Mr. Griddle does not know “Rolex” and “Tizz’s” real names, but knew that they lived in West Philadelphia, near 56th and Catherine or Christian Streets.
- 7) Prior to making this statement, Kenyatta Felder showed Mr. Griddle a copy of “Rolex’s” March 18, 2011, confession.¹⁹

39. On June 21, 2011, staff members from the Pennsylvania Innocence Project spoke with eyewitness Donita Mickeals at 6138 Gillespie Street, Philadelphia, PA. Ms. Mickeals was supposed to testify at Mr. Gilyard’s trial in 1998 but she never received a subpoena. Ms.

¹⁹ When Mr. Griddle made this statement, he had not seen Mr. Welborn’s June 20th detailed confession.

Mickeals' statements, made at the time of the murder and recently, corroborate those of Mr. Welborn and Mr. Griddle. A certification from Ms. Mickeals is attached as Exhibit H.

- 1) The night Thomas Keal was shot, Ms. Mickeals saw "Rolex" and "Tizz" hanging out at the Chinese store at near 17th and Erie.
- 2) Ms. Mickeals heard gunshots in the early morning of August 31, 1995. A few seconds after hearing the shots she saw "Rolex," "Tizz," and one or two others she knew running from where Mr. Keal was shot. They ran down 17th Street and turned onto Venango.
- 3) Ms. Mickeals gave a statement to the police soon after the crime occurred.
- 4) Eugene Gilyard was not involved in Mr. Keals' murder.

40. On July 7, 2011, staff members from the Pennsylvania Innocence Project spoke with eyewitness Kenyatta Felder, Lance Felder's brother, in North Philadelphia. Mr. Felder has never talked to the police about the murder. His statement corroborates Mr. Welborn's confession, as well as Mr. Griddle's and Ms. Mickeal's statements. A certification from Kenyatta Felder is attached as Exhibit I.

- 1) On the day of Thomas Keal's murder, Kenyatta was hanging out at a Chinese store at 17th and Atlantic. He was with Eugene Gilyard, Lance Felder, Phillip Pratt, and Michael Griddle.
- 2) Kenyatta had previously met "Rolex" and "Tizz" through his brother Rob Felder, but he did not know them well.
- 3) "Rolex" and "Tizz" approached the group outside the Chinese store and said that they were planning to rob the bar across the street. They were told not to rob that bar because Kenyatta and his friends hung out at that bar.

- 4) "Rolex" and "Tizz" then walked up the street in the direction of Mr. Keal's bar. Kenyatta heard gunshots, but did not actually see the murder. Kenyatta then saw "Rolex" and "Tizz" running away from the crime scene.
- 5) Kenyatta's brother Rob told him that "Rolex" threw one of the guns used in Mr. Keal's murder into the basement window of an abandoned house on Venango Street. Kenyatta never spoke to the police about the crime.
- 6) Ricky Welborn goes by the name "Rolex," but Kenyatta does not know "Tizz's" real name.

41. On July 25, 2011, staff members from the Pennsylvania Innocence Project spoke with Eugene Gilyard's mother, Christine Gilyard, at her home in North Philadelphia. Although not with Mr. Gilyard when Mr. Keal was shot, Ms. Gilyard lived very close to the crime scene and went to find her son as soon as she heard gunshots. Ms. Gilyard's statement corroborates the statements of Mr. Welborn, Mr. Griddle, Mr. Felder, and Ms. McKeals, because all of those witnesses indicated that the true perpetrators fled the scene, while Ms. Gilyard and her son stayed on the crime scene for about forty-five minutes after Mr. Keal was shot. A certification from Ms. Gilyard is attached as Exhibit J.

- 1) On the night of Mr. Keal's murder, Ms. Gilyard was home with her sister. She heard gunshots and immediately grabbed her bicycle. She rode to the Chinese store on 17th Street because she knew that Eugene hung out there.
- 2) Ms. Gilyard saw Eugene and Kenyatta Felder walking up 17th Street towards Victoria Street. The two boys were walking towards Mr. Keal's body, where a crowd had gathered. Ms. Gilyard stayed around the crime scene with Eugene for about forty-five minutes being nosy before going home together.
- 3) Eugene was questioned by the police a few weeks after the incident occurred.

THE NEWLY DISCOVERED EVIDENCE IS SUFFICIENT TO WARRANT A NEW TRIAL:

42. To be granted a new trial based on the basis of after-discovered evidence, Mr. Gilyard must demonstrate that the evidence: (1) could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) would likely result in a different verdict if a new trial were granted. Commonwealth v. Padillas, 997 A.2d 356, 363 (Pa. Super. Ct. 2010) appeal denied, 2010 WL 5116345 (Pa. Dec. 16, 2010) (citing Commonwealth v. Pagan, 597 Pa. 69, 106 (2008)).

43. Neither Mr. Welborn's statement nor "Tizz's" confession to Mr. Wiggins could have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence. Mr. Welborn and "Tizz" would not have confessed to participating in Mr. Keal's murder at the time of Mr. Gilyard's trial, and their identity was not known to the defense.

44. Mr. Welborn and "Tizz's" statements are not merely corroborative or cumulative of testimony given at Mr. Gilyard's trial, nor do they merely serve to impeach another witness' credibility. Mr. Gilyard's defense at trial was mistaken eye-witness identification, but no evidence was presented indicating that Mr. Welborn and "Tizz" were the actual perpetrators. Both confessions are independent, reliable accounts of who was involved in Mr. Keal's murder and the confessions could only come from the true perpetrators themselves. Because "this evidence [i]s not available from any other source . . . [Mr. Gilyard] satisfie[s] the second and third prongs in that the unavailable evidence was not merely cumulative of evidence presented by [other witnesses] and would not be used solely to impeach their credibility." Commonwealth v. Fiore, 780 A.2d 704, 712 (Pa. Sup. 2001).

45. If a new trial were granted, it is highly likely that the jury would reach a different verdict. Mr. Welborn's voluntary, detailed, and corroborated confession, absolving Mr. Gilyard of all guilt, along with "Tizz's" voluntary and reliable admission, would outweigh Ms. Keal's questionable eye-witness testimony.

THIS COURT SHOULD ALSO GRANT PETITIONER RELIEF ON THE GROUNDS THAT THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS PROHIBIT THE INCARCERATION OF ONE WHO IS ACTUALLY INNOCENT, AND PETITIONER EUGENE GILYARD MUST BE DISCHARGED FORTHWITH.

46. The continued incarceration of a truly, factually, innocent person would be a deprivation of that individual's right to liberty and to be free from cruel and unusual punishment.

47. Eugene Gilyard is actually innocent of the crime for which he was convicted.

48. Although Mr. Gilyard contends that there are existing remedies that entitle him to, at a minimum, a new trial under the PCRA, the United States and Pennsylvania Constitutions require that Mr. Gilyard be immediately discharged.

49. The central purpose of any system of criminal justice is to "convict the guilty and free the innocent." United States v. Nobles, 422 U.S. 225, 230 (1975). Moreover, "the interest in avoiding injustice is most compelling in the context of actual innocence." Schlup v. Delo, 513 U.S. 298, 324 (1995).

50. The United States Supreme Court has implied that a claim of actual innocence may, in certain exceptional cases, be a basis for relief under the Eighth or Fourteenth Amendment to the United States Constitution. See Herrera v. Collins, 506 U.S. 390, 406 (1993) (outlining what a freestanding actual innocence claim would require and evaluating petitioner Herrera's claim of actual innocence on its merits).

51. The Pennsylvania Constitution provides two separate avenues for relief from an improper judgment based upon actual innocence: Article I, Section 9 (that trials must follow the “law of the land”) and Article I, Section 13 (prohibiting “cruel punishments”).

52. Article I, Section 9 is the functional equivalent of the Due Process Clause under the Fourteenth Amendment to the United States Constitution, and is referred to as “the due process clause of our state constitution.” Commonwealth v. Heck, 517 Pa. 192, 194-195 (1987).

- 1) Where an interpretation of Article I, Section 9 is involved, “most cases which shed light on the question are analyses of the strictures imposed by the due process clause of the Fourteenth Amendment of the United States Constitution.” Commonwealth v. Davis, 526 Pa. 428, 431 (1991). However, the federal clause “may not be controlling if the due process clause of the Pennsylvania Constitution sets a higher standard.” Id.
- 2) As a matter of substantive due process, appellate courts in the Commonwealth have regularly held that the Pennsylvania Constitution provides greater protection to the individual than the federal counterpart. See, e.g., Davis, 526 Pa. at 433 (finding “no doubt that the due process clause of the Pennsylvania Constitution prohibits the deprivation of liberty solely on the basis of hearsay evidence” while acknowledging “doubt” whether Fourteenth Amendment would as well); Commonwealth v. Edmunds, *supra*; Commonwealth v. Kohl, 532 Pa. 152 (1992) (“Article I, Section 8 has an identity and vitality that is separate and distinct from that of the Fourth Amendment.”).
- 3) Under any interpretation of “due process” as meaning action which “shocks the conscience,” or devoid of “fundamental fairness” the continued imprisonment of one who did not commit a crime cannot be countenanced.

Numerous states have found a freestanding innocence claim under their own state due process clauses. As the Supreme Court of Illinois recognized, “[i]mprisonment of the innocent would also be so conscience shocking as to trigger operation of substantive due process.” People v. Washington, 665 N.E.2d 1330, 1336 (Ill. 1996) (recognizing a free-standing innocence claim under Illinois Constitution). See also, In re Clark, 855 P.2d 729 (Cal. 1993); People v. Bermudez, 906 N.Y.S.2d 77 (Supreme Court of New York, New York County 2009) (recognizing a “free-standing claim of innocence” under the due process clause of the New York Constitution independent of statutory habeas corpus procedures); Ex Parte Elizondo, 947 S.W.2d 202 (Tex. Crim. App. 1996) (granting state habeas relief alleging actual innocence as an independent ground for relief); Montoya v. Ulibarri, 142 N.M. 89 (2007) (holding that “the conviction, incarceration, or execution of an innocent person violates all notions of fundamental fairness implicit with the due process provision of” the New Mexico Constitution); Summerville v. Warden, 229 Conn. 397 (1994) (holding that “a substantial claim of actual innocence is cognizable by way of a petition for a writ of habeas corpus, even in the absence of proof by the petitioner of an antecedent constitutional violation”); Amrine v. Roper, 102 S.W.3d 541 (Mo. 2003) (recognizing that “the continued imprisonment and eventual execution of an innocent person is a manifest injustice” so “a habeas petition under a sentence of death may obtain relief from judgment of conviction ... upon a clear and convincing showing of actual innocence”).

- 4) Pennsylvania's history of fierce protection of citizen's rights against "arbitrary" action of the State supports the recognition of a free-standing innocence claim under Article I, Section 9.

53. Under Article I, Section 13, where a sentence is so severe as to "shock the moral conscience of the community," it is unconstitutional. Commonwealth v. Sourbeer, 492 Pa. 17, 33 (1980) (upholding mandatory life sentence for 1st degree murder).

- 1) There is no question that the continued incarceration of an individual who is actually innocent of a crime would "shock the moral conscience of the community." As such, under that constitutional provision, Mr. Gilyard is entitled to immediate release.

54. Having demonstrated that he is beyond question "actually innocent" of the charges for which he was convicted, Eugene Gilyard is entitled to immediate discharge under the United States and Pennsylvania Constitutions.

THE ISSUES RAISED HEREIN HAVE NEITHER BEEN PREVIOUSLY LITIGATED NOR WAIVED:

55. The allegations set forth above have not been previously litigated. Nor have they been waived, as they are being raised at the earliest opportunity in the proceedings.

56. Mr. Gilyard proffers evidence the courts did not consider in post-sentence proceedings or on direct appeal, thus complying with the Pennsylvania Supreme Court's precedent that a PCRA claim is reviewable when the petitioner/appellant does not rely solely on previously litigated evidence.²⁰

²⁰ See Commonwealth v. Miller, 746 A.2d 592, 512 n. 9 (2000) (when PCRA "claim does not rest solely upon the previously litigated evidence, we will reach the merits of appellant's claim"); id. at 602 n. 10 (same); Commonwealth v. Williams, 828 A.2d 981, 984 n. 6 (Pa. 2003) (PCRA claim that appeal counsel's litigation of claim was ineffective would not be deemed previously litigated despite direct appeal opinion that trial counsel had effectively cross-examined the Commonwealth's experts if PCRA

THE ISSUES RAISED HEREIN MEET THE LAWSON STANDARD FOR A SECOND OR SUBSEQUENT PCRA PETITION:

57. The present petition being a “second or subsequent PCRA petition,” Mr. Gilyard must demonstrate that his conviction of these charges constitutes a miscarriage of justice in order for his petition to be heard by this Court. Commonwealth v. Lawson, 519 Pa. 504 (1988). An appellant makes such a prima facie case “if he demonstrates that either the proceedings which resulted in his conviction were so unfair that a miscarriage of justice occurred which no civilized society could tolerate, or that he was innocent of the crimes charged.” Commonwealth v. Morales, 549 Pa. 400, 409-410 (1997).

58. The claims raised herein demonstrate clearly that Mr. Gilyard’s conviction and sentence, and the affirmance of that conviction on appeal, constitute a miscarriage of justice. Mr. Gilyard is serving a life sentence in prison for a crime he did not commit. Any rational juror, who heard the Ricky Welborn and “Tizz’s” confessions in addition to the corroborating eyewitness testimony and the evidence presented at trial, would find Mr. Gilyard not guilty. Because Mr. Gilyard raises claims that demonstrate he is actually innocent, this petition is not barred by the Lawson doctrine.

AN EVIDENTIARY HEARING IS REQUIRED.

59. Mr. Gilyard hereby requests an evidentiary hearing. This Petition is being filed timely as an amendment to the petition that Mr. Gilyard filed within 60 days of obtaining the newly discovered evidence. Certifications for each witness who will appear, including a summary of the evidence they will present, are attached as Exhibits C, E, H, I, J, K, and L.

60. The witnesses expected to testify at Mr. Gilyard’s evidentiary hearing are as follows:

court determined that affidavits of the proffered experts contain facts that “go beyond those which were presented on direct appeal”).

- 1) Ricky Welborn (Inmate #DF4934)
- 2) Michael Griddle
- 3) Donita Mickeals
- 4) Kenyatta Felder
- 5) Christine Gilyard
- 6) Donnell Wiggins
- 7) Anthony Stokes (Inmate # KB8445)

61. The timeliness of Mr. Gilyard's petition has been established. The claims he raises within this Petition are not frivolous. On the contrary, this Petition raises several material facts which, if uncontested by the Commonwealth or proven at an evidentiary hearing, establish the jurisdiction of this Court and entitle Mr. Gilyard to relief. Unless the Commonwealth concedes the facts and Mr. Gilyard's entitlement to relief, an evidentiary hearing is required, both to allow Mr. Gilyard to demonstrate the Court's jurisdiction and to establish his claim. See Pa. R.Cr. P. 907; Commonwealth v. Williams, 557 Pa. 207, 249, 732 A.2d 1167, 1189-90 (1999); Commonwealth v. Sherard, 394 A.2d 971 (Pa. 1978); Townsend v. Sain, 372 U.S. 293 (1963); Commonwealth v. Pulling, 470 A.2d 170 (Pa. Super. 1983).

62. Counsel who will represent Mr. Gilyard in the Court of Common Pleas of Philadelphia County on this Petition is:

Charlotte Haldeman Whitmore, Esq.
Attorney No. 208724
The Pennsylvania Innocence Project
Temple University Beasley School of Law
1719 North Broad Street
Philadelphia, PA 19122
215-204-4255

Frank DeSimone, Esq.
Attorney No. 12359
Suite 600

1880 JFK Boulevard
Philadelphia, PA 19103
215-567-3507

63. Counsel is not waiving any other issue Mr. Gilyard may have and reserves the right to supplement his petition pursuant to Pa. R. Crim. Pro. 905(a) should the interest of justice require.

CONCLUSION

64. The instant Petition is timely, as Mr. Gilyard is in possession of new facts that demonstrate his actual innocence of the crime for which he is currently serving a life sentence. These facts would have changed the outcome of his trial. This Petition is being filed timely according to 42 Pa.C.S. §9545(b)(1)(i) and (b)(2).

65. The newly discovered evidence outlined in this Petition, namely the confessions of Ricky Welborn and “Tizz,” along with the corroborative testimony of Anthony Stokes, Michael Griddle, Kenyatta Felder, and Donita Mickeals, demonstrates that Mr. Gilyard did not murder Thomas Keal.

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

Respectfully submitted,



Charlotte Whitmore, Esq.
Attorney I.D. No. 208724
The Pennsylvania Innocence Project
Temple University Beasley School of Law

1719 North Broad Street
Philadelphia, PA 19122
215-204-4255

Frank DeSimone, Esq.
Attorney No. 12359
Suite 600
1880 JFK Boulevard
Philadelphia, PA 19103
215-567-3507


Counsel for Eugene Gilyard

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

COMMONWEALTH OF PENNSYLVANIA :
Respondent :
 :
 :
 :
 v. : CP-51-CR-0408371-1998
 :
 EUGENE GILYARD :
Petitioner :

VERIFICATION

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



EUGENE GILYARD
Date of Birth: 5/4/71

Date: 12/19/11

IN THE PHILADELPHIA COURT OF COMMON PLEAS
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :
Respondent :

v. :

CP-51-CR-0408371-1998

EUGENE GILYARD :
Petitioner :

PROOF OF SERVICE

Charlotte Haldeman Whitmore, Esquire, being duly sworn according to law does hereby state and aver that she is counsel for the petitioner in the above-captioned matter and that she has served by hand delivery upon

Robin Godfrey, Esquire
Chief, PCRA Division
Philadelphia District Attorney's Office
2 South Penn Square
Philadelphia, PA 19107

a copy of the Fourth Amended Petition for Post-Conviction Relief being filed on behalf of the petitioner in the above-captioned matter.



Charlotte Haldeman Whitmore, Esq.
Pa. I.D. No. 208724
The Pennsylvania Innocence Project
at Temple University Beasley School of Law
1719 N. Broad Street
Philadelphia, PA 19122
215-204-3146

Counsel for Eugene Gilyard

Date: 2/3/12