

4. Despite Bundy's multiple stories, Officer Dunbar did not formally arrest him for Craig Young's homicide; instead, Officer Dunbar detained him for investigative purposes and transported him to Homicide.
5. At Homicide, **Detective Stephen Buckley** interviewed Bundy at **7:58 p.m.** on **December 13, 2007**. During his interview, Bundy told Det. Buckley what he told Officer Dunbar, *i.e.*, he came out of 1515 Hemberger Way, approached his car, and heard someone call his name; he walked over to speak to them and then he threw a bottle in the dumpster near 23rd and Jefferson Street and heard shots; when he heard shots, he started running.
6. During and after Bundy's interview with Det. Buckley, Homicide detectives interviewed several people from the convenience store where Craig Young was shot. None of these witnesses implicated Bundy in the shooting.
7. Thus, the quantum and quality of evidence after Bundy's interview with Det. Buckley was identical to the quantum and quality of evidence after Bundy spoke with Officer Dunbar. If Officer Dunbar did not have probable cause to formally arrest Bundy, neither did Det. Buckley. Det. Buckley, however, did not permit Bundy to leave Homicide after his interview; neither did he formally arrest him or *Mirandize* him.
8. Instead, homicide detectives detained Bundy at Homicide from **8:20 p.m.** on **December 13, 2007** until **Detective Nathaniel Williams** questioned him at **9 p.m.** on **December 14, 2007**. In other words, detectives detained Bundy for more than a day without *Mirandizing* him, formally arresting him, or allowing him to consult with counsel.
9. In the late morning or early afternoon of December 14, 2007, during his "custodial detention" at Homicide, Bundy supposedly spoke with a man name **Dominique Keys** in the interview room they were both detained in. According to Keys, Bundy allegedly told him he opened fire on a man named **Jerome Foreman** because Foreman refused to pay him for an expensive watch he (Bundy) had given him.
10. After Keys told detectives of Bundy's alleged statement, Det. Williams interrogated him at 9 p.m. on December 14, 2007. During the interrogation, Bundy gave another story (his fourth); this time he said he acted in self-defense when Jerome Foreman opened fire on him near the convenient store where Craig Young was shot.
11. Prior to trial, trial counsel failed to file a suppression motion to suppress Bundy's statement on Fourth and Fifth Amendment grounds. Trial counsel had no tactical or strategic reason for not filing a pre-trial suppression motion. At trial, however, trial counsel made an oral suppression motion after cross-examining Det. Williams. The trial court denied the motion because the Rules of Criminal Procedure (Rule 581) require defendants to file *pre-trial* suppression motions; if not, the suppression issue is waived. Trial counsel, therefore, waived Bundy's suppression issue, allowing the

Commonwealth to introduce Keys's statement and Bundy's statement to Det. Williams. Based on these statements, the jury convicted Bundy of third-degree murder, VUFA, and PIC.

12. Once appellate counsel, **Norris Gelman**, was appointed he was granted a *Bomar* hearing regarding the following trial counsel ineffectiveness claim: Whether trial counsel was ineffective for failing to request a mistrial when Dominique Keys could not be located after the prosecutor summarized his testimony in during opening statements. Gelman, though, did not litigate trial counsel's ineffectiveness for failing to file a pre-trial suppression motion regarding Bundy's illegal detention and the statements he made and allegedly made while illegally detained without probable cause. Gelman had no tactical or strategic reasons for not litigating this issue during the *Bomar* hearing.
13. Gelman's failure to litigate this issue prejudiced Bundy on direct appeal because the suppression issue was meritorious. In other words, Bundy is entitled to relief because, had trial counsel performed effectively and filed a timely suppression motion, there is a reasonable probability Bundy's statements would have been suppressed on Fourth and Fifth Amendment grounds. Had these statements been suppressed, there is a reasonable probability the outcome of Bundy's trial would have been different. Stated differently, the Court can have no confidence in Bundy's convictions based on trial counsel's and appellate counsel's ineffectiveness.

PROCEDURAL HISTORY

14. On **March 26, 2008**, the Commonwealth filed an Information charging Bundy with murder (18 Pa. C.S. § 2502); VUFA (18 Pa. C.S. § 6106(a)), PIC (18 Pa. C.S. § 907(a)), carrying a firearm in public (18 Pa. C.S. § 6108), and possession of a prohibited firearm (18 Pa. C.S. § 6105(A)(1)), in connection with Craig Young's **December 13, 2007** shooting death.
15. Bundy pled not guilty and proceeded to a jury trial before the **Honorable Leon Tucker**. **Joseph Santiguida** represented Bundy at trial.
16. On **April 2009**, a jury convicted Bundy of **third-degree murder, VUFA, and PIC**.
17. On **August 12, 2009**, the trial court sentenced Bundy to **19-39 years** for his murder conviction, to run concurrently with a 3½ to 7 year term for the VUFA conviction, and a 2 ½ to 5 year term for the PIC conviction. On the same day, the trial court granted Joseph Santiguida's motion to withdraw and appointed **Norris E. Gelman** to serve as Bundy's appellate attorney.
18. On **August 21, 2009**, Gellman filed Bundy's *Post-Sentencing Motion* ("PSM"), raising the following issues:

- a. Whether the evidence was sufficient to establish Bundy’s guilt for third-degree murder and PIC if he either acted in self-defense or under an unreasonable belief his right to use deadly force is self-defense.
 - b. Whether Bundy’s third-degree murder and PIC convictions are against the greater weight of the evidence.
 - c. Whether the defendant was denied a fair trial because his guilt and defense were predicated on transferred intent, *i.e.*, he intended to kill Jerome Foreman, but accidentally fatally injured Craig Young, when the concept of transferred intent was not explained to the jury.
 - d. Whether trial counsel was ineffective for failing to request a mistrial when Dominique Keys could not be located after the prosecutor summarized his testimony in during opening statements.
19. On **January 7, 2010**, at Gelman’s request, the trial court held an evidentiary hearing regarding Bundy’s direct appeal ineffectiveness claims. *See Commonwealth v. Bomar*, 826 A.2d 831, 853 (Pa. 2003). After the hearing, the trial court denied Bundy’s PSM claims, including his ineffectiveness claims.
 20. On **January 21, 2010**, Gelman filed a timely *Notice of Appeal* (**284 EDA 2010**). The trial court did not request a 1925(b) Statement from Bundy because his PSM gave the court “insight as to what the issues on appeal may be[.]”¹
 21. On **March 9, 2010**, the trial court issued an opinion addressing and ultimately denying the issues presented in Bundy’s *PSM*.
 22. On **February 11, 2011**, the Superior Court affirmed Bundy’s convictions, rejecting the following claims:
 - a. Whether trial counsel was ineffective for failing to move for a mistrial when it became clear that Dominique Keys would not appear as a witness, and the prosecutor told the jury in opening statements Bundy had allegedly confessed to Keys and related the content of that alleged confession.
 - b. Whether Bundy was prejudiced when the prosecutor informed the jury he allegedly confessed to Dominique Keys.
 23. On **March 7, 2011**, Bundy filed his *Petition for Allowance* (“PFA”), which was denied on **September 19, 2011**.
 24. Bundy did not seek certiorari to the U.S. Supreme Court, so his conviction became final on **December 19, 2011**. *See Griffith v. Kentucky*, 479 U. S. 314, 321, n. 6 (1987); U.S. S. Ct. R. 13; 42 Pa. C.S. § 9545(b)(3).

¹ Trial Court’s 03/09/2010 PSM Opinion.

25. On December 11, 2012, Bundy filed a *timely pro se* PCRA petition, raising the following ineffectiveness claims:
 - a. Trial counsel failed to adequately investigate the circumstances surrounding Bundy's thirty-six plus hour interrogation and file a motion to suppress the statement procured from his lengthy interrogation because it was not knowing and voluntarily, but rather made under duress.
 - b. Trial counsel failed to adequately investigate his case before making trial decisions.
 - c. Trial counsel failed to interview a female witness who, after viewing a video of the shooting, identified the victim as the man who initiated the shooting.
26. On **November 22, 2013**, counsel was appointed to serve as Bundy's PCRA attorney.
27. On **October 17, 2014**, counsel filed the instant amended PCRA petition.

STATEMENT OF FACTS

28. On **December 13, 2007**, around **5:25** and **5:30 p.m.**, a barrage of bullets, from three different firearms, were fired near **2236 West Jefferson Street** in Philadelphia. One of these bullets struck and killed **Craig Young**—an innocent bystander who happened to be in a nearby convenience store (“Yasim Market”) when the shooting occurred.
29. All the convenience store customers heard the shooting, but none saw who was involved in the shooting.²
30. CSI personnel collected **twenty-six fired cartridges** that came from **three different firearms**.³ Analysis of the fired cartridges revealed that someone was shooting in front of Yasim Market, while two firearms were discharged on the side of Yasmin Market.⁴
31. The Philadelphia Police Department fielded several 911 calls and quickly dispatched officers to the scene.
32. When Officer Hakim Dunbar and his partner neared the scene they saw **David McDonald** running from the scene. As they pursued him, they saw him place something, presumably a weapon, into an idle vehicle. Officer Dunbar, however, lost McDonald, but quickly spotted **Bundy** running from the shooting scene as well. When Officer Hakim stopped him, Bundy gave three reasons why he was running from the shooting scene:

² Exs. 5-10.

³ NT, Trial, 7/11/2009, at 89, 123, 124.

⁴ Id. at 121-123.

- a. Bundy first said someone tried to rob him.⁵ Bundy then admitted the robbery happened two week beforehand.⁶
 - b. Bundy then said he thought someone was trying to set him up.⁷
 - c. Lastly, Bundy said “he was coming out of 1515 Hemberger Way and approaching his car and someone called him by his name. He said that he walked over to speak to them and then he threw a bottle in the dumpster near 23rd and Jefferson Street when he heard shots and started running.”⁸
33. At **5:35 p.m.**, on **December 13, 2007**, Officer Dunbar detained Bundy and transported him to Homicide as a “witness” for investigative purposes, *i.e.*, investigative detention. This can be gleaned from Officer Dunbar’s *Complaint or Incident Report* where he wrote: “Below *witness* brought down to Homicide in reference to a homicide which occurred on 12-13-07 at 2236 Jefferson.”⁹ Officer Dunbar, in other words, did not arrest Bundy for Craig Young’s murder, and, therefore, did not *Mirandize* him when he detained him. Bundy, moreover, was unarmed when Officer Dunbar detained him.
 34. Once at Homicide, **Detective Gregory Singleton** interviewed Bundy at **7:35 p.m.** on **December 13, 2007**, in order to complete his *Biographical Information Report*. Notably, in the upper left corner of the *Biographical Information Report* are three boxes: ___ **ARREST** ___ **INVESTIGATION** ___ **OTHER**.¹⁰ None of the boxes are checked, meaning Det. Singleton did not complete the form with the intention of arresting or detaining Bundy.
 35. After providing his biographical information, **Detective Stephen Buckley** interviewed Bundy at **7:58 p.m.** on **December 13, 2007**. Det. Buckley did not *Mirandize* Bundy because he was brought to Homicide as a witness, not a suspect.¹¹ Det. Buckley did not speak with Officer Dunbar before or after Bundy’s interview, meaning he had no information as to what Bundy told Officer Dunbar.¹² Bundy told Det. Buckley what he eventually told Officer Dunbar.¹³
 36. After Det. Buckley interviewed Bundy, neither him nor **Detective Nathaniel Williams** discussed with Bundy whether he was being arrested for Craig Young’s murder or whether he was free to leave Homicide. However, despite not having this straightforward conversation, Homicide detectives detained Bundy, but they did not

⁵ Exs. 1, 4.

⁶ Exs. 1, 4.

⁷ Exs. 1, 4.

⁸ Ex. 4.

⁹ Ex. 1 (emphasis added).

¹⁰ Ex. 2.

¹¹ NT, Trial, 5/7/2009, at 149, 150, 157.

¹² *Id.* at 156-157.

¹³ Ex. 3.

explain the reasoning for his *custodial detention*, nor did they *Mirandize* him or give him an opportunity to contact and consult with an attorney.¹⁴

37. Thus, the sum total of facts supporting Bundy's custodial detention are these:
 - a. Officer Dunbar saw Bundy running from the scene.
 - b. When Bundy saw Officer Dunbar, he tried to evade him by running from him.
 - c. Once Officer Dunbar detained him, Bundy gave three reasons as to why he was running from the shooting scene.
38. Bundy spent the night at Homicide detained and unable to contact an attorney because he had no phone access and he was not *Mirandized*.
39. On December 14, 2007, in the morning, Det. George Fetters transported an arrestee named **Dominique Keys** from Homicide to the fingerprinting center; once fingerprinted, Det. Fetters returned Keys to Homicide and placed him into the same interview room as Bundy.¹⁵ Later that afternoon, Det. Fetters transported Keys from Homicide to the prison.¹⁶ As Det. Fetters transported him, Keys told him Bundy made incriminating statements to him earlier in the day while both were being detained at Homicide.¹⁷ Det. Fetters relayed this information to the lead detective— Det. Williams—later that afternoon (on December 14, 2007).¹⁸
40. On December 14, 2007, Det. Williams had Keys brought back to Homicide where he and Det. Singleton interviewed him at **6:15 p.m.**¹⁹ During his interview, Keys said he was placed in the same holding room at Homicide as Bundy. When Keys asked Bundy what he “came in” for, Bundy supposedly said the following:

I was sitting in a room in the Homicide Unit and another person came in there with me and I asked him what he came in for. He told me [he] was grabbed for a shooting. So I asked him where at and he told [me] at 23rd & Jefferson. I asked him what happened and he told me that he let somebody borrow some jewelry... a couple months ago and that he went to the person and asked for some money and the person tried to play him out. So he said he went around asking family members to give him back his jewelry and the person [sic] family member told him that they didn't have nothing to do with that. So he said he took it in his own hands and said that he wanted to fight the person, but he said he knew he couldn't beat him. So he said he tried to shoot him. He said one of the bullets

¹⁴ NT, Trial, 5/7/2009, at 227.

¹⁵ NT, Trial, 5/11/2009, at 69-70.

¹⁶ *Id.* at 70.

¹⁷ *Id.*

¹⁸ *Id.* at 72.

¹⁹ Exs. 17, 18.

went thru the window and hit somebody in the store, but he was trying to hit the person that had his jewelry. Then he said he ran off and tried to jump in somebody's car, which was supposed to have been church people, but he was really trying to get away. He said Housing Authority Police stopped him and asked him why he was running and he said because they was shooting. So the Housing Authority Police put him in the car, asked him questions and he told them that somebody tried to rob him when he was coming out of the building with his son. He also said he stashed his hit in the back of the police car. He also told me that he told his little man to get the gun he stashed, but he don't know if this little man grabbed it. That's about it.²⁰

41. Shortly thereafter, at **9:24 p.m.**, on **December 14, 2007**, Dets. Williams and Singleton interrogated Bundy based on the information Keys provided. Before interrogating him, Det. Williams finally *Mirandized* Bundy,²¹ but did not allow him to contact anyone before speaking with him and Det. Singleton:

Counsel: Was he allowed to use that cell phone before you took the [December 14, 2007] statement?

Det. Williams: No.

Counsel: So after you got what you wanted, you let him use the phone?

Det. Williams: I wanted the gun. I never got the gun.²²

42. During his interrogation, Bundy said he was involved in the shooting, but acted in self-defense. Specifically, he said he gave Jerome Forman (aka: Keonbu) a watch worth thousands of dollars based on the understanding Foreman would pay him for the watch. When Foreman never paid him, Bundy made numerous calls to friends and family trying to contact Foreman, but to no avail. Once Foreman heard Bundy was looking for him, he called him on December 13, 2007:

So on 12/13/07 [at] approximately 5 o'clock [Foreman] called my phone. He said what the fuck you going around telling people you looking for me, I ain't no pussy. I said, "Yes you is. Without that gun you are a bitch." He said come outside, come outside. I'm in front of the store right now. I paced around the floor because I didn't really want to go. Reluctantly I went. I saw [Foreman] standing in front of the store and when he seen me, he pulled a gun out and started shooting. So I pulled my gun out and started shooting back. After all the shooting I ran. And that's what happened.²³

²⁰ Ex. 18.

²¹ Ex. 19.

²² NT, Trial, 5/7/2009, at 227.

²³ Ex. 20.

43. At trial, during opening statements, the prosecutor initially misrepresented the facts as to how often detectives spoke with Bundy on December 13, 2007. Three people interviewed Bundy on December 13, 2007: **Officer Dunbar, Det. Singleton, and Det. Buckley**; in that order.²⁴ The prosecutor mentioned Bundy's statements to Officer Dunbar and his interview with Det. Buckley,²⁵ but he added this wrinkle:

[Bundy] [c]onveniently didn't tell Detective Buckley [everything he told Officer Dunbar], who at that hadn't gotten a chance to speak to Officer Dunbar..., just how far he ran; the fact that he had been chased by the police the whole time he was running.

You will hear after receiving that information from the [Housing Authority] officers needless to say they wanted to talk to Bundy again. And gradually the story as to what in fact happened out there outside the Yasim Food Market unfolded.²⁶

44. The prosecutor's statement **is a complete misrepresentation of the facts**: detectives never spoke with Bundy again on December 13, 2007, and they did not speak with him until the late evening of December 14, 2007, after Dominique Keys entered the picture. The last person Bundy spoke with on December 13, 2007 was Det. Buckley at 7:58 p.m. The next time he spoke with a Homicide detective was when Det. Williams interrogated him at 9:24 p.m. on December 14, 2007. Thus, from 8 p.m. on December 13, 2007 until 9:24 p.m. on December 14, 2007, detectives detained Bundy without informing him he was under arrest or *Mirandizing* him.
45. During opening statements, the prosecutor summarized Dominique Keys's statement and told the jury Keys would be testifying:

And it began to unfold with a young man by the name of Dominique Keys, who had been brought in by homicide detectives on a case completely unrelated to the one we are going to hear about.

And you will hear... he had two open bench warrants for his arrest at the time. He ultimately was taken up to the Curran Fromhold Correctional Facility on those warrants.

And he was being taken down to be fingerprinted to be taken to the prison, Mr. Keys told Detective George Fetters at that time that the man he had been stuck in an interview room with for about a half hour to an hour, Nathan Bundy, while they were sitting there, had told him what had happened on his case.

²⁴ Exs. ____.

²⁵ NT, Trial, 5/6/2009, at 290-292.

²⁶ *Id.* at 292-293.

And it wasn't that he had just walked outside and heard shots and ran. No, what Mr. Bundy told Mr. Keys was that he was having a dispute... with a man named... Jerome Foreman. And he in fact wanted to beat Mr. Foreman up over it, but didn't think he could beat him. So he decided to shoot him anyway.²⁷

46. Dominique Keys, however, never testified. As a result, the jury learned about his statement through the Commonwealth's one-sided version, and Bundy never had the opportunity to confront and cross-examine Keys.
47. Bundy testified in his own defense and told the jury what he told Det. Williams during his December 14, 2007 interrogation, *i.e.*, he acted in self-defense when Jerome Foreman opened fire on him.²⁸
48. The jury convicted Bundy of third-degree murder, VUFA, and PIC.
49. The trial court sentenced Bundy to 19-39 years for his murder conviction, to run concurrently with a 3½ to 7 year term for the VUFA conviction, and a 2 ½ to 5 year term for the PIC conviction.
50. The trial court appointed Norris Gelman immediately after trial to serve as Bundy's appellate attorney. Once appointed, Gelman requested and was granted a *Bomar* hearing to factually develop the following trial counsel ineffectiveness claim: trial counsel was ineffective for failing to move for an immediate mistrial when the Commonwealth failed to produce Dominique Keys.
51. Gelman did *not* raise the following trial counsel ineffectiveness claim: Trial counsel was ineffective for failing to file a pre-trial suppression motion based on Fourth and Fifth Amendment grounds.
52. On January 7, 2010, the trial court held the *Bomar* hearing regarding Gelman's trial counsel ineffectiveness claims. After the hearing, the trial court denied Bundy's post-sentencing motion, including his trial counsel ineffectiveness claims.

THE PCRA STATUTORY REQUIREMENTS

53. Bundy must meet the following conditions to be eligible for PCRA relief. *See* 42 Pa. C.S. § 9543(a)(1)-(a)(4).
54. First, Bundy must show he has been convicted of a crime under the laws of this Commonwealth and is serving a prison sentence. *See* 42 Pa. C.S. § 9543(a)(1). Bundy stands convicted of third-degree murder and is serving a lengthy prison sentence at SCI-Coal Township.

²⁷ *Id.* at 293-294.

²⁸ NT, Trial, 5/11/2007, at ____.

55. Second, Bundy must present a cognizable claim under 42 Pa. C.S. § 9543(a)(2). Here, Bundy alleges state and federal claims that: (1) undermine the truth-determining process; and (2) establish ineffective assistance of counsel. *See* 42 Pa. C.S. §§ 9543(a)(2)(i & ii).
56. Third, Bundy must show his claims are not previously litigated or waived. *See* 42 Pa. C.S. §9543(a)(3). Here, Bundy’s claims focus on trial counsel’s and appellate counsel’s ineffectiveness—or claims that could not have been raised until PCRA proceedings. *See Commonwealth v. Grant*, 813 A.2d 726, 738 (Pa. 2002). Consequently, his claims have not been previously litigated or waived.

CLAIMS FOR RELIEF

A. Trial and Appellate Counsel Ineffectiveness Claims

57. Bundy had a right to effective trial counsel. *See* U.S. Const. Amend. 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). Trial counsel’s purpose 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.” *Id.* at 1317. The right to effective representation, consequently, is “the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656 (1984). Trial counsel, as a result, “has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” *Strickland v. Washington*, 468 U.S. 668, 688 (1984). Consequently, unless a defendant receives effective representation, “a serious risk of injustice infects the trial itself.” *Cuyler v. Sullivan*, 446 U.S. 330, 343 (1980).
58. Bundy also had a due process right to effective appellate representation. *See Evitts v. Lucey*, 469 U.S. 387, 394, 396 (1985); *accord Penson v. Ohio*, 488 U.S. 75, 85 (1988) (“The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage.”). Thus, direct appeal, like trial, “require[s] careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over.” *Penson v. Ohio*, 488 U.S. at 85. While appellate counsel need not raise all non-frivolous claims, *see Jones v. Barnes*, 463 U.S. 745, 752-753 (1983), he or she must “examine the record with a view to selecting [and presenting] the most promising issues for review.” *Id.* at 752.
59. To prevail on an ineffectiveness claim, Bundy must demonstrate that trial counsel’s performance was deficient and the deficient performance prejudiced him. *See 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.

60. 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, in other words, “is a probability sufficient to undermine confidence in the outcome.” *Strickland v. Washington*, 466 U.S. at 694.
61. The Pennsylvania Supreme Court has interpreted *Strickland* and articulated its own three-factor test to determine whether counsel rendered ineffective assistance. To obtain IAC relief, the defendant must show: (1) the underlying legal claim is of arguable merit; (2) counsel’s action or inaction lacked any objectively reasonable basis designed to effectuate his client’s interest; and (3) prejudice, to the effect that there was a reasonable probability of a different outcome at trial if not for counsel’s error. See *Commonwealth v. Pierce*, 527 A.2d 973, 975–976 (Pa. 1987). 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 (Pa. 1998). Although *Pierce* rests on a three-prong analysis, as compared to *Strickland*’s two-prongs, “the test for counsel ineffectiveness is[, in substance,] the same under both the Pennsylvania and federal Constitutions: it is the performance and prejudice test set forth in *Strickland*[.]” *Commonwealth v. Spatz*, 870 A.2d 822, 829 (Pa. 2005).
62. Moreover, because Bundy’s primary ineffectiveness claim alleges trial counsel failed to file a suppression motion based on Fourth and Fifth Amendment principles, Bundy must also prove his Fourth and Fifth Amendment claims are meritorious:

Where defense counsel’s failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.

Kimmelman v. Morrison, 477 U.S. at 375.

Claim One: After Requesting and Being Granted a *Bomar* Hearing, Appellate Counsel Was Ineffective for Not Factually Developing this Claim at the *Bomar* Hearing and Raising it on Direct Appeal: Trial Counsel Was Ineffective For Not Filing A Pre-Trial Motion To Suppress Bundy’s December 14, 2007 Statement To Detectives Williams and Patterson Based on the Fact Detectives Did Not Have Probable Cause to Arrest Bundy Immediately After His December 13, 2007 With Detective Buckley. U.S. Const. amend. IV, V, VI, XIV; Pa. Const. art. 1, §§ 8, 9.

A. State and Federal Constitutions

63. The Fourth Amendment protects “the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures[.]” U.S. Const. amend. IV. Article I, § 8 of the Pennsylvania Constitution similarly provides, in part: “The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures[.]” Pa. Const. art. I, § 8.
64. The Fifth Amendment declares, in part, that “[n]o person shall... be compelled in any criminal case to be a witness against himself[.]” U.S. Const. amend. V. Article I, § 9 of the Pennsylvania Constitution similarly provides, in part: “In all criminal prosecutions the accused... cannot be compelled to give evidence against himself[.]” Pa. Const. art. I, § 9.

B. Custody Case Law

65. Whether a suspect is “in custody” is an objective inquiry:

Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. Once the scene is set and the players’ lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.

Thompson v. Keohane, 516 U.S. 99, 112 (1995) (internal quotation marks, alteration, and footnote omitted); *accord J.D.B. v. N. Carolina*, 131 S. Ct. 2394, 2402 (2011).

C. Probable Cause Case Law

66. Interaction between police and citizens may be characterized as a “mere encounter,” an “investigative detention,” or a “custodial detention.” Police may engage in a “mere encounter” absent any suspicion of criminal activity, and the citizen is not required to stop or respond. *See Commonwealth v. Vasquez*, 703 A.2d 25, 30 (Pa. Super. 1997). If the police action becomes too intrusive, a mere encounter may escalate into an

“investigatory stop” or a seizure. *See Commonwealth v. Jackson*, 630 A.2d 1231, 1233 (Pa. Super. 1993). If the interaction rises to the level of an “investigative detention,” the police must possess reasonable suspicion criminal activity is afoot, and the citizen is subjected to a stop and a **brief period of detention** so law enforcement can conduct a reasonable and prompt investigation. Probable cause, however, **must** support a “custodial detention” or arrest. *Commonwealth v. Boswell*, 721 A.2d 336, 340 (Pa. 1998). Police detentions become “custodial detentions” when, under the totality of the circumstances, the conditions and/or duration of the detention become so coercive as to become the functional equivalent of arrest. *See Commonwealth v. Busch*, 713 A.2d 97, 100 (Pa. Super. 1998) (citation and quotations omitted).

Among the factors the court utilizes in determining, under the totality of the circumstances, whether the detention became so coercive as to constitute the functional equivalent of arrest are: the basis for the detention; the location; whether the suspect was transported against his will; how far, and why; whether restraints were used; the show, threat or use of force; and the methods of investigation used to confirm or dispel suspicions.

Commonwealth v. DiStefano, 782 A.2d 574, 579-580 (Pa. Super. Ct. 2001) (citation omitted).

67. In other words, a “custodial detention” occurs “when [the suspect] is **physically deprived** of his freedom in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by the interrogation.” *Commonwealth v. Nester*, 709 A.2d 879, 882 n. 4 (Pa. 1998) (emphasis added).
68. For a warrantless custodial detention to be lawful it must, under the totality of the circumstances, be supported by “probable cause to believe that (1) a felony has been committed; and (2) the person to be arrested is the felon.” *Commonwealth v. Thompson*, 778 A.2d 1215, 1221-1222 (Pa. Super. 2001); *accord Illinois v. Gates*, 462 U.S. 213, 232 (1983). Probable cause exists “[w]here the facts and circumstances within a police officer’s knowledge would warrant a person of reasonable caution to believe that an offense has been committed” and the person arrested committed the offense. *In re C.C.J.*, 799 A.2d 116, 121 (Pa. Super. 2002) (citations omitted); *accord Florida v. Harris*, 133 S.Ct. 1050, 1055 (2013). Moreover, probable cause must have existed **prior** to the suspect’s arrest; it cannot be an after-the-fact determination based on information developed **after** the suspect has been detained and physically deprived of his freedom. *See Commonwealth v. Evans*, 685 A.2d 535, 537 (Pa. 1998). In other words, hindsight cannot supply probable cause that was lacking at the time of arrest.
69. Once a custodial detention has occurred, the police must *Mirandize* the suspect. *See Duckworth v. Eagan*, 492 U.S. 195, 201 (1989); *Commonwealth v. Heggins*, 809 A.2d 908, 914 (Pa. Super. 2002). Thus, the suspect’s state and federal self-incrimination

rights are triggered once he is in custody. *Miranda* requires the police to inform the suspect: [1] he has a right to an attorney, [2] ***if he cannot afford an attorney one will be appointed to him***; [3] he has to remain silent; and [4] anything he says can be used against him in a future legal proceeding. *See Florida v. Powell*, 559 U.S. 50, 59-60 (2010).

70. A statement given by a suspect to law enforcement is subject to suppression when the statement is the product of an illegal detention by the police. *See Missouri v. Seibert*, 542 U.S. 600 (2004); *Kaupp v. Texas*, 538 U.S. 626, 632-633 (2003); *Oregon v. Elstad*, 470 U.S. 298 (1985); *Commonwealth v. Goodwin*, 750 A.2d 795 (Pa. 2000). A detention is illegal if an arrest (or custodial detention) is not supported by probable cause. *See Commonwealth v. Donaldson*, 786 A.2nd 279 (Pa. Super. 2001).

D. Application of Law to Fact

71. Here, when Officer Dunbar detained Bundy on December 13, 2007, after seeing him running from the shooting scene, this constituted an “investigative detention.” Bundy does not complain of this investigative detention because Officer Dunbar had reasonable suspicion to detain him to adequately investigate his presence near the shooting scene. Bundy also does not complain of his interview with Det. Buckley later that night at 7:58 p.m. because the interview was a mere extension of his investigative detention. Detectives, however, did not permit Bundy to leave Homicide; instead, they detained him for reasons that are still entirely unclear. When they detained him, moreover, no one: [1] informed him he was being arrested for Craig Young’s murder; or [2] *Mirandized* him. Thus, detectives did not inform he had a right to contact an attorney, if he so wished, and did not provide him the resources to contact an attorney, if he so wished. Homicide did not permit Bundy to call anyone, let alone an attorney, until *after* he gave his statement to Det. Williams shortly after 9 p.m. on December 14, 2007:

Counsel: Was he allowed to use that cell phone before you took the [December 14, 2007] statement?

Det. Williams: No.

Counsel: So after you got what you wanted, you let him use the phone?

Det. Williams: I wanted the gun. I never got the gun.²⁹

72. Bundy’s sole complaint is that police did not have probable cause to detain or arrest him *after* Det. Buckley interviewed him on December 13, 2007 at 7:58 p.m. In other words, after Det. Buckley interviewed him, the facts known to the detectives were insufficient to warrant a prudent person to believe Bundy shot and killed Craig Young. *See In re C.C.J.*, 799 A.2d at 121.

²⁹ NT, Trial, 5/7/2009, at 227.

73. With no probable cause to detain him, Bundy's subsequent statement to Det. Williams on December 14, 2007 at 9:25 p.m.—one provided after being illegally detained for nearly thirty hours—should have been suppressed as well as his alleged statement to Dominique Keys on December 14, 2007.
74. More importantly, ninety-nine percent of the facts discussed *infra*, excluding Det. Williams's trial testimony, were available to trial counsel *before* trial. However, despite these facts, trial counsel failed to file a timely, pre-trial suppression motions as Rule 581 mandates. Indeed, the trial court rejected trial counsel's mid-trial suppression motion because trial counsel could have made the motion before trial.³⁰ Trial counsel, therefore, performed ineffectively, and his deficient performance prejudiced Bundy.
75. Had trial counsel filed a pre-trial suppression motion, there is a reasonable probability the trial court would have suppressed Bundy's alleged statement to Dominique Keys and Det. Williams on December 14, 2007. Had these statements been suppressed, there is a reasonable probability the outcome of Bundy's trial would have been different. This is so because Dominique Keys's statement represented the linchpin to the Commonwealth's case; indeed, the Commonwealth hammered home his statement during opening statements and closing arguments.³¹ Moreover, when the Commonwealth could not locate Keys, it presented Dwayne Keys, Dominique's father,³² and Officer Michael Livewell to explain the steps the Commonwealth took to locate and produce Keys.

1. Pre-Trial Facts

76. When **Officer Hakim Dunbar** detained Bundy shortly after the shooting, around **5:30 p.m. on December 13, 2007**, he transported him to Homicide as a witness, not a suspect. This can be gleaned from Officer Dunbar's *Complaint or Incident Report* where he wrote: "Below *witness* brought down to Homicide in reference to a homicide which occurred on 12-13-07 at 2236 Jefferson."³³ Officer Dunbar said Bundy gave multiple reasons why he was running from the shooting scene:³⁴
- a. Bundy first said someone tried to rob him.³⁵ Bundy then admitted the robbery happened two week beforehand.³⁶
 - b. Bundy then said he thought someone was trying to set him up.³⁷

³⁰ NT, Trial, 5/7/2009, at 248-249.

³¹ NT, Trial, 5/6/2009, at 293-294 (opening statements); NT, Trial, 5/12/2009, at 50-51 (closing arguments).

³² NT, Trial, 5/11/2009, at 82-83 (Dwayne Keys); *id.* at 133-138 (Officer Livewell).

³³ Ex. 1 (emphasis added).

³⁴ NT, Trial, 5/7/2009, at 68-69.

³⁵ *Id.*; Ex. 4.

³⁶ *Id.*; Ex. 4.

³⁷ *Id.*; Ex. 4.

- c. Lastly, Bundy said “he was coming out of 1515 Hemberger Way and approaching his car and someone called him by his name. He said that he walked over to speak to them and then he threw a bottle in the dumpster near 23rd and Jefferson Street when he heard shots and started running.”³⁸
77. Despite these reasons, Officer Dunbar transported Bundy to Homicide as a *witness*, not a suspect. When Officer Dunbar detained Bundy, he *was not armed*.³⁹
78. Once at Homicide, Det. Singleton interviewed Bundy at **7:35 p.m. on December 13, 2007**, in order to complete his *Biographical Information Report*. Notably, in the upper left corner of the *Biographical Information Report* are three boxes: **ARREST** **INVESTIGATION** **OTHER**.⁴⁰ None of the boxes are checked off, meaning Det. Singleton did not complete the form with the intention of arresting or detaining Bundy.
79. After providing his biographical information to Det. Singleton, Det. Buckley interviewed Bundy at **7:58 p.m. on December 13, 2007**. Det. Buckley did not *Mirandize* Bundy because he was brought to Homicide as a *witness*, not a suspect.⁴¹ Det. Buckley did not speak with Officer Dunbar before or after Bundy’s interview, meaning he had no information as to what Bundy told Officer Dunbar.⁴²
80. During his interview with Det. Buckley, Bundy told him what he told Officer Dunbar:
- Det. Buckley: Go on in your own words and tell me what you know about the shooting death of Craig Young.
- Bundy: I was coming out of my mom’s building and I was walking across Jefferson from Hemberger, I was just getting in my van, [when] I heard someone say from the other side of my van, “What’s up Nate,” and I’m trying to look over the van to see who it is. I walked around my van onto the sidewalk and I heard a bunch of shots going off. I took off running towards 23rd Street, and down 23rd towards Master. The cops pulled up and asked me what happened. I told them there was shooting around the corner and they put me in the car.
- Det. Buckley: Who was outside that you know of when you came from your mom’s?
- Bundy: When I first came out I didn’t see anyone. When I got to my van I could see a couple of guys outside the store. They were just

³⁸ Ex. 4.

³⁹ NT, Trial, 5/7/2009, at 68-69.

⁴⁰ Ex. 2.

⁴¹ NT, Trial, 5/7/2009, at 149, 150, 157.

⁴² *Id.* at 156-157.

standing there. No one I recognized.

Det. Buckley: How many persons did you see?

Bundy: Maybe about 4, young guys. They was all dressed alike, wearing hoodies.

Det. Buckley: Could you tell where the shots came from?

Bundy: Down towards 22nd Street, that's why I took off the other way.

Det. Buckley: Do you know if Craig was having problems with anyone?

Bundy: Not that I know of.

Det. Buckley: How far was your van from the store?

Bundy: About 3 car lengths.

Det. Buckley: Where exactly were you when the shots went off?

Bundy: I went around my van onto the sidewalk, I walked past [sic] the store, there is a lot with a dumpster, I threw my water bottle in the dumpster, when I did that is when the shots went off. My van was between the store and 22nd Street.

Det. Buckley: Is there anything else you can add?

Bundy: No.⁴³

81. Despite the fact Det. Buckley viewed Bundy as a witness, he did not release Bundy once his interview ended.
82. After interviewing Bundy, Homicide detectives interviewed several other witnesses on December 13, 2007. None of these witnesses implicated Bundy in Craig Young's murder:
 - a. 8:00 p.m., Maria Buchanan: Buchanan provided the following statement:

I was outside of the store. I was walking towards the store. I was coming out of my building and I walked across the street towards the store. There was a couple of guys outside of the front door of the store. I saw a silver car pull up almost in front of the store. The store is on the corner of 23rd and Jefferson Sts. Someone was firing from the passenger side of the car. As soon as I heard the four to five

⁴³ Ex. 3.

gunshots I ducked on the side of the store. There is a little parking lot there. I saw two guys running down Stewart Street in the back of the store. One guy had on a red hoodie and he was tall and small built, I cannot remember what the other guy was wearing. One of the males was hollering “don’t come back down here no more.” The guys that were running must have shot back at the guys in the car. The bullet went through the back glass of a black car which is parked in front of the store. There was no one in the car. There was a bullet hole in the front door of the store. The man that was shot sits in the front of the store on the inside all the time. The last time I saw the two guys were down Stewart Street.⁴⁴

b. 8:00 p.m., Yasim Andrews: Andrews provided the following statement:

I was at the counter purchasing a Septa Token to go home when I heard some shooting that I didn’t know was shooting at first. Then I proceeded to an aisle on the right side, closer to the wall. I looked at the door and I saw a bullet hole in the door. Then I backed up and walked to the back of the store where there were two women and their kids and we started talking about what happened and I was asking them if it was a back door so that I could leave. I was about a phone and they said there was a phone in the front of the store. When I looked up from for the phone I saw the man locking the door. I asked him for the phone and he said he just called 911 and I couldn’t use the phone at the time. That’s when I saw the man laying there on his stomach, but stretched out of his left side. He was saying, “help me I can breathe. I need my inhaler” (Repeatedly). I told him that the ambulance is coming. He kept saying he couldn’t breathe, so I asked him where his inhaler was and he said it was in his pocket. I went into his left pants pocket and got his inhaler. He lifted his head and I pumped it. He needed another one so I pumped it again. He kept saying he couldn’t breathe. Then the police officers came in and I told Officer O’Brien what I had done and I gave the inhaler to the officer. Then the ambulance came in and took the man out.⁴⁵

c. 8:10 p.m., Shelia Jenkins: Jenkins provided the following statement:

I came into the store with my daughter Ryan. We were going to get something to eat. When I first came in the store, I saw Craig, he was sitting up front on the Ice Pop freezer eating a Taco of some kind. He offered me one and told me that the store is selling it now. I told Craig that it was good and that I was going to buy some and I did. Then I went to the back where the lunch meat is and ordered my hoagie. I sent Ryan over to the soda refrigerator to get a soda. Then I heard gunshots. My first reaction was to see where Ryan was. I looked over and she was up against the soda refrigerator door. Then I relaxed a little bit because I could see that Ryan was alright. Then I saw Craig lying on the floor. He said “I got shot!” I thought he was joking at first. The store owners were telling Craig

⁴⁴ Ex. 5.

⁴⁵ Ex. 6.

not to move. I tried to leave and the store owners wouldn't let me leave the store. They didn't want us to step over Craig.⁴⁶

- d. 8:45 p.m., Celina Wilson: Wilson provided the following statement:

I was inside of the store towards the back of the store ordering lunchmeat. I had my son with me and I told my son to get some sodas and take them to the front. He went and got the sodas and he started to walk back towards me and all of a sudden I heard about five to six gun shots and I started to pull my son towards me and I saw the man that works in the store fall to the floor... About five to six people and the people who work in the store [were in the store at the time of the shooting]... There were [a] couple of guys with Gray hoodies [in the store shortly before the shooting].⁴⁷

- e. 9:02 p.m., Ryan Thompson: Thompson provided the following statement:

I went to the store with my mom. I was by the soda machine. We were in there about 10-15 minutes. Mr. Young was by the front door. I heard shots go off and I ran to the back of the store. I stayed in the back with my mom until the police got there.⁴⁸

- f. 9:15 p.m., Naizi Fadheil: Fadheil provided the following statement:

Yes I was behind the register. There were about maybe ten people in the store when it happened. There were four workers including Craig. A lady came in and she asked for a token and we heard a shooting outside in front of the store. Everyone started to run towards the back of the store. I stayed behind the register. There is a wall there. Craig was sitting next to the front door on top of the ice cream machine. He was just sitting there. There were a lot of gunshots and the next thing that I saw was Craig screaming that he had been shot and he fell on the floor. I called 911 from the store phone... Yes, [David McDonald] is the guy wearing the orange shirt. He was in the store before the shooting happened. He left about two to three minutes before the shooting happened.⁴⁹

- g. 9:45 p.m., Felix Tejada Flores: Flores provided the following statement:

No, [I did not see who shot Craig], I was in the back of the store making some sandwiches for the costumers [sic] when I saw Craig running up the aisle and he was grunting like he was hurt, Craig then fell on the floor face down. I went over to help him but the male that was working the cash register up in the front of the store told me not to touch him. I then walked up towards the front of the store

⁴⁶ Ex. 7.

⁴⁷ Ex. 8.

⁴⁸ Ex. 9.

⁴⁹ Ex. 10.

and I notice there was a hole on the window that's next to the front door it looked like a hole from a gunshot.⁵⁰

83. Detectives, moreover, interviewed Michael McDonald, Haroon Ali, David McDonald, Tyreik Wyatt, and Jerome Foreman *after* December 13, 2007; meaning, the information provided by these individuals did not and could not have impacted their probable cause determination.
- a. Haroon Ali: Det. Singleton interviewed Ali on **December 14, 2007** at **11:45 p.m.**⁵¹
 - b. David McDonald: Det. Williams and Det. Singleton interviewed David McDonald on **December 27, 2007** at 2 p.m.⁵²
 - c. Tyreik Wyatt: Det. Singleton and Det. Venson interviewed Wyatt on **January 6, 2008**, at 1:15 p.m.⁵³
 - d. Michael McDonald: Det. Williams and Det. Singleton interviewed Michael McDonald on **January 15, 2008** at 11 a.m.⁵⁴
84. In short, by **8:20 p.m.** on **December 13, 2007**, this was the sum total of what Homicide detectives knew about Craig Young's murder. Indeed, Det. Buckley **developed no new facts** when he interviewed Bundy. When Officer Dunbar brought Bundy into Homicide, Officer Dunbar conveyed these facts to Homicide detectives:
- a. Bundy first said someone tried to rob him.⁵⁵ Bundy then admitted the robbery happened two week beforehand.⁵⁶
 - b. Bundy then said he thought someone was trying to set him up.⁵⁷
 - c. Lastly, Bundy said "he was coming out of 1515 Hemberger Way and approaching his car and someone called him by his name. He said that he walked over to speak to them and then he threw a bottle in the dumpster near 23rd and Jefferson Street when he heard shots and started running."⁵⁸
85. When Bundy interviewed with Det. Buckley, he told Det. Buckley what he eventually told Officer Dunbar (*i.e.*, he walked outside of 1515 Hemberger and eventually heard shots fired). Based on these facts, Homicide detectives did not have probable cause to

⁵⁰ Ex. 16.

⁵¹ Ex. 12.

⁵² Ex. 13.

⁵³ Ex. 14.

⁵⁴ Ex. 15.

⁵⁵ Exs. 1, 4.

⁵⁶ Exs. 1, 4.

⁵⁷ Exs. 1, 4.

⁵⁸ Ex. 4.

arrest Bundy for Craig Young's murder. As a result, detectives were constitutionally obligated to release Bundy. In the alternative, if they did arrest Bundy at this point, they were constitutionally obligated to *Mirandize* him to ensure he understood his rights, particularly his right to consult with an attorney. Homicide detectives did neither; they did not release Bundy nor *Mirandize* him.

2. Det. Nathaniel Williams's Trial Testimony

86. Det. Williams's trial testimony was not only evasive and inconsistent, it substantiated Bundy's claim that Homicide detectives did not have probable cause to arrest and permanently detain him after he interviewed with Det. Buckley at 7:58 p.m. on December 13, 2007.

87. When asked why Bundy was not permitted to leave Homicide after his interview with Det. Buckley, Det. Williams said: "Because he was still being investigated."⁵⁹ This answer prompted the following colloquy between trial counsel and Det. Williams:

Counsel: Investigated. You just said he wasn't investigated. He wasn't given any warnings. You took a statement. And you went home to go to sleep. Why wasn't he allowed to go home?

Det. Williams: I told him once he told the truth, he'd be free to go.

Counsel: How did you know – you didn't even interview him?

Det. Williams: I didn't have to.

Counsel: What do you mean you didn't have to?

Det. Williams: I relied on my fellow detectives. That is what the assigned detective does.

Counsel: You didn't know it was the truth?

Det. Williams: When you tell three different stories, which one do you identify as the truth?

Counsel: So what are you going to do, just let him stay there forever?

Det. Williams: He was going to stay there until... until his part of the investigation was credible.⁶⁰

88. The colloquy continued:

⁵⁹ NT, Trial, 5/7/2009, at 216.

⁶⁰ *Id.*

Counsel: We heard that [Bundy] was supposed to go – they had an officer brought him in [sic], and after he was questioned, the officer was supposed to take him home, the same officer who brought him. Why wasn't he allowed to go home?

Det. Williams: Mr. Santanguida [counsel], if he was truly a witness, he would have went home.

...

Counsel: Now you come back the next day. You never talked to Fetters. What are you going to do with Bundy?

Det. Williams: Continue to talk to Bundy about the truth.

Counsel: What do you mean about the truth? You just kept on talking to him, whether or not he wanted to answer you or not?

Det. Williams: Just keep on talking to him in an effort to get to the truth.⁶¹

89. The colloquy continued:

Counsel: I see. So now he's just sitting there, and until you were satisfied that he gave you a statement that complied with what you wanted him to say, correct?

Det. Williams: Unit his information made sense. He was all over the place.⁶²

90. Shortly after saying Bundy was *not a witness*, Det. Williams said Bundy *was, in fact, a witness* when he was brought in and detained:

Counsel: Let me ask a question: Now, you said that he was in a room with this Dominique Keys. Every defendant is kept in a separate interview room, isn't he?

Det. Williams: When was he a defendant?

Counsel: ... Was he a suspect?

Det. Williams: No. He was a witness.

Counsel: So, why didn't you send him home, if he was a witness?

Det. Williams: He was lying.

⁶¹ *Id.* at 218-219.

⁶² *Id.* at 219.

Counsel: So, if you are a lying witness, you are not allowed to go home, unless Officer Williams determines that you are not a lying witness; is that what you are telling us?

...

Det. Williams: Well, every case is different, counselor.

Counsel: Well, what is the cutoff point, is it four days.

Det. Williams: You asked me something that never happened.

...

Counsel: You are telling us... he comes in on the 13th at seven o'clock. You don't talk to him until twenty – thirty hours later?

Det. Williams: No. I talked to him before thirty hours.

Counsel: Well, you put down in your statement it says here nine o'clock on the 14th.

Det. Williams: I think that would put him there just under 26 hours.

Counsel: Oh, 26. Pardon me. 26....

...

Counsel: ... I want to know why you didn't turn him loose on the 14th, on the 13th?

Det. Williams: Again, he was inconsistent. He was lying, and he was involved.⁶³

91. Det. Williams then gave inconsistent statements regarding Bundy's freedom to leave Homicide after his interview with Det. Buckley.
- a. Det. Williams first said Bundy was free to leave before and after speaking with Det. Buckley, but immediately changed course and said Bundy was not free to leave because his statement to Det. Bundy had many "inconsistencies."
 - b. More importantly, Det. Williams **conceded Bundy's very point**: Bundy was free to go after speaking with Det. Buckley, but he was not free to go the moment Det. Williams had contact with him at 9 p.m. on December 14, 2007. ***In other words, Homicide detectives held Bundy for another 24 hours, despite the fact Bundy was free to leave after his interview with Det. Buckley.***
92. Trial counsel initiated the colloquy that produced these admissions and inconsistencies by asking Det. Williams whether Bundy was free to leave once Officer Dunbar detained him and brought him to Homicide on December 13, 2007:

⁶³ *Id.* at 221, 222, 223, 224.

Counsel: Well, he wasn't arrested as a result of that [*i.e.*, fleeing from Officer Dunbar and providing three stories to him], was he?

Det. Williams: Well, he was brought into the Homicide Unit.

Counsel: Was he free to leave? Was he free to leave?

Det. Williams: When?

Counsel: After the first guy talked to him before you went home [on December 13, 2007]?

Det. Williams: Well, at some point he was free to leave.

Counsel: Did you tell him?

Det. Williams: I did not have contact with him.

Counsel: You were the head detective. Did you tell anybody: Hey, this guy, we are done with him. He's free to go if he wants to.

Det. Williams: I didn't tell anybody in –

Counsel: Did you tell Bundy he could go?

Det. Williams: He definitely wasn't free to go?

Counsel: He wasn't free to go?

Det. Williams: No.

Counsel: So he wasn't free to go. So he was under arrest from the time he came in until the time you took that interview?

Det. Williams: From the time when I had contact with he, he was not free to go.

Counsel: [Did you have] contact with him on the 13th....

Det. Williams: I don't remember contact with Mr. Bundy on the 13th.

Counsel: But why – if you didn't have contact with him on the 13th, and you are the lead detective, why wasn't he allowed to leave after he spoke to the other guys?

Det. Williams: Well, I mean, I'm sure I weighed in on the decision for him not to leave, but Detective Buckley interviewed him.

Counsel: You can't have it both ways. Was he allowed to leave or wasn't he?

Det. Williams: Well, I can have it both ways. I can have it both ways, because that is the way it was.

Counsel: Was he allowed to leave or wasn't he?

...

Det. Williams: At what point are you trying to discern is he free to go? Because at some point he was free to go. It was after that we go conclusive information from the police officer that this male did everything opposite of a victim that he was not free to go, and that he lied in his interview. So at that point, Mr. Santaguida, he was not free to go.

Counsel: But that was – they knew all that from the beginning.

...

Counsel: When [Officer] Dunbar came in, he knew everything, and he told the officer that – the told the first detective that spoke to him. So was he allowed to leave then?

...

Counsel: Okay. December 13th, five p.m., 5:30 whatever time it was, he's brought into the detective station.

Det. Williams: 7:30 I believe.

Counsel: 7:30, okay. Now, he's talked to by Detective Buckley, correct?

Det. Williams: Correct.

Counsel: Is he free to leave?

Det. Williams: Yes.

Counsel: He's free to leave?

Det. Williams: Yes.

Counsel: Well, why – did you tell him? Was he told he could leave?

...

Det. Williams: I can't tell you that. I did not tell him, and I don't know who told him.

Counsel: Okay.

Det. Williams: But at that point he would have been free to leave.

...

Counsel: What happened from the time he gave the statement to Buckley that he was allowed to leave when he wasn't allowed to leave?

Det. Williams: When he gave the statement of lies to Buckley, it wasn't know that there was additional information that would preclude him from leaving. That information –

Counsel: You didn't know that information until the next day.

...

Det. Williams: The answer to his question is: After the information came from Dunbar to Detective Singleton, Detective Singleton was the first investigator to realize that this male's information is inconsistent.

Counsel: Singleton was the – didn't even interview him. Singleton took biographical information from him.⁶⁴

3. Pa. Rules of Criminal Procedure

93. Under Rule 578, “all pretrial requests for relief shall be included in one omnibus motion.” Pa. R. Crim. P. 578. The “[t]ype of relief appropriate for the omnibus pretrial motions include the following requests:... (3) suppression of evidence[.]” Rule 578, Comment. Under Rule 581, the defendant “may make a motion to the court to suppress any evidence alleged to have been obtained in violation of the defendant’s rights.” Pa. R. Crim. P. 581(A). The suppression motion “shall state specifically and with particularity the evidence sought to be suppressed, the grounds for suppression, and the facts and events in support thereof.” Pa. R. Crim. P. 581(D). If timely filed, the trial court must conduct a suppression hearing either before or at trial. Pa. R. Crim. P. 581(E) (“A hearing shall be scheduled in accordance with Rule 577”).
94. A suppression motion, more importantly, “*shall* be contained in the omnibus pretrial motion set for in Rule 578.” Pa. R. Crim. P. 581(B) (emphasis added). If trial counsel does not make a “timely motion..., the issue of suppression of such evidence *shall be deemed to be waived.*” *Id.* (emphasis added); accord Rule 581, Comment (“It should be noted that failure to file the motion within the appropriate time limit constitutes a waiver of the right to suppress.”).
95. Despite Rule 581’s mandatory nature and the pre-trial facts available to trial counsel, trial counsel did not file a pre-trial suppression motion. Indeed, the trial court rejected

⁶⁴ *Id.* at 232, 233, 234, 235, 236, 237.

trial counsel's mid-trial (oral) suppression motion because trial counsel could have (and should have) presented a written suppression motion before trial.⁶⁵ Trial counsel had no tactical or strategic reason not to file a pre-trial suppression motion; indeed, trial counsel presented a suppression motion mid-trial, so he knew Bundy's Fourth Amendment and Fifth Amendment claims were meritorious. Trial counsel, therefore, performed deficiently by failing to file a pre-trial (written) suppression motion.

96. Here, then, the first two *Pierce* prongs are satisfied: (1) Bundy's Fourth and Fifth Amendment claims are meritorious; and (2) trial counsel's failure to file a pre-trial suppression motion was unreasonable because filing a motion "offered a potential for success substantially greater than the course actually pursued." *Commonwealth v. Howard*, 719 A.2d at 237 (Pa. 1998).

4. Bomar Hearing

97. On January 7, 2010, at Norris Gelman's request, the trial court held an evidentiary hearing regarding Bundy's direct appeal ineffectiveness claims. *See Commonwealth v. Bomar*, 826 A.2d at 853. At the hearing, Gelman developed facts for the following trial counsel ineffectiveness claim: Whether trial counsel was ineffective for failing to request a mistrial when Dominique Keys could not be located after the prosecutor summarized his testimony in during opening statements.
98. Gelman did not litigate trial counsel's ineffectiveness for failing to file a pre-trial suppression motion regarding Bundy's illegal detention and the statements he made and allegedly made while illegally detained without probable cause.
99. Gelman had no tactical or strategic reasons for not litigating this issue during the *Bomar* hearing.

5. Prejudice

100. Had trial counsel filed a pre-trial suppression motion he would have developed the very facts he developed at trial when he cross-examined Det. Williams. Had trial counsel coupled these facts with the pre-trial facts already available to him based on the pre-trial discovery, there is a reasonable probability the trial court would have suppressed Bundy's alleged statement to Dominique Keys *and* his statement to Det. Williams on December 14, 2007. Had these statements been suppressed, there is a reasonable probability the outcome of Bundy's trial would have been different because Dominique Keys's statement represented the linchpin to the Commonwealth's case; indeed, the Commonwealth hammered home his statement during opening statements and closing arguments.⁶⁶ Moreover, when the Commonwealth could not locate Keys, it presented Dwayne Keys, Dominique's father, and Officer Michael Livewell to explain the steps it took to locate and produce Keys.⁶⁷ Furthermore, Bundy's

⁶⁵ NT, Trial, 5/7/2009, at 248-249.

⁶⁶ NT, Trial, 5/6/2009, at 293-294 (opening statements); NT, Trial, 5/12/2009, at 50-51 (closing arguments).

⁶⁷ NT, Trial, 5/11/2009, at 82-83 (Dwayne Keys); *id.* at 133-138 (Officer Livewell).

statement to Det. Williams contradicted his alleged statement to Keys undermining Bundy's credibility at trial when he testified.

101. Appellate counsel, moreover, was ineffective for not raising the suppression issue on direct appeal. Here, because the trial court held a *Bomar* hearing, appellate counsel could have easily developed and argued the suppression issue at the hearing. Appellate counsel had no tactical or strategic reason for not developing and arguing the suppression issue at the *Bomar* hearing and raising it on direct appeal. Appellate counsel's ineffectiveness prejudiced Bundy because his Fourth and Fifth Amendment suppression issues are meritorious.
102. Bundy is entitled to a new trial based on trial counsel's and appellate counsel's prejudicial ineffectiveness.

PCRA DISCOVERY

A. Request Discovery

103. Bundy requests the following discovery:
 - a. Video(s) from the convenience store
 - i. According to Maria Buchanan's, Celina Wilson's, and Naizi Fadheil's statements, responding officers reviewed the convenience store video(s).⁶⁸
 - ii. The video(s) may produce evidence bolstering Bundy's self-defense claim.
 - b. Any and all investigative reports, arrest reports, and statements related to Jerome Foreman's arrest and interrogation and the search of his 1516 Judson Way residence
 - i. On December 18, 2007, Det. Francis Kane obtained a search warrant for **Jerome Foreman's residence**: 1516 Judson Way, Apt. 809, Philadelphia, PA 19121 (residence within Norman Blumberg Apartments).⁶⁹ In the search warrant, Det. Kane averred the following facts regarding Foreman:

On Sunday 12-16-2007 P/O Ricci #9913, 23rd District, was interviewed by Det. Mangoni #642, homicide unit and stated that on this date at appx. 7:30 pl. He and his partner observed a black male identified as Jerome Foreman who was wanted for investigation in a homicide which occurred on 12-13-2007 enter 1516 Judson Way from the front door

⁶⁸ Exs. 5, 8, 10.

⁶⁹ Ex. 11.

and get onto the elevator. As the officers entered the building Foreman got onto the elevator and took it to the 8th floor. The officers went to the 8th floor via the stairs and when they reached the 8th floor they saw Foreman flee into apartment #809. The officers knocked on the door several times but got no response. The officers notified their supervisor who secured the apartment and declared the situation a barricade....

As a result of the above information it is requested that this warrant be issued and a nighttime search be authorized in order to prevent the destruction of evidence, the escape of Jerome Foreman, and the manpower limits of the Philadelphia Police Department and to recover any firearms, ballistics evidence, a red hooded sweatshirt, blue hat, contraband and any and all evidence related to the death of Craig Young.⁷⁰

- i. At trial, Det. Williams said police arrested Foreman and that Det. Singleton interviewed him.⁷¹ Trial counsel, though, never received discovery regarding Foreman’s arrest or any statement Foreman may have made during his interview with Det. Singleton.⁷²
- ii. At trial, Bundy said Foreman opened fire on him prompting him to fire back in self-defense.⁷³ If Foreman provided a statement or statements to Homicide detectives, it may bolster Bundy’s self-defense claim.

B. State Right to Discovery

104. Rule 902(E)(1) requires Bundy to demonstrate “exceptional circumstances” before receiving discovery. The General Assembly did not define “exceptional circumstances,” so the Court must evaluate this standard on a case-by-case basis. *See Commonwealth v. Frey*, 41 A.3d 605, 611 (Pa. Super. 2012). Under Rule 902(E)(1), Bueno must “establish... specific ground[s] that... warrant” the requested discovery. *Commonwealth v. Williams*, 732 A.2d 1167, 1175 (Pa. 1999). In other words, his discovery request “must be accompanied by an explanation why the exculpatory information was unavailable to prior counsel and must identify specific documents or items that were not disclosed pre-trial or during the trial proceedings.” *Commonwealth v. Williams*, 86 A.3d 771, 789 (2014). Lastly, if the documents requested by Bueno “may arguably support” his ineffectiveness claims, he is entitled

⁷⁰ *Id.*

⁷¹ NT, 5/7/2007, at 228-229.

⁷² *Id.*

⁷³ NT, 5/11/2007, at 198-199.

to discovery. *Commonwealth v. Frey*, 41 A.3d at 613 (granting PCRA discovery where the requested material “may” have “arguably supported” the petitioner’s PCRA claims).

105. Here, there are exceptional circumstances warranting discovery:

- a. **First**, Bundy has a statutory right to effective PCRA counsel. *See, e.g., Commonwealth v. Bennett*, 930 A.2d at 1273–1274. To vindicate this right, counsel needs the requested discovery to meaningfully and adequately review all the record and off-the-record evidence to determine if Bundy’s state and federal rights were protected or violated.
- b. **Second**, because Bundy is prohibited from raising ineffectiveness claims on direct appeal, *see Commonwealth v. Grant*, 813 A.2d at 738, the first time he can challenge trial counsel’s effectiveness is during PCRA proceedings. *See, e.g., Commonwealth v. Figueroa*, 29 A.3d 1177, 1180 n.6 (Pa. Super. 2011). As a result, counsel must review the record and *non-record* evidence to ensure Bundy received effective trial representation. Thus, to meaningfully evaluate Bundy’s state and federal claims, counsel needs the requested discovery. *See Martinez v. Ryan*, 132 S. Ct. 1309, 1317, 1318 (2012) (noting, twice, that ineffectiveness claims “often turn[s] on evidence outside the trial record.”); *accord Massaro v. United States*, 538 US 500, 505 (2003) (“The evidence introduced at [a plea hearing]... will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis.”). Without the requested discovery, counsel cannot meaningfully evaluate Bundy’s claims, preventing him from adequately developing and presenting potentially meritorious claims on his behalf.⁷⁴
- c. **Third**, if the requested discovery existed before trial, it should have been disclosed before trial for the following reasons:
 - i. Rule 573 and federal due process principles required mandatory discovery because both items were needed to prepare and present a meaningful and complete defense at trial. *See Kyles v. Whitley*, 514 U.S. 419 (1995); Pa. R. Crim. P. 573(B)(1)(a-6) and 573(B)(2)(a-d).
 - ii. Moreover, if the Commonwealth had a duty to disclose before trial, that duty continues into PCRA proceedings. *See Commonwealth v. Williams*, 86 A.3d 771, 788 (Pa. 2014) (“*Brady* imposes an affirmative and **continuing** duty upon the government to disclose exculpatory

⁷⁴ Ineffectiveness claims, “by their very nature, often involve claims that are not apparent on the record. Thus, [PCRA] counsel must not only scour the existing record for any issues, but also has the additional burden of raising *any extra-record claims* that may exist by interviewing the client, family members, and any other people who may shed light on claims that could have been pursued before or during trial and at sentencing.” *Commonwealth v. Grant*, 813 A.2d at 737 (emphasis added). The requested discovery will allow counsel to meaningfully identify the “extra-record claims” and those “people who may shed light on [potentially meritorious] claims” not “pursued before or during [the plea hearings] and at sentencing.” *Id.*

information”) (emphasis added); *Commonwealth v. Williams*, 732 A.2d 1167, 1175-1176 (Pa. 1999) (“[T]he Commonwealth’s obligations under *Brady* continue **through all stages** of the judicial process[.]”) (emphasis added).

- d. **Forth**, Bundy cannot access police/investigate reports pursuant to the Commonwealth’s *Right To Know Law* because they are exempt from public disclosure. *See* 65 Pa. Stat. § 67.708(b)(16); *Cf. Pennsylvania State Police v. Office of Open Records*, 5 A.3d 473, Pa. Cmwlth. 2010); *Mitchell v. Office of Open Records*, 997 A.2d 1262 (Pa. Cmwlth. 2010).
- e. **Fifth**, the requested discovery will expedite the judicial process because counsel will not have to seek alternative avenues to obtain the requested information. *Cf. Commonwealth v. Grant*, 813 A.2d at 737-738 (recognizing that “time is necessary for a petitioner to discover and fully develop claims related to trial counsel ineffectiveness.”).
- f. **Sixth**, post-conviction is also the first time Bundy can review whether the Commonwealth (*i.e.*, the DA’s Office and law enforcement agencies that assisted the DA’s Office) adhered to its *Brady* obligations. *See Kyles v. Whitley*, 514 U.S. 419 (1995) (discussing *Brady* obligations). While the prosecutors in Bundy’s case are presumed to have “properly discharged their official duties,” *Bracy v. Gramley*, 520 US 899, 909 (1997) (citations and quotations omitted), this is a rebuttable presumption that can only be rebutted with evidence developed through post-conviction investigation and discovery. *See Commonwealth v. Williams*, 86 A.3d at 786.

2. Federal Law Right to Discovery

106. Bundy has a substantive liberty interest in obtaining relief based on ineffective assistance of counsel and government interference.
 - a. Under 42 Pa. C.S. § 9543(a)(2)(ii), Bundy is “eligible for relief” if he pleads and proves by a preponderance of the evidence his “conviction or sentence” resulted from “[i]neffective assistance of counsel, which... so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.”
 - b. Under 42 Pa. C.S. § 9543(a)(2)(vi), Bundy is “eligible for relief” if he pleads and proves by a preponderance of the evidence his “conviction or sentence” 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.” *Cf.* Pa. C.S. § 9545(b)(1)(i) (petitioner may circumvent the 1-year limitations period if “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.”).

107. Both rights to relief are substantive liberty interests. *See District Attorney’s Office v. Osborne*, 129 S.Ct. 2308, 2319 (2008) (“Osborne does... have a liberty interest in demonstrating his innocence with new evidence under state law.”). Bundy’s liberty interests are entitled to due process protection, meaning “in some circumstances,” the protected liberty interests may “beget yet other rights to procedures essential to the realization of the parent right.” *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981). In other words, a State’s post-conviction *procedures* must be “fundamentally []adequate to vindicate” the *substantive* liberty interest identified in the State’s post-conviction statute. *District Attorney’s Office v. Osborne*, 129 S.Ct. at 2320; *accord Swarthout v. Cooke*, 131 S.Ct. 859, 862 (2011) (“When... a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication[.]”).
108. Here, to vindicate his *substantive* liberty interest of obtaining relief based on ineffective assistance of counsel and government interference, Bundy needs a subsidiary procedural right, namely access to the requested discovery. This *procedural* remedy (*i.e.*, discovery) will allow counsel to adequately review and meaningfully present Bundy’s *substantive* state and federal claims.

INVESTIGATIVE FUNDING

109. It’s in the trial court’s sound discretion whether it will allocate funds to a PCRA petitioner to hire an investigator. *See Commonwealth v. Gelormo*, 475 A.2d 765, 768 (Pa. Super. 1984). To warrant such funds, the petitioner must demonstrate that the investigative assistance is “reasonably necessary” to prepare or amend his PCRA petition. *Commonwealth v. Bridges*, 886 A.2d 1127, 1131 (Pa. 2005); *accord Commonwealth v. Howard*, 719 A.2d 233, 241-242 (Pa. 1998); *Commonwealth v. Bell*, 706 A.2d 855, 862 (Pa. Super. 1998). In other words, the PCRA petitioner must identify a “particularized need” for the investigative assistance that relates to “a colorable issue” presented in his PCRA petition. *Commonwealth v. Howard*, 719 A.2d 241-242.
110. A qualified PCRA investigator is “reasonably necessary” to locate and interview **Dominique Keys**. Before trial, a reasonably competent trial attorney would have known Keys represented the Commonwealth’s most important and damaging witness. There’s nothing in the record or in trial counsel’s case file to indicate he attempted to interview Keys before trial. During opening statements and closing arguments, the Commonwealth hammered home Keys’s statement, despite the fact Keys never testified.⁷⁵
111. A reasonably competent trial attorney would have attempted to interview Keys to obtain his version of events at Homicide on December 14, 2007. That Keys refused to

⁷⁵ NT, Trial, 5/6/2009, at 293-294 (opening statements); NT, Trial, 5/12/2009, at 50-51 (closing arguments).

testify raises significant questions and suspicions as to how Keys came to be placed into the same room as Bundy and what Bundy said to him, if anything.

112. Trial counsel's failure to *at least* attempt to interview Keys prejudiced Bundy because it denied him the opportunity to develop potentially exculpatory or material evidence relevant to his defense. The prejudice, in other words, is not knowing (a) whether Keys would have actually spoke with a defense investigator prior to trial, and if so, (b) what exactly he would have said regarding the circumstances resulting in his brief encounter with Bundy at Homicide on December 14, 2007. To rectify this prejudice, counsel must be afforded investigative funds so he can attempt to interview Keys.

EVIDENTIARY HEARING

113. Under Rule 908, the PCRA court "shall order a hearing" when the petitioner's petition "raises material issues of fact." Pa. R. Crim. P. 908(A)(2). Here, Bundy has presented material issues of fact and is entitled to a hearing (or oral arguments) regarding his Fourth and Fifth Amendment claims, his discovery request, and investigative funding request.

PRAYER FOR RELIEF

WHEREFORE, Bundy requests the following relief:

- a. A hearing on his claims, discovery request, and investigative funds request.
- b. An order granting the requested discovery.
- c. An order granting reasonable investigative funds.
- d. The right to amend his PCRA petition, *see* Pa. R. Crim. P. 905(A), if Bundy is granted discovery and the opportunity to interview Dominique Keys.
- e. The right to request additional discovery if new facts are developed via investigation and discovery.
- f. The right to request additional funding if, after reviewing the requested discovery and conducting additional investigation, counsel identifies additional "material" witnesses.
- g. And any other relief the Court deems necessary to protect and vindicate Bundy's state and federal constitutional rights during his initial-review PCRA proceedings.

Respectfully submitted this the 23rd day of October, 2014.

/s/Craig M. Cooley
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Certificate of Service

On **October 23, 2014**, counsel served the foregoing PCRA petition on the Commonwealth by e-filing the petition with Philadelphia's Electronic Filing System:

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