PHILADELPHIA COUNTY COMMON PLEAS COURT
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA **Respondent,**	)	
v.	)	**CP-51-CR-0008303-2009** **PCRA: Non-Capital Murder** **PCRA Court: Ransom, L.H.**
RAYMOND ARMSTRONG **Petitioner**	)	

Amended PCRA Petition

1. Defendant-Petitioner, **Raymond Mr. Armstrong**, by and through his attorney, **Craig M. Cooley**, respectfully files his *Amended PCRA Petition*, which is presented in good faith and based on the following facts and points of authority.

PROCEDURAL HISTORY

2. On **June 30, 2009**, the Commonwealth filed an *Information* charging **Raymond Mr. Armstrong** with **murder** in connection with **Anthony Williams's September 27, 2008** death.

3. Mr. Mr. Armstrong **pled not guilty** and proceeded to a **jury trial** before the **Honorable Lillian H. Ransom** ("Court"). **Todd Henry** represented Mr. Armstrong.

4. Testimony began on **June 20, 2012**, ended on **June 21, 2012**, and the jury found Mr. Armstrong **guilty** of **first-degree murder** on **June 22, 2012**. The Court immediately sentenced him to life in prison without the possibility of parole ("LWOP").

5. Mr. Armstrong appealed (**1851 EDA 2012**), with **Barnaby Wittels** serving as appellate counsel, but the Superior Court affirmed on **September 3, 2013**.

6. Mr. Armstrong filed a timely *Petition for Allowance of Appeal* (**520 EAL 2013**), which the Pennsylvania Supreme Court denied on **February 26, 2014**.

7. On **May 20, 2014**, Mr. Armstrong filed a timely *certiorari* petition with the U.S. Supreme Court (**Case No. 14-5629**), which the Supreme Court denied on **October 6, 2014**, *Armstrong v. Pennsylvania*, 135 S.Ct. 275 (2014), making his conviction final on **October 6, 2014**. *Griffith v. Kentucky*, 479 U. S. 314, 321, n.6 (1987); 42 Pa. C.S. § 9545(b)(3).

8. On **August 21, 2015**, Mr. Armstrong filed a timely PCRA Petition, which he amends today.

STATEMENT OF FACTS

A. Witnesses See Raymond Armstrong Talking With Someone On His Cell Phone

9. On **September 27, 2008**, shortly before 10 p.m., **Damon Sanders** sat in his car parked on the **2600 block of Wilder Street** in Philadelphia–only one house down from **Anthony Williams's** residence at **2629 Wilder Street**. Shortly thereafter, he saw **Mr. Armstrong** park his black SUV. Mr. Armstrong, he said, appeared upset while talking on his cell phone in the SUV. When Mr. Armstrong exited his SUV, Mr. Sanders heard him yelling into his phone. When Mr. Armstrong re-entered his SUV, Mr. Sanders said he appeared more agitated because he yelled and screamed louder than before. At this point, Mr. Sanders said, **Anthony Williams** exited his house and approached the SUV. Mr. Williams helped Mr. Armstrong out of the SUV, but Mr. Armstrong nearly fell to the ground. Mr. Williams, Mr. Sanders said, calmed down Mr. Armstrong, stabilized him, and carried him into his house.[1]

10. **Denise Comer** also witnessed Mr. Armstrong's actions leading up to Mr. Williams helping him into his house. When Mr. Williams came out of his house, Ms. Comer said he went into Mr. Armstrong's SUV, calmed him down, and helped him out of his SUV. Once out, though, Mr. Armstrong could barely walk. Mr. Williams assisted him and continued to tell him to calm down. When Mr. Armstrong sat on the trunk of Ms. Comer's car, his cell phone rang in his SUV. Mr. Williams grabbed the cell phone and gave it to Mr. Armstrong. Ms. Comer heard part of Mr. Armstrong's phone conversation where he said, "Come on baby,

[1] NT, Trial, 6/20/2012, at 46-49; Ex. 1.

everything is set. I know I fucked up good this time, didn't I." At this point, Mr. Williams helped Mr. Armstrong into his house.[2]

11. **Tyonia Gardner**, who lived next door to Mr. Williams, also saw Mr. Armstrong yelling into his cell phone. After witnessing this, she went inside her house.[3]

12. **Jerome Smith**, who lived across the street from Mr. Williams, also saw Mr. Armstrong banging on the windows of the SUV. He also saw Mr. Williams exit his house and both he and Mr. Armstrong return to the house. Mr. Smith's wife, **Takia Smith**, videotaped the interaction between Mr. Williams and Mr. Armstrong before both entered Mr. Williams's house.[4]

B. Raymond Armstrong's Phone Calls

13. Prior to Mr. Williams's exiting his house and helping Mr. Armstrong into his house, Mr. Armstrong was on his cell phone with his fiancée, **Kim Velaquez**, who lived in Florida at the time.[5] Once Mr. Armstrong fell to the ground and lost reception, Ms. Velaquez felt so concerned about him she called at least three people to report her concerns: **Catherine Pillay**, **Loticia Ganas**, and **Linda Armstrong**.

14. Detectives interviewed **Catherine Pillay** the day after Mr. Williams's death because she went to the scene after hearing of Mr. Williams's death. When they asked her why she went to Mr. Williams's house that night she said:

> **I received a phone call from Kim Velazque**z and she told me something happened to Ray and that she didn't know what was going on. She told me that she was talking to him over the phone and she heard him saying to someone, "You think you're slick." **Then she heard someone fall and then she heard Ray saying help me**. At that point I told her that I would go and check on him. That's when I went to Anthony's house.[6]

[2] NT, Trial, 6/21/2012, at 15-16, 20-22. Ex. 2.
[3] NT, Trial, 6/20/2012, at 137, 139; Ex. 3.
[4] NT, Trial, 6/20/2012, at 149-151, 152-153.
[5] NT, Trial, 6/21/2012, at 113-114.
[6] Ex. 8.

15. Detectives interviewed **Loticia Ganas** the day after Mr. Williams's death because she too went to the scene after hearing of Mr. Williams's death. When they asked her what she knew about Mr. Williams's death she said:

> All I know is that **Ray's girlfriend called** and said that something was wrong with Ray. She said that she thought that Ray was hurt or dead. She knew that he was at Anthony's house.[7]

16. **Linda Armstrong** is Mr. Armstrong's mother. On **September 27, 2008**, Ms. Armstrong received a call from Mr. Armstrong's cell phone around **10 p.m**. Ms. Armstrong describes what happened next:

> I answered immediately and started talking. When there was no response I listened.
>
> While on my cell phone, I heard Raymond say, that he didn't have any feelings in his legs or arms and that he was done. He kept repeating "I'm done." Several times Mr. Williams said to Raymond, "Come on Ray get up." I did not know what had happened. My phone beeped [as I was listening to Raymond and Mr. Williams]. **It was my son's girlfriend Kim. She was crying and said something was wrong with Raymond and that I needed to call him**. I told her I was on the phone now with him and he wasn't answering and agreed something was wrong. I told her I had to go and I clicked back over to Raymond's phone line.
>
> When I came back on the line [with Raymond's phone] I heard Mr. Williams saying, "Come on Ray get up." I yelled into the phone at least [twice], "Raymond pick up the phone it's mom," [but] he never acknowledged me.

[7] Ex. 9.

> Initially, I thought Mr. Williams was trying to help Raymond. I became frightened when I heard Mr. Williams tone of voice change. It became very harsh. I heard him say, "**Get up here I said, get up. You're mine now**." I started yelling, "Raymond, Raymond please answer me it's mom," then I listened. Next I heard a groan sound and I called to Raymond, "It's mom Raymond, I heard you, please answer me. I heard you."[8]

C. Evidence of a Struggle in Mr. Williams's House

17. Damon Sanders, Denise Cromer, and other witnesses did not see what occurred inside Mr. Williams's house once he assisted Mr. Armstrong back into it. Some, however, heard a struggle or fight inside the house once they went inside.

18. **Damon Sanders** said after Mr. Williams helped Mr. Armstrong in to his house, he heard banging, screaming, and yelling coming from the house for the **next fifteen to twenty minutes**. He then saw Mr. Armstrong exit the house naked and state, "I killed Anthony," before dropping to the ground in the middle of the street.[9]

19. **Tyonia Gardner** said she "heard banging noises" coming from the house, as if "someone was banging on [her] front door." After the initial banging, she heard "continuous" banging coming from the house, before finally hearing "something being dragged down the steps."[10] She went to bed immediately thereafter.

D. Investigation

20. Neighbors entered the house after Mr. Armstrong exited and said he killed Anthony and called police once they found his body. At **10:30 p.m**., **Officer Santos Higgins** responded to the scene and discovered Mr. Armstrong naked on the street and face down. Officers entered Mr. Williams's house and discovered his body. EMT personnel tried to revive him, but they declared him dead.[11]

[8] Ex. 10.
[9] NT, Trial, 6/20/2012, at 49, 50-51; Ex. 1,
[10] NT, Trial, 6/20/2012, 140-141; Ex. 3.
[11] NT, Trial, 6/20/2012, at 67-68, 69-70, 70-71, 76.

21. **EMT Andrew O'Hara** attended to Mr. Armstrong at the scene and described him as having a decreased level of consciousness and being confused. Mr. O'Hara transported Mr. Armstrong to **Methodist Hospital**,[12] where **Dr. Bruce Hart** treated him and collected, *inter alia*, fingernail scrapings.[13] **Officer William Trentworth** photographed Mr. Armstrong at Methodist Hospital and the photographs showed scratches to his forehead, knee, left heel, and finger.[14] After photographing Mr. Armstrong, **Officer Hillary Hudson** transported him to **Homicide**, dropping him off at **7:30 a.m**. on **September 28, 2008**.[15]

22. After **Officer Trentworth** photographed Mr. Armstrong, he photographed Mr. Williams's house and his photographs showed bloodstains throughout the house.[16] **Ben Levin**, a DNA analyst, tested several items of evidence, including Mr. Armstrong's fingernail scrapings. Mr. Levin identified Mr. Williams's DNA in the fingernail scrapings and Mr. Armstrong's DNA from blood recovered on (1) his heel, (2) the upper wall near the bathroom, (3) the hallway outside the middle bedroom, (4) the top of the steps, (5) the bottom of Mr. Armstrong's bed, and (6) a pillow case from the Mr. Armstrong's bedroom.[17]

23. **Dr. Dennett G. Preston** conducted Mr. Williams's autopsy, identified the following wounds, and made the following conclusions in his autopsy report:

a. Despite the fact CSI personnel never recovered a ligature from Mr. Williams's house, Dr. Preston identified the **cause of death** as **ligature asphyxiation** based on the following findings:

i. A 3" x 1/8" ligature abrasion on the right side of Mr. Williams's neck.

ii. Extensive hemorrhaging in the anterior and lateral neck muscles.

iii. Numerous petechial hemorrhages on the forehead, nose, checks, and in the right eye's conjuncitiva.[18]

[12] NT, Trial, 6/20/2012, at 169-170.
[13] NT, Trial, 6/21/2012, at 40, 42, 47-48.
[14] NT, Trial, 6/20/2012, at 183-186.
[15] NT, Trial, 6/20/2012, at 203-205.
[16] NT, Trial, 6/20/2012, at 189, 192-193, 198.
[17] NT, Trial, 6/21/2012, at 71-78, 79-87.
[18] Ex. 6.

b. Despite finding **no skull fractures**, Dr. Preston characterized the following head wounds as **blunt force head injuries** that contributed to Mr. William's death.

i. Three 1/8" lacerations to his right upper eyelid.

ii. Four 1/8" lacerations to the right anterior temple region.

iii. One 3/8" laceration to the let anterior temple region.

iv. One ¼" abrasion to the right upper scalp.[19]

c. These injuries, Dr. Preston said, "are consistent with the subject being struck repeatedly with a blunt object such as a fist."[20]

d. Dr. Preston also identified a (1) 3" abrasion on the left shoulder, (2) a 2" linear bruise on the right arm, and (3) multiple abrasion on the right elbow and forearm. These wounds, according to Dr. Preston, are "consistent with a struggle," while the 2" linear bruise on the right arm "may be consistent with a defense wound."[21]

24. Before trial, detectives and prosecutor Leon Goodman interviewed **Harold Robinson**. At a **May 26, 2011** pre-trial hearing, ADA Goodman mentioned his interview with Mr. Robinson:

> If I may, Your Honor, as the Court is aware at the last listing I requested Mr. Henry to give me the names of any individuals that he thought would be on his list and I could check with the family members. He declined to do that… But I did in talking to [Mr. Williams's] family members confirm [a] name and turned it over and the address of one [of] the individuals who I spoke with at length who lived in the house at the time period when the Defendant and the victim first began to associate with each other. He was there for several months if not close

[19] Ex. 6.
[20] Ex. 6.
[21] Ex. 6.

> to a year when this relationship… was occurring. And as he moved out the Defendant moved into the room that he formally resided in and he would still on [] regular occasions come over and still associate because he was friends with the victim. So I turned… I turned that person's name over and I presume they would try to interview him and [I] notified this gentlemen he would be contacted by the Defense.[22]

E. Raymond Armstrong's Questioning and Statement

25. Once at Homicide, **Detective John Harkins** questioned Mr. Armstrong and obtained his biographical information, which he used to complete the *Biographic Information Report*.[23] Mr. Armstrong also told him he killed Mr. Williams in self-defense after Mr. Williams attempted to sexually assault him. **Detective Levi Morton** and his partner then questioned Mr. Armstrong. Mr. Armstrong also told them he killed Mr. Williams in self-defense after Mr. Williams attempted to sexually assault him.

26. When Mr. Armstrong was arraigned on **September 28, 2008**, he told his attorney, **Zenaida Lockard** (Defenders Association), he gave a statement to detectives while at Homicide. On the *Preliminary Arraignment Report*, which Zenaida Lockard completed, Ms. Lockard handwrote the following:

> statement already taken[24]

27. The pre-trial discovery provided to trial counsel, however, did contain a report from Detective Harkins summarizing Mr. Armstrong's custodial statement, nor a report from Detective Morton summarizing Mr. Armstrong's custodial statement.

28. The discovery also did not include a *Miranda* rights/waiver sheet indicating detectives *Mirandized* Mr. Armstrong and that Mr. Armstrong voluntarily waived his *Miranda* rights and agreed to give a custodial statement without an attorney.

[22] NT, Pre-Trial Hrg., 5/26/2011, at 7-8.
[23] NT, Trial, 6/21/2012, at 95-96; Ex. 5.
[24] Ex. 11.

F. Defense Investigation

29. Prior to trial, Mr. Armstrong's investigator, **Manus MacLean** interviewed multiple people who said Mr. Williams trolled the internet, particularly the gay black men websites, *e.g.*, blackplanet.com; Adam4Adam.com, in search of young, attractive black men. Mr. Williams was gay and strongly attracted to attractive young, black men and under-aged boys. Once he identified an attractive black man, he contacted them claiming he had his own modeling agency and was in search of young male models. Some men took the bait and traveled to Philadelphia on their own dime. For those reluctant to travel to Philadelphia, Mr. Williams paid their travel expenses to Philadelphia. Mr. Williams allowed these attractive, young black men to live with him under the guise his alleged modeling company would advance their modeling careers. There was a catch, though; after paying their living expenses for a period of time, Mr. Williams used this against them by demanding sexual favors in exchange for his continued payments toward their living expenses. If the men refused, Mr. Williams quit paying their expenses and evicted them. Witnesses also told Mr. MacLean that Mr. Williams was in love and sexually obsessed with Mr. Armstrong.

30. Mr. MacLean spoke with **Michele Canales**, **Hayley Sydor**, and **Alexander "Tayo" Afalabi**.

a. **Michele Canales**: Ms. Canales worked with Mr. Armstrong and frequently spent the night at Mr. Williams's house with Mr. Armstrong. She nicknamed Mr. Williams's house "the orphanage" because he always had young, under-aged black men staying with him. She also said that, based on Mr. Williams's comments, behavior, and facial expressions, it was obvious to her Mr. Williams was in love and sexually obsessed with Mr. Armstrong.[25]

b. **Hayley Sydor**: Ms. Sydor actually lived with Mr. Williams and would have testified to the frequent presence of young men and boys in his home. She also said that, based on Mr. Williams's comments, behavior, and facial expressions, it was obvious to her Mr. Williams was in love and sexually obsessed with Mr. Armstrong.[26]

[25] Ex. 12.
[26] Ex. 12.

c. **Alexander "Tayo" Afalabi**: Tayo is a German national. He described how, while living in Atlanta, Mr. Williams contacted him via blackplant.com under the guise he had a successful modeling company. Eager to advance his modeling career, Tayo flew from Atlanta to Philadelphia and stayed with Mr. Williams, only to learn Mr. Williams did not have a modeling company.[27]

d. During his stay, Tayo saw Mr. Williams search the internet for men and under-aged boys, who he then flew into Philadelphia under the same ruse he used with him regarding his alleged modeling company. Tayo saw Mr. Williams manipulate these young men and under-aged boys. Specifically, if they refused to have sex with him, Mr. Williams refused to photograph them, meaning if they wanted to advance their modeling career with Mr. Williams's assistance, they had to have sex with him. When Tayo figured out Mr. Williams's alleged modeling agency was a front used to hoodwink young men and under-aged boys to coming to Philadelphia, Tayo left, but not before having a heated argument with Mr. Williams.[28]

e. During his time at Mr. Williams's house, Tayo befriended Mr. Williams. Based on Mr. Williams's comments, behavior, and facial expressions, it was obvious to him Mr. Williams was in love and sexually obsessed with Mr. Armstrong.[29]

31. **Eric Tolbert**: Before trial, the Commonwealth theorized Mr. Armstrong premeditated Mr. Williams's death because Mr. Williams intended to evict Mr. Armstrong. To counter suggestions by the prosecution that Mr. Armstrong killed Mr. Williams because he was evicting him, Mr. MacLean interviewed **Eric Tolbert**. Mr. Tolbert said Mr. Armstrong decided to leave Mr. Williams's house before Mr. Williams threatened to evict him.[30]

32. Before trial, Mr. Armstrong also developed psychiatric testimony indicating he lacked the capacity to form specific intent because, once Mr. Williams attempted to rape him, he had an anxiety attack. Mr. Armstrong's first trial attorney, **Joseph Canuso**, retained **Dr. Timothy J. Michals** who evaluated Mr. Armstrong. Mr. Canuso discussed Dr. Michals's findings at a **May 9, 2011** pre-trial hearing:

[27] Ex. 7.
[28] Ex. 7.
[29] Ex. 12.
[30] Ex. 12.

> Mr. Armstrong was examined by… Dr. [Timothy J.] Michals, a psychiatrist. And he rendered a report which basically said that at the time of this incident Mr. Armstrong suffered an anxiety attack. And his… opinion… was that during this anxiety attack he was incapable of formulating the specific intent to kill…[.]
>
> Now, among the facts presented to Dr. Michals was that… [Mr. Williams] had tak[en] certain actions towards Mr. Armstrong which included… an attempt to have sexual relations with him…[.][31]

33. Mr. Armstrong's second (and actual) trial attorney, **Todd Henry**, had Mr. Armstrong evaluated by **Dr. William L. Manion** on **June 1, 2012**. Based on his evaluation of Mr. Armstrong, the autopsy reports, and crime scene reports, Dr. Manion opined:

> It is… my opinion to a reasonable degree of medical certainty that… Mr. Williams attempted to sexually molest Mr. Armstrong and Mr. Armstrong continually fought back causing Mr. Williams to suffer many injuries. Mr. Williams continued to be the aggressor in this matter and ultimately Mr. Armstrong grabbed his shirt in an attempt to make him go unconscious. Mr. Armstrong kept urging Mr. Williams to tap out… as though they were in a wrestling match and Mr. Armstrong was asking for a submission. Therefore it is my opinion to a reasonable degree of medical certainty that there was no intent on the part of Mr. Armstrong to kill Mr. Williams. Rather after multiple assaults he was attempting to incapacitate Mr. Williams by knocking him out so he would not further be sexually assaulted by Mr. Williams. In the height of a fight or flight scenario an individual is filled with adrenalin/epinephrine and… will fight to defend themselves. After multiple assaults it is

[31] NT, Pre-Trial Hrg., 5/9/2011, at 5-6. Counsel is still in the process of trying to obtain a copy of Dr. Michals's report. Counsel has communicated with Dr. Michals and he (Michaels) is reviewing his older case files to find the report.

> my opinion… that Mr. Armstrong was entitled to defend himself and in that defense the death of Mr. Williams took place.
>
> As Mr. Williams continued to assault Mr. Armstrong when Mr. Armstrong was in a weak and incapacitated state it is my opinion… that Mr. Armstrong was entitled to use force to defend himself and the actual manner of death in light of the repeated assaults by Mr. Williams would be justifiable homicide… [.][32]

G. Trial

34. Before trial, the Commonwealth moved to bar the defense from presenting Dr. Michals and having him testify that Mr. Williams's attempted sexual assault triggered a panic attack.[33] The trial court agreed and ruled: "[The] Defense doctor cannot make reference to any sexual assault. It must just be framed in terms of an assault."[34] Trial counsel did not object to the trial court's ruling.

35. The Commonwealth offered Mr. Armstrong a **third-degree murder plea deal** carrying a **twenty to forty year sentence**. Mr. Armstrong rejected the deal.[35]

36. At trial, during opening arguments, the prosecutor told jurors Mr. Armstrong strangled Mr. Williams for **over three minutes** with a **cord** or **rope**.[36] In doing so, the prosecutor told jurors to focus on **Dr. Gary Collins's** testimony. Dr. Collins, as the prosecutor explained, did not perform Mr. Williams's autopsy, but because autopsies are standardized, Dr. Collins did not have to actually perform the autopsy to testify to its results in court.[37] The prosecutor repeatedly emphasized just how long it took to kill someone via ligature strangulation and told jurors ligature strangulation **is always first-degree murder**.[38]

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[32] Ex. 13.
[33] NT, Pre-Trial Hrg., 5/9/2011, at 1-32; NT, Pre-Trial Hrg., 5/26/2011, at 1-16.
[34] NT, Pre-Trial Hrg., 5/26/2011, at 14.
[35] NT, Trial, 6/21/2012, at 11-14.
[36] NT, Trial, 6/20/2012, at 23-25.
[37] NT, Trial, 6/20/2012, at 25-26.
[38] NT, Trial, 6/20/2012, at 25, 26.

37. Prior to presenting Dr. Collins, the Commonwealth never admitted a cord or rope collected from Mr. Williams's residence that it claimed was used by Mr. Armstrong to strangle him. When the prosecutor presented Dr. Collins, trial counsel did not object on confrontation grounds.[39] Dr. Collins admitted he did not conduct the autopsy, but said he reviewed Dr. Preston's case file, and based on his review, he opined the **cause of death was ligature strangulation**.[40] Dr. Collins said Dr. Bennett did not report examining a ligature; neither did he (Collins) examine a ligature.[41] He said the ligature mark on the right side of Mr. Williams's neck could have been caused by anything long, thin, and flexible.[42]

38. To emphasize the mechanics, pressure, and time needed to strangle someone with a ligature, Dr. Collins placed a power cord around his neck and demonstrated.[43] He said victims lose consciousness within 30 seconds, suffer brain damage after two minutes, and are brain dead with two to five minutes based on the lack of blood flow to the brain.[44] He said the blunt force injuries to Mr. Williams's head did not fracture the skull or produce significant subdural wounds under the skull.[45] Lastly, on cross-examination, Dr. Collins said the ligature wound and blunt force wounds are consistent with a struggle.[46]

39. In his opening statement, trial counsel said the evidence did not prove premeditation or malice because Mr. Armstrong killed Mr. Williams in self-defense. **Trial counsel, though, never mentioned why Mr. Armstrong had to defend himself**, *i.e*., Mr. Williams saw Mr. Armstrong in a weakened physical and mental state and tried to have sex with him knowing full well Mr. Armstrong was heterosexual and not into men. Trial counsel specifically told the jury it would be instructed on self-defense.[47]

40. Mr. Armstrong testified in own defense. As a model, he met Mr. Williams through a friend who said Mr. Williams was a photographer. Mr. Armstrong did a group photo shoot with Mr. Williams, liked the photographs, and developed a

[39] NT, Trial, 6/20/2012, at 85-88.
[40] NT, Trial, 6/20/2012, at 89-93, 105-110.
[41] NT, Trial, 6/20/2012, at 121-122.
[42] NT, Trial, 6/20/2012, at 113-114.
[43] NT, Trial, 6/20/2012, at 95-96.
[44] NT, Trial, 6/20/2012, at 96.
[45] NT, Trial, 6/20/2012, at 110-114.
[46] NT, Trial, 6/20/2012, at 119, 123-130.
[47] NT, Trial, 6/20/2012, at 38-40.

model-photographer relationship with him. At the time of the incident, Mr. Armstrong house sat for Mr. Williams, but did not live with him.[48]

41. Prior to the incident, Mr. Armstrong was in Florida from September 9th to the 16th, 2008, and returned to Philadelphia to attend his sister's wedding.[49] On the day of the incident, like the days leading up to the incident, Mr. Armstrong had a very busy day, including a photo shoot with a New York City client, and did not eat much.[50] Thus, by the time he drove to Mr. Williams's house that night, he was running on empty, so he drank multiple energy drinks, which made him very jumpy and dehydrated and caused an accelerated heart rate and chest pains. When he reached Mr. Williams's house, and was arguing with his girlfriend, **Kim Velazque**z, he noticed and felt he had difficulty walking.[51]

42. When Mr. Armstrong viewed the video **Jerome Smith's wife** took of him and Mr. Williams outside Mr. Williams's home, he said he was not faking, and his legs truly were not functioning properly. When Mr. Williams assisted him, Mr. Armstrong told him he was "paralyzed or something."[52] What Mr. Armstrong did not know, though, was he was suffering from pneumonia.[53] Mr. Armstrong agreed he was angry and upset while talking to Ms. Velazquez, but he was not upset with Mr. Williams.[54]

43. Mr. Armstrong recalled Mr. Williams assisting him into his house, but said he was disoriented. He next recalled being on the bed in the upstairs middle bedroom, and dozing off. He was still fully clothed with shoes on.[55] Shortly thereafter, he felt something tugging at his shoe and realized Mr. Williams was trying to remove his shoes. As Mr. Williams forcibly removed his shoe, he turned him onto his side and began caressing his back and thighs with his hand.[56]

[48] NT, Trial, 6/21/2012, at 109-113.
[49] NT, Trial, 6/21/2012, at 139
[50] NT, Trial, 6/21/2012, at 113-114, 167.
[51] NT, Trial, 6/21/2012, at 113-116.
[52] NT, Trial, 6/21/2012, at 116.
[53] NT, Trial, 6/21/2012, at 119.
[54] NT, Trial, 6/21/2012, at 140.
[55] NT, Trial, 6/21/2012, at 120.
[56] NT, Trial, 6/21/2012, at 118-120.

44. Mr. Armstrong next heard Mr. Williams say something to the effect, "You're hot and burning up," before Mr. Williams began caressing his (Williams's) face against the backs of his thighs, prompting Mr. Armstrong to pop his head and shoulders up, but when he did, Mr. Williams pushed his head and shoulders back down, told Mr. Armstrong to calm down, and began kissing his thighs.[57] Mr. Armstrong repeatedly lifted his head and shoulders, only to have Mr. Williams push them both back down. Mr. Williams ultimately pushed Mr. Armstrong's head into the pillow and said, "It's okay, it's okay," as he straddled Mr. Armstrong's back and rubbed his face against his back. Mr. Armstrong felt Mr. Williams's bristles on his lower back and top part of his butt. Mr. Williams continued saying, "You're okay, just calm down little brother, you're all right, just relax."[58]

45. At this point, Mr. Williams rubbed his penis between Mr. Armstrong's butt cheeks, prompting Mr. Armstrong to twist his hips and "buck" Mr. Williams off of him onto the floor.[59] Mr. Armstrong then reached for the bedroom door to leave, but Mr. Williams quickly got up and leaned against the door, slamming Mr. Armstrong's hand in the door in the process.[60] Mr. Armstrong eventually wrestled Mr. Williams away from the door, but as he exited the bedroom, Mr. Williams grabbed his arm creating another struggle that led to the upstairs bathroom.[61] As the struggle entered the bathroom, Mr. Williams apologized and pleaded with Mr. Armstrong not to leave.[62]

46. Once in the bathroom and disoriented, Mr. Armstrong quickly splashed water on his face, only to see Mr. Williams standing behind him. Mr. Williams grabbed him and tried to kiss and hug him.[63] When Mr. Armstrong pulled away, another struggle ensued, causing Mr. Armstrong to fall to the bathroom floor and hit the back of his head on the toilet. Mr. Williams fell on top of him and licked his (Armstrong's) face multiple times.[64] Mr. Armstrong pushed him off and got up, but Mr. Williams pulled him back down on top of him.[65] Mr. Williams began "grunting" and refused to let go of him for several minutes before he (Williams)

[57] NT, Trial, 6/21/2012, at 120, 121.
[58] NT, Trial, 6/21/2012, at 122, 123.
[59] NT, Trial, 6/21/2012, at 123.
[60] NT, Trial, 6/21/2012, at 124.
[61] NT, Trial, 6/21/2012, at 125.
[62] NT, Trial, 6/21/2012, at 125.
[63] NT, Trial, 6/21/2012, at 125-126.
[64] NT, Trial, 6/21/2012, at 125-126, 160;
[65] NT, Trial, 6/21/2012, at 153.

tried to "choke [him] out."[66] Mr. Armstrong feared for his life: "[I]t was like he was going to kill me in the bathroom. He was going to choke me out."[67]

47. Mr. Armstrong eventually wrestled Mr. Williams's arm away from his neck, crawled out of the bathroom, got to his feet, and grabbed the hallway stairs banister.[68] As he did, Mr. Williams again grabbed him from behind, leading to another struggle and Mr. Williams trying to kiss him, causing their teeth to smash into one another's.[69] When Mr. Armstrong pushed his (Williams's) face away, his hand went into Mr. Williams's mouth, resulting in Mr. Williams biting his hand.[70] Mr. Armstrong repeatedly tried to pull his hand from Mr. Williams's mouth, but Mr. Williams did not let go and kept grunting.[71] Mr. Armstrong continued to fear for his life: "[T]his is my last minute, like this is a wrap."[72]

48. Mr. Armstrong ultimately wrestled his hand from Mr. Williams's mouth, but their continuing struggle caused both to fall down the hallway stairs.[73] When they both landed at the bottom of the stairs, Mr. Williams was on top of Mr. Armstrong still attempting to assault him. To fight him off, Mr. Armstrong grabbed Mr. Williams's tank top and pulled it until he was able to free himself from him.[74]

49. Trial counsel presented no forensic experts, *e.g.*, pathologist or reconstructionist, to corroborate and explain Mr. Armstrong's self-defense testimony and explain how his defensive pulling of Mr. Williams's shirt after they fell down the stairs resulted in Mr. Williams's death. Mr. Armstrong's family paid Todd Henry $5,000 to hire Dr. Manion, but Mr. Henry never called Dr. Manion.

50. Trial counsel did not present lay witnesses either, including **Linda Armstrong** or **Tayo Afolabi**. Mr. Armstrong's family flew Tayo to Philadelphia from Germany and paid his hotel expenses, but Todd Henry never presented him.

[66] NT, Trial, 6/21/2012, at 125-126, 153.
[67] NT, Trial, 6/21/2012, at 132.
[68] NT, Trial, 6/21/2012, at 126-127, 155.
[69] NT, Trial, 6/21/2012, at 128
[70] NT, Trial, 6/21/2012, at 128, 130, 161.
[71] NT, Trial, 6/21/2012, at 130, 132.
[72] NT, Trial, 6/21/2012, at 132.
[73] NT, Trial, 6/21/2012, at 133, 158, 163-164
[74] NT, Trial, 6/21/2012, at 177.

51. Instead, Mr. Henry presented two character witnesses, **Eric Tolbert** and **Hayley Sydor**. Both said Mr. Armstrong had a reputation for being peaceful.[75]

52. During closing arguments, trial counsel said the evidence did not prove specific intent or malice, **but barely mentioned self-defense** and the fact Mr. Williams's death was directly related to his attempted sexual assault of Mr. Armstrong.[76] Specifically, trial counsel repeatedly said the physical evidence, particularly the bloodstains in the bedroom, bathroom, and hallway proved a struggled occurred, but only mentioned the sexual assault in passing.[77]

53. When the prosecutor closed, he argued ligature strangulation is a long, continuous application of pressure that cannot be done accidentally.[78] He also argued the physical evidence did not corroborate Mr. Armstrong's testimony,[79] and specifically mentioned how the defense failed to present testimony explaining how Mr. Armstrong's actions resulted in Mr. Williams's strangulations:

> Dr. Collins said, first of all, that [Mr. Williams] was strangled, ligature strangulation for several minutes in order to cause death. And nothing [Mr. Armstrong] said about that accounts for that… First, a ligature abrasion on the right front of the throat in the area of the arteries leading to the brain, right where Dr. Collins said pressure would cause that constriction of the carotid arteries to the brain. And there's a ligature abrasion there. Well, what does [Mr. Armstrong] offer? All [Mr. Armstrong] offered was, in his testimony about what happened is, well, I pulled on his shirt from behind and, you know, then we fell down the steps.[80]

[75] NT, Trial, 6/21/2012, at 102-104, 179-181.
[76] To be specific, Mr. Henry mentioned self-defense *and* the fact Mr. Williams attempted to sexually assaulted Mr. Armstrong once. NT, Trial, 6/22/2012, at 38-39. Toward the very end of his closing argument, Mr. Henry said Mr. Armstrong acted "in a justifiable manner," but did not connect the self-defense with the attempted sexual assault. NT, Trial, 6/22/2012, at 43.
[77] NT, Trial, 6/22/2012, at 38-39.
[78] NT, Trial, 6/22/2012, at 45.
[79] NT, Trial, 6/22/2012, at 55 ("The injuries [to Mr. Williams] don't match up to the testimony that [Mr. Armstrong] gave about what happened that night.").
[80] NT, Trial, 6/22/2012, at 56.

54. The prosecutor continued, explaining how Dr. Collins–when cross-examined by trial counsel–seriously doubted whether Mr. Armstrong could strangle Mr. Williams with his shirt alone.[81] The prosecutor also spent considerable time arguing the DNA evidence from the bloodstains did not corroborate Mr. Armstrong's testimony.[82]

55. The prosecutor also accused Mr. Armstrong of crafting his self-defense claim *after* he examined the pre-trial discovery:

> Every little piece that [Mr. Armstrong] explains; the biomechanics of the struggle, flipping [Mr. Williams] over down the stairs, trying to explain the ligature mark. All of these things are directly linked, every single little thing he remembers is directly linked to some piece of physical evidence. He looked at the file. He looked at the pictures. He knew what the evidence was going to be. He knew what you were going to hear. And he weaves this story to try and save himself.[83]

56. The prosecutor based his argument on the fact Mr. Armstrong never told the EMT and ER doctors about Mr. Williams's sexual assault:

> What doesn't he say during all this time? He doesn't say, hey, thank God you're here. By the way, I was just anally raped and I had to kill my best friend because he left me no choice, because afterward he tried to kill me. He doesn't say any of that. He doesn't say that to the medics when they first responded.
>
> …
>
> I asked [Dr. Hart] if [Mr. Armstrong] made any other complaints. No. [Dr. Hart] certainly didn't say, oh, yeah, by the way, I noted here in the chart [Mr. Armstrong] reported that he was sexually assaulted.[84]

[81] NT, Trial, 6/22/2012, at 57.
[82] NT, Trial, 6/22/2012, at 59-64.
[83] NT, Trial, 6/22/2012, at 72.
[84] NT, Trial, 6/22/2012, at 72, 80-81.

57. In terms of motive, the prosecutor admitted the Commonwealth could not prove motive because it had no idea why Mr. Armstrong strangled his good friend Mr. Williams.[85] After mocking Mr. Armstrong's testimony that Mr. Williams's shirt caused his strangulation,[86] the prosecutor admitted the Commonwealth did not know what type of ligature Mr. Armstrong supposedly used to strangle Mr. Williams.[87]

58. The trial court charged the jury with first- and third-degree murder and voluntary manslaughter, but not involuntary manslaughter.[88] Trial counsel, though, did not request an involuntary manslaughter instruction.

59. The trial court also issued a self-defense instruction.[89]

60. In regards to its manslaughter instructions, the trial court instructed on imperfect self-defense, but not serious provocation.[90] Trial counsel, though, did not request a serious provocation instruction.

PCRA STATUTORY REQUIREMENTS

61. Mr. Armstrong must meet the following conditions to be eligible for PCRA relief. 42 Pa. C.S. § 9543(a)(1)-(a)(4).

62. ***First***, Mr. Armstrong must show he has been convicted of a crime under the laws of this Commonwealth and is serving a prison sentence. 42 Pa. C.S. § 9543(a)(1). Mr. Armstrong stands convicted of first-degree murder and is serving LWOP at SCI-Forest.

63. ***Second***, Mr. Armstrong must present a cognizable claim under 42 Pa. C.S. § 9543(a)(2). Mr. Armstrong alleges state and federal claims that: (1) undermine the truth-determining process; (2) establish ineffective assistance of counsel; and (3) after-discovered evidence. 42 Pa. C.S. §§ 9543(a)(2)(i), (ii), (iv).

[85] NT, Trial, 6/22/2012, at 87, 88, 89.
[86] NT, Trial, 6/22/2012, at 57.
[87] NT, Trial, 6/22/2012, at 89.
[88] NT, Trial, 6/22/2012, at 106-109, 113-115.
[89] NT, Trial, 6/22/2012, at 109-112.
[90] NT, Trial, 6/22/2012, at 113-115.

64. ***Third***, Mr. Armstrong must show his claims are not previously litigated or waived. 42 Pa. C.S. §9543(a)(3). Mr. Armstrong's claims focus on trial counsel's ineffectiveness–or claims that could not have been raised until PCRA proceedings, *Commonwealth v. Grant*, 813 A.2d 726, 738 (Pa. 2002), as well as *Brady* claims, which, by definition, are claims where the Commonwealth suppressed material evidence, meaning the suppressed evidence was not part of the record on direct appeal and could not be relied on to support or bolster a state or federal claim. Consequently, Mr. Armstrong's claims have not been previously litigated or waived.

CLAIMS FOR RELIEF

Trial Ineffectiveness Claims

65. Mr. Armstrong 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. Cronic*, 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).

66. To prevail on an ineffectiveness claim, Mr. Armstrong 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).

67. 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. Spotz*, 870 A.2d 822, 829 (Pa. 2005); *Commonwealth v. Williams*, 936 A.2d 12, 19 (Pa. 2007).

<u>Claim 1a</u>: Trial Counsel Was Prejudicially Ineffective for Failing to Present Substantial Testimony and Evidence that Corroborated Mr. Armstrong's Testimony that he Killed Anthony Williams While Defending Himself as Mr. Williams Repeatedly Attempted to Sexually Assault Him. U.S. Const. amends. V, VI, VIII, XIV, Pa. Const. art. 1, § § 8, 9.

68. During closing arguments, the prosecutor described Mr. Williams in the following manner:

> What about the sexual assault, the rape? [Mr. Armstrong] comes in here and accuses his best friend in Philadelphia… of raping him, raping him… I mean it's ridiculous. Shame on him for coming in here and making accusations like that to save himself from a situation that he created. **A generous person who had let him live in his house, a generous person [who] put a roof over his head whenever he needed one, who… introduced him to his son, a person who was raising a son, who worked two jobs to support [his son]**.[91]

69. This is an incomplete and inaccurate caricature of Mr. Williams. Yes, Mr. Williams allowed Mr. Armstrong to live with him, but he did not do this out of the goodness of his heart; he did it with the hopes of one day manipulating a young, muscular, attractive black man to be intimate with him. Mr. Williams trolled the internet, particularly the gay black websites (*e.g.*, blackplanet.com; Adam4Adam.com), in search of young, attractive black men. Yes, Mr. Williams had a son, but he was gay and strongly attracted to attractive young, black men, even under-aged boys. Once he identified an attractive black man, he contacted them claiming he had his own modeling agency and was in search of young male models. Some men took the bait and traveled to Philadelphia on their own dime. For those reluctant to travel to Philadelphia, Mr. Williams paid their travel expenses. Mr. Williams allowed these men to live with him under the guise he and his alleged modeling company would advance their modeling careers. There was a catch, though; after paying their living expenses for a period of time, Mr. Williams used this against them by demanding sexual favors in exchange for his continued financial support. If the men refused, Mr. Williams quit paying their expenses and evicted them.

70. Likewise, contrary to the Commonwealth's claim at trial, Mr. Williams was, in fact, infatuated and in love with Mr. Armstrong. It was his long-standing desire to be with Mr. Armstrong physically and romantically that led him to sexually assault Mr. Armstrong in his bedroom once he helped him inside his house.

[91] NT, Trial, 6/22/2012, at 73.

71. Mr. MacLean interviewed several witnesses before trial who provided this narrative of Mr. Williams's life and described Mr. Williams's infatuation with Mr. Armstrong. Trial counsel, though, presented none of these witnesses. Trial counsel's decisions were objectively unreasonable and prejudicial because they deprived the jury of critical evidence regarding Mr. Armstrong's self-defense and manslaughter arguments.

A. Witnesses Not Presented at Trial

1. Harold Robinson

72. Trial counsel never interviewed **Harold Robinson**, despite the fact the Commonwealth provided Mr. Robinson's contact information to him as early as May 2011.[92] The prosecutor interviewed Mr. Robinson and made it clear Mr. Robinson lived with Mr. Williams for quite some time. A reasonably competent trial attorney would have interviewed Mr. Robinson.

73. Counsel interviewed Mr. Robinson on **February 10th and 12th of 2015**.

74. **Mr. Robinson** discussed his pre-trial interview with the prosecutor. He said the prosecutor and his investigator interviewed him at school and asked a series of questions regarding Mr. Williams and Mr. Armstrong. Mr. Robinson said the investigator took notes during the interview. At the end of the hour-long interview, the investigator handwrote a statement, which he asked Mr. Robinson to read. Mr. Robinson read the statement, but when he identified errors, the investigator rewrote the statement. **Mr. Robinson's statement was not part of the pre-trial discovery.**

75. Mr. Robinson described how Mr. Williams flew him to Philadelphia from North Carolina, paid his room and board, and allowed him to sleep in his (Williams's) bedroom. On multiple occasions, though, Mr. Robinson awoke in the morning to find Mr. Williams giving him or attempting to give him oral sex. On another occasion, he awoke as Mr. Williams was attempting to have anal sex with him. Mr. Robinson, who is gay, rejected Mr. Williams's nonconsensual and inappropriate sexual attempts each time.

[92] NT, Pre-Trial Hrg., 5/26/2011, at 7-8.

76. When Mr. Robinson began dating his now ex-boyfriend, Mr. Williams told him he had to move his belongings to his (Williams's) office because he could no longer stay in his bedroom. Mr. Williams also quit paying his living expenses. Mr. Robinson said Mr. Williams had no boundaries. Mr. Robinson not only referenced Mr. Williams's inappropriate sexual attempts toward him, he also described another incident where Mr. Williams grabbed his friend's crotch without consent. His friend's name is Jerome.

77. Mr. Robinson described what he saw and heard during the time he stayed with Mr. Williams. Each weekend Mr. Williams flew in attractive, young black men from all over the country. Many times he heard Mr. Williams having sex with these men.

78. Mr. Robinson said Mr. Williams had more photographs of Mr. Armstrong in his house **than any other male model he photographed**. As time went on, Mr. Williams always added more photographs of Mr. Armstrong, many of which had Mr. Armstrong posing in provocative positions.

2. Tayo Afolabi

79. Mr. MacLean communicated with Tayo before trial. On **May 28, 2012**, Tayo emailed Mr. MacLean explaining how he knew Mr. Williams.[93] Mr. Armstrong's family flew Tayo from German to Philadelphia for the trial because he was willing and prepared to testify.[94] Trial counsel, though, never presented him.

80. According to his **May 28, 2012** email, Tayo said Mr. Williams contacted him via blackplant.com under the guise he had a successful modeling company. Eager to advance his modeling career, Tayo flew from Atlanta and stayed with him only to learn Mr. Williams did not have a modeling company. During his stay, Tayo saw Mr. Williams search the internet for men and under-aged boys, who he then flew to Philadelphia under the same guise he used with him regarding his alleged modeling company.

[93] Ex. 7.
[94] Ex. 7.

81. Once at Mr. Williams's, Tayo saw Mr. Williams manipulate these young men and under-aged boys. Specifically, if they refused to have sex with him, Mr. Williams refused to photograph them, meaning if they wanted to advance their modeling career, they had to have sex with him. When Tayo figured out Mr. Williams's alleged modeling agency was a front used to hoodwink young men and under-aged boys to coming to Philadelphia, Tayo left, but not before having a heated argument with Mr. Williams.

82. Tayo met Mr. Armstrong while he was staying at Mr. Williams's and immediately **saw the fascination Mr. Williams had towards Mr. Armstrong**.

3. Michele Canales

83. Mr. MacLean interviewed Ms. Canales before trial. Ms. Canales was willing to testify, but trial counsel never presented her.

84. Ms. Canales worked with Mr. Armstrong and frequently spent the night the at Mr. Williams's house with Mr. Armstrong. She nicknamed Mr. Williams's house "the orphanage" because he always had young and under-aged black men staying with him. She also said that, based on Mr. Williams's comments, behavior, and facial expressions that she heard and observed, it was her lay opinion that **Mr. Williams was in love and sexually obsessed with Mr. Armstrong**.[95]

4. Hayley Sydor

85. Mr. MacLean interviewed Ms. Sydor before trial. Ms. Sydor was willing to testify, and in fact testified as a character witness at trial, but trial counsel never elicited the following testimony from her.

86. Ms. Sydor lived with Mr. Williams and would have testified to the frequent presence of young men and boys in his home. She also said that, based on Mr. Williams's comments, behavior, and facial expressions that she heard and observed, **it was her lay opinion that Mr. Williams was in love and sexually obsessed with Mr. Armstrong**.[96]

[95] Ex. 13.
[96] Ex. 13

5. Eric Tolbert

87. Mr. MacLean interviewed **Eric Tolbert**. Mr. Tolbert was willing to testify, and in fact testified as a character witness at trial, but trial counsel never elicited the following testimony from him.

88. Mr. Tolbert said Mr. Armstrong decided to move out of Mr. Williams's house **before** Mr. Williams threatened to evict him, assuming Mr. Williams made such a threat.[97]

6. Linda Armstrong

89. Mrs. Armstrong spoke with trial counsel numerous times before trial, particularly about her phone calls with Mr. Armstrong immediately before and during the incident. Trial counsel subpoenaed Mr. Armstrong's cell phone records, which confirmed her statement regarding her phone call with her son. Mrs. Armstrong was willing to testify, but trial counsel did not presented her.

90. Mrs. Armstrong would have testified regarding Mr. Williams's then existing state-of-mind, motive, and intent when he assisted a physically and emotionally weak Mr. Armstrong into his house:

> I heard Mr. Williams yell, "**Give me that [God] damn phone[.]**" I yelled in to my phone, "Raymond, Raymond it's mom." I heard Mr. Williams yelling, "**You're mine now, oh yea, you're mine now and I'm turning this [God] damn cell phone off!**" The call ended and I tried over and over again to reach Raymond, but there was no answer. I knew my son was in danger.[98]

7. Dr. Michals and Dr. Manion

91. Trial counsel knew about Dr. Michal's and Dr. Manion's reports, both of which went directly to Mr. Armstrong's state-of-mind, *e.g.*, specific intent and malice, and the self-defense claim. Trial counsel, though, presented neither at trial.

[97] Ex. 13.
[98] Ex. 10.

2. Prejudice

92. Individually and cumulatively, the absence of these witnesses' testimony prejudiced Mr. Armstrong.

93. Mr. Armstrong is entitled to relief.

Claim 1b: Trial Counsel Failed to Request an Involuntary Manslaughter Instruction

94. Under 18 Pa.C.S. § 2504(a), a person is guilty of involuntary manslaughter "when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner, he causes the death of another person." *Commonwealth v. McCloskey*, 656 A.2d 1369, 1375 (Pa. Super. 1995). Involuntary manslaughter is a lesser-included offense of murder. *Commonwealth v. Garcia*, 378 A.2d 1199, 1208, 1209-1210 (Pa. 1977).

95. Criminal defendants are entitled to a lesser-included offense instruction if the trial evidence reasonably supports a verdict for the lesser-included offense. A trial court, therefore, "must charge on a lesser included offense," like involuntary manslaughter, "if there is some disputed evidence concerning an element of the greater charge or if the undisputed evidence is capable of more than one rational inference." *Commonwealth v. Hawkins*, 614 A.2d 1198, 1202 (Pa. Super. 1992). Thus, "[i]t is the presence of **any quantum** of evidence countering the prosecution's [case-in-chief] which will activate the need for the charge on the lesser included offense; **no matter how improbable that evidence may be**." *Commonwealth v. Channell*, 484 A.2d 783, 787 (Pa. Super. 1984) (quotations and citations omitted) (emphasis added); *accord Commonwealth v. Frank*, 398 A.2d 663, 670 (Pa. Super. 1979). When reviewing whether the trial evidence was sufficient to reasonably support a verdict, the Court is "required to view the evidence in **the light most favorable to the defendant**." *Commonwealth v. McCloskey*, 656 A.2d at 1372 n.1 (emphasis added).

96. Based on the trial evidence, an involuntary manslaughter verdict would have been reasonably supported. Mr. Armstrong, therefore, was entitled to have the jury instructed on involuntary manslaughter. *Commonwealth v. McCloskey*, 656 A.2d at 1372; *accord Commonwealth v. Draxinger*, 498 A.2d 963, 965 (Pa. Super. 1985) ("If any version of the evidence in a homicide trial, from whatever source, supports

a verdict of involuntary manslaughter, then the offense has been made an issue in the case, and a charge on involuntary manslaughter must be given if requested.").

97. The jury could have reasonably concluded Mr. Armstrong was lawfully defending himself as he fought off Mr. Williams's attempted sexually assault. The jury could have also reasonably concluded that the manner in which Mr. Armstrong defended himself, *i.e*., pulling Mr. Williams's shirt from behind until he tapped out, was reckless or grossly negligent. Negligence is about foresseeability and the jury could have reasonably concluded that, while Mr. Armstrong did not specifically or intentionally intend to kill Mr. Williams, it should have been fairly foreseeable to him that his actions could result in Mr. Williams's death.

98. To vindicate Mr. Armstrong's right to an involuntary manslaughter instruction, however, trial counsel had to timely request such an instruction. *Commonwealth v. McCloskey*, 656 A.2d at 1372. Trial counsel did not request an involuntary manslaughter instruction. Trial counsel's oversight or purposeful decision not to request such an instruction was objectively reasonable and prejudiced Mr. Armstrong.

99. Had trial counsel requested an involuntary manslaughter instruction and the trial court denied his request, such an error would have been considered prejudicial, not harmless:

> We hold that where sufficient evidence is presented at trial to entitle a defendant to an instruction on a criminal offense, and, upon timely request, the jury is so instructed, the failure to afford the jury an opportunity to return a verdict on the charge is not harmless error beyond a reasonable doubt.

Commonwealth v. McCloskey, 656 A.2d at 1378.

100. Consequently, if trial counsel failed to request an involuntary manslaughter instruction, when the evidence reasonably supported such a verdict, trial counsel's error must too be considered prejudicial and not harmless.

101. Mr. Armstrong is entitled to relief.

Claim 1c: Trial Counsel Failed to Request a Sudden Provocation Instruction in Connection with the Trial Court's Voluntary Manslaughter Instruction

102. Voluntary manslaughter is a lesser-included offense of murder. *Commonwealth v. Schaller*, 426 A.2d 1090, 1095 (Pa. 1981). In Pennsylvania, two fact patterns support a finding of voluntary manslaughter:

a. ***First***, a person who "kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by… the individual killed[.]" 18 Pa. C.S. § 2503(a)(1).

b. ***Second***, a person who "intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify the killing…., but his belief is unreasonable." 18 Pa. C.S. § 2503(a)(1). This is referred to as imperfect self-defense.

103. Trial counsel requested and received an imperfect self-defense instruction,[99] but he did not request a sudden provocation instruction. The evidence, though, reasonably supported such a verdict.

104. The test for provocation is "whether a reasonable [person] confronted by the same series of events, would become impassioned to the extent that his mind would be incapable of cool reflection." *Commonwealth v. Kim*, 888 A.2d 847, 853 (Pa. Super. 2005). Passion "means any of the emotions of the mind such as anger, rage, sudden resentment or terror, rendering the mind incapable of cool reflection." *Commonwealth v. Gay*, 413 A.2d 675, 678 (Pa. 1980).

105. A reasonable person in Mr. Armstrong's position would have reacted as he did when Mr. Williams repeatedly attempted to sexually assault him. Trial counsel's decision not to request a provocation instruction, therefore, was not tactical, but based on inadvertence and ignorance of the facts and law. Trial counsel's objectively unreasonable decision prejudiced Mr. Armstrong.

106. Mr. Armstrong is entitled to relief.

[99] NT Trial, 6/22/2012, at 113-115.

<u>Claim 1d</u>: Trial Counsel Failed to Make a Confrontation Clause Objection when Dr. Gary Collins Testified in lieu of Dr. Bennett Preston, the Medical Examiner Who Actually Performed Mr. Williams's Autopsy, and Therefore Did Not Prepare, Write, and Certify the Autopsy Report, which is the Document that Formed the Basis of Dr. Collins's Trial Testimony.

A. The Coroner's Act

107. Under 16 P.S. § 1237 (a), once the Coroner's Office views the decedent's body, it "shall investigate the facts and circumstances concerning deaths which appear to have happened within the county, regardless where the cause thereof may have occurred, for the purpose of determining **whether or not an autopsy should be conducted**… , in the following cases… deaths occurring under suspicious circumstances" and "deaths occurring as a **result of violence or trauma**, whether apparently homicidal, suicidal or accidental (including, but not limited to, those due to mechanical, thermal, chemical, electrical or radiational injury, drowning, cave-ins and subsidences)[.]" Under 16 P.S. § 1238(a), "[i]f, upon investigation, the coroner shall be unable to determine the cause and manner of death, he shall perform or order an autopsy on the body." Under 16 P.S. § 1242, "[i]n the exercise of his duties as contained in this subdivision, the coroner **shall**, so far as may be practicable, consult and advise with the district attorney. The district attorney **shall act as counsel** to the coroner in matters relating to inquests."

108. Consequently, the "principal judicial function of the coroner in these modern times, as in the early days, is to investigate the causes of sudden, violent, and unnatural deaths, with a view of determining whether they were caused by criminal actions of others and to apprehend and bring the responsible persons to trial." *Marvin v. Monroe County*, 35 A.2d 781, 782 (Pa. Super. 1944). Based on these functions and the above statutes, therefore, a "deputy coroner… qualifies as a local law enforcement officer or, at a minimum, a person who assists local law enforcement officers." *Commonwealth v. Bean*, 17 Pa. D. & C.5th 470, 497 (C.P. 2010). *Commonwealth v. Anderson*, 385 A.2d 365, 371 (Pa. Super. 1978) ("[A] coroner in Pennsylvania has powers which in fact make him part of the Commonwealth's criminal investigation team."). As such, a deputy coroner or its authorized designee, such as a medical examiner, serves a law enforcement function in Pennsylvania. *Marvin v. Monroe County*, 35 A.2d at 782. It is not surprising, therefore, coroners have sufficient law enforcement and investigatory powers to trigger the Fourth Amendment's protections: "Given [a coroner's] statutory and common law powers, we will assume that a coroner investigating a

suspicious death has the same status as a police officer investigating any suspected crime." *Commonwealth v. Anderson*, 385 A.2d at 371-372.

109. In Philadelphia County, Medical Examiner's Office is part of the Coroner's Office. As a result, when Dr. Bennett Preston conducted the autopsy and wrote his autopsy report his "status" was that of "a police officer investigating any suspected crime." *Id*.

B. Trial Facts

110. Dr. Bennett Preston performed Mr. Williams's autopsy and wrote the autopsy report.[100] Dr. Gary Collins testified as a surrogate expert and discussed and introduced Dr. Preston's findings to the jury.[101] The Commonwealth presented no evidence regarding Dr. Preston's unavailability. Trial counsel did not make a confrontation objection to Dr. Collins's testimony.

111. On direct appeal, Mr. Armstrong argued the Commonwealth violated his confrontation right when it presented Dr. Collins. The Superior Court refused to consider the issue because trial counsel failed to object when the Commonwealth presented Dr. Collins.

C. Case Law

112. The U.S. Constitution reads, in part: "In all criminal prosecutions, the accused shall enjoy the right… to be confronted with the witnesses against him[.]" U.S. Const. amdt. VI. The Pennsylvania Constitution reads, in part: "In all criminal prosecutions the accused hath a right… to meet the witnesses face to face." Pa. Const. art. I, § 9.

113. Defendants, consequently, have the right to confront those witnesses who provide "testimonial" statements or reports. *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004). Statements or reports are testimonial when "the primary purpose of the interrogation [or report] is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006).

[100] Ex. 6.
[101] NT, Trial, 6/20/2012, at 85-133.

114. An autopsy report, created as part of a homicide investigation and written by a medical examiner who had the "status" of a criminal investigator, is testimonial. *See, e.g*., *State v. Bass*, 2016 N.J. LEXIS 223, at *51-52 (Mar. 7, 2016) ("[T]he primary purpose of the autopsy was to establish facts for later use in the prosecution of this case. Dr. Peacock's autopsy report is therefore testimonial."); *Rosario v. State*, 175 So. 3d 843, 854-855 (Fla. Dist. Ct. App. 2015); *Miller v. State*, 313 P.3d 934, 969 (Ok. Crim. App. 2013) ("[A] medical examiner's autopsy report in the case of a violent or suspicious death is indeed testimonial for Sixth Amendment confrontation purposes"); *State v. Navarette*, 294 P.3d 435, 440-442 (N.M. 2013) (autopsy reports prepared during homicide investigations are testimonial because "[i]t is axiomatic" that medical examiner create such reports "with the understanding that they may be used in a criminal prosecution."); *State v. Kennedy*, 735 S.E.2d 905, 916-917 (W.Va. 2012) (autopsy reports conducted during "death investigations" are "under all circumstances testimonial"); *United States v. Ignasiak*, 667 F.3d 1217 (11th Cir. 2012); *United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011); *Commonwealth v. Reavis*, 992 N.E.2d 304 (Mass. 2013); *People v. Childs*, 810 N.W. 563 (Mich. 2012); *Connors v. State*, 92 So.3d 676 (Miss. 2012); *Cuesta-Rodriguez v. State*, 241 P.3d 214 (Okla. Crim. App. 2010); *State v. Lockler*, 681 S.E.2d 293 (2009) (N.C. 2009); *Wood v. State*, 299 S.W.3d 200 (Tex. Crim. App. 2009).

115. In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the U.S. Supreme Court held that formalized forensic reports fall within the "core class of testimonial statements" covered by the Confrontation Clause. *Id*. at 310. Specifically, such reports are created "under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial." *Id*. at 311 (quoting *Crawford v. Washington*, 541 U.S. at 52). Furthermore, the reports in *Melendez-Diaz*–sworn laboratory reports asserting that bags police seized from the defendant contained cocaine–were transmitted directly to the police and offered "the precise testimony the analysts would be expected to provide if called at trial." *Id*. at 310. The Supreme Court "safely assume[d] that the analysts were aware of the [reports'] purpose," and thus held them to be testimonial.

116. In *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011), the Supreme Court also held that a forensic laboratory report certifying the defendant's blood alcohol content was above the legal threshold was testimonial. As in *Melendez-Diaz*, the Court stressed that the laboratory was required by state law to assist the police investigation; that the analyst "tested the evidence and prepared a certificate

concerning the result of his analysis"; and that the certificate was "formalized" in a signed document. *See id*.

117. Lest there be any doubt, the Supreme Court's *Crawford* jurisprudence is designed to "comport[] with history" and to apply the Confrontation Clause to the kinds of documents it traditionally barred without testimony from the author. *Williams v. Illinois*, 132 S.Ct. 2221, 2260 (2012) (Thomas, J., concurring in the judgment). Historical sources demonstrate that the right to confrontation covered coroner's reports finding deaths to be caused by homicide. *See*, *e.g.*, *Diaz v. United States*, 223 U.S. 442, 450 (1912) (noting that autopsy report could not be admitted without the accused's consent "because the accused was entitled to meet the witnesses face to face); Note, *Evidence – Office Records – Coroner's Inquest*, 65 U. Pa. L. Rev. 290-291 (1971).

118. Indeed, on more than one occasion, the U.S. Supreme Court has recognized that autopsy reports have historically been treated in early America as testimonial, notwithstanding their potential status as nontestimonial in England during the same time. *See Melendez-Diaz v. Massachusetts*, 557 U.S. at 322 ("Respondent seeks to rebut this limitation by noting that at common law the results of a coroner's inquest were admissible without an opportunity for confrontation. But as we have previously noted, whatever the status of coroner's reports at common law in England, they were not accorded any special status in American practice."); *Crawford v. Washington*, 541 U.S. at 47 n.2 ("There is some question whether the requirement of a prior opportunity for cross-examination applied as well to statements taken by a coroner, which were also authorized by the Marian statutes. Whatever the English rule, several early American authorities flatly rejected any special status for coroner statements." (citations omitted)); *Giles v. California*, 554 U.S. 353, 399-400 (2008) (Breyer, J., dissenting) ("Coroner's statements seem to have had special status that may sometimes have permitted the admission of prior unconfronted testimonial statements despite lack of cross-examination. But, if so, that special status failed to survive the Atlantic voyage. "). The fact that the Constitution's Framers categorically viewed autopsy reports as testimonial weighs heavily in favor of concluding that autopsy reports are testimonial today.

119. Lastly, for "testimonial evidence to be admissible, the Sixth Amendment 'demands what the common law required: unavailability [of the witness] and a prior opportunity for cross-examination." *Michigan v. Bryant*, 562 U.S. 344, 354 (2011) (quoting *Crawford v. Washington*, 541 U.S., at 68).

D. Mr. Armstrong Need Not Establish Prejudice

120. Mr. Armstrong need not establish prejudice.

121. The Sixth Amendment's purpose "is to ensure a fair trial," but it "does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145 (2006). If a "particular guarantee" of the Sixth Amendment is violated, no substitute procedure can cure the violation, and "[n]o additional showing of prejudice is required to make the violation 'complete.'" *Id*. at 146; *accord Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2716 (2011). Thus, as the *Bullcoming* Court said, "If representation by substitute counsel does not satisfy the Sixth Amendment [as held in *Gonzalez-Lopez*], neither does the opportunity to confront a substitute witness"–like a surrogate expert. *Bullcoming v. New Mexico*, 131 S.Ct. at 2716.

122. The Commonwealth deprived Mr. Armstrong his right to confront Dr. Preston regarding the testimonial statements and findings in his autopsy report. This was a "complete" violation of his confrontation right requiring "no additional showing of prejudice."

123. Even if he had to prove the error was not harmless, Mr. Armstrong could do so. From the get-go, the prosecutor told the jury to focus strongly on Dr. Collins's testimony. Dr. Collins testified and, except for Mr. Armstrong's testimony, his testimony lasted the longest of any other witness; it went on for nearly 50 pages. Dr. Collins, moreover, repeatedly told the jury how long Mr. Armstrong had to strangle Mr. Williams with a ligature to cause death. This aspect of Dr. Collins's testimony went directly to malice and specific intent.

124. Here's the problem, though, CSI personnel never located a ligature of any kind inside Mr. Williams's home and Mr. Armstrong denied wrapping a ligature around Mr. Williams's neck. Instead, Mr. Armstrong said he merely grabbed Mr. Williams's shirt in such a way as to force him off of him, but Mr. Williams refused to cease his continual sexual advances.[102]

125. A significant issue, therefore, was how Dr. Preston came to the conclusion the cause of death was ligature asphyxiation when CSI personnel never recovered the alleged ligature used to strangle Mr. Williams. Dr. Collins obviously could not answer this question because he did not conduct the autopsy or write the autopsy

[102] NT, Trial, 6/21/2012, at 126-128, 161-165.

report. It was critical, therefore, for Mr. Armstrong to confront Dr. Preston about his autopsy findings because they went directly to the malice and specific intent issue.

126. Mr. Armstrong is entitled to relief.

AFTER-DISCOVERED EVIDENCE CLAIM

Claim 2: Had the Jury Heard Semaj Howard's Testimony Regarding Anthony Williams's Proclivity to Make Unwanted Sexual Advances Toward Men and His Fascination and Obsession with Mr. Armstrong there is a Reasonable Probability the Outcome of Mr. Armstrong's Trial Would Have Been Different. U.S. Const. amends. V, VI, VIII, XIV, Pa. Const. art. 1, § § 8, 9.

127. **Semaj Howard** contacted Mr. Armstrong after his conviction. He read about Mr. Armstrong's conviction and the circumstances surrounding Mr. Williams's death and knew he had relevant information regarding Mr. Williams.

128. Counsel interviewed Mr. Howard on **January 1, 2015**.

129. Mr. Howard met Mr. Williams on a gay website, went out on one date with him, and, although he did not find him attractive, he became friends with him. During the course of their friendship, though, Mr. Williams inappropriately touched him repeatedly by grabbing his buttock and trying to kiss him. Mr. Howard described one instance where he was at Mr. Williams's house for a party when Mr. Williams wedged himself between him and another partygoer for the sole purpose of trying to kiss and make out with him.

130. The apex of Mr. Williams's attraction to young, attractive black men, Mr. Howard said, was none other than Mr. Armstrong. **Mr. Williams was obsessed with Mr. Armstrong**. Mr. Howard gave two examples of Mr. Williams's obsession. Both involved Mr. Armstrong bringing a woman back to Mr. Williams's house.

a. In one instance, Mr. Howard said Mr. Williams paced back and forth and grumbled to himself while Mr. Armstrong was upstairs with a woman.

b. In another instance, Mr. Williams's face became noticeably angry when Mr. Armstrong went to his bedroom with another woman.

131. 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, 544-45 (Pa. 1995).

132. Mr. Howard's testimony is consistent with the observations and lay opinions of Tayo Afolabi, Harold Robinson, Michele Canales, and Hayley Sydor.

133. Individually and collectively, therefore, Mr. Howard's testimony is of such a nature and character that a different verdict would likely result if the Court granted Mr. Armstrong a new trial.

134. Mr. Armstrong is entitled to relief.

Brady CLAIM

<u>Claim 3</u>: Mr. Armstrong Gave a Custodial Statement to Detectives Explaining How Mr. Williams Attempted to Sexually Assault Him. The Commonwealth Never Disclosed Mr. Armstrong's Statements or *Miranda* Waiver Sheet. Both Documents Were Material and the Commonwealth Had a Duty to Disclose them Before Trial. The Commonwealth's Suppression of these Documents Prejudiced Mr. Armstrong Requiring a New Trial. U.S. Const. amends. V, VI, VIII, XIV, Pa. Const. art. 1, § § 8, 9.

A. Facts

135. After Mr. Armstrong received medical treatment at the hospital, officers transported him to Homicide. Once there, **Detective John Harkins** questioned him and obtained his biographical information, which he used to complete the *Biographic Information Report*.[103] Mr. Armstrong told Detective Harkins he was defending himself from Mr. Williams's attempted sexually assault. After Detective Harkins questioned him, **Detective Levi Morton** questioned him. Detective Morton was the lead detective. Mr. Armstrong told Detective Morton and his partner he was defending himself from Mr. Williams's attempted sexually assault.

136. When Mr. Armstrong was arraigned on **September 28, 2008**, he told his attorney, **Zenaida Lockard** (Defenders Association), he gave a statement to detectives while at Homicide. On the *Preliminary Arraignment Report*, which Zenaida Lockard completed, Lockard handwrote the following:

<u>statement</u> <u>already</u> <u>taken</u>[104]

137. The pre-trial discovery, however, did not contain a report from Detective Harkins or Morton summarizing Mr. Armstrong's statements, nor did it include a *Miranda* waiver sheet indicating Mr. Armstrong's agreed to speak with them.

138. More noteworthy, though, is that the Commonwealth never called Detectives Harkin or Morton as witnesses. Indeed, not one detective testified on the Commonwealth's behalf. The Commonwealth and trial counsel entered a joint stipulation as to Detective Harkins's interview of Mr. Armstrong, but the

[103] NT, Trial, 6/21/2012, at 95-96; Ex. 5.
[104] Ex. 11.

stipulation merely said Detective Harkins obtained biographical information from Mr. Armstrong.[105]

139. During the prosecutor's cross-examination of Mr. Armstrong, he repeatedly implied Mr. Armstrong fabricated his self-defense claim and Mr. Williams's attempted sexual assault. The prosecutor also implied Mr. Armstrong's memory was faulty.[106]

140. During closing arguments, the prosecutor double-downed on his claim that Mr. Armstrong concocted the self-defense claim only after viewing the discovery and forensic evidence.[107]

B. Case Law

141. "[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. Armstrong need **not** show that he "more likely than not" would have been acquitted of murder had the jury known of his custodial statements. *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).

142. 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.

[105] NT, Trial, 6/21/2012, at 95-96.
[106] NT, Trial, 6/21/2012, at 135-176.
[107] NT, Trial, 6/22, 2012, at 72, 80-81.

143. 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).

144. The Commonwealth had a state-law duty to disclose Mr. Armstrong's custodial statements as well. Under Pa.R.Crim.P. 573, it is mandatory for the Commonwealth to disclose the following types of evidence:

> (a) Any 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; [and]
>
> (b) any written confession or inculpatory statement, or the substance of any oral confession or inculpatory statement, and the identity of the person to whom the confession or inculpatory statement was made that is in the possession or control of the attorney for the Commonwealth;

Pa.R.Crim.P. 573(B)(1)(a)&(b).

C. Application of Law to Facts

145. Counsel has litigated numerous murder PCRA cases in Philadelphia County. Mr. Armstrong's case, however, represents the first time where the defendant willingly gave a custodial statement admitting his actions likely resulted in the victim's death, yet the Commonwealth did not call the detectives who took the custodial statement to discuss the statement's substance and incriminating facts. The Commonwealth's refusal to call Detectives Harkins and Morton, in other

words, strongly suggests, if not outright proves, that Mr. Armstrong's custodial statement explained how he **defended himself against Mr. Williams's attempted sexually assault**. Under both state and federal law, therefore, Mr. Armstrong's custodial statements are material because there is a reasonable likelihood they could have affected the jury's judgment.

146. Due to the Commonwealth's suppression, the jury was left to believe Mr. Armstrong never mentioned Mr. Williams's attempted sexual assault to detectives or his claim of self-defense. Without this evidence, consequently, it was much easier to believe the prosecutor's argument, *i.e.*, Mr. Armstrong fabricated the self-defense claim only after reviewing the discovery and forensic evidence.

147. However, had the Commonwealth disclosed Mr. Armstrong's custodial statements, trial counsel could have called Detectives Harkins and Morton as defense witnesses to discuss the custodial statements. The discussion of his custodial statements would have been admission under Pa.R.Evid. 613(c)(1) as a prior consistent statement. Had the jury known Mr. Armstrong immediately told detectives about Mr. Williams's attempted sexual assault, there is a reasonable probability it would not have found Mr. Armstrong guilty of murder. Stated differently, the absence of Mr. Armstrong's custodial statement undermines confidence in the jury's first-degree murder verdict.

148. Standing alone, the suppression of this evidence entitles Mr. Armstrong to relief. Relief is also required when this suppression is coupled with the testimony and evidence trial counsel failed to present at trial as well as the after-discovered facts.

CUMULATIVE PREJUDICE CLAIM

149. "[C]umulative prejudice from individual claims may be properly assessed in the aggregate when the individual claims have failed due to lack of prejudice[.]" *Commonwealth v. Hutchinson*, 25 A.3d 277, 319 (Pa. 2011). Where a defendant "has failed to prove prejudice as the result of any individual errors, he cannot prevail on a cumulative effect claim unless he demonstrates how the particular cumulation requires a different analysis." *Commonwealth v. Wright*, 961 A.2d 119, 158 (Pa. 2008); *accord Commonwealth v. Small*, 980 A.2d 549, 579 (Pa. 2009). A "bald averment of cumulative prejudice does not constitute a claim." *Commonwealth v. Hutchinson*, 25 A.3d at 319. Thus, defendants must "set[] forth a specific, reasoned, and legally and factually supported argument for [his cumulative prejudice] claim." *Id*.; *accord Commonwealth v. Johnson*, 966 A.2d 523, 532 (Pa. 2009).

150. The jury faced four fundamental issues. It knew Mr. Armstrong's actions resulted in Mr. William's death. The jury, therefore, had to decide whether:

a. Mr. Armstrong killed Mr. Williams with premeditation and deliberateness, making him guilty of **first-degree murder**.

b. Mr. Armstrong acted in self-defense, making Mr. Williams's death **justifiable** and Mr. Armstrong innocent of all charges.

c. Mr. Armstrong's subjective perception of imminent bodily harm or death, based on Mr. Williams's attempted sexual assault, was objectively unreasonable (*i.e.*, **imperfect self-defense**), making him guilty of either **voluntary** or **involuntary manslaughter**.

d. Mr. Williams's **sudden** attempted sexual assault caused Mr. Armstrong to defend himself in the **heat of passion**, making him guilty of **voluntary** or **involuntary manslaughter**.

151. The only evidence establishing Mr. Williams attempted to sexually assault Mr. Armstrong came from Mr. Armstrong himself and no one else. The witnesses trial counsel failed to present and Mr. Armstrong's suppressed custodial statement would have provided impactful and admissible evidence regarding self-defense, sudden provocation, and imperfect self-defense–each of which undermine confidence in the jury's first-degree murder verdict.

a. Several of the witnesses describe Mr. Williams's infatuation with Mr. Armstrong. This goes directly to Mr. Armstrong's self-defense claim. The jury needed to hear evidence and testimony as to **why** Mr. Williams would have attempted to sexually assault Mr. Armstrong. In many respects, then, the testimony of these witnesses constitutes motive evidence, *i.e.*, Mr. Williams attacked Mr. Armstrong because he long desired him, but Mr. Armstrong was now moving out of his house on his own accord.

b. Tayo, Mr. Robinson, and Mr. Howard would have described Mr. Williams's proclivity to touch men inappropriately and make unwanted sexual advances toward them. This goes directly to the issue of whether Mr. Williams would have acted on his desire to be with Mr. Armstrong, even if Mr. Armstrong had no desire to be with him physically or romantically. It supports the belief that, yes, Mr. Williams would have tried to, and did, force himself onto Mr. Armstrong because Mr. Armstrong was physically and emotionally weak when he entered his house.

c. The jury also needed to hear evidence and testimony supporting Mr. Armstrong's claim that Mr. Williams, **in fact, attempted to sexually assault him**. Linda Armstrong's statement would have hammered home this point dramatically because she heard Mr. Williams say, in an angry voice, "**You're mine now, oh yea, you're mind now**." This testimony, perhaps more than any other testimony, proves that Mr. Williams did, in fact, attempt to sexually assault Mr. Armstrong because it goes to Mr. Williams's then existing state of mind, motive, and intent. Mrs. Armstrong's testimony, therefore, would have been admissible under Pa.R.Evid. 803(3).

d. The jury also needed to hear evidence and testimony proving Mr. Armstrong did not concoct his self-defense claim after reviewing the discovery and forensic evidence. In other words, if the jury was to believe Mr. Williams, in fact, attempted to sexually assault Mr. Armstrong, it needed to know Mr. Armstrong told this to detectives immediately after the incident and not for the first time at trial. Mr. Armstrong's custodial statements, consequently, would have bolstered not only his credibility, but the validity of his claim that Mr. Williams attempted to sexually assault him.

e. The jury also needed to hear evidence and testimony regarding Mr. Armstrong's state-of-mind during the attempted sexual assault. Drs. Michals and Manion would have provided such testimony. Psychiatric testimony, for instance, is both competent and relevant to demonstrate that the defendant's statement of

mind was such that he acted in a state of passion sufficient to reduce murder to manslaughter. *Commonwealth v. Henderson*, 416 A.2d 1084, 1085 (Pa. Super. 1979); *Commonwealth v. McCusker*, 292 A.2d 286 (Pa. 1972).

152. Collectively, had the jury heard from these witnesses and about Mr. Armstrong's custodial statement, it is reasonably probable it would have acquitted Mr. Armstrong of murder and manslaughter. In the alternative, it is reasonably probable the cumulative impact of these facts would have resulted in the jury acquitting Mr. Armstrong of murder. These facts, in other words, prove did not, at the very least, act with specific intent, premeditation, or malice.

RIGHT TO DISCOVERY

153. Mr. Armstrong 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 Mr. Armstrong's custodial statements, *Miranda* waiver sheet, and any reports summarizing or discussing Mr. Armstrong's custodial statements.

154. Mr. Armstrong 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.

155. Mr. Armstrong is also entitled to the requested discovery under federal due process. Due process requires post-conviction proceedings to be fundamentally fair. *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). States have no constitutional obligation to provide post-conviction relief, *Pennsylvania v. Finley*, 481 U.S. at 557, but if a State creates a post-conviction process "integral" to "finally adjudicating" a defendant's "guilt or innocence," *Griffin v. Illinois*, 351 U. S. 12, 18 (1956), the State's post-conviction process "must comport with due process." *Evitts v. Lucey*, 469 U.S. at 393. The PCRA process is "integral" to "finally adjudicating" a Pennsylvania prisoner's guilt or innocence.

156. Moreover, under the PCRA statute, Mr. Armstrong 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. Armstrong 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).

157. Under the PCRA, therefore, Mr. Armstrong 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. 52, 68 (2009). 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. 458, 463 (1981) (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. 216, 220 (2011).

158. Mr. Armstrong, consequently, must be afforded reasonable procedures to ensure he can "adequately vindicate" his **substantive** liberty interest of obtaining relief based on the Commonwealth's suppression of his custodial statements. *Dist. Attorney's Office v. Osborne*, 557 U.S. at 68-69. To adequately vindicate his **substantive** liberty interest, Mr. Armstrong 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 his custodial statements and *Miranda* waiver sheet.

RIGHT TO AN EVIDENTIARY HEARING

159. Mr. Armstrong 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. Armstrong'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). Mr. Armstrong is entitled to a hearing because his petition raises material issues of fact regarding trial counsel's effectiveness.

RIGHT TO AMEND

160. Mr. Armstrongs 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

161. **WHEREFORE**, Mr. Armstrong 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.

a. Any other relief the Court deems necessary to protect and vindicate Mr. Armstrong's state and federal rights to effective PCRA counsel and a fundamentally fair PCRA process.

Respectfully submitted this the **3rd day** of **April, 2016**.

/s/Craig M. Cooley
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CERTIFICATE OF SERVICE

On **April 3, 2016** counsel emailed this amended PCRA petition to ADA Robin Godrey at Robin.Godfrey@phila.gov. The Commonwealth also received notice and a PDF copy of the amended PCRA petition because counsel e-filed the petition with Philadelphia County's e-filing system.