

**PENNSYLVANIA SUPERIOR COURT
EASTERN DISTRICT**

COMMONWEALTH OF)	
PENNSYLVANIA)	
)	
Plaintiff-Appellee,)	
)	
v.)	2913 EDA 2016
)	CP-39-CR-0000791-2011
)	Non-Capital PCRA
)	Guilty Plea: M1
CHRISTIAN BUENO)	PCRA Court: Dantos, M. L.
Defendant-Appellant.)	
)	

Opening Brief for Defendant-Appellant

Appeal from the August 16, 2016 Order Dismissing Christian Bueno’s Second PCRA Petition Entered by the Honorable Maria L. Dantos of the Lehigh County Common Pleas Court, Criminal Division, CP-39-CR-0000791-2011

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STATEMENT OF JURISDICTION

Jurisdiction for this appeal is provided for at 42 Pa. C.S. § 742, relating to this Court's exclusive appellate jurisdiction from a Common Pleas Court's final order.

ORDER OR OTHER DETERMINATION IN QUESTION

Under appeal is the August 16, 2016 order dismissing Christian Bueno's second PCRA petition entered by the Honorable Maria L. Dantos of the Leigh County Common Pleas Court, Pennsylvania, Criminal Division, CP-51-CR-0000791-2011.¹

On September 13, 2016, Mr. Bueno timely appealed.²

CONCISE STATEMENT OF ERRORS AND OPINION

On October 4, 2016, Mr. Bueno filed his *Concise Statement of Errors on Appeal*.³

On August 16, 2016, when Judge Dantos dismissed Mr. Bueno's second PCRA petition, her dismissal was accompanied with a written opinion.⁴ On October 10, 2016, after Mr. Bueno filed his *Concise Statement of Errors on Appeal*, Judge Dantos

¹ Ex. 1. The exhibits are in the Reproduced Record.

² Ex. 2.

³ Ex. 3.

⁴ Ex. 4.

issued another opinion adopting her findings and conclusions from her first opinion.⁵

PROCEDURAL HISTORY

On November 1, 2010, the Commonwealth filed an *Information* (CP-39-CR-0004257-2010) against Dennis Velez charging him with homicide, robbery, and conspiracy in connection with the September 8, 2007 shooting death of Debra Robberson. On the same date, the Commonwealth filed its notice of intent to seek the death penalty against Velez.

On March 16, 2011, the Commonwealth filed an *Information* (CP-39-CR-0000791-2011) and its notice of intent to seek the death penalty against Mr. Bueno in connection with Robberson's murder. Their cases were assigned to the Honorable Maria L. Dantos ("trial court").

On April 6, 2011, the trial court appointed Matthew Potts as trial counsel.

On September 12, 2011, jury selection began and it ended on September 15, 2012.

On September 15, 2011, the Commonwealth amended Velez's *Information* by withdrawing the capital murder count and recharging Velez with third-degree murder. On that same day, Velez pled guilty to third-degree murder and agreed to testify against Mr. Bueno at his death penalty trial.

⁵ Ex. 5.

On September 19, 2011, Mr. Bueno pled not guilty, the trial court swore in the jury, and the Commonwealth began presenting its case.

On September 20, 2011, after both parties rested, and shortly before the jury was to be charged, Mr. Bueno pled guilty to first-degree murder, in exchange for the Commonwealth withdrawing the death penalty. The trial court immediately sentenced Mr. Bueno to life imprisonment.

On September 30, 2011, Mr. Bueno filed a motion to withdraw his guilty plea.

On October 10, 2011, the trial court held a hearing and denied the motion.

On November 8, 2011, Mr. Bueno timely appealed (3039 EDA 2011).

On August 7, 2012, this Court affirmed.⁶

On September 6, 2012, Mr. Bueno filed a timely *Petition for Allowance of Appeal* (704 MAL 2012), which was denied on January 9, 2013. Mr. Bueno did not seek review from the U.S. Supreme Court, making his conviction final on April 9, 2013.

On January 9, 2014, Mr. Bueno filed a timely *pro se* PCRA petition.

On February 2, 2014, the PCRA court appointed Sean Poll as PCRA counsel.

On March 12, 2014, Poll filed a motion to withdraw and a *Finley*/no-merits letter brief.

On May 1, 2014, the PCRA court granted Poll's motion.

⁶ Ex. 6.

On June 6, 2014, undersigned counsel entered his appearance and filed an amended PCRA petition on October 8, 2014, which he supplemented on March 4, 2015.

On March 26, 2015, the PCRA court held a PCRA hearing.

On May 13, 2015, the PCRA court issued an order accompanied by an opinion dismissing Mr. Bueno's first PCRA petition.

On June 8, 2015, Mr. Bueno timely appealed (1685 EDA 2015).

On April 19, 2016, this Court affirmed.⁷

On May 19, 2016, the time for filing a *Petition for Allowance of Appeal* ("PAA") expired. Mr. Bueno did not file a PAA, thereby ending the appellate process for his first PCRA petition.

On July 6, 2016, within 60 days of the expiration of his first PCRA appeal, Mr. Bueno filed a *Second PCRA Petition* based on after-discovered evidence,⁸ which counsel amended on August 15, 2016.⁹

On August 15, 2016, the PCRA court heard oral arguments and orally dismissed Mr. Bueno's second PCRA petition, which it formally dismissed by written order and opinion on August 16, 2016.¹⁰

On September 13, 2016, Mr. Bueno timely appealed.¹¹

⁷ Ex. 7.

⁸ Ex. 8.

⁹ Ex. 9.

¹⁰ Exs. 1, 4.

ISSUES PRESENTED

Claim One: The PCRA court erred when it concluded that Mr. Bueno's second PCRA petition was untimely because counsel did not diligently try to interview Felix Oquendo before the dismissal of Mr. Bueno's first PCRA petition. U.S. Const. amds. 6, 8, 14; Pa. Const. art. I, § 9, 23.

Claim Two: The PCRA court erred when it refused to grant Mr. Bueno an evidentiary hearing where trial counsel, ADA Matt Falk, Detective Velazquez, Felix Oquendo, and Mr. Bueno could testify. U.S. Const. amds. 6, 8, 14; Pa. Const. art. I, § 9, 23.

Claim Three: The PCRA court erred by finding that ADA Matt Falk's statements during the August 15, 2016 hearing were true and accurate and relying on these statements to dismiss Mr. Bueno's second PCRA petition and to refuse to grant an evidentiary hearing. The process by which the PCRA court made this factual finding violated Mr. Bueno's state and federal due process rights because the PCRA court deprived Mr. Bueno the opportunity for discovery and of confronting and cross-examining ADA Falk and Detective Velazquez based on the discovery. U.S. Const. amds. 6, 8, 14; Pa. Const. art. I, § 9, 23.

SCOPE AND STANDARD OF REVIEW

This Court reviews PCRA dismissal orders in the light most favorable to the Commonwealth. *Commonwealth v. Burkett*, 5 A.3d 1260, 1267 (Pa. Super. 2010). Review is limited to the PCRA court's findings and the record. *Id.* The PCRA court's ruling will not be disturbed if it is supported by the record. *Id.* The Court

¹¹ Ex. 2.

reviews constitutional questions *de novo*. *City of Philadelphia v. FOP Lodge No. 5*, 985 A.2d 1259, 1269 (Pa. 2009).

The right to a PCRA evidentiary hearing is not absolute. *Commonwealth v. Jordan*, 772 A.2d 1011, 1014 (Pa. Super. 2001). It is within the PCRA court's discretion to decline to hold a hearing if the petitioner's claims are "patently frivolous" and has "no support either in the record or other evidence." *Commonwealth v. Wah*, 42 A.3d 335, 338 (Pa. Super. 2012). It is this Court's responsibility to examine each claim raised in the PCRA petition in light of the record to determine if the PCRA court erred in its determination that there were no genuine issues of material fact in controversy and in denying relief without conducting an evidentiary hearing. *Id.*

STATEMENT OF FACTS

A. Introduction

On September 8, 2007, someone shot and killed Debra Robberson in the parking lot of Diamondz a LGBT bar in Allentown. The case remained cold until February 24, 2010 when a Lehigh County Jail ("LCJ") inmate named Isaiah Workman met with detectives and Assistant District Attorney ("ADA") Matt Falk. Workman told detectives Dennis Velez, a high ranking Ñetas gang member and fellow LCJ inmate, told him that he (Velez) shot a "guy" at Diamondz when he and his "wife" got into an altercation with the "guy." Velez told Workman he only

learned the victim was a woman the next day after watching news reports. On February 8, 2011, another LCJ inmate, Tyrone Davis, also came forward and told detectives Velez had told him that he (Velez) shot a lesbian because she saw his face during a botched robbery.

Only a month after implicating Velez, ADA Falk petitioned the trial court to modify Isaiah Workman's 1 to 3 year prison sentence. Workman's modified sentence was probation. Tyrone Davis also received a lenient sentence after implicating Velez, despite facing charges in three separate *Informations*. Davis received "immediate" parole on August 26, 2011.

Detectives interviewed Dennis Velez on March 18, 2010, March 22, 2010, March 25, 2010, and April 7, 2010. Velez initially told detectives he and Mr. Bueno both planned the robbery, but then said Mr. Bueno planned it. Velez also said he and Mr. Bueno exited the car at the same time, but then said Mr. Bueno exited first and he only exited when he saw Mr. Bueno struggling with Robberson. Velez initially said Mr. Bueno shot Robberson when the gun accidentally discharged as he (Mr. Bueno) and Robberson struggled for control of it. In his subsequent statements, Velez said Mr. Bueno purposely shot Robberson after he (Velez) mocked him and challenged his manhood for being unable to singlehandedly rob Robberson. Velez also failed a polygraph exam on March 25, 2010.

Detectives interviewed Velez's girlfriend, Amarilys Soto, on March 2nd and 3rd, 2010. Soto initially denied all involvement, saying she only learned of the shooting when she overheard Velez and Mr. Bueno arguing two days after the shooting. Soto also initially said Velez had told her that he (Velez) tried robbing someone and it did not go well. Soto ultimately admitted to detectives that her initial statement was untrue and then told detectives that she drove Velez and Mr. Bueno to Diamondz, and once there, Velez and Mr. Bueno exited her car at the same time, only to return 15 to 20 minutes later after she heard a gunshot.

After the shooting, Velez and Soto both said they spent the night at Reina Lopez's house. Lopez is Velez's older sister. When detectives interviewed Lopez on March 22, 2010, she assisted them by showing them Mr. Bueno's Myspace page, which played an important role in their investigation. Lopez assisted detectives again on April 15, 2010, when she viewed a photo array and identified Mr. Bueno, and again on May 5, 2010 when she answered additional questions. In none of these interviews did Lopez say she overheard Mr. Bueno tell her (then) brother-in-law, Felix Oquendo, that he (Mr. Bueno) shot and killed a woman during a botched robbery with Velez.

On January 4, 2011, when detectives arrested Mr. Bueno, he denied involvement, even after hearing portions of Velez's taped statements.

On September 6, 2011, only weeks before Mr. Bueno's and Velez's death penalty trial was scheduled to begin, Reina Lopez met with Velez at the LCJ to discuss his impending trial. The next day, September 7th, Lopez proactively met with detectives and ADA Falk and told them, for the first time, that she now recalled overhearing Mr. Bueno confess to Felix Oquendo the night of the shooting. Mr. Bueno, according to Lopez, told Oquendo he accidentally shot someone during a botched robbery with Velez when the victim reached for his (Mr. Bueno's) gun.¹²

The pre-trial discovery trial counsel received from the Commonwealth contained no reports or memos indicating that detectives or ADA Falk spoke with or attempted to speak with Felix Oquendo before Mr. Bueno's death penalty trial. In September 2011, Oquendo was (and still is) serving a 10 to 20 year sentence for a variety of offenses in case number CP-39-CR-0002338-2008.

Shortly after Lopez implicated Mr. Bueno, the Commonwealth offered Velez a third-degree murder plea deal if he agreed to testify against Mr. Bueno at his death penalty trial. Velez accepted and pled guilty to third-degree murder on September 15, 2011, only days before Mr. Bueno's trial.

Shortly before Velez pled guilty, Velez ordered several lower-ranking Ñetas gang members to travel to Brooklyn to threaten Mr. Bueno's family. Three Ñetas gang members knocked on Mr. Bueno's mother, Jackeline Mancayo's, front door

¹² Ex. 20.

and told her there would be consequences if Mr. Bueno did not take the rap for Robberson's murder. Terrified of what might happen if she told authorities, Mancayo did not report the threat or immediately tell Mr. Bueno about it.

Velez testified at Mr. Bueno's death penalty trial and told jurors that Mr. Bueno purposely shot Robberson in cold blood immediately after he (Velez) called his (Mr. Bueno's) "manhood" into question for failing to rob Robberson by himself. ADA Falk described it best during opening arguments when he said Mr. Bueno shot Robberson because he wanted to show Velez that he was not a pussy. Velez also told jurors he only exited Soto's car when he saw Mr. Bueno struggling with Robberson. Lopez also testified and told jurors she overheard Mr. Bueno tell Felix Oquendo that he shot someone during a botched robbery. Soto also testified, but said Mr. Bueno *and* Velez exited her car at the same time. Soto, however, did not see who shot Robberson. Isaiah Workman testified on Mr. Bueno's behalf and told jurors how Velez confessed to him that he (Velez) and "his girlfriend or wife" had an "altercation with" a really "butch" woman that ultimately ended when he (Velez) accidentally shot the woman.

Concerned about Velez's and Lopez's testimony and the prospect of Mr. Bueno receiving the death penalty if convicted, trial counsel asked Jackie Mancayo to convince her son to plead guilty in exchange for the Commonwealth dropping the death penalty. Mancayo agreed, urged Mr. Bueno to plead guilty, and told him

about the threat from the three Ñetas gang members to encourage him to do so. Mr. Bueno agreed and pled guilty to first-degree murder. The factual basis of Mr. Bueno's guilty plea has him shooting Robberson as a purposeful act to prove his manhood to Velez.

B. First PCRA Proceedings

In May 2014, Mr. Bueno retained undersigned counsel to litigate his first PCRA petition. After reviewing the case, counsel wanted to interview Dennis Velez, Felix Oquendo, Reina Lopez, and Amarilys Soto. On October 14, 2014, before counsel even attempted to contact Velez, Velez sent an affidavit to Mr. Bueno's family admitting that his pre-trial statements and trial testimony were false and that he, in fact, shot Robberson, not Mr. Bueno.¹³ Counsel and his investigator, Russ Kollins, subsequently interviewed Velez at SCI-Greene on December 18, 2014, where Velez admitted (1) he was the one who shot Robberson, (2) his statements and trial testimony were false, (3) he confessed to Isaiah Workman and Tyrone Davis while housed in the LCJ, and (4) he instructed lower ranking Ñetas gang members to threaten Mr. Bueno's family in Brooklyn.¹⁴

In terms of Felix Oquendo, counsel wrote Mr. Oquendo three times at SCI-Brenner Township between October 2014 and March 2015: October 7, 2014,

¹³ Ex. 10.

¹⁴ Ex. 11.

December 2, 2014, and March 10, 2015.¹⁵ Mr. Oquendo never responded to counsel's letters. Like Velez, counsel wished to interview Oquendo at SCI-Brenner Township to determine if law enforcement or ADA Falk spoke with him before Mr. Bueno's trial and guilty plea regarding Reina Lopez's September 7, 2011 allegation that Mr. Bueno confessed to him the night of the shooting. To interview an inmate housed in the Pennsylvania Department of Corrections, either face-to-face or telephonically, the inmate must place counsel's name and contact information on his visiting list and/or call list. By March 2015, Oquendo had yet to respond to counsel's letters and had yet to place counsel's name on his visiting list and/or call list. Counsel, therefore, had no way of communicating with Oquendo to determine if detectives or ADA Falk spoke with him before Mr. Bueno's trial and guilty plea.

Based on Velez's October 14, 2014 affidavit and December 18, 2014 statements to counsel, the PCRA court held a hearing on March 26, 2015. Velez testified and said he wrote and signed the October 14, 2014 affidavit,¹⁶ and did so because he had a "guilty conscience."¹⁷ Velez testified, "I can't... have a man in jail doing time... for something he didn't do."¹⁸ Velez added, "I gave him life... I said he

¹⁵ Ex. 12.

¹⁶ NT, PCRA Hrg., 3/26/2015, at 15.

¹⁷ *Id.* at 17.

¹⁸ *Id.* at 17.

killed somebody. He never even did it.”¹⁹ Velez testified that he was the one who shot Robberson: “I shot Debra Roberrson... I was the one that had the gun that shot Debra Robberson.”²⁰ Velez testified that he met Mr. Bueno for the first time that night, and that he, Mr. Bueno, and Soto left Lopez’s house together, but by the time they arrived at Diamondz, Mr. Bueno had passed out in the back seat of Soto’s car.²¹

Velez also admitted to confessing to Isaiah Workman and Tyrone Davis and testified that Workman’s and Davis’ statements to detectives were true.²² Velez also testified to sending Ñetas gang members to Jacqueline Moncayo’s Brooklyn house to tell her that Mr. Bueno had to “take the rap for the murder,” and if not, “there was going to be consequences.”²³ When the PCRA court asked Velez what he meant by “consequences,” Velez testified, “If the system is going to take my life, I’m going to take somebody else’s life.”²⁴ In need of more clarity, the PCRA court asked, “What did you tell them?” Velez testified, “They were gonna be killed.” When the PCRA court asked “who” was going to be killed, Velez testified,

¹⁹ *Id.* at 17.

²⁰ *Id.* at 18.

²¹ *Id.* at 19.

²² *Id.* at 19, 20, 21, 34.

²³ *Id.* at 22, 41.

²⁴ *Id.* at 43.

“Christian’s mom. Anybody that was in the house. Anybody that answered the door.”²⁵

On cross-examination, Velez repeatedly admitted to lying during his guilty plea colloquy and at Mr. Bueno’s trial,²⁶ and said his primary motivation for lying was to escape a life or death sentence.²⁷ Velez also testified that the factual basis of Mr. Bueno’s guilty plea was not true because he shot Robberson, not Mr. Bueno.²⁸

Jackeline Moncayo also testified and described the terrifying experience of when three Ñetas gang members knocked on the front door of her Brooklyn home and threatened her and her family. Moncayo testified the threat happened sometime between 10 a.m. and 11 a.m. approximately two weeks before Mr. Bueno’s trial. Speaking in Spanish, the three men said if Mr. Bueno did not take the rap for the murder there would be consequences to pay.²⁹

Moncayo never told anyone, including Mr. Bueno, about the threat because she was “very scared.”³⁰ On September 20, 2011, however, after trial counsel told her that Mr. Bueno would likely be convicted and sentenced to death if he did not plead guilty, she spoke with Mr. Bueno and encouraged him to plead guilty. In

²⁵ *Id.* at 43.

²⁶ *Id.* at 37, 38.

²⁷ *Id.* at 45.

²⁸ *Id.* at 28.

²⁹ *Id.* at 86-88.

³⁰ *Id.* at 89, 90, 91.

doing so, Moncayo mentioned the threat as one of the primary reasons she believed Mr. Bueno should plead guilty because she did not want him or her family to be harmed or killed.³¹ On cross-examination, the Commonwealth never questioned the veracity of Moncayo's testimony; instead, it focused on why she did not contact law enforcement or the District Attorney's Office to report the threat.³²

On May 13, 2015, the PCRA court entered an order and opinion dismissing Mr. Bueno's first PCRA petition. In its opinion, the PCRA court summarized Velez's and Moncayo's testimony and at the end of both summaries it simply wrote, "This Court did not find any of... Velez's testimony to be credible"³³ and "This Court did not find Jackeline Moncayo's testimony to be credible."³⁴ The PCRA court recognized that Mr. Bueno could withdraw his guilty plea based on after-discovered evidence, but only if the evidence was "of such a nature that it would compel a different outcome[.]"³⁵ The PCRA court held that Mr. Bueno did not meet this standard because it "found" his witnesses "completely and utterly unreliable."³⁶

³¹ *Id.* at 92-93.

³² *Id.* at 91-95.

³³ Ex. 13, at 4.

³⁴ *Id.* at 6.

³⁵ *Id.* at 8.

³⁶ *Id.* at 8, 9.

Mr. Bueno timely appealed (1685 EDA 2015), but this Court affirmed on April 19, 2016.³⁷ Mr. Bueno did not file a PAA with the Pennsylvania Supreme Court.

C. Second PCRA Proceedings

After the PCRA court dismissed Mr. Bueno's first PCRA petition in May 2015, and during the pendency of his first PCRA appeal to this Court, counsel continued writing Felix Oquendo at SCI-Brenner Township. On June 1, 2015, counsel faxed a letter to SCI-Brenner Township asking for a face-to-face visit with Oquendo under the gate-pass exception.³⁸ Certain SCI facilities will occasionally allow attorneys to interview inmates face-to-face even if the attorney is not the inmate's attorney and is not on the inmate's visiting list. On June 2, 2015, SCI-Brenner Township called counsel and informed him it did not offer one-time gate passes to attorneys and that if counsel wanted to interview Oquendo face-to-face and telephonically Oquendo had to place counsel's name and contact information on his visiting list and call list. That same day, counsel wrote Oquendo again,³⁹ but received no response. Counsel wrote Oquendo again on October 7, 2015.⁴⁰ The next day, October 8, 2015, counsel received a phone call from Mr. Bueno's family informing counsel that Oquendo had contacted the family and told them that he would meet with counsel face-to-face at SCI-Brenner Township. Counsel wrote Oquendo that

³⁷ Ex. 7.

³⁸ Ex. 14a.

³⁹ Ex. 14b.

⁴⁰ Ex. 15.

day confirming this information,⁴¹ and then faxed a letter to SCI-Brenner Township on October 28, 2015 asking for a face-to-face visit with Oquendo for November 5, 2015.⁴²

On November 5, 2015, counsel interviewed Oquendo at SCI-Brenner Township. When counsel showed Oquendo a copy of Reina Lopez's September 7, 2011 statement, Oquendo laughed and told counsel that Mr. Bueno made no such comment to him on September 8, 2007 or anytime thereafter.⁴³

Oquendo also told counsel that Matt Potts, Mr. Bueno's trial attorney, called him at SCI-Crescent shortly before trial in September 2011 and asked him about Reina Lopez's statement. Oquendo told Potts what he told counsel: Mr. Bueno made no such comment to him on September 8, 2007 or anytime thereafter.⁴⁴

Oquendo also told counsel that a week after he spoke with Mr. Potts, detectives interviewed him at SCI-Crescent and asked him the same questions regarding Lopez's statement. Oquendo told counsel that detectives told him they could help him with his appeal if he cooperated. Despite their offer of assistance, Oquendo told detectives what he told Matt Potts and counsel: Mr. Bueno made no such comment to him on September 8, 2007 or anytime thereafter.⁴⁵

⁴¹ Ex. 16.

⁴² Ex. 17.

⁴³ Ex. 18.

⁴⁴ Ex. 8.

⁴⁵ Ex. 8.

Although Mr. Bueno's first PCRA appeal (1685 EDA 2015) was still pending, Mr. Bueno filed his *Second PCRA Petition* on January 4, 2016, based on Oquendo's statements to counsel on November 5, 2015. The PCRA court dismissed the petition the next day, January 5th, because of Mr. Bueno's (then) pending PCRA appeal to this Court.⁴⁶ After this Court affirmed the dismissal of Mr. Bueno's first PCRA petition on April 19, 2016, Mr. Bueno did not file a PAA, meaning his first PCRA appeal ended on May 19, 2016.

On July 6, 2016, within 60 days of the expiration of Mr. Bueno's first PCRA appeal, Mr. Bueno re-filed his *Second PCRA Petition*,⁴⁷ which he amended on August 15, 2016.⁴⁸ In the second PCRA petition, counsel explained how he diligently attempted to interview Felix Oquendo at SCI-Brenner Township between October 2014 and March 2015, and argued that the petition was timely under the PCRA's government interference and after-discovered evidence timeliness exceptions.

On August 15, 2016, the PCRA court heard oral arguments regarding the timeliness of Mr. Bueno's second PCRA petition.⁴⁹ At the hearing, counsel explained how he wrote Oquendo multiple times between October 2014 and March 2015, before the dismissal of Mr. Bueno's first PCRA petition, and explained

⁴⁶ Ex. 18.

⁴⁷ Ex. 8.

⁴⁸ Ex. 9.

⁴⁹ Ex. 19.

how the Pennsylvania Department of Corrections prohibits attorneys from interviewing an inmate unless the inmate has placed the attorney's name and contact information on his visiting list or call list. Counsel also asked the PCRA court to compel the Commonwealth to answer counsel's question of whether detectives and ADA Falk interviewed Oquendo before Mr. Bueno's trial.⁵⁰

ADA Falk told the PCRA court that detectives and he had, in fact, attempted to interview Oquendo at SCI-Crescent before Mr. Bueno's trial. According to ADA Falk, when Oquendo saw him and Detective Vasquez in the interview room, Oquendo allegedly said, "Fuck you, Vasquez," and walked away without giving a statement. ADA Falk then alleged that (1) detectives did not write a report regarding this attempted interview, (2) detective Vasquez told Mr. Bueno's trial attorney, Matt Potts, about their attempted interview with Oquendo, and (3) when Vasquez spoke with Potts, Potts told Vasquez that Oquendo also refused to speak with him (Potts).⁵¹

At the end of the oral arguments, the PCRA court dismissed Mr. Bueno's petition for two reasons. *First*, the PCRA court found that counsel could have interviewed Oquendo well before November 5, 2015, and, therefore, counsel did not satisfy the diligence requirement for after-discovered evidence timeliness exception, making Mr. Bueno's petition untimely. *Second*, the PCRA court

⁵⁰ Ex. 19.

⁵¹ Ex. 19, p. 13.

credited ADA Falk's statements regarding how Oquendo allegedly acted and what Oquendo allegedly said when he saw ADA Falk and Detective Vasquez at SCI-Crescent.⁵²

The next day, August 16, 2016, the PCRA court filed its formal dismissal order, which was accompanied by a short opinion.⁵³ After reciting the procedural history, the PCRA court held that Mr. Bueno "failed to prove" that he satisfied one of the PCRA's three timeliness exceptions, rendering his petition untimely.⁵⁴ In a footnote written in support of its finding that Mr. Bueno's petition was untimely, the PCRA court credited ADA Falk's statements during oral arguments:

As an aside, however, at the hearing on August 15, 2016, the attorney for the Commonwealth, Senior Deputy District Attorney Matthew Falk, represented to this Court that when investigators for the Commonwealth went to interview Mr. Oquendo at state prison, Mr. Oquendo stated, "Fuck you" and walked away without providing a statement. Senior Deputy District Attorney Matthew Falk was present for this exchange and related same to Attorney Potts. According to Senior Deputy District Attorney Matthew Falk, Attorney Potts informed him that he never spoke to Mr. Oquendo.

The PCRA court also elaborated on why counsel failed to satisfy the diligence requirement.

⁵² Ex. 19.

⁵³ Ex. 4.

⁵⁴ Ex. 4, pp. 4-5.

Based on the pleadings, the within second untimely Motion for Post Conviction Collateral Relief must be dismissed. Indeed, according to 42 Pa. C.S.A. § 9545(b)(1)(ii), an untimely claim is permitted when the “facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence.” 42 Pa. C.S.A. § 9545(b)(1)(ii) (emphasis supplied). Ms. Lopez’s statement was available since 2011. All parties involved in the within matter were aware of Ms. Lopez’s statement in 2011, and consequently this issue should have been raised, at a minimum, in the first Motion for Post Conviction Collateral Relief. Mr. Oquendo was being housed in state prison and his whereabouts were known. Ultimately, present defense counsel interviewed Mr. Oquendo on November 15, 2015, and then filed the within motion. However, said interview could have occurred at a much earlier juncture, and the Defendant failed to explain to this Court why the information from Mr. Oquendo could not have been discovered earlier. As such, this Court finds that the Defendant failed to prove an exception to the one-year time requirement.

Mr. Bueno timely appealed the dismissal.⁵⁵

⁵⁵ Ex. 2.

ARGUMENTS

Claim One: The PCRA court erred when it concluded that Mr. Bueno's second PCRA petition was untimely because counsel did not diligently try to interview Felix Oquendo before the dismissal of Mr. Bueno's first PCRA petition. U.S. Const. amdts. 6, 8, 14; Pa. Const. art. I, § 9, 23.

The PCRA statute has a 1-year limitation period. 42 Pa. C.S. § 9545(b)(1), meaning petitioners must generally file their PCRA petitions within one year of when their conviction(s) become final. The PCRA statute, however, lists three exceptions to the 1-year limitations period:

(b) Time for filing petition.—

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

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

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

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme

Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa. C.S. §§ 9545(b)(1)(i-iii).

Felix Oquendo's November 5, 2015 statement to counsel satisfies the after-discovered evidence exception. The PCRA court, therefore, erred when it held that Mr. Bueno's second PCRA petition was untimely.

Section § 9545(b)(1)(ii) provides that "the facts upon which the claim is predicated were *unknown to petitioner* and could not have been ascertained by due diligence." (emphasis added). Commonly referred to as the "after-discovered" or "newly-discovered" evidence exception, this exception "does not require a merits analysis of the claim in order for it to qualify as timely and warranting merits review." *Commonwealth v. Lambert*, 884 A.2d 848, 852 (Pa. 2005). Instead, § 9545(b)(1)(ii) has two components: (1) "the *facts* upon which the claim was predicated were *unknown to the petitioner*" and (2) "could not have been ascertained by the exercise of *due diligence*." 42 Pa. C.S. § 9545(b)(1)(ii) (emphasis added); *Commonwealth v. Bennett*, 930 A.2d 1264, 1272 (Pa. 2007). If the "petitioner alleges and proves these two components, then the PCRA court has jurisdiction over the claim under this subsection." *Id.* at 1272. Importantly, § 9545(b)(1)(ii)'s has a subjective element to it because it focuses on whether the new facts were "unknown to the petitioner." *Commonwealth v. Burton*, 121 A.3d

1063, 1071-1072 (Pa. Super.) (*en banc*). Accordingly, the focus must be on whether the petitioner, *not* trial counsel, knew of or could access the after-discovered facts. *Id.*

A. Facts Unknown to Mr. Bueno

According to the PCRA court, “[a]ll parties involved in the within matter were aware of Ms. Lopez’s statement in 2011, and consequently this issue should have been raised, at a minimum, in the first Motion for Post-Conviction Collateral Relief.”⁵⁶ The PCRA court erred because the record evidence does not support this finding.

Mr. Bueno did not know of trial counsel’s phone call with Felix Oquendo before trial, during trial, on direct appeal, or during his first PCRA proceedings. Mr. Bueno first learned of trial counsel’s phone call with Oquendo in November 2015, after counsel interviewed Oquendo at SCI-Brenner Township on November 5, 2015. Trial counsel’s case file supports this fact because trial counsel never memorialized the substance of Oquendo’s statement to him into a memo, nor did trial counsel memorialize the fact he even spoke with Oquendo before trial.

The record from the first PCRA proceedings also supports the fact Mr. Bueno did not know about Oquendo’s phone call with trial counsel until November 2015, after his first PCRA proceedings. Mr. Bueno wrote and filed a comprehensive first PCRA petition, wherein he cited, referenced, and quoted

⁵⁶ Ex. 4, p. 4 n.3.

nearly every statement from Amarilys Soto, Dennis Velez, and Reina Lopez and explained how their statements contradicted one another. Mr. Bueno, moreover, attached these statements as exhibits to his first PCRA petition. Despite maintaining his innocence throughout his first PCRA petition, however, Mr. Bueno did not reference Oquendo's exculpatory statement to trial counsel rejecting Reina Lopez's September 7, 2011 statement.

For someone who has maintained his innocence from day one, it is unfathomable to think Mr. Bueno purposely and knowingly refused to cite or reference Oquendo's exculpatory statement to trial counsel in his first PCRA petition. Indeed, Oquendo's exculpatory statement to trial counsel rejecting Reina Lopez's statement is by far the most compelling evidence of his innocence outside of Isaiah Workman's and Tyrone Davis' statements that Dennis Velez confessed to them to shooting a "dyke" at a LGBT bar.

Based on these facts, therefore, the record supports the finding that Mr. Bueno did *not* know of Oquendo's exculpatory statement to trial counsel during his first PCRA proceedings. Had Mr. Bueno known of Oquendo's exculpatory statement, he surely would have referenced it in his first PCRA petition.

B. Due Diligence

The “due diligence inquiry is fact-sensitive and dependent upon the circumstances presented.” *Commonwealth v. Burton*, 121 A.3d at 1070. Due diligence, more importantly, “requires neither perfect vigilance nor punctilious care, but rather it requires reasonable efforts by a petitioner, based on the particular circumstances, to uncover facts that may support a claim for collateral relief.” *Id.* at 1071. Based on the “particular circumstances” described *supra*, counsel diligently attempted to interview Oquendo either by phone or face-to-face before the dismissal of Mr. Bueno’s first PCRA petition. Between October 2014 and November 2015, counsel wrote Oquendo at SCI-Brenner Township three times.⁵⁷ In October 2015, Oquendo finally agreed to meet with counsel by placing counsel’s name on his visiting list. Counsel met with Oquendo shortly thereafter on November 5, 2015.

Likewise, in June 2015, counsel requested a one-time gate pass from SCI-Brenner Township to interview Oquendo face-to-face.⁵⁸ Counsel based his request on the fact other SCI facilities had previously provided one-time gate passes to counsel in those instances where counsel was not the inmate’s attorney and not on the inmate’s visiting list. SCI-Brenner Township, though, rejected counsel’s request, informing him that the only way he could interview Oquendo was if

⁵⁷ Ex. 12.

⁵⁸ Ex. 14.

Oquendo placed counsel's name on his visiting list or call list. Thus, *unlike law enforcement and prosecutors*, defense attorneys cannot simply call, write, or fax an SCI facility and demand to speak with a non-client inmate face-to-face or telephonically. The inmate must place the defense attorney's name and contact information on his visiting list or call list. If the inmate refuses to do so, defense counsel has no way of interviewing the inmate face-to-face or telephonically.

Despite the fact counsel had absolutely no ability or authority to call or meet with Oquendo face-to-face at SCI-Brenner Township, the PCRA court held:

Mr. Oquendo was being housed in state prison and his whereabouts were known. Ultimately, present defense counsel interviewed Mr. Oquendo on November 15, 2015, and then filed the within [PCRA petition]. However, said *interview could have occurred at a much earlier juncture, and the Defendant failed to explain to this Court why the information from Mr. Oquendo could not have been discovered earlier.*⁵⁹

The PCRA court's finding is not supported by the record or the Pennsylvania Department of Corrections' rules and regulations for communicating with and visiting inmates. Counsel did everything he could to arrange a phone call or face-to-face meeting with Oquendo during Mr. Bueno's first PCRA proceedings by writing Oquendo three times between October 2014 and March 2015.⁶⁰ Counsel's efforts, therefore, were "reasonable," *Commonwealth v. Burton*, 121 A.3d at 1070,

⁵⁹ Ex. 4, p. 4 n.3 (emphasis added).

⁶⁰ Ex. 12.

because writing was the only means by which counsel could have possibly made contact with Oquendo during this time period.

The PCRA court, consequently, erred when it concluded that counsel did not act diligently when trying to secure an interview with Felix Oquendo before the dismissal of Mr. Bueno's first PCRA petition. This error resulted in the PCRA court erroneously dismissing Mr. Bueno's second PCRA petition as untimely, which in turn resulted in the PCRA court's erroneous decision to reject Mr. Bueno's request for an evidentiary hearing.

Claim Two: The PCRA court erred when it refused to grant Mr. Bueno an evidentiary hearing where trial counsel, ADA Matt Falk, Detective Vasquez, Felix Oquendo, and Mr. Bueno could testify. U.S. Const. amdots. 6, 8, 14; Pa. Const. art. I, § 9, 23.

The PCRA court “shall order a hearing” when then the petitioner’s 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 PCRA court is “certain” the PCRA petition lacks “total” merit. *Commonwealth v. Bennett*, 462 A.2d 772, 773 (Pa. Super. 1983). 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, the PCRA court must grant a hearing on those claims that are “not clearly refute[d]” by the record. *Id.*

ADA Falk’s statements during the August 15, 2016 oral argument clearly prove there are material issues of disputed facts. According to Felix Oquendo, he told detectives and ADA Falk that Reina Lopez’s statement regarding Mr. Bueno’s alleged confession was *not* true. According to ADA Falk’s statements at oral argument, when Oquendo saw Detective Vasquez and him (Falk), Oquendo allegedly said, “fuck you, Vasquez,” and walked out of the interview room.⁶¹

⁶¹ Ex. 19, p. 13.

These are diametrically opposing narratives describing the same encounter. By definition, when two or more witnesses provide opposite accounts of what allegedly happened during a single encounter, there are material issues of disputed fact regarding what actually occurred during the encounter. To resolve the factual disputes, the PCRA court was obligated to hold an evidentiary hearing where Oquendo, ADA Falk, Vasquez, trial counsel, and any other detective who was present during this alleged encounter with Oquendo could testify. There was also a material factual dispute regarding whether trial counsel informed Mr. Bueno of his pre-trial phone call with Oquendo. To resolve the factual dispute, the PCRA court was obligated to hold an evidentiary hearing where trial counsel and Mr. Bueno could testify. The PCRA court, therefore, erred when it refused to hold an evidentiary hearing.

Claim Three: The PCRA court erred by finding that ADA Matt Falk’s statements during the August 15, 2016 hearing were true and accurate and relying on these statements to dismiss Mr. Bueno’s second PCRA petition and to refuse to grant an evidentiary hearing. The process by which the PCRA court made this factual finding violated Mr. Bueno’s state and federal due process rights because the PCRA court deprived Mr. Bueno the opportunity for discovery and of confronting and cross-examining ADA Falk and Detective Velazquez based on the discovery. U.S. Const. amds. 6, 8, 14; Pa. Const. art. I, § 9, 23.

A. State-Created Liberty Interests and Due Process

States have no constitutional duty to provide post-conviction review, *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987), but if a State creates a post-conviction review process that is “integral” to “finally adjudicating” a defendant’s “guilt or innocence,” *Griffin v. Illinois*, 351 U. S. 12, 18 (1956), the post-conviction review process “must comport with due process.” *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). Moreover, while States have “more flexibility in deciding what procedures are needed in the context of postconviction relief,” *Dist. Attorney’s Office v. Osborne*, 557 U.S. 52, 69 (2009), due process still requires post-conviction proceedings to be fundamentally fair, *Pennsylvania v. Finley*, 481 U.S. at 556-557; *Evitts v. Lucey*, 469 U.S. at 401; *Commonwealth v. Haag*, 809 A.2d 271, 283 (Pa. 2002), meaning “petitioners must be given the opportunity for the presentation of claims at a meaningful time and in a meaningful manner.” *Commonwealth v. Bennett*, 930 A.2d at 1273.

The post-conviction process in Pennsylvania is “integral” to “finally adjudicating” a defendant’s guilt or innocence because it represents the first time petitioners can present after-discovered evidence that gives rise to a variety of state and federal claims including *Brady* and trial counsel ineffectiveness claims. 42 Pa. C.S. § 9543(a)(2)(vi); 42 Pa. C.S. § 9545(b)(1)(ii). Under *Osborne* and supporting case law, therefore, the Commonwealth and PCRA court must afford petitioners those procedures and/or tools that are capable of adequately vindicating this state-created liberty interest in receiving post-conviction review of those state and federal claims based on diligently developed after-discovered evidence. *District Attorney’s Office v. Osborne*, 557 U.S. at 69. Moreover, “state-created right[s] can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right[s].” *Id.* at 68 (quotations and citation omitted). Stated differently, “[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). Thus, a petitioner’s due process rights are violated if the post-conviction procedures and/or tools provided to him are “fundamentally inadequate to vindicate” his state-created liberty interest in receiving fundamentally fair post-conviction review of those state and federal claims based on diligently developed after-discovered evidence. *Dist. Attorney’s Office v. Osborne*, 557 U.S. at 69.

B. The Process by which the PCRA Court Determined that ADA Matt Falk's Statements During Oral Argument were True, and the Fact the PCRA Court Relied on These Statements in Denying Relief, Violated Mr. Bueno's State and Federal Due Process Rights

In its August 16, 2016 opinion, the PCRA court referred to ADA Falk's "representations" regarding his and Detective Vasquez's interaction with Oquendo and found ADA Falk's representations to be true. The PCRA court then relied on these "representations" to dismiss Mr. Bueno's second PCRA petition and to reject his request for an evidentiary hearing. In other words, the PCRA court made a factual finding that ADA Falk's representations were truthful and credible. The process by which the PCRA court made this finding, and the fact it relied on this finding to deny relief, violated Mr. Bueno's state and federal due process rights.

On August 15, 2016, ADA Falk, *for the first time*, disclosed that the Commonwealth had, in fact, interviewed Oquendo before Mr. Bueno's death penalty trial. The truthfulness of ADA Falk's narrative of what allegedly occurred when he and Detective Vasquez attempted to interview Oquendo at SCI-Crescent, however, could not be adequately evaluated and confronted by counsel and Mr. Bueno because the Commonwealth and PCRA court failed to provide counsel and Mr. Bueno minimal procedural due process protections such as discovery and an evidentiary hearing to confront and cross-examine ADA Falk and Vasquez.

Counsel filed Mr. Bueno's second PCRA petition on July 7, 2016—a month before oral argument. Thus, ADA Falk and the Commonwealth knew and were aware of the allegations regarding Oquendo. However, despite knowing these allegations, ADA Falk and the Commonwealth never informed counsel or Mr. Bueno *before* oral argument that he and Vasquez attempted to interview Oquendo at SCI-Crescent before trial and that Oquendo said, “fuck you, Vasquez,” and refused to speak with them. Rather, ADA Falk waited until oral argument to tell the PCRA court and counsel the “fuck you” narrative.

ADA Falk's belated disclosure deprived counsel and Mr. Bueno from filing a discovery motion. For instance, had counsel known of the “fuck you” narrative, counsel would have filed a discovery motion requesting the following information from the Commonwealth and SCI-Crescent: (1) the date ADA Falk and Detective Vasquez interviewed Oquendo; (2) the time when ADA Falk and Vasquez arrived and signed in at SCI-Crescent to interview Oquendo; (3) the time when ADA Falk and Vasquez actually met with Oquendo at SCI-Crescent; (4) the time when ADA Falk and Vasquez signed out of SCI-Crescent after interviewing Oquendo; and (5) the visiting logs from SCI-Crescent on the date when ADA Falk and Vasquez interviewed Mr. Oquendo.

Counsel would have also requested the following information from the Commonwealth, the Bethlehem Police Department, and Allentown Police

Department: (1) any and all communications, reports, memos, emails, letters, faxes, and supplemental reports regarding ADA Falk's and Vasquez's interview with Oquendo, as well as any and all communications, reports, memos, emails, letters, faxes, and supplemental reports the Commonwealth wrote and sent to trial counsel informing trial counsel of the "fuck you" narrative; and (2) any and all communications, reports, memos, emails, letters, faxes, and supplemental reports the Commonwealth wrote after speaking with trial counsel and learning that Oquendo also refused to speak with trial counsel.

ADA Falk's "fuck you" narrative, consequently, was not subject to the type of cross-examination that is built on a thorough review of the underlying facts and discovery. As a result, the PCRA court's finding regarding the truthfulness and accuracy of ADA Falk's "fuck you" narrative is wrong because the process by which the PCRA court made this factual finding was inadequate under state and federal due process principles. The PCRA court, more importantly, then relied on this inadequately and unconstitutionally determined fact to dismiss Mr. Bueno's second PCRA petition as untimely and to reject his evidentiary hearing request.

As argued in Claim Two, because ADA Falk's "fuck you" narrative is completely at odds with Oquendo's narrative as to what happened when ADA Falk and Vasquez interviewed him, the PCRA court was obligated to hold an evidentiary hearing because these competing narratives created material issues of

disputed fact. This Court, therefore, must vacate the PCRA court's dismissal order and remand Mr. Bueno's case back to the PCRA court with instructions to hold an evidentiary hearing where Oquendo, ADA Falk, Vasquez, Potts, Mr. Bueno, and any other witnesses relevant to the disputed facts at issue can testify and Mr. Bueno and counsel can confront and cross-examine them.

CONCLUSION

WHEREFORE, based on the foregoing facts and authorities, Mr. Bueno respectfully requests the Court to vacate the PCRA court's dismissal order, to find Mr. Bueno's second PCRA petition timely because counsel diligently sought to interview Felix Oquendo before and after the dismissal of Mr. Bueno's first PCRA petition, and to remand his case back to the PCRA court with instructions to hold an evidentiary hearing.

Respectfully submitted this the 30th day of March, 2017.

/s/Craig M. Cooley
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CERTIFICATE OF SERVICE

On **March 30, 2017**, counsel e-filed this brief with PAC-File and the Commonwealth received e-service of this brief.

CERTIFICATION OF COMPLIANCE

Pursuant to Pa.R.A.P. 2135(d), counsel certifies Mr. Bueno's brief does not exceed 14,000.