

d. An autopsy showed Ercel Butts-Sterns had been shot **five times**.⁴

3. Police canvassed the neighborhood. Two witnesses, **Hazel Matthias** and **Tracie Hunter** saw different parts of the shooting.

a. **Hazel Matthias** and her sister, **Tracie Hunter**, were driving south on 57th Street approaching Hadfield Street when she saw a group of **4 to 5 black males** run out from Hadfield Street and turn south onto 57th Street. Shortly thereafter she heard a gunshot and saw one of the males fall to the ground. She then saw a black male with a gun walk up to the fallen male, stand over him, and shoot him. The man with the gun then ran north on 57th Street with another black male. The gunman had on a **blue or black hoody** with a **white stripe on the sleeve**. She could not identify the gunman because she could not see his face.⁵

b. **Tracie Hunter** said she heard shots just as her and her sister approached Hadfield Street. She then saw three or four black males run out of Hadfield Street and south on 57th Street. She then saw the black male who was shot fall to the ground. At which point, she saw the gunman walk over to the victim and shoot him once again. The gunman had on a **blue hoody** and she “seem[ed] to remember **white stripes somewhere on the hoody**,” but she “[was] not sure where[.]”⁶

4. On **November 22, 2011**, after detectives met with the Criminal Intelligence Unit, they received information about an incident that occurred “in the area of 56th and Walnut shortly before” Ercel Butts-Sterns’s murder, “which may [have been] the underlying motive for the shooting[.]”⁷ Detectives, on the same day, then seized video footage from the **MJ Mini-Mart located at 5603 Walnut Street** which depicted the pre-shooting incident.⁸

5. On **November 22, 2011**, after obtaining the MJ Mini-Mart video footage, detectives had **Lidell Brightman** picked up and transported to Homicide where they questioned him.⁹

⁴ NT, Trial, 5/15/13, at 160-166, 170.

⁵ Ex. 4.

⁶ Ex. 5.

⁷ Ex. 7.

⁸ Ex. 7.

⁹ Exs. 8-10.

a. Mr. Brightman described the incident outside the MJ Mini-Mart that occurred shortly before Mr. Butts-Sterns's shooting. According to Mr. Brightman, Mr. Butts-Sterns, **Benderick Sterns, Rashon Gaffney**, and him stopped in the MJ Mini-Mart and got change for the bus. When they left, a **black male in a red hoody** exchanged words with Mr. Gaffney. The encounter escalated to where Mr. Gaffney pulled his gun and fired it toward the ground near the red hooded man's feet.¹⁰

b. After this shooting, Mr. Brightman, **Benderick Sterns, Rashon Gaffney**, and Ercel Butts-Sterns ran north on 56th Street briefly before crossing the street and running south on 56th Street. They ran until they got to the **bread factory** at the corner of 56th Street and Whitby Avenue. They looked to see if the red hooded man was following them, but they didn't see anyone. At that point, they started walking again. They walked south on 56th Street, turned right (or southwest) onto Hadfield Street.

c. Once on Hadfield, Mr. Gaffney turned and saw two black males following them. When Mr. Brightman turned, he saw a black male reaching for a gun near his waistband. At this point, Mr. Gaffney "ran into the street and started shooting at the two boys" and told Mr. Brightman, Benderick Sterns, and Ercel Butts-Sterns to run.

d. Mr. Brightman, Mr. Sterns, and Mr. Butts-Sterns ran. Mr. Brightman was in the middle. Mr. Butts-Sterns was to his left, Mr. Sterns to his right.

e. Mr. Brightman ran southwest on Hadfield Street, turned left (or south) onto 57th Street, and right (or southwest) onto Willows Avenue where he ran into **Orville Francis**. Mr. Francis told him to run into his (Francis's) house, which he did. When he got to Mr. Francis's and didn't see Ercel Butts-Sterns and Benderick Sterns, he asked Mr. Francis to see if they were okay.

f. A short while later, Mr. Francis returned and told him Mr. Butts-Sterns was "stretched out, like dead."

g. Mr. Brightman described the black male he saw retrieving his gun as short and wearing a **black hoody with a white (horizontal) stripe across the**

¹⁰ Ex. 9.

upper chest. He said the other black male “had all black on” and was wearing a black hoody.

h. Mr. Brightman didn’t see the red-hooded man Mr. Gaffney had feuded with and shot at shortly before the fatal shooting.

i. Detectives showed Mr. Brightman the MJ Mini-Mart video footage. In the video footage, a black man wearing a white-striped hoody is seen entering and exiting the mini-mart. When detectives asked him if he remembered this man, Mr. Lightman supposedly said, “He was the one shooting at us.”

j. Mr. Lightman did not know the shooter’s name and detectives did not have him view a photo array or arrays.¹¹

k. **Butchie Long** is the man wearing the white-striped hoody in the mini-mart.

6. The video footage establishes the following:

a. Mr. Long enters the mini-mart at **17:55:02** (camera time) or **5:05 p.m.** (real time). The camera time is 50 minutes ahead of real time.¹²

b. The red-hooded man enters the mini-mart at **17:55:53** (camera time).

c. The red-hooded man exits the mini-mart at **17:56:23** (camera time) and **walks east on Walnut Street** toward the corner of Walnut Street and 56th Street.

d. Mr. Long exits the mini-mart at **17:56:28** (camera time) or **5:06 p.m.** (real time) and **walks west on Walnut Street** toward South Ithan Street.

e. At **19:01:08** (camera time) or **6:11 p.m.**, Ercel Butts-Sterns, Benderick Sterns, Rashan Gaffney, and Lidell Brightman are seen approaching the mini-mart.

¹¹ Ex. 9.

¹² NT, Trial, 5/15/2013, at 129.

f. At **19:01:22** (camera time), Mr. Butts-Sterns, Mr. Sterns, and Mr. Gaffney enter the mini-mart. They exit at **19:01:52** and **walk west** on Walnut Street toward the corner of Walnut Street and 56th Street.

g. At **19:02:00** (camera time), the red-hooded man comes around the corner of 56th Street and Walnut Street and walks east on Walnut Street directly toward Mr. Butts-Sterns, Mr. Gaffney, Mr. Brightman, and Mr. Sterns.

h. At **19:02:04** (camera time), the red-hooded man exchanges words with Mr. Gaffney.

i. At **19:02:14** (camera time), after Mr. Gaffney and the red-hooded man scuffled briefly, Mr. Gaffney pulled his firearm.

j. At **19:02:18** (camera time), Mr. Gaffney fired a shot at the red-hooded man's feet.

k. At **19:02:20** (camera time) or **6:12 p.m.** (real time), Mr. Gaffney fired a second shot at the red-hooded man before running north on 56th Street with Ercel Butts-Sterns, Benderick Sterns, and Lidell Brightman.

l. Twenty minutes later, at **6:32 p.m.**, 12th District officers responded to a radio call regarding Mr. Butts-Sterns's shooting near 57th Street and Willows Avenue.¹³

7. On **December 30, 2011**, detectives had **Rashon Gaffney** picked up and transported to Homicide where they questioned him.¹⁴ Detectives *Mirandized* Mr. Gaffney because they had indisputable evidence he illegally possessed the firearm he discharged on November 10, 2011 shortly before Mr. Butts-Sterns's murder.¹⁵ Mr. Gaffney knew it was illegal for him to carry a firearm.¹⁶ **Mr. Gaffney gave a similar narrative as Lidell Brightman.**

a. He said he was with Ercel Butts-Sterns, **Benderick Sterns**, and Lidell Brightman when the shooting occurred outside the MJ Mini-Mart.

¹³ Ex. 1.

¹⁴ Exs. 11-13.

¹⁵ NT, Trial, 5/14/2013, at 214; NT, Trial, 5/15/2-13, at 85-86. Illegally possessing a firearm is a significant felony, 18 Pa. C.S. § 6106(a)(1), that can result in a lengthy incarceration.

¹⁶ NT, Trial, 5/14/2013, at 214.

b. After the initial shooting, they ran to 55th Street and Pine Street. Mr. Gaffney, at this point, didn't see anyone following them.

c. At 55th Street and Larchwood Avenue, though, he saw "two guys" following them.

d. They continued south on 55th Street and crossed Baltimore Avenue. When they got to 56th Street and Thomas Avenue Mr. Gaffney didn't see the two men.

e. Mr. Gaffney went into a mini-mart on 56th Street and Broomall Street. Once he left, him, Mr. Butts-Sterns, **Mr. Sterns**, and Mr. Brightman continued south on 56th Street.

f. When they got to 56th Street and Malcolm Street, Mr. Gaffney saw the "same two guys" following them. The one black male had on a **black and white Nike jacket**, a hoody, and **black pants**.

g. They turned right (or southwest) onto Malcolm Street and walked toward South Frazier Street.

h. When they got to the corner of Malcolm Street and Frazier Street, they met up with **Eric Green**. At this point, though, the two men were two or three houses from them. Mr. Gaffney turned to the group and said, "Yo who are these two boys following us?" When the others turned and saw the two men, they ran, including Mr. Gaffney.

i. Once they ran, the two men chased them.

j. Mr. Gaffney and the group ran south on Frazier Street toward Hadfield Street. The two men shot at them as they ran.

k. They turned right (or southwest) onto Hadfield Street and the men continued shooting. Toward the end of Hadfield Street, near 57th Street, Mr. Butts-Sterns said "don't leave me."

l. Once Mr. Gaffney, Mr. Butts-Sterns, Mr. Sterns, and Mr. Brightman, got to 57th Street, they ran in different directions. **Mr. Gaffney hid under a truck.**

m. Once under the truck, Mr. Gaffney saw Mr. Butts-Sterns run a short distance before falling in the middle of the street. He then saw the man in the black and white Nike outfit stand over him and shoot him in the head.

8. After taking his statement, detectives allegedly showed him an eight-man photo array that included **Butchie Long's photograph**. Mr. Gaffney **allegedly identified Mr. Long** as the gunman in the black and white Nike outfit.¹⁷

9. That same day, **December 30th**, detective had **Benderick Sterns** picked up and brought to Homicide where they questioned him.¹⁸ Mr. Sterns **and Mr. Butts-Sterns's are cousins**. According to the **Police Activity Sheet**, Mr. Sterns "denie[d] having been present during" his cousin's homicide and denied "having any information pertaining" to the homicide.¹⁹

n. Based on the **Police Activity Sheet**, detectives **did not take a "formal statement"** from him.

10. On the same day, **December 30th**, detectives had **Eric Green** picked up and brought to Homicide for questioning. According to the **Police Activity Sheet**, Mr. Green said he was not present during Ercel Butts-Sterns's homicide and had no information pertaining to the homicide. Based on the **Police Activity Sheet**, detectives did not take a "formal statement" from him.²⁰

11. On **January 8, 2011**, detectives had **Lidell Brightman** picked up again and brought to Homicide where they allegedly showed him an eight-man photo array. Mr. Brightman allegedly **identified Butchie Long** as the gunman wearing the black and white hoody.²¹

12. On **January 18, 2012**, the District Attorney's Office approved murder charges against Mr. Long. Detective arrested him the next day.

¹⁷ Exs. 11-12.

¹⁸ Ex. 14.

¹⁹ Ex. 14.

²⁰ Ex. 14.

²¹ Ex. 15.

B. Trial

13. Mr. Long's trial came down to one witness: **Rashon Gaffney**. The Commonwealth **never presented Lidell Brightman**, despite the fact he allegedly identified Mr. Long as the gunman. **Hazel Matthias, Tracie Hunter, and Ebony Mitchell**, moreover, did little to help the Commonwealth prove the gunman's identity.

a. **Hazel Matthias didn't see the gunman's face** because his dark hoody covered it and she only described seeing a white stripe on the gunman's jacket, **not his pant legs**. Detectives never contacted her after November 10, 2011 and asked her to view a photo array with Mr. Long's photograph.²²

b. **Tracie Hunter also didn't see the gunman's face** because of his dark hoody and because she wasn't paying attention to it. Likewise, she too only described seeing a white stripe on the gunman's jacket, **not his pants legs**. Detective also never asked her to view a photo array with Mr. Long's photograph.²³

c. **Ebony Mitchell didn't even witness the shooting**. She heard gunshots and then looked out her front door and saw three men. One of these men had on "**dark clothing**" and was running north on 57th Street, but because she didn't see the shooting she couldn't say whether this man was the gunman. Detectives never asked her to view a photo array with Mr. Long's photograph.²⁴

14. In regards to **Rashon Gaffney**, he agreed to testify at trial and the preliminary hearing **only after** the Commonwealth agreed **to give him immunity** based on the shooting incident outside of the MJ mini-mart.²⁵

15. Mr. Gaffney discussed the incident outside the mini-mart.²⁶ After the incident, Mr. Gaffney said he, Ercel Butts-Sterns, Benderick Sterns, and Lidell Brightman ran south toward 56th Street and Pine Street. Once at 56th Street and Pine Street, Mr. Gaffney saw two black males following them, but he couldn't see who they were. Mr. Gaffney stopped briefly at another mini-mart at 56th Street and

²² NT, Trial, 5/14/2013, at 44, 47, 53, 56, 62.

²³ NT, Trial, 5/15/2013, at 11, 12, 13.

²⁴ NT, Trial, 5/14/2013, at 102, 112, 121, 124.

²⁵ NT, Trial, 5/14/2013, at 204-205, 242.

²⁶ NT, Trial, 5/14/2013, at 146-151.

Broomall Street before the group continued south on 56th Street toward Malcolm Street.²⁷

16. The group met up with **Eric Green** at the corner of Malcolm Street and Frazier Street. Immediately thereafter, Mr. Gaffney saw the two black males chasing them and one had a gun.

17. Mr. Butts-Sterns thought he was shot, so Mr. Gaffney grabbed his arm and pulled him until he could run no further. At that point, **Mr. Gaffney hid under a truck**, where he saw Mr. Butts-Sterns fall to the ground at the corner of 57th Street and Willows Avenue. He then saw a hooded man in a black and white Nike jacket stand over Mr. Butts-Sterns and shoot him in the head. The gunman then ran north on 57th Street toward Whitby Avenue.²⁸

18. When the prosecutor asked Mr. Gaffney if he saw the gunman's face, he said: **"I told you I ain't seen nobody. Only thing I seen was a black-and-white hoodie."**²⁹ When the prosecutor asked him about his December 30, 2011 photographic identification of Mr. Long, Mr. Gaffney said detectives showed **numerous video footage photographs** from the MJ mini-mart **before** they showed him the photo array and this was why he circled Mr. Long's photograph.³⁰ He repeatedly said **he did not see the gunman's face** and, therefore, could not identify Mr. Long as the gunman:

[T]he only reason I circled the picture was because when they showed me the tape, that's who had the black and white jacket on. That's why I circled it, **I ain't never seen nobody**. I told ya'll. The only person I saw chasing me was with a black-and-white jacket on. **I never seen no face to tell you this is the person. I don't know that man from a can of paint**. I can't tell you who he shot, who he killed, but I did say that, though.

....

You showed me my statement earlier. I told you we was getting chased by a guy with a black-and-white hoodie

²⁷ NT, Trial, 5/14/2013, at 152-155.

²⁸ NT, Trial, 5/14/2013, at 155-161.

²⁹ NT, Trial, 5/14/2013, at 164.

³⁰ NT, Trial, 5/14/2013, at 248.

on. I told you that. You said did I see his face... I told you **I ain't never see his face. I couldn't.** It was dark. All I know we got chased by someone with a black-and-white hoodie on. My man got killed. Other than that, I can't tell you nothing.

Whatever's in the paper work, that's what I told you. I told you the story how it happened. I **never told you all that whatever his name killed him. I don't know. We just got chased with people with black-and-white hoodies on. I don't know who killed Ercel.**

...

[W]hen I got at Homicide, they showed me a picture in the office, and he had a black-and-white jacket on, I circled it. But I **never seen his face** to say that's him behind this jacket.

...

... You see the black-and-white jacket, right? I said a person with a black-and-white jacket killed Ercel. I never seen anybody's face to tell you who killed Ercel.

When you showed me a picture of [Mr. Long] he was in the surveillance [footage], that's who had the black-and-white jacket on. I never seen his face to say, oh, that's the person that was chasing [us]. I didn't see nobody. It was dark outside.³¹

19. The Court took a brief recess during Mr. Gaffney's testimony, during which it said the following regarding Mr. Gaffney's testimony: "**[Mr. Gaffney] has basically adopted the entire statement except for the fact that he's saying he did not see the face of the person that allegedly shot the decedent.**"³²

³¹ NT, Trial, 5/14/2013, at 171, 195-196, 196, 197.

³² NT, Trial, 5/14/2013, at 201.

20. On cross-examination, Mr. Gaffney picked up where he left off on cross-examination.

a. He told defense counsel: **“I didn’t see his face. I just know a person with a black-and-white hoodie was shooting.”**³³

b. Mr. Gaffney added: **“I never told you [Mr. Long] was following me. I said a person with a black-and-white jacket was following me. I never told you all that [Mr. Long] was following me.”**³⁴

c. Mr. Gaffney also said: **“I just know the only reason I circled [Mr. Long’s] picture was because of the black-and-white jacket. I don’t know who that is.”**³⁵

21. Mr. Gaffney also highlighted the fact Mr. Long had a white stripe running (vertically) down his pant legs. **The gunman, though, did not have a white stripe on his pant legs.**³⁶

22. Mr. Gaffney also said Mr. Long wasn’t involved in the shooting incident with the red-hooded man.³⁷

23. Mr. Gaffney disputed the prosecutor’s claim that detectives only held him briefly at Homicide when they picked him up to questioned him:

I was in there for a day and a half. You all keep saying five hours. I was in there for a day and a half. I missed a whole day. I didn't talk to the detective until the next day. You all keep saying five hours. I was in there for a day and a half.³⁸

24. After giving his December 30, 2011 statement, detectives never arrested him for illegally possessing the firearm he discharged at the red-hooded man.³⁹

³³ NT, Trial, 5/14/2013, at 220.

³⁴ NT, Trial, 5/14/2013, at 247.

³⁵ NT, Trial, 5/14/2013, at 248.

³⁶ NT, Trial, 5/14/2013, at 249.

³⁷ NT, Trial, 5/14/2013, at 222.

³⁸ NT, Trial, 5/14/2013, at 250-251.

³⁹ NT, Trial, 5/14/2013, at 221.

25. During the charge conference, the Court acknowledged that Mr. Gaffney never identified Mr. Long as the gunman at trial:

It's the Court's position that I have to modify the *Kloiber* charge in that the question, because there's no identification in this case, is whether or not his identification at the previous hearing is weakened by his failure to identify in court, and it's the Court's position that I do.⁴⁰

26. The Court gave the following *Kloiber* instruction:

Now, once again I just have to add a few more things in this regard because sometimes a victim or another witness can make a mistake when trying to identify a criminal. If certain factors are present, then you have to take the accuracy -- the accuracy of the identification is so doubtful that you must receive it with caution.

Identification testimony must be received with caution if the witness was in a bad position, poor lighting, or other reasons did not have an opportunity to observe the criminal, or if his testimony is not positive as to the identity, or if the witness's positive identity is weakened by qualifications, hedging, or inconsistencies by his not identifying the defendant at any point. So in this particular case, I just want to highlight, you had testimony that [Mr. Gaffney] identified the defendant through the photo array, and you had testimony that under oath he identified him at another proceeding. But you have to look at that in the context of the fact that [Mr. Gaffney] did not identify the defendant in this particular proceeding, so you want to make sure that you look at that prior identification testimony in light of that.

But once again and in conclusion in this regard, you must consider with caution his testimony identifying the defendant as the person who committed the crime if you

⁴⁰ NT, Trial, 5/16/2013, at 113.

think that the prior identification was weakened by his failure to identify in this case.⁴¹

27. During deliberations, the **jury asked three questions**. It first asked to see the photograph of Mr. Long in the MJ mini-mart. It next one asked to see Mr. Gaffney's December 30, 2011 custodial statement.⁴²

28. On **May 17, 2013**, the jury convicted Mr. Long of **first-degree murder**.⁴³

29. After Mr. Long filed notice of appeal and his *Concise Statement of Errors*, the Court issued its opinion. In it, the Court said the jury's verdict was not against the weight of the evidence and its "conscience" was "not shocked" because the "**evidence so strongly established [Mr. Long's] guilt.**"⁴⁴ On appeal, the Superior Court made a similar finding when it said "the Commonwealth presented identification evidence that **unequivocally branded [Mr. Long] as the shooter.**"⁴⁵

C. Post-Trial Developments

30. On **November 5, 2014**, counsel wrote **Benderick Stern** at **SCI-Coal Township**.

a. Mr. Stern was serving LWOP for the **November 27, 2011** murder of **Rymeek Horton**.⁴⁶ Mr. Horton's murder occurred two weeks after Ercel Butts-Sterns's murder.

⁴¹ NT, Trial, 5/16/2013, at 134-136.

⁴² Exs. 16-17.

⁴³ NT, Trial, 5/17/2013, at 4.

⁴⁴ Trial Court Opin., 7/23/2013, p. 9 (emphasis added).

⁴⁵ Super. Court Opin., 7/9/2014, p. 9 (emphasis added). With all due respect to both Courts, Mr. Long respectfully disagrees with their assessment of the evidence against him, particularly the identification evidence. There is overwhelming evidence the **gunman had on a dark hoody with a white stripe**, but there's no **trial testimony** identifying Mr. Long as the gunman. Yes, Rashon Gaffney identified Mr. Long at the preliminary hearing, but this was after the Commonwealth agreed not to prosecute him for illegally possessing a firearm. Moreover, Mr. Gaffney admitted at trial the gunman he saw didn't have a white stripe running down his pant legs. NT, Trial, 5/14/2013, at 249.

⁴⁶ Ex. 18.

b. Mr. Sterns (**CP-51-CR-0006419-2012**) and his co-defendant, **Kahhim Odom (CP-51-CR-0002652-2012)**, were convicted of Mr. Horton's murder on **April 18, 2013**—a month before Mr. Long's trial. The **Honorable Teresa Sarmina** presided over their joint trial.

c. Counsel wished to speak with Mr. Stern about the shooting and his December 30, 2011 interview with detectives.

31. On **November 5, 2014**, counsel wrote **Eric Green** at **SCI-Pine Gove**.

a. Mr. Green is serving a **10 to 20 year prison sentence** for **third-degree murder** in case number **CP-51-CR-0010340-2012**.⁴⁷

b. The murder occurred on **December 5, 2011**. Mr. Green was arrested on **June 22, 2012**.

c. Counsel wished to speak with Mr. Green about the shooting and his December 30, 2011 interview with detectives.

32. On **August 24, 2015**, counsel received a handwritten letter from **Jermaine Burch**, Benderick Sterns's cell mate at SCI-Coal Township for two years.⁴⁸ In his letter, Mr. Burch informed counsel:

a. Mr. Sterns passed away at SCI-Coal Township on **August 15, 2015**.⁴⁹

b. Mr. Sterns received counsel's November 2014 letter. Mr. Burch was in their cell when Mr. Sterns received counsel's letter.

c. Mr. Sterns wrote a letter to counsel in December 2014 informing him he was willing to speak with counsel because **he "knew for a fact" Mr. Long was innocent**, but by that time he had misplaced counsel's letter and office address.

d. Mr. Sterns told him (Burch) he was with his cousin Ercel Butts-Sterns when he was murdered and that the **gunman was not Mr. Long**, but, in fact, the person he (Sterns) murdered on November 27, 2011.

⁴⁷ Mr. Green's PA DOC number is **KY-1278**.

⁴⁸ Ex. 20.

⁴⁹ Based on SCI-Coal Township policies, counsel couldn't interview Mr. Sterns at SCI-Coal Township unless Mr. Sterns placed him on his visiting list.

33. Counsel called and spoke with Mr. Burch multiple times between August 2015 and March 2016. Each time, though, Mr. Burch could only speak briefly because of work or **half-way house** restrictions.⁵⁰

34. On **December 8, 2015**, counsel faxed a letter to **Regina Coyne, Kahhim Odom's trial attorney**, asking if she would provide counsel a copy of the discovery in *Commonwealth v. Kahhim Odom*, **CP-51-CR-0002652-2012**.

a. According to Mr. Burch's August 24th letter, Benderick Sterns shot and killed the person who shot and killed his cousin. Mr. Sterns and Mr. Odom were charged and convicted of **Rymeek Horton's** November 27, 2011 shooting death.

b. Counsel requested the discovery to determine if there is a connection between Ercel Butts-Sterns's murder and Rymeek Horton's murder.

35. On **January 14, 2016**, counsel scanned the discovery from *Commonwealth v. Kahhim Odom*, **CP-51-CR-0002652-2012** at Ms. Coyne's office.

36. On **January 15, 2016**, counsel went to the courthouse to scan the **10 volumes of trial transcripts** from Mr. Sterns and Mr. Odom's joint (April 2013) trial, but court staff prohibited him from scanning the transcripts. Counsel can't afford to pay for the voluminous transcripts or pay the copying fees to have them copied at the courthouse.

37. **On March 23, 2016**, counsel finally had a long phone conversation with Jermaine Burch, where he said the following:

a. Benderick Sterns was his cellmate for two years at SCI-Coal Township.

b. After Mr. Sterns received counsel's letter, he told him he was with his cousin when he was shot and saw the gunman and the gunman wasn't Butchie Long.

⁵⁰ Mr. Burch is still under sentence for the drug charges he pled guilty to on **February 13, 2013** in case number **CP-51-CR-0000040-2013**. Ex. 20. Mr. Burch left SCI-Coal Township in **September 2015** and is now serving a one year probation sentence at a **halfway house**. The halfway house is located at **1007 West Lehigh Avenue, Philadelphia, PA 19133**. Mr. Burch's PA DOC number is **KY-9030**.

c. Mr. Sterns told him the person who killed his cousin was the person he shot and killed on November 27, 2011.

d. Mr. Sterns told him when detectives interviewed him in connection with his cousin's murder, he gave a statement. He also said they showed him a photograph of Butchie Long and he told detectives Butchie Long wasn't the gunman.

e. He is willing to testify at a PCRA evidentiary hearing.

38. On **December 16, 2015**, counsel wrote **Eric Green** again, but this time at **SCI-Dallas**.

39. On **March 29, 2016**, Mr. Green called counsel from **SCI-Dallas** and spoke with him briefly:

a. He didn't feel comfortable talking over a recorded DOC line and asked counsel to speak with him in person at SCI-Dallas.

b. He was with Ercel Butts-Sterns, Benderick Sterns, Rashon Gaffney, and Lidell Brightman when Mr. Butts-Sterns was shot and killed.

c. He saw the gunman and **Butchie Long wasn't the gunman**.

CLAIMS FOR RELIEF

Claim 1: Mr. Long has a liberty interest in obtaining PCRA relief based a state or federal constitutional violation, newly-discovered evidence, and counsel’s ineffectiveness. Mr. Long’s liberty interest is entitled to state and federal due process protection. The Court, therefore, must provide him adequate “process” that will allow him to meaningfully vindicate the substantive liberty interests afforded to him under the PCRA. The Court’s refusal to grant any further continuances, however, violates Mr. Long’s state and federal due process rights because it prevents him from adequately vindicating the liberty interests afforded to him under the PCRA. U.S. Const. amdots., V, VI, VII, XIV; Pa. Const. art. 1, § 9.

A. Case Law

40. Mr. Long has a due process right to a fundamentally fair post-conviction proceeding. *Pennsylvania v. Finley*, 481 U.S. 551, 556-557 (1987); *Evitts v. Lucey*, 469 U.S. 387, 401 (1985); *Commonwealth v. Haag*, 809 A.2d 271, 283 (Pa. 2002). While States have no constitutional duty to provide post-conviction relief, *Pennsylvania v. Finley*, 481 U.S. at 557, if a State creates a comprehensive post-conviction process that is “an integral part” of “finally adjudicating” a defendant’s “guilt or innocence,” *Griffin v. Illinois*, 351 U. S. 12, 18 (1956), the procedures used to adjudicate post-conviction claims “must comport with” due process. *Evitts v. Lucey*, 469 U.S. at 393.

41. The post-conviction process is an “integral part” of Pennsylvania’s system for adjudicating a defendant’s guilt and innocence. Post-conviction represents the first time a defendant can (1) challenge counsel’s advocacy, *Commonwealth v. Holmes*, 79 A.3d 562, 583 (Pa. 2013); *Commonwealth v. Grant*, 813 A.2d 726, 738 (Pa. 2002); 42 Pa. C.S. § 9543(a)(2)(ii), (2) present off-the-record evidence establishing a state or federal constitutional violation, 42 Pa. C.S. § 9543(a)(2)(i), and (3) present newly-discovered exculpatory evidence. 42 Pa. C.S. § 9543(a)(2)(vi).

42. Under the PCRA, therefore, Mr. Long has a **substantive liberty interest** in demonstrating the unfairness of his trial based on counsel’s ineffectiveness, the Commonwealth’s suppression of material evidence, and newly-discovered evidence. *Dist. Attorney’s Office v. Osborne*, 557 U.S. 52, 68 (2009). This **substantive liberty interest** is entitled to due process protection. In “some circumstances” for instance, a protected liberty interest may “beget yet other rights

to **procedures** essential to the realization of the parent **[substantive]** right.” *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981) (emphasis added). In other words, a State’s post-conviction **procedures** must be “fundamentally [i]adequate to vindicate” the **substantive** liberty interest(s) provided for in the State’s post-conviction statute. *District Attorney’s Office v. Osborne*, 557 U.S. at 68. In short, “[w]hen... a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication[.]” *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011); *accord Pennsylvania v. Finely*, 481 U.S. at 556 (the Fourteenth Amendment obligates a State “to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State’s appellate process,” and “require[s] that the state appellate system be ‘free from unreasoned distinctions’”); *Commonwealth v. Bennett*, 930 A.2d 1264, 1273 (Pa. 2007) (PCRA petitioners “must be given the opportunity for the presentation of claims at a meaningful time and in a meaningful manner.”).

43. Providing adequate process to PCRA petitioners is logical, reasonable, and fair because the burden shifts to them once they are convicted and they began their appellate and post-conviction proceedings. *Cf. Commonwealth v. Shaffer*, 2016 Pa. Super. Unpub. LEXIS 922, *7 (Pa. Super. 2016) (“[I]n collateral proceedings under the PCRA, it is the petitioner’s burden to establish his claims.”); *Commonwealth v. Steele*, 961 A.2d 786, 796 (Pa. 2008) (“[C]ounsel is presumed effective, and [appellant] bears the burden of proving otherwise.”).

B. Application of Law to Facts

44. On **December 1, 2015**, Mr. Long filed his PCRA petition.

45. On **December 4, 2015**, the Court gave counsel **only 90 days** to file an amended PCRA petition.

46. On **March 31, 2015**, the Court informed counsel “[n]o continuance requests will be granted in this matter.”⁵¹

⁵¹ Ex. 22. Counsel, by the way, did not “fail to appear” at the March 15, 2016 status conference. Counsel could not attend the March 15th status conference because of a family medical procedure, so he timely contacted his colleague **Marissa Bluestine** of the **Pennsylvania Innocence Project** on **March 8, 2016** and asked if she could cover for him. Mrs. Bluestine responded that day and said she could cover for counsel. Ex. 23. On **March 14, 2016**, counsel emailed Mrs. Bluestine again to remind her of the March 15th status conference. Mrs. Bluestine responded that day and said, “**No worries. I’m on it.**” Ex. 24. On **March 14th**, Mrs. Bluestine reviewed the docket and was confused by the listings so she called the Court’s chambers. She

47. The Court’s “no continuance” stance violates Mr. Long’s state and federal due process rights.⁵² The “process” afforded by the Court must be “fundamentally adequate” for Mr. Long to vindicate the substantive liberty interests provided to him under the PCRA. The Court’s “no continuance” stance effectively **short circuits** counsel’s and Mr. Long’s **diligent investigation**.

48. Moreover, to meaningfully present his claims, Mr. Long has a right to effective PCRA counsel. *Commonwealth v. Albrecht*, 720 A.2d 693, 699–700 (Pa. 1998). To be effective, counsel must investigate the facts underlying Mr. Long’s conviction, identify possible claims for relief, develop facts relevant to these claims, and present his claims in a persuasive PCRA petition. *Commonwealth v. Hampton*, 718 A.2d 1250, 1254 (Pa. Super. 1998) (citation omitted); *Commonwealth v. Mceneaney*, 3002 EDA 2012 (Slip. Op.), at *12 (March 7, 2014) (unpublished decision) (“Counsel is to be appointed in a PCRA case to **adequately and fully develop** legal issues by filing an amended petition precisely because a *pro se* petitioner is not learned in the law.”) (emphasis added); *Commonwealth v. Harris*, 553 A.2d 428, 433 (Pa. Super. 1989) (“Counsel’s ability to frame the issues in a legally meaningful fashion insures the trial court that all relevant considerations will be brought to its attention[.]”) (quotations and citation omitted). To “adequately and fully develop” Mr. Long’s “legal issues,” counsel needs “adequate” time to investigate not only Mr. Long’s case, but the circumstances surrounding Rymeek Horton’s November 27, 2011 shooting death.

spoke with a **law clerk** who informed her **the Court was not sitting on March 15th** and the March 15th date was for filing purposes only. Mrs. Bluestine immediately emailed counsel and conveyed this message to him. This is Mrs. Bluestine’s exact email to counsel:

I checked judicial calendar, and Barb's not sitting tomorrow. I called her chambers; law clerk told me tomorrow is not a status date, just deadline for CW response.

This email is attached as Exhibit 25 (underling added).

⁵² The Fourteenth Amendment provides in part, “nor shall any State deprive any person of life, liberty, or property, without due process of Law ...” U.S. Const. amend. XIV, § 1. Article 1, Section 9 of the Pennsylvania Constitution states in part, “In all criminal prosecutions the accused ... [cannot] be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land.” Pa. Const. art. 1, § 9. The Pennsylvania Supreme Court has interpreted Article 1, Section 9 as the functional equivalent of the federal Due Process Clause. *Commonwealth v. Kratsas*, 564 Pa. 36, 764 A.2d 20, 27 n. 5 (2001).

49. Mr. Long is indigent. Counsel is representing him *pro bono*. Counsel, though, has diligently investigated Mr. Long's case to the point where he has developed additional evidence proving Mr. Long is not the gunman. Counsel, however, needs adequate time to do the following:

- a. Interview Eric Green at SCI-Dallas.⁵³
- b. Interview Lidell Brightman.
- c. Interview Rashan Gaffney.⁵⁴
- d. Obtain and read the 10 volumes of trial transcripts from Benderick Sterns and Kahhim Odom's (April 2013) trial held before Judge Sarmina.
- e. Conduct all reasonable additional investigations based on counsel's review of the Sterns-Odom trial transcripts and pre-trial discovery.

50. To obtain and review the Sterns-Odom trial transcripts, moreover, counsel needs either one of two things:

- a. An order allowing counsel to scan the transcripts at the courthouse; or
- b. An order granting Mr. Long a copy of the transcripts free of charge because he is indigent.

51. Mr. Long is entitled to the requested relief.

⁵³ When counsel spoke with Mr. Green on March 29th, he agreed to place him (counsel) on his visiting list so counsel could meet with him face-to-face at SCI-Dallas.

⁵⁴ In regards to **Lidell Brightman** and **Rashan Gaffney**, on March 29, 2016, after speaking with Eric Green, counsel emailed Brenda Beyersdoerfer of Quest Associates, and asked her to run "locates" on Mr. Brightman and Mr. Gaffney. Ex. 26. On April 4, 2016, Ms. Beyersdoerfer emailed counsel and attached the "locates" associated with Mr. Brightman and Mr. Gaffney. Ex. 27. Mr. Brightman's locate is Ex. 28. Mr. Gaffney's locate is Ex. 29.

Claim 2: Trial counsel was ineffective for not interviewing or attempting to interview Benderick Sterns and Eric Green before trial. Trial counsel's failure prejudiced Mr. Long because it prevented two witnesses from telling the jury Mr. Long was not the gunman. U.S. Const. amdts., V, VI, VII, XIV; Pa. Const. art. 1, § 9.

A. Case Law

52. Mr. Long had a right to effective trial counsel. U.S. Const. amdt. VI; *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012) (“The right to the effective assistance of counsel at trial is a bedrock principle in our justice system.”). This right is “fundamental” because it “assures the fairness, and thus the legitimacy, of our adversary process.” *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986). The right to effective counsel, consequently, is a “great engin[e] by which an innocent man can make the truth of his innocence visible[.]” *Luis v. United States*, 2016 U.S. LEXIS 2272, at *11 (Mar. 30, 2016) (citation omitted). Trial counsel’s purpose, therefore, “is to “test[] the prosecution’s case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged.” *Martinez v. Ryan*, 132 S.Ct. at 1317. The right to effective representation, consequently, is “the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656 (1984). Trial counsel, as a result, “has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” *Strickland v. Washington*, 468 U.S. 668, 688 (1984). Consequently, unless a defendant receives effective representation, “a serious risk of injustice infects the trial itself.” *Cuyler v. Sullivan*, 446 U.S. 330, 343 (1980).

53. To prevail on an ineffectiveness claim, Mr. Long must demonstrate that trial counsel’s performance was deficient and the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. at 687. The deficiency prong “requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* This prong is “necessarily linked to the practice and expectations of the legal community: ‘The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (quoting *Strickland v. Washington*, 466 U.S. at 688). Thus, when a court reviews an IAC claim, “the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” *Strickland v. Washington*, 466 U.S. at 688. The prejudice prong requires showing a reasonable probability that, but for counsel’s errors, the proceeding’s results would have been different. A reasonable

probability “is a probability sufficient to undermine confidence in the outcome.” *Strickland v. Washington*, 466 U.S. at 694. This “is not a stringent one” and is “less demanding than the preponderance standard.” *Hall v. Kyler*, 190 F.3d 88, 110 (3d Cir. 1999); accord *Kyles v. Whitley*, 514 U.S. 419, 435 (1995); *Nix v. Whiteside*, 475 U.S. 157, 175 (1986).

54. The Pennsylvania Supreme Court has interpreted *Strickland* and articulated its own three-factor test to determine whether counsel rendered ineffective assistance. To obtain relief, the petitioner must show: (1) the underlying legal claim is of arguable merit; (2) trial counsel’s action or inaction lacked any objectively reasonable basis designed to effectuate his or her client’s interest; and (3) prejudice, to the effect there was a reasonable probability of a different outcome at trial, if not for counsel’s error. *Commonwealth v. Pierce*, 527 A.2d 973, 975–976 (Pa. 1987). Trial counsel’s strategy will be considered unreasonable if the petitioner establishes “that an alternative not chosen offered a potential for success substantially greater than the course actually pursued.” *Commonwealth v. Howard*, 719 A.2d 233, 237 (1998). The *Pierce* standard is substantively identical to the *Strickland* standard. *Commonwealth v. Spatz*, 870 A.2d 822, 829 (Pa. 2005); *Commonwealth v. Williams*, 936 A.2d 12, 19 (Pa. 2007).

B. Relevant Facts

55. Detectives interviewed Benderick Sterns and Eric Green on December 30, 2011, **after** they interviewed Rashon Gaffney and Lidell Brightman.

a. Mr. Gaffney and Mr. Brightman both said Benderick Stern was with them and Ercel Butts-Sterns when Mr. Butts-Sterns was shot and killed.

b. Mr. Gaffney also said Mr. Green was with them as well and witnessed the shooting.

56. On December 30, 2011, detectives first interviewed Mr. Gaffney and showed him a photo array that included Mr. Long’s photograph. Mr. Gaffney supposedly identified Mr. Long as the gunman.

57. After interviewing Mr. Gaffney, detectives interviewed Mr. Sterns.⁵⁵ According to the **Police Activity Sheet**, Mr. Sterns denied being with Mr. Butts-Sterns and the others during the fatal shooting. Despite Mr. Gaffney's and Mr. Lightman's statements to the contrary, the **Police Activity Sheet** indicates detectives believed Mr. Sterns and supposedly didn't take a formal statement from him or show him Mr. Long's photograph.

58. After interviewing Mr. Gaffney, detectives interviewed Mr. Green.⁵⁶ According to the **Police Activity Sheet**, Mr. Green denied being with Mr. Butts-Sterns and the others during the fatal shooting. Despite Mr. Gaffney's statement to the contrary, the **Police Activity Sheet** indicates detectives believed Mr. Green and supposedly didn't take a formal statement from him or show him Mr. Long's photograph.

59. The Commonwealth disclosed the **Police Activity Sheets** before trial, including the one summarizing Mr. Sterns's and Mr. Green's December 30th interviews.

60. **Eugene Tinari** represented Mr. Long at trial.

61. Mr. Tinari, though, didn't enter his appearance until **March 6, 2013**—only two months before trial.⁵⁷

62. Concerned about the timing of Mr. Tinari's appearance, the Court sent him a letter on **March 13, 2013** in which it informed him it would “not permit” his “entry of appearance in this matter unless” he was “prepared to go to trial on the scheduled trial date of **May 13, 2013.**”⁵⁸

63. At a **March 21, 2013** status listing, Mr. Tinari informed the Court he would be prepared for the May 13th trial date. Based on Mr. Tinari's representation, the Court entered an order attaching him as trial counsel. On this date, Mr. Tinari also informed the Court he received the pre-trial discovery.⁵⁹

⁵⁵ Ex. 14.

⁵⁶ Ex. 14.

⁵⁷ Ex. 30.

⁵⁸ Ex. 31.

⁵⁹ Ex. 30.

64. Between March 3, 2013 and the beginning of trial on May 13, 2013, Mr. Tinari never interviewed or attempted to interview Benderick Sterns or Eric Green.

C. Application of Law to Facts

65. Trial counsel's decision not to interview Benderick Sterns and Eric Green was objectively unreasonable based on the information contained in the **Police Activity Sheet**.

66. Detectives would have the defense believe it simply took Mr. Sterns's and Mr. Green's denials at face value and didn't press them for the truth based on what they gathered from Lidell Brightman and Rashon Gaffney.

67. A reasonably competent trial attorney would have realized something was amiss, especially when it came to Benderick Sterns. Rashon Gaffney and Lidell Brightman both gave detailed statements about the shooting and both repeatedly identified Mr. Sterns as part of the group Ercel Butts-Sterns was with when he was shot and killed. Based on these statements, if Benderick Sterns did in fact tell detectives he didn't witness the shooting and wasn't with Mr. Butts-Sterns and the others, the detectives would've have questioned him further. The same goes for Eric Green. Indeed, there are no rationale reasons why Rashon Gaffney and Lidell Brightman would falsely mention Mr. Sterns and Mr. Green.

68. A reasonably competent trial attorney, moreover, would've surmised that detectives may have falsified the **Police Activity Report**, *i.e.*, they showed Benderick Sterns and Eric Green photo arrays, but neither identified Butchie Long as the gunman; they suppressed this information, however, because it undermined Rashon Gaffney's identification.

69. Consequently, a reasonably competent trial attorney would have, at the very least, attempted to interview Benderick Sterns and Eric Green to determine whether (1) they told detectives what was said in the Police Activity Sheets, (2) detectives showed them photo arrays, and if so, (3) whether they identified Butchie Long.

70. Trial counsel's failure prejudiced Mr. Long.

71. Mr. Long is entitled to relief.

Claim 3: Mr. Long is entitled to relief based on Jermaine Burch's after-discovered statements. U.S. Const. amdts., V, VI, VII, XIV; Pa. Const. art. 1, § 9.

72. After-discovered evidence can be the basis for a new trial if: (1) it has been discovered *after* trial and could not have been obtained at or prior to the conclusion of the trial by the exercise of reasonable diligence; (2) it is not merely corroborative or cumulative; (3) it will not be used to impeach the credibility of a witness; and (4) it is of such a nature and character that a different verdict would likely result if a new trial is granted. *Commonwealth v. Williams*, 640 A.2d 1251, 1263 (1994); *Commonwealth v. McCracken*, 659 A.2d 541, 544-545 (Pa. 1995).

73. Jermaine Burch's letter and statements were developed after trial.

74. Mr. Long could not have obtained Mr. Burch's letter and statements before trial with reasonable diligence.

75. Mr. Burch's letter and statements will not be used to impeach a witness's credibility. Rather, it will bolster Rashon Gaffney's **trial** testimony that Butchie Long was not the gunman.

76. The substance of Mr. Burch's letter and statements are of such a nature and character that a different verdict would likely result if the Court granted a new trial.

77. Mr. Long is entitled to relief.

Claim 4: Benderick Sterns gave a formal statement to detectives. Detectives showed him a photo array that included Mr. Long’s photograph. Mr. Sterns didn’t identify Mr. Long as the gunman. Mr. Sterns’s non-identification of Mr. Long was exculpatory. The Commonwealth suppressed it. The suppression of Mr. Sterns’s exculpatory non-identification of Mr. Long undermines confidence in the jury’s verdict requiring a new trial. U.S. Const. amends. V, VI, VIII, XIV, Pa. Const. art. 1, § § 8, 9.

A. Facts

78. Benderick Sterns gave a formal statement to detectives on December 30, 2011.

79. Detectives showed Mr. Sterns a photo array with Butchie Long’s photograph.

80. Mr. Sterns told detectives Mr. Long was not the gunman.

81. In the **Police Activity Sheet**, detectives falsely mischaracterized the substance of Mr. Sterns’s statement. They also lied when they wrote they didn’t take a formal statement from him.

82. The Commonwealth never disclosed Mr. Sterns’s exculpatory non-identification of Mr. Long.

B. Case Law

83. “[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Evidence “qualifies as material when there is **any reasonable likelihood** it could have affected the judgment of the jury.” *Wearry v. Cain*, 194 L.Ed.2d 78, 83-84, (2016) (quotations and citations omitted); accord *Giglio v. United States*, 405 U. S. 150, 154 (1972); *Napue v. Illinois*, 360 U. S. 264, 271 (1959). To prevail on his *Brady* claim, Mr. Long need **not** show that he “more likely than not” would have been acquitted of murder had the jury known of Mr. Sterns’s exculpatory non-identification. *Smith v. Cain*, 132 S.Ct. 627, 630 (2012). He “must show **only** that the new evidence is sufficient to undermine confidence in the verdict.” *Wearry v. Cain*, 194 L.Ed.2d at 84 (emphasis added).

84. A defendant need not demand material evidence before trial; instead, the prosecution has an “affirmative duty” to disclose any such evidence “regardless of request.” *Kyles v. Whitley*, 514 U.S. 419, 432-433 (1995). And *Brady* encompasses material evidence “known only to police investigators and not to the prosecutor,” *id.* at 438; accord *Youngblood v. West Virginia*, 547 U.S. 867, 869-870 (2006), and applies “irrespective of” the prosecutor’s “good faith or bad faith.” *Brady v. Maryland*, 373 U.S. at 87.

85. Under *Brady*, “the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police,” and to disclose that evidence *sua sponte* to the defense. *Kyles v. Whitley*, 514 U.S. at 437. To be sure, that obligation requires a prosecutor to “gauge the likely net effect” of favorable evidence *ex ante* and to make a predictive judgment as to whether the failure to disclose the evidence would be prejudicial to the defense. *Id.* As the Supreme Court has stressed, however, “the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial’s outcome.” *Id.* at 439. Instead, the Supreme Court has admonished that “a prosecutor anxious about tacking too close to the wind” should “disclose a favorable piece of evidence,” *id.*, and “resolve doubtful questions in favor of disclosure.” *United States v. Agurs*, 427 U.S. 97, 108 (1976).

86. The Commonwealth had a state-law duty to disclose as well. Under Pa.R.Crim.P. 573(B)(1)(a), it is mandatory for the Commonwealth to disclose “[a]ny evidence favorable to the accused that is material either to guilt or to punishment, and is within the possession or control of the attorney for the Commonwealth[.]”

C. Application of Law to Facts

87. The suppression of Benderick Sterns’s exculpatory non-identification of Mr. Long undermines confidence in the jury’s guilty verdict.

88. Mr. Long is entitled to relief.

Claim 5: Trial counsel was ineffective for not timely informing Mr. Long of the Commonwealth's plea offer. U.S. Const. amdts., V, VI, VII, XIV; Pa. Const. art. 1, § 9.

89. On **May 13, 2013**, shortly before trial was to begin, trial counsel informed Mr. Long that the Commonwealth presented a 25 to 50 year imprisonment plea offer.

90. Trial counsel advised Mr. Long to reject the plea offer and go to trial.

91. Based on trial counsel's advice, Mr. Long rejected the plea offer.

92. The Commonwealth's plea offer and Mr. Long's rejection of it based on trial counsel's advice were not memorialized in court on-the-record.

93. Likewise, counsel can't find any documentary evidence, *e.g.*, memo, fax, email, discussing the plea's offer date, term of years, and expiration date.

94. Trial counsel's advice to reject the plea offer was objectively unreasonable because, as the Court found, "the evidence so strongly established [Mr. Long's]." ⁶⁰ On appeal, the Superior Court also said "the Commonwealth presented identification evidence that unequivocally branded [Mr. Long] as the shooter." ⁶¹

95. If the evidence "so strongly established" Mr. Long's guilt because the "identification evidence... unequivocally branded" him as the shooter, a reasonably competent trial attorney would have encouraged and advised Mr. Long to take the plea offer.

96. Mr. Long is entitled to relief. *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

⁶⁰ Trial Court Opin., 7/23/2013, p. 9.

⁶¹ Super. Court Opin., 7/9/2014, p. 9.

RIGHT TO DISCOVERY

97. Mr. Long is entitled to post-conviction discovery, namely, **access to the Philadelphia Police Department’s H-file and District Attorney’s case file(s)**. Access to these case files can be conducted by the Court conducting an *in camera* review to determine whether they contain Benderick Sterns’s and Eric Green’s December 30, 2011 statements and non-identifications of Mr. Long.

98. Mr. Long is entitled to the requested discovery under Rule 902(E) because it “may arguably support one or more of [his] PCRA theories.” *Commonwealth v. Frey*, 41 A.3d 605, 613 (Pa. Super. 2012). He’s also entitled to them because they should have been disclosed prior to trial under state and federal due process principles and state statutory law.

99. Mr. Long is also entitled to the requested discovery under federal due process. Due process, as mentioned, requires post-conviction proceedings to be fundamentally fair. *Pennsylvania v. Finley*, 481 U.S. at 556-557. Moreover, under the PCRA statute, Mr. Long can obtain relief if his conviction “resulted from” a state or federal constitutional violation that “so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.” 42 Pa. C.S. § 9543(a)(2)(i). Mr. Long can also obtain PCRA relief if his conviction “resulted from” the “unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.” 42 Pa. C.S. § 9543(a)(2)(i).

100. Under the PCRA, therefore, Mr. Long has a **substantive liberty interest** in demonstrating the unfairness of his trial based on the Commonwealth’s suppression of his custodial statements and any reports summarizing his custodial statement. *Dist. Attorney’s Office v. Osborne*, 557 U.S. at 68. This **substantive liberty interest** is entitled to due process protection, meaning “in some circumstances,” a protected liberty interest may “beget yet other rights to **procedures** essential to the realization of the parent [**substantive**] right.” *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. at 463 (emphasis added). In other words, a State’s post-conviction **procedures** must be “fundamentally []adequate to vindicate” the **substantive** liberty interest provided for in the State’s post-conviction statute. *District Attorney’s Office v. Osborne*, 557 U.S. at 68. In short, “[w]hen... a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication[.]” *Swarthout v. Cooke*, 562 U.S. at 220.

101. Mr. Long, consequently, must be afforded adequate process to ensure he can “adequately vindicate” his **substantive** liberty interest of obtaining relief based on the Commonwealth’s suppression of Benderick Sterns’s exculpatory non-identification of Mr. Long. *Dist. Attorney’s Office v. Osborne*, 557 U.S. at 68-69. To adequately vindicate his **substantive** liberty interest, Mr. Long needs the requested discovery or a procedure by which the Court can meaningfully determine whether the H-file and/or District Attorney’s case file(s) contain Mr. Sterns’s exculpatory statement.

RIGHT TO FORENSIC TESTING

102. In terms of discovery, Mr. Long also requests that the ballistic characteristics from the **six 9mm shell casings collected from the shooting scene** be submitted and uploaded to the **Integrated Ballistics Identification System (“IBIS”)**. IBIS has been adopted as the platform of the National Integrated Ballistic Information Network (“NIBIN”) Program, which the ATF spearheads NIBIN tracks about 100,000 guns used in crimes

103. In 1999, ATF established the NIBIN to provide federal, state, and local partner agencies with an automated ballistic imaging system. NIBIN partners can discover formerly impossible-to-identify links between firearms-related violent crimes to identify firearm users or “trigger pullers.”⁶²

104. IBIS technology takes digital images of cartridge cases from crime scenes or a crime gun test fires. Multiple casings/bullets may be part of the same case record. In hours, IBIS compares those images against previous NIBIN entries. If a high-confidence candidate emerges, firearms examiners compare the original physical evidence microscopically to confirm the match. This is a NIBIN “hit,” or the linking of two different investigations. Linking otherwise unassociated crimes gives investigators and **defendants** a better chance to identify the actual shooter(s).⁶³

105. The Philadelphia Police Department has access to IBIS and the NIBIN and has successfully utilized them to solve previously unsolved cases.⁶⁴

⁶² Ex. 32.

⁶³ Ex. 32.

⁶⁴ Ex. 32.

106. Mr. Long is entitled to the requested discovery because it “may arguably support one or more of [his] PCRA theories.” *Commonwealth v. Frey*, 41 A.3d at 613.

RIGHT TO INVESTIGATIVE FUNDING

107. The Court has discretion to allocate investigative funds to counsel. *Commonwealth v. Gelormo*, 475 A.2d 765, 768 (Pa. Super. 1984). To warrant such funds, Mr. Long must demonstrate the funding is “reasonably necessary” to prepare an amended PCRA petition or to prepare for an evidentiary hearing. *Commonwealth v. Bridges*, 886 A.2d 1127, 1131 (Pa. 2005); *accord Commonwealth v. Howard*, 719 A.2d 233, 241-242 (Pa. 1998). In other words, Mr. Long need only identify a “particularized need” for the investigative assistance that relates to “a colorable issue” presented in his amended PCRA petition. *Commonwealth v. Howard*, 719 A.2d 241-242.

108. Mr. Long satisfies this standard.

109. Mr. Long needs investigative funding to interview, at the very least, Eric Green at SCI-Dallas and to locate and interview Lidell Brightman and Eric Green.

110. Mr. Long reserves the right to amend his funding request if his and counsel’s investigation identifies additional witnesses that may know material facts relating to Ercel Butts-Sterns’s murder.

RIGHT TO AN EVIDENTIARY HEARING

111. Mr. Long is entitled to summary relief where there are not disputes to material facts. Pa.R.Crim.P. 907(2). However, the PCRA court “shall order a hearing” when the PCRA petition “raises material issues of fact.” Pa.R.Crim.P. 908(A)(2); *accord Commonwealth v. Williams*, 732 A.2d 1167, 1189-1190 (Pa. 1999). A hearing cannot be denied unless the Court is “certain” Mr. Long’s petition lacks “total” merit. *Commonwealth v. Bennett*, 462 A.2d 772, 773 (Pa. Super. 1983); *accord Commonwealth v. Rhodes*, 416 A.2d 1031, 1035-1036 (Pa. Super. 1979). Even in “borderline cases Petitioners are to be given every conceivable legitimate benefit in the disposition of their claims for an evidentiary hearing.” *Commonwealth v. Pulling*, 470 A.2d 170, 173 (Pa. Super. 1983). Thus, an “evidentiary hearing should... be conducted where the record does not clearly refute the claim of an accused that his plea was unlawfully induced.” *Id.* (citing numerous guilty plea cases).

112. Mr. Long is entitled to a hearing because his petition raises material issues of fact regarding trial counsel’s effectiveness, the Commonwealth’s suppression of exculpatory evidence, and newly-discovered exculpatory evidence. At this point, Mr. Long would present the following witnesses at the hearing:

- a. Jermaine Burch
- b. Eric Green
- c. Lidell Brightman

113. Mr. Long reserves the right to add to this list as he continues his investigation.

RIGHT TO AMEND

114. Mr. Long reserves the right to amend or supplement his petition if: (1) he develops new facts relevant to his claims; or (2) his amended petition is defective. Pa.R.Crim.P. 905(A) (“Amendment shall be freely allowed to achieve substantial justice”); Pa.R.Crim.P. 905(B) (when a petition is “defective,” the PCRA court “shall order amendment of petition”).

PRAYER FOR RELIEF

115. **WHEREFORE**, Mr. Long respectfully requests the following relief:

- a. An *Order* granting the requested discovery. In the alternative, an *Order* granting *in camera* review of the H-file and District Attorney’s case file(s).
- b. An *Order* granting an evidentiary hearing.
- c. An *Order* granting counsel an additional 90 days to continue his diligent investigation of Mr. Long’s innocence, *Brady*, and ineffectiveness claims.
 - a. Any other relief the Court deems necessary to protect and vindicate Mr. Long’s state and federal rights to effective PCRA counsel and a fundamentally fair PCRA process.

Respectfully submitted this the 7rd day of April, 2016.

/s/Craig M. Cooley
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CERTIFICATE OF SERVICE

On **April 6, 2016** counsel e-filed the petition with Philadelphia County's e-filing system. The Commonwealth received an email notifying it of counsel's pleading.