

**IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY  
CRIMINAL DIVISION**

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| <b>COMMONWEALTH OF<br/>PENNSYLVANIA</b> | ) |                              |
|   | ) |                              |
| <b>Respondent,</b>                      | ) |                              |
|   | ) |                              |
| <b>v.</b>                               | ) | <b>CP-39-CR-0000791-2011</b> |
|   | ) |                              |
| <b>CHRISTIAN BUENO</b>                  | ) | <b>Judge Maria L. Dantos</b> |
| <b>Defendant-Petitioner</b>             | ) |                              |
|   | ) |                              |

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**Amended PCRA Petition**

1. Petitioner, **Christian Bueno (“Bueno”)**, by and through his attorney, **Craig M. Cooley**, files his *Amended PCRA Petition*. His petition is presented in good faith and premised on the following facts and points of authority.

**INTRODUCTION**

2. Bueno has the right to effective PCRA representation, *see, e.g., Commonwealth v. Bennett*, 930 A.2d 1264, 1273–1274 (Pa. 2007); *Commonwealth v. Pursell*, 724 A.2d 293, 303 (Pa. 1999); *Commonwealth v. Albrecht*, 720 A.2d 693, 699–700 (Pa. 1998), as well as the right to meaningfully present his state and federal claims in a fundamentally fair legal proceeding. *See Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987); *Commonwealth v. Haag*, 809 A.2d 271, 283 (Pa. 2002) (emphasis added). As a result, counsel respectfully requests additional discovery to adequately and meaningfully evaluate, plead, and present Bueno’s state and federal claims.
3. Counsel respectfully requests the following discovery:
  - a. The transcripts from Bueno’s trial.
  - b. The (color) autopsy and crime scene photographs.
    - i. According to Andrew Kehm’s September 8, 2011 shooting reconstruction report, he reviewed the 336 digital photographs taken at the crime scene and during the autopsy. Counsel requests copies of all 336 digital photographs. Specifically, counsel requests that the Commonwealth transfer these 336 photographs to a CD and to disclose the CD to counsel.
  - c. All Pennsylvania State Police (“PSP”) forensic reports.

- i. According to Andrew Kehm's September 8, 2011 shooting reconstruction report, he reviewed at least two PSP forensic reports. Counsel requests these and all other PSP forensic reports.
- d. In regards to Amarilys Soto's March 2, 2010 interview:
  - i. Detective John Buckwalter's (Allentown Police Department) notes taken during the interview and his post-interview report, if he wrote one.
- e. In regards to Amarilys Soto's March 3, 2010 interview:
  - i. Detective John Buckwalter's notes taken during the interview and his post-interview report, if he wrote one.
  - ii. Soto's video statement, a copy of which is in the BPD evidence room according to Detective DiLuzio's report.
- f. In regards to Dennis Velez's March 18, 2010 interview:
  - i. Detective John Buckwalter's notes taken during the interview and his post-interview report, if he wrote one.
  - ii. Detective Joseph Vazquez's (Lehigh County DA's Office) notes taken during the interview and his post-interview report, if he wrote one.
- g. In regards to Dennis Velez's March 23, 2010 interview:
  - i. Detective John Buckwalter's notes taken during the interview and his post-interview report, if he wrote one.
  - ii. Detective Joseph Vazquez's notes taken during the interview and his post-interview report, if he wrote one.
  - iii. Velez's videotaped statement, a copy of which is in the BPD evidence room according to Detective DiLuzio's report.
- h. In regards to Dennis Velez's March 25, 2010, polygraph exam:
  - i. Detective Thomas Fallstich's (Leigh County DA's Office) report regarding Velez's polygraph exam.
  - ii. Velez's videotaped statement, a copy of which is in the BPD evidence room according to Detective DiLuzio's report.

- i. In regards to Dennis Velez's April 7, 2010 interview:
    - i. Detective John Buckwalter's notes taken during the interview and his post-interview report, if he wrote one.
    - ii. Detective Joseph Vazquez's notes taken during the interview and his post-interview report, if he wrote one.
    - iii. Velez's videotaped statement, a copy of which is in the BPD evidence room according to Detective DiLuzio's report.
  - j. Any and all reports, memos, or videotapes regarding the Commonwealth's interviews of Bueno's alibi witnesses: Pedro Medina, Jose Nunez, and Victor Villard.
    - i. On June 22, 2011, Matthew Potts, Bueno's trial attorney, provided Medina's, Nunez's, and Villard's phone numbers to ADA Kevin McCloskey.
    - ii. On September 16, 2011, Potts provided Medina's, Nunez's, and Villard's dates of birth to ADA McCloskey.
  - k. In regards to Manuel Gonzalez:
    - i. The Lehigh County prison's cell placement information regarding Gonzalez and Denniz Velez for the following time period: January 2011 through December 2011.
  - l. The AFIS results regarding the unknown fingerprint lifted from the driver's window frame of the green minivan.
    - i. According to detective Mouser's (BPD) September 8, 2007 report, he "dusted the driver's side door with black silk dusk and found numerous fingerprint smudges with no ridge detail... [and] **found a partial print on the upper part of the window frame.**" Detective Mouser "lifted the print using a fingerprint lifter and secured it with the other items taken." Detective Mouser compared the unknown print to Robberson's prints, but the print was not from Robberson, at which point he submitted the unknown print to AFIS.
4. Additionally, counsel requests investigative funds to interview a new witness, **Manuel Gonzalez**, who claims Dennis Velez admitted to him, while incarcerated at the Lehigh County prison, that he (Velez) was the person who shot and killed Debra Robberson in the early morning hours of September 8, 2007. Gonzalez marks the third inmate who has come forward and said Velez implicated himself in Robberson's murder. In February 2010, Isiah Workman said Velez confessed to him that he (Velez) shot Robberson. In

February 2011, Tryone Davis said Velez confessed to him that he (Velez) shot Robersson.

### **PROCEDURAL HISTORY**

5. In April 2011, the Commonwealth charged Bueno with homicide, robbery, and conspiracy in connection with the September 8, 2007 shooting death of Debra Robberson.
6. On March 16, 2011, the Commonwealth filed an Information charging Bueno with capital murder and other charges.
7. Bueno's case was assigned to the Honorable Maria L. Dantos ("Court").
8. On April 6, 2011, the Court appointed Matthew Potts to serve as Bueno's trial attorney.
9. On September 12, 2011, Potts and the Commonwealth began jury selection, which ended on September 15, 2012.
10. On September 19, 2011, Bueno entered a not guilty plea, the Court swore in the jury, and the Commonwealth began introducing evidence into the record.
11. On September 20, 2011, after both sides had rested in the trial's guilt phase and just before the jury was to be charged, Bueno changed his plea and pled guilty to first-degree murder. In exchange for pleading guilty, both parties agreed Bueno would be sentenced to life in prison without the possibility of parole. The Court, as a result, sentenced him to life in prison.
12. On September 30, 2011, Bueno filed a motion to withdraw his guilty plea.
13. On October 10, 2011, the Court held a hearing regarding the withdrawal motion. At the hearing, Bueno said he felt pressured and coerced to plead guilty, and therefore, he did not voluntarily plead guilty. The Court denied the motion.
14. On October 11, 2011, the Court granted Matthew Potts's motion to withdraw and appointed Kimberly F. Makoul to serve as Bueno's appellate attorney.
15. Bueno timely appealed (3039 EDA 2011), but the Superior Court affirmed his conviction on August 7, 2012.
16. On September 6, 2012, Bueno filed a timely *Petition for Allowance* with the Pennsylvania Supreme Court (704 MAL 2012), which the Supreme Court denied on January 9, 2013.
17. Bueno did not seek review from the U.S. Supreme Court, meaning his conviction became final on April 9, 2013. *See* U.S. S.Ct. R. 13; 42 Pa. C.S. § 9545(b)(3).

18. On January 9, 2014, Bueno filed a timely *pro se* PCRA petition. *See* 42 Pa. C.S. § 9545(b)(1).
19. On February 2, 2014, the Court appointed Sean Poll to serve as Bueno's PCRA attorney.
20. On March 12, 2014, Poll filed a motion to withdraw and a Finley letter. The Court granted the motion to withdraw on May 1, 2014 and scheduled a hearing for June 12, 2014.
21. On June 4, 2014, Bueno retained undersigned counsel (Cooley) to serve as his PCRA attorney.
22. On June 12, 2014, the Court entered an Order requiring counsel to file Bueno's amended PCRA petition on or by October 10, 2014 and scheduled an hearing for October 22, 2014.

### **STATEMENT OF FACTS**

23. On **September 8, 2007**, at 7:16 a.m., the Bethlehem Police 911 Center received a call from a citizen regarding an "elderly male" lying in a van in the Diamonz Club parking lot in Lehigh County. When Bethlehem Police Officers arrived, they learned the "elderly male" was in fact a deceased female: **Debra Robberson**. Robberson was lying partially out of the driver's seat of her green Dodge Mini-van.
24. Officers noticed coins and other items commonly carried in a person's pocket scattered across the driver's seat and floor area. Robberson's pocket was turned inside-out and officers found no cash on her.
25. On **September 10, 2007**, Dr. Samuel Land, a forensic pathologist, performed Robberson's autopsy at Lehigh Valley Hospital Center and ruled the cause of death to be a gunshot wound to the left side of the chest. Dr. Land also identified a U-shaped laceration on Robberson's left check.
26. Bethlehem and Allentown Police Departments spearheaded the investigation, but the case went cold quickly and remained cold until February 2010 when a jailhouse informant named **Isiah Workman** contacted detectives and said he had information about Robberson's murder.

#### **A. Isiah Workman Interview**

27. On **February 24, 2010**, Detectives Mark DiLuzio (BPD), Andrew Kehm (BPD) and John Buckwater (APD) met with Workman at the Lehigh County's District Attorney's Office. At the time of the interview, Workman was incarcerated at Lehigh County Prison (LCP). According to Workman, while in LCP, he met an inmate named **Dennis Velez**. In early February 2010, Workman had a conversation with Velez regarding Velez's (then) pending rape charge. While discussing the rape charge, Workman said Velez admitted to

a Bethlehem homicide. According to Detective DiLuzio's report, Workman said the following

Velez told Isiah about "homicide" investigating a shooting in Bethlehem. Velez told Isiah that "homicide" was saying I did it. Isiah stated that he asked Velez "did you do it." Velez looked at him and stated "**yes I did it.**" Velez then stated that he was at Diamondz with his wife. His wife got in some altercation with some guy at Diamondz. **Velez stated he shot the guy and gestured with his hands, like he was holding and shooting a rifle or shotgun.** Velez stated that he did not know the guy was really a girl until the next day or so. Velez then told Isiah that he came back to Diamondz the next day and saw police tape all around. Velez stated that he drove by and said this is when he realized that she was dead, that he killed someone... Isiah stated that Velez showed no emotion/remorse in his words or body language when he told him these things. Velez also told Isiah that this was not the first time he did that.

### **B. Amarily Soto Interviews**

28. On **March 2, 2010**, Detectives DiLuzio and Buckwater interviewed **Amarilys Soto**, Dennis Velez's girlfriend. Soto *gave two stories to detectives*; the first, according to Soto was untrue, while the second represented the truth. In her first story, Soto said she overheard Velez and his friend, Lo, arguing. She described Lo as being a Hispanic male, with long hair, and shorter than Velez. During the argument, which supposedly occurred a day or two after the homicide, Velez supposedly told Lo, "[W]e were supposed to rob him, [it] was not supposed to go down like that," to which Lo replied, "[Y]ou're fucking done, you fucked up." Velez then said something to the effect that "all [we] were trying to do is rob somebody... it wasn't supposed to go down that way."

29. Soto said Velez made another statement to her a few days later. Quoting from Detective DiLuzio's report:

Dennis stated, "damn, something happened," and told her that it was not supposed to go down like that. Amarily stated that Dennis told her that he tried to rob somebody and that it did not go well. She asked him what happened... Dennis stated that something bad happened and that he did not want to talk about it. Dennis also told her he couldn't tell her because she'll snitch on him and that he did not want to talk to her about it anymore.

30. At this point, Soto *admitted her first statement was untrue* and that she wanted to tell "the whole truth." She then admitted to driving Dennis and Lo to Diamondz in her 1998 Chevy Malibu LS; they arrived around 1:30 a.m. on September 8, 2007; the club was still open and there were people standing in the parking lot, which "was full of vehicles."

31. Once in Diamondz's parking lot, Soto said she parked next to a green minivan. After parking, Soto said Velez "started looking around" and "acting strange." Soto believed their intention was to hang out in the club until it closed, but Dennis told her to "shut the fuck up" and to drive "up the hill and wait." Velez directed her to drive across the lot to the street adjacent to the club. After Velez and Lo exited her car, Soto did as instructed and drove off to wait. Soto said she saw no guns in her car before Velez and Lo exited the car. Once Velez and Lo exited, Soto said they walked toward the green minivan.
32. Soto parked and waited. About 15 to 20 minutes later, she heard "a loud gunshot, like a 'big boom sound.'" Right after that, Soto saw Velez and Lo running toward her car with Velez holding "some type of gun." The gun looked like a "long gun with two barrels on it."
33. Velez slapped Soto twice, pulled her from the front seat, and got into the driver's seat. Once Soto got into the passenger's seat, Velez drove to Soto's house where he and Lo began arguing over what happened. Velez and Lo both said "it wasn't supposed to do down that way." Velez thought the victim was a man, but learned through the newspaper the victim was a woman.
34. When Soto realized what they (Velez and Lo) had done, she told them she was going to call the police, at which time Velez punched her face several times. Velez said "all they were supposed to do is rob the guy and get some money to get high."
35. A day or so later, after the newspaper covered the murder, Velez told Soto what happened. Velez said "all they wanted was to get some money to get high." Velez added that "when he was taking the money off the guy, he hit the guy in the face with his gun twice." Velez struck him twice because, as he dug through his pockets, the guy refused to cooperate.
36. Soto said she never saw Lo after the night of the shooting.
37. Soto also said she was "very scared" of Velez because he physically abused and assaulted her in the past. She described one incident where he threatened to kill her with a gun pointed at her. Also, Velez told her, "[I]f I ever go down bitch, you'll go to, you'll get your part." Lastly, Velez told her, if she ever "snitched on him, he would kill her."
38. On **March 3, 2010**, Detectives DiLuzio, Kehm, and Buckwater interviewed **Soto** once more and had her take them to Diamondz's parking lot and explain what happened during the early morning hours of September 8, 2007. Soto said once she parked to the right of the green minivan, Velez and Lo exited her car. Soto then directed the detectives to where she waited for Velez and Lo.
39. Soto said she waited 15 to 20 minutes, before she heard the "loud boom," and saw Velez and Lo running toward her car. Velez initially got into the passenger's front seat and told Soto to, "[G]o, go, go." Soto drove, but pulled over shortly thereafter on West Market

Street because she was upset and crying. Velez became angry, slapped her several times, got into the driver's seat, and drove away like a "maniac" looking in the rear view mirror for police. Soto said Velez's hands were shaking, while Lo sat in the back seat looking as if he was in shock. Soto said they drove around Bethlehem for thirty minutes before driving to her house.

40. Soto provided the following timeline regarding their activities on the evening of September 7, 2007 until the early morning hours of September 8, 2007:
  - a. 9:00 p.m. to midnight: Soto, Velez, and Lo were at Reina Lopez's (Velez's sister) house in Allentown.
  - b. Midnight: Soto, Velez, and Lo left Reina's house "to go out."
  - c. 12:00 a.m. to 1:00 a.m.: Drove around before driving to Soto's house in Allentown.
  - d. 1:15 a.m.: Velez suggested they go to Diamondz.
  - e. 1:15 to 1:30 a.m.: Soto, Velez, and Lo drove to Diamondz.
  - f. 1:30 a.m.: Arrived at Diamondz; it was still open and the parking lot was full of cars.
41. After the shooting, Soto said they drove around Bethlehem for thirty minutes before going to her house in Allentown. They then drove to Reina's house.
42. After speaking with the detectives the day before, Soto recalled something Velez told her regarding Lo's gun; Velez told her Lo's gun "had broke or something like that" because a bullet in his gun "got stuck in the barrel." Soto said Lo usually carried a 9 mm handgun.
43. The detectives showed Soto an eight-man photo array; she identified **Alex Abreu** as Lo. She also identified Felix Oquendo as Velez's brother-in-law.
44. Soto provided a video statement a copy of was placed into the BPD Evidence Room under this case number (07051376).

### **C. Dennis Velez's Interviews**

45. On **March 18, 2010**, detectives DiLuzio, Buckwater, and Joseph Vazquez (Leigh County DA's Office) interviewed **Dennis Velez** at the Leigh County District Attorney's Office. When detectives informed him they wished to speak to him about the Diamondz parking lot homicide, he became visibly upset and repeatedly denied killing anyone. Velez, though, asked about the potential charges he faced. When detectives explained the charges, Velez said, "Lo shot the dude, he set this up, I'll talk to you about what happened." Velez added, "Lo fucked up, he fucked up, Lo did not have to do this, he

wanted to show me what he was[.]” Velez admitted to being with Lo when Lo “shot the guy.”

46. Prior to the shooting, on September 7, 2007, Velez said he and Soto were at his sister’s house (Reina’s) drinking; he had been drinking and smoking weed since 2 p.m. that afternoon. That night Velez said he met an individual who he knew as Lo. Later that night he, Soto, and Lo went out driving around town; they eventually drove to Diamondz where Soto parked next to a green minivan. Velez said he saw a “dude” in the minivan slumped over the steering wheel.
47. Velez said it was around 2 a.m. when they got to Diamondz; people were exiting the club and standing in the parking lot. Lo exited Soto’s car with a .40 caliber semi-automatic handgun, while Velez exited with a shotgun. When Lo opened the minivan’s front driver’s side door, the “dude” grabbed Lo’s handgun causing it to accidentally discharge. Velez said they intended “to rob the guy,” not kill him. Although he had a shotgun, Velez said he did not point it “at the dude” or fire it.
48. After hearing the gunshot, Velez said he put the shotgun back into Soto’s car before he grabbed Lo’s handgun and took it from him. He and Lo then got back into Soto’s car. Velez said Soto drove off, but stopped before exiting the parking lot; at this point, Velez said he exited the car, walked back toward the green minivan, and “checked the dude.” According to Velez, the “guy was just laying there moaning,” but Velez said he did not see blood. At this point, Velez returned to Soto’s car and they drove back to his sister’s house in Allentown. Once there, Velez said when he examined Lo’s .40 caliber handgun, he realized the gun had jammed: “The round that was fired was jammed in the slide... it didn’t fly out.”
49. Velez said Lo’s .40 caliber semi-automatic handgun came from Reina’s basement. Felix Oquendo (Velez’s brother-in-law) kept it wrapped in a sweater in Reina’s basement. Velez, though, said he did not see Lo take the gun from the basement.
50. About two to three weeks after the shooting, Velez said he “left the area” and went to upstate New York.
51. At the end of the interview, Velez repeatedly said his statement was true. Velez also agreed to provide a “taped statement” during their next interview.
52. On **March 23, 2010**, detectives DiLuzio, Vasquez, and Buckwalter interviewed Velez at the Leigh County District Attorney’s Office. Detectives taped the interview. Velez again said Lo shot “the girl,” not him.
53. During this interview, Velez said when they parked at Diamondz and saw the person in the green minivan, only Lo exited the vehicle. Moreover, Velez said he only exited the vehicle when he saw Lo struggling “with the dude.” Before exiting, he grabbed his 16 gauge shotgun, but before he got to the minivan, he heard the gunshot. Velez said he then “checked the victim,” who was moaning and whining. As he checked the victim,

Velez said Soto and Lo “took off” and drove “around the corner.” Velez said he had no intention of using his shotgun; instead, he “had his 16 gauge to scare the person.”

54. Velez said he “cursed at” Lo for shooting the victim: “I was barking at him.” After that night, though, he never saw Lo again.
55. At the end of his statement, Velez said “he was being honest in his statement and that there was no reason for him to lie.”
56. On **March 25, 2010**, Velez took a polygraph exam at the Lehigh County Prison. Lehigh County Detective Thomas Fallstitch administered the exam, while detectives DiLuzio and Buckwalter observed.
57. During the exam, detectives asked Velez whether only Lo intended to rob the victim or whether both intended to rob the victim. During his previous interview, Velez said, “I did know [Lo] was going to rob the guy, [I] figured he was going to do a sale. The guy started struggling with Lo, so I figured the sale went bad and he was robbing the guy.” During the polygraph exam, Velez did not change his story, saying he “did not get out to rob the guy,” but instead exited Soto’s car only to “scare the guy.” He said, again, he truly believed Lo approached the car to make a drug sale, not to rob the guy.
58. After the exam, detective Fallstitch said Velez was “deceptive” regarding the robbery questions and other questions. Once Velez learned of the “deceptive” results, **he said he wanted to “correct” his previous statement.** Velez consented to having the “corrected” statement videotaped.
59. During his corrected, videotaped statement, Velez said the robbery was “planned” and that Lo planned it: “[Velez] stated that they... talked about doing the robbery in the car prior to anything occurring that night.” Velez said he was only supposed “to back [Lo] up.” Despite planning the robbery, Velez said neither he nor Lo obtained anything from the robbery.
60. On **April 5, 2010**, Velez contacted detective Buckwalter and asked if he could “**redo his taped statement**” again. On **April 7, 2010**, detectives Vasquez and Buckwalter met with Velez at the Lehigh County DA’s Office where he gave another “corrected” statement in which he “admitted to being involved in [the] murder” and “admitted that they were there because of a planned robbery.” Detectives videotaped his statement.
61. Lastly, when shown a photograph of Alex Abreu, Velez said Abreu was not Lo.

#### **D. Christian Bueno’s Interview**

62. In **March 2010**, detectives learned Lo supposedly had a MySpace page with the screen name “Forever Alive.” Detectives tracked the IP address to this MySpace page to a Jacqueline Moncayo, 426 Baltic Street, Apt. 19, Brooklyn, NY 11217, 718-858-5733.

When detectives contacted Moncayo, she said her son, **Christian Bueno**, goes by the nickname, “Lo.”

63. On **April 15, 2010**, when detectives showed **Reina Lopez** a photo array, she identified Bueno as the man she knew as “Lo” or/and “Lo Rider.” On the same day, when Velez viewed the same photo array, he also identified Bueno as man he knew as “Lo” and/or “Lo Rider.”
64. On **June 1, 2010**, detectives DiLuzio and Vasquez interviewed **Bueno** at the Downstate Correctional Facility in New York.
65. Bueno said he went to Allentown in November 2006 and stayed a couple months before returning to Brooklyn. Bueno said he traveled back and forth from Allentown to Brooklyn in 2007. When in Allentown, Bueno hung with Felix Oquendo (Velez’s brother-in-law) and his girlfriend, **Daneisa Colon**.
66. Bueno said he went to prison in New York in November 2007 for assaulting an EMS worker on December 25, 2006. He also said the NYPD arrested him on September 15, 2007 for drug possession. Bueno said he was not in prison or jail on September 8, 2007.
67. Bueno said he knew Felix Oquendo, Dennis Velez, and Reina Lopez. Bueno said Felix is his “best friend; more like a brother.” Bueno met Reina and Velez through Felix.
68. When detectives questioned him about the September 8, 2007 shooting, Bueno denied involvement.

#### **E. Amarilys Soto’s Interview**

69. On **June 8, 2010**, detectives DiLuzio and Buckwalter interviewed **Soto** again. Soto said she first met Lo a month before the shooting at Reina’s house; she met him thru Felix Oquendo who was a close friend of Lo’s.
70. Detectives showed Soto another photo array and asked her to identify Lo; she identified Bueno’s photograph as the man she knew as Lo. Soto said when she viewed the first photo array (on March 3, 2010), and identified Alex Abreu, “she was very nervous.” She said the shape of Abreu’s face and his long hair “threw her off.” She said Lo had long hair like Abreu.

#### **F. Bueno’s Arrest**

71. On **August 10, 2010**, detective DiLuzio issued an arrest warrant for Bueno.
72. On **January 4, 2011**, detectives DiLuzio and Vasquez traveled to SCI-Auburn in New York, arrested Bueno, and transported him back to Lehigh County. During the trip back, Bueno denied involvement again, even after hearing portions of Velez’s taped statements.

### **G. Tyrone Davis's Interview**

73. On **February 8, 2011**, detectives DiLuzio and Vasquez interviewed **Tyrone Davis** at the Northampton County DA's Office. Davis, at the time, was an inmate at Northampton County prison. Davis informed his defense attorney he had information regarding Dennis Velez.
74. Prior to being transferred to Northampton County prison, Davis was in Lehigh County prison where he played basketball nearly every day with Velez. After playing basketball with Velez one day in July or August 2010, Velez mentioned a murder he was involved in. Velez told Davis "he and another guy were with his girl" when she "drove them to the... night club." Velez said "he and the other guy got out of the car to rob this lady," but that Velez "did not know the lady was a lesbian and that he is hoping that [the Commonwealth] [does] not make this sometype [sic] of crime against 'homos' or something like that." Davis said Velez "**told him he shot the lady.**" Velez also said "his **friend could not shoot the lady.**" When Davis asked why he shot the lady, Velez said, "[S]he saw my face."

### **H. Probable Cause Hearing**

75. On **February 24, 2011**, Bueno had his probable cause hearing. At the hearing, the Commonwealth presented one witness: **Amarilys Soto**. Soto described the events on the night of September 7-8, 2007:
  - a. Her, Velez, and Lo were at Reina's house on the evening of September 7, 2008.
  - b. Sometime between 10:00 and 10:30 p.m., her, Velez, and Lo left Reina's house and drove to her apartment in her car where they stayed for an hour.
  - c. Sometime after midnight she drove them (Velez and Lo) to Diamondz night club.
  - d. When she parked, Velez told her that, once he and Lo exited her car, she needed to drive up the ramp and wait for them.
  - e. When Velez and Lo exited, she drove off and parked on the ramp. Soto could not see either of them when she parked.
  - f. She waited on the ramp for twenty minutes before she heard a gunshot; after hearing the gunshot, she saw Velez and Lo running toward the car; Lo was armed with a 9 mm handgun, while Velez had a shotgun.
  - g. When they reached the car, Velez was laughing and said, "[W]e robbed this lady," while Lo said nothing. Soto described Lo as being in shock.

- h. After the shooting, they went to Soto's apartment where Velez and Lo argued. During the argument, Lo said, "It was not supposed to go down like that, it was not supposed to happen like that."
76. Bueno's defense attorney, **Eric Dowdle**, asked the Court if he could offer two alibi witnesses: "I have two alibi witnesses who are here, available and ready to testify. And I didn't want any adverse inference or argument on the part of the Commonwealth that this is the first time they are coming forward when this gets to trial."<sup>1</sup>
77. The Commonwealth objected, but said it would "certainly interview" them: "We'd like an opportunity to interview them. They're here, and we'll certainly interview them."<sup>2</sup>
78. Neither Dowdle nor the Commonwealth identified the alibi witnesses on the record.

### I. Preliminary Hearing

79. On **May 25, 2011**, Bueno had his preliminary hearing. Matthew Potts represented Bueno at the preliminary hearing. The Commonwealth presented three witnesses: Soto, Velez, and Detective DiLuzio.
80. Soto testified to the following:
- a. Her and Velez had been dating for two years when the shooting occurred on September 8, 2007.<sup>3</sup>
  - b. Her, Velez, and Lo left for Diamondz from her apartment around 10:30 p.m.<sup>4</sup> Diamondz was a predetermined choice, meaning everyone knew they were going to Diamondz when they left her apartment.<sup>5</sup> Soto drove to Diamondz and arrived around 11 p.m.<sup>6</sup>
  - c. Velez picked Diamondz: "Dennis said he wanted to go to the club[.]"<sup>7</sup> Velez wanted to rob someone at the club: "[Dennis] was trying to get some money."<sup>8</sup> Velez "said that he needed some money, that he wanted... [to] smoke a little weed."<sup>9</sup>
  - d. When they arrived at Diamondz, there were people in the parking lot,<sup>10</sup> so Velez instructed Soto to drive around the parking lot twice.<sup>11</sup> Velez saw a green

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<sup>1</sup> NT, Prelim. Hrg., 2/24/2011, at 16-17.

<sup>2</sup> *Id.* at 17.

<sup>3</sup> NT, Prelim. Hrg., 5/25/2011, at 4.

<sup>4</sup> *Id.* at 5.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 12.

<sup>7</sup> *Id.* at 6, 11 ("[Velez] said... let's go to the club, Diamondz.").

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 12.

<sup>10</sup> *Id.* at 12.

minivan, told Soto to park next to it, and then Velez and Lo (in that order) exited the car.<sup>12</sup> Before exiting, though, Velez told Soto to pull up the short hill on the right side of the club and wait for them.<sup>13</sup>

- e. Velez and Lo exited her car, in that order, but Soto said she did not see anything in their hands. Once they exited, both ran toward the green minivan.<sup>14</sup>
- f. After Velez and Lo exited the car, Soto pulled around the club up the short hill and parked adjacent to the right side of the club.<sup>15</sup> Soto could not see them from her vantage point.<sup>16</sup> After twenty minutes, she heard a gunshot; shortly after the gunshot, she saw Velez and Lo running toward her car; Velez had a shotgun, Lo a 9 mm handgun.<sup>17</sup>
- g. When they reached her car, they were “yelling and laughing and cursing each other.”<sup>18</sup> Velez, according to Soto, had roughly forty dollars (\$40) when he returned to her car.<sup>19</sup>
- h. Once in the car, Soto drove everyone back to her apartment where Velez and Lo argued with one another, both saying something to the effect that: “[I]t wasn’t supposed to go down – it was not supposed to happen like that.”<sup>20</sup>

81. Velez testified to the following:

- a. Velez and the Commonwealth did not have a “firm” promise in place in exchange for his testimony. However, if he testified truthfully the Commonwealth would agree to allow him to plead guilty to third-degree murder and robbery and to run the sentences concurrently.<sup>21</sup>
- b. Before September 7, 2007, Velez had never met Lo; he met him that night at his sister’s house.<sup>22</sup>
- c. Velez, Soto, and Lo went “riding around” that night looking for someone to rob because Velez needed money.<sup>23</sup>

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<sup>11</sup> *Id.* at 6, 13 (“... I parked the car. Then Dennis, he looked to the side. He was like, all right, go up the hill... we’re going to stay right here.”).

<sup>12</sup> *Id.* at 13.

<sup>13</sup> *Id.* at 7.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 7, 14.

<sup>16</sup> *Id.* at 14.

<sup>17</sup> *Id.* at 8.

<sup>18</sup> *Id.* at 8-9.

<sup>19</sup> *Id.* at 17.

<sup>20</sup> *Id.* at 9.

<sup>21</sup> *Id.* at 19-20.

<sup>22</sup> *Id.* at 21.

<sup>23</sup> *Id.* at 21.

- d. They went to Diamondz because that is where Soto drove to that night: “[W]e were just riding around and Amarilys pulled up behind the parking lot and everything went down after that.”<sup>24</sup> Velez said he did not know Diamondz was a gay bar.<sup>25</sup>
- e. Once parked at Diamondz, Velez denied instructing Soto to drive around the other side of the bar and park on the hill near the exit.<sup>26</sup> He also contradicted Soto’s testimony when he said Lo exited the car, but not him; rather, he stayed in the car with Soto as Lo approached the green minivan: “I stayed in the car like for a minute or two.”<sup>27</sup>
- f. Velez did not see Lo with a gun when he exited Soto’s car, but he (Velez) had a shotgun.<sup>28</sup>
- g. Velez exited the car—with his shotgun—when he saw Lo arguing and struggling with the victim: “They was struggling... with the gun.”<sup>29</sup> When asked why he brought his shotgun, Velez said:

Because [Lo] was in my car. He was with me. I didn’t know the victim was a female. She looked pretty big, and I thought he was in danger. You see his size. I thought he was in danger, so I came out of the car too.<sup>30</sup>

- h. When Velez approached the minivan, the victim was struggling with Lo trying to push away or grab his gun. Velez said he did not see Lo’s gun from the car, but only once he exited the car and walked toward him and the victim.<sup>31</sup> At this point, Velez pistol whipped the victim twice in the face with his shotgun.<sup>32</sup>
- i. After pistol whipping the victim, Velez said Lo “just turned around and shot her.”<sup>33</sup> Velez and Lo did not exchange words at this point either because, according to Velez, Lo ran back to the car while he (Velez) stayed next to the minivan: “I stood there. [Lo] ran. I stood. I put my gun down on the floor and told the victim, you should have listened to him.”<sup>34</sup>

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<sup>24</sup> *Id.* at 21, 27.

<sup>25</sup> *Id.* at 28.

<sup>26</sup> *Id.* at 21.

<sup>27</sup> *Id.* at 28; *see also id.* at 22.

<sup>28</sup> *Id.* at 22.

<sup>29</sup> *Id.* at 23.

<sup>30</sup> *Id.* at 22-23.

<sup>31</sup> *Id.* at 29, 30.

<sup>32</sup> *Id.* at 24.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 24-25.

- j. Soto's car, according to Velez, was still beside the minivan: "The car was right there. [Lo] ran back. He was barking at me, because I was screaming at him."<sup>35</sup>
- k. Velez said neither of them took money from the victim: "I didn't see [Lo] take nothing. I didn't rob that person... I didn't take nothing later... I stood there last. I didn't go through her pockets."<sup>36</sup>

#### **J. Velez's Guilty Plea**

- 82. On **September 15, 2011**, Velez pled guilty to third-degree murder and robbery. On **October 21, 2011**, after testifying against Bueno on September 19, 2011, the Court sentenced Velez to 20 to 40 years for the murder count and 5 to 10 years for the robbery count – to run concurrently.

#### **K. Bueno's Guilty Plea**

- 83. On **March 16, 2011**, the Commonwealth filed its notice of intent to seek the death penalty and identified two aggravating factors: (1) Bueno committed the killing in the perpetration of a felony, *see* 42 Pa. C.S. § 9711(d)(6); and (2) Bueno has a significant history of felony convictions involving the use of threat of violence to the person. *See* 42 Pa. C.S. § 9711(d)(9).
- 84. On **September 19, 2011**, Bueno's capital jury trial commenced. Matthew Potts represented Bueno at trial. On **September 20, 2011**, immediately before the Court was to charge the jury, Bueno changed his plea and pled guilty to first-degree murder to avert the death penalty; the Commonwealth agreed to a life without parole sentence.<sup>37</sup>
- 85. The prosecutor presented the factual basis of the plea as follows:

[I]n the early morning hours of September the 8<sup>th</sup>, 2007, Amarilys Soto drove Dennis Velez and Christian Bueno to the Diamonds [sic] Night Club for the purpose of committing a robbery.

When they got there, Christian Bueno and Dennis Velez got out of the car and approached the... green van, that had Debra Roberson in the car.

Ms. Robberson was there. Christian Bueno went into the car, opened the door, and a struggle ensued between the defendant and Ms. Robberson.

To end the struggle Dennis Velez... came over with a shotgun and hit Ms. Robberson in the face, knocking her backwards.

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<sup>35</sup> *Id.* at 25.

<sup>36</sup> *Id.*

<sup>37</sup> NT, Plea Colloquy, 9/20/2011, at 2.

At that point... Dennis Velez, cursed and questioned the defendant's manhood, at which point the defendant responded by pulling out a handgun, aiming at the victim's chest, and pulled the trigger, firing the gun, ultimately killing Debra Roberson [sic].<sup>38</sup>

86. The Court entered judgment immediately after the plea colloquy and sentenced Bueno to natural life.<sup>39</sup>

#### **L. Motion To Withdraw Guilty Plea**

87. On **September 30, 2011**, Bueno filed a motion to withdraw his guilty plea. On **October 10, 2011**, the Court held a hearing regarding the motion. Bueno testified at the hearing and said he filed the motion because: (1) he is innocent; and (2) Matthew Potts advised him to take the plea deal because he (Potts) believed the jury would convict and sentence him to death.<sup>40</sup> Specifically, to persuade Bueno to plead guilty, Potts asked Bueno's mother to encourage him to take the plea:

And [Potts] came in with my mom. My mom was crying. She was pleading, begging me, and that's why I took [the plea deal]."<sup>41</sup>  
Bueno added: "I took the plea because my mother told me to take the plea. Because my mother was scared, that's why I took the plea."<sup>42</sup>

88. The Court found Bueno's innocence claim unpersuasive: "Your claim of innocence is not genuine given what you said at your guilty plea."<sup>43</sup> Thus, the Court denied the motion, finding Bueno did not show a manifest injustice. The Court said: "I think that what happened was that you, too, not just your mother, but I think that you, too, were nervous about the death penalty part of the case and that's why you took the plea."<sup>44</sup>

#### **M. Direct Appeal**

89. Bueno appealed and the Court appointed Kimberly F. Makoul to serve as his appellate attorney. Makoul filed a timely opening brief, arguing the that the Court failed to address the six areas of "mandatory inquiry" set forth in Pa. R. Crim. P. 590. Specially, Makoul alleged the Court failed to appraise Bueno of the elements of first-degree murder, citing the following exchange between the Court and Bueno:

Court: Each crime has a number of elements to it. Did you lawyer explain to you the elements of the crime of murder?

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<sup>38</sup> *Id.* at 15-16.

<sup>39</sup> *Id.* at 19.

<sup>40</sup> NT, Motion to Withdraw Plea Hrg., 10/10/2011, at 4.

<sup>41</sup> *Id.* at 4.

<sup>42</sup> *Id.* at 7.

<sup>43</sup> *Id.* at 8.

<sup>44</sup> *Id.* at 8.

Bueno: Yes.<sup>45</sup>

90. On **August 7, 2012**, the Superior Court rejected Makoul's argument and affirmed Bueno's conviction (3039 EDA 2011).

#### **N. PCRA Proceedings**

91. On **January 9, 2014**, Bueno filed a timely *pro se* PCRA petition. In his *pro se* petition, Bueno summarized his primary issue as follows:

Counsel advised the petitioner to plead guilty, knowing that no factual basis for first-degree murder existed and that the evidentiary circumstances did not support a finding of any aggravating circumstances. The evidence mounted against the petitioner was constitutionally infirm, in which the factual basis does not support the plea of guilt or a sentence of Life Without Parole. Thus the petitioner is actually innocent of first-degree murder and his plea should be deemed involuntary due to counsel's deficiency.<sup>46</sup>

92. Bueno pled his primary issue in the following manner:

Trial Counsel Was Ineffective For (a) Advising The Petition To Plead Guilty To... First-Degree Murder Without A Factual Basis For Crimes of Which He is Actually Innocent and (b) For Urging The Acceptance of And Agreeing To An Unlawfully Induced Term That Could Only Result In a Sentence No Higher Than Mandatory Life.<sup>47</sup>

93. Bueno attached an affidavit from his mother, **Jackeline Moncayo**, to his *pro se* petition. In the affidavit, Moncayo said that, approximately two weeks before Bueno's trial, a man came to her front door and said if Bueno is not found guilty, he would "take care" of her and her family, including Bueno.<sup>48</sup>
94. On **February 4, 2014**, the Court appointed **Sean Poll** to serve as Bueno's PCRA attorney. On **March 12, 2014**, Poll filed a no-merits *Finley/Turner* brief and a motion to withdraw, which the Court granted on **May 1, 2014**. According to Poll, he "thoroughly reviewed" Bueno's "entire case file" before filing his no-merits brief.

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<sup>45</sup> NT, Plea Colloquy, 9/20/2011, at 6.

<sup>46</sup> *Pro se* PCRA, at 13.

<sup>47</sup> *Id.* at 14.

<sup>48</sup> *Id.*, Ex. D.

95. On **May 1, 2014**, the Court scheduled a PCRA hearing for **June 12, 2014**.
96. On **June 4, 2014**, Bueno retained undersigned counsel to serve as his PCRA attorney.
97. On **June 12, 2014**, the Court entered an Order requiring counsel to file Bueno's amended PCRA petition on or by **October 10, 2014** and scheduling an evidentiary hearing for **October 22, 2014**.
98. On **October 10, 2014**, counsel filed Bueno's amended petition. Counsel, however, needs additional discovery to adequately and meaningfully evaluate Bueno's state and federal claims. Counsel identifies the requested discovery *infra*, when he addresses the PCRA discovery standard.
99. On **September 9, 2014**, counsel received a signed affidavit from Manuel Gonzalez an inmate at SCI-Fayette (inmate # LF-9379, DOB: 9/30/1987). Gonzalez, like **Isiah Workman** and **Tyrone Davis**, had a conversation with Dennis Velez in 2011 where Velez said he shot Robberson, not Bueno. Gonzalez averred:

I, Manuel Gonzalez, was with Dennis Velez, AKA "Tito," at the Lihigh [sic] County Prison, on 2011 [sic]. We were both in the R.H.U. at 3C-1. I was in 26 cell and Dennis was in 36 cell. We begin talking about the neighborhood and clubs, then we stared [sic] talking about our cases. Dennis told me more than one time that, he killed a girl who was a dike in the parking lot of a club when he was trying to rob her. And that he didn't got [sic] charge [sic] for it because he blame some guy name Low Rider. He was saying that he don't care if somebody innocent go to jail as long as he don't. Or as long as they lower his time. Then he said how he Dennis Velez send people to Low Rider house to threaten them into forcing Low Rider to take the case or more people will be dying. I came forward with this information because [it] is not right that an innocent man is doing time for something he didn't do. And if a lawyer or anybody would have told me to testified [sic] to this [sic] facts, I would have.<sup>49</sup>

100. Based on counsel's research, he learned police arrested Gonzalez on June 10, 2010 and November 1, 2010 for possession (**CP-39-CR-0003448**) manufacturing (**CP-39-CR-0005335-2010**) charges, meaning Gonzalez was likely incarcerated at Lehigh County prison sometime in 2011 when he spoke with Dennis Velez. Gonzalez is currently serving a 20-40 year sentence for third-degree murder in connection with a October 22, 2011 murder that occurred in Lehigh County (**CP-39-CR-0001329-2012**).

### THE PCRA STATUTORY REQUIREMENTS

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<sup>49</sup> Ex. 1.

101. Bueno must meet the following conditions to be eligible for PCRA relief. *See* 42 Pa. C.S. § 9543(a)(1)-(a)(4).
- a. First, Bueno 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). Bueno stands convicted of first-degree murder and is serving a life prison sentence at SCI-Forest.
  - b. Second, Bueno must present a cognizable claim under 42 Pa. C.S. § 9543(a)(2). Here, Bueno alleges state and federal claims that: (1) undermine the truth-determining process; (2) establish ineffective assistance of counsel; (3) prove he was unlawfully induced to plead guilty to a crime he did not commit; and (4) demonstrate his sentence is illegal. *See* 42 Pa. C.S. §§ 9543(a)(2)(i), 9543(a)(2)(ii); 9543(a)(2)(iii); 9543(a)(2)(iv).
  - c. Third, Bueno must show his claims are not previously litigated or waived. *See* 42 Pa. C.S. §9543(a)(3). Here, all of Bueno’s claims focus on trial 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.

#### **WITHDRAWING AND CHALLENGING GUILTY PLEAS**

102. A guilty plea colloquy must include inquiry as to whether: (1) the defendant understood the nature of the charge to which he is pleading guilty; (2) there is a factual basis for the plea; (3) the defendant understands that he has the right to a jury trial; (4) the defendant understands that he is presumed innocent until he is found guilty; (5) the defendant is aware as to the permissible range of sentences; and (6) the defendant is aware that the judge is not bound by the terms of any plea agreement unless he accepts such agreements. *See Commonwealth v. Willis*, 369 A.2d 1189 (Pa. 1977).
103. Inquiry into these six areas is mandatory. *See Commonwealth v. Glaze*, 531 A.2d 796 (Pa. Super. 1987). In short, then, a guilty plea is a waiver of treasured rights (*e.g.*, right to a jury trial, to confront your accusers, to have the Commonwealth prove each element of the charged offense(s) beyond a reasonable doubt, to testify, etc.), and to be valid, the plea must be knowing, intelligent, and voluntary. *See* Pa. R. Crim. P. 590(A)(3); *Commonwealth v. Sauter*, 567 A.2d 707 (Pa. Super. 1989); *see also Hill v. Lockhart*, 474 U.S. 52, 56 (1985); *North Carolina v. Alford*, 400 U.S. 25, 31 (1970).
104. A defendant may move to withdraw his guilty plea at any time, but the standard for withdrawing his plea changes and becomes more daunting the longer he or she waits to file their motion to withdraw. Withdrawal requests made *before* sentencing are liberally granted. *See Commonwealth v. Turiano*, 601 A.2d 846, 854 (Pa. Super. 1992). Here, though, because Bueno filed his withdrawal request *after* sentencing, he had to demonstrate prejudice “on the order of manifest injustice” before withdrawal is justified. *Commonwealth v. Yeomans*, 24 A.3d 1044, 1046 (Pa. Super. 2011). A showing of

manifest injustice may be established “if the plea was entered into involuntarily, unknowingly, or unintelligently.” *Id.* Also, a defendant who pled guilty to avoid the death penalty, is not subject to a more lenient withdrawal standard. *See Commonwealth v. Barnes*, 687 A.2d 1163, 1167 (Pa. Super. 1996).

105. During appellate and collateral proceedings, after a defendant pleads guilty, his appellate rights are limited to challenging (1) the plea’s validity, (2) the sentence’s legality, or (3) the trial court’s jurisdiction. *See Commonwealth v. Flood*, 627 A.2d 1193, 1198 (Pa. Super. 1993). Here, because the Court had jurisdiction of Bueno’s case and Bueno’s life sentence is constitutional, Bueno can only challenged the plea’s validity at this point.
106. Bueno can prove his plea was invalid if he can prove Matthew Potts’s ineffectiveness wrongly induced him to plead guilty. In other words, ineffectiveness allegations “provide a basis for withdrawal of the plea only where there is a causal nexus between counsel’s ineffectiveness, if any, and an unknowing or involuntary plea.” *Commonwealth v. Flood*, 627 A.2d. at 1199. The issue, therefore, is whether Bueon was “misled or misinformed and acted under that misguided influence when entering the guilty plea.” *Id.*; *see also Commonwealth v. Broadwater*, 479 A.2d 526, 531 (Pa. Super. 1984).
107. Consequently, a “defendant is permitted to withdraw his guilty plea under the PCRA if ineffective assistance of counsel caused the defendant to enter an involuntary plea of guilty.” *Commonwealth v. Kersteter*, 877 A.2d 466, 468 (Pa. Super. 2005); *accord Commonwealth v. Hickman*, 799 A.2d 136, 141 (Pa. Super. 2002). Thus, a defendant who pled guilty may base his constitutional claims on 42 Pa. C.S. §§ 9543(a)(2)(ii) & (iii).
  - a. Under subsection (ii), the petitioner pleads and proves his conviction “result from... [i]neffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.” Importantly, despite the “undermining the truth-determining process” phrase, “all constitutionally-cognizable claims of ineffective assistance of counsel may be reviewed in a PCRA petition.” *Commonwealth ex rel. Dadario v. Goldberg*, 773 A.2d 126, 130 (Pa. 2001) (holding that the PCRA afforded relief for IAC claims where trial counsel misinformed a defendant, who pled guilty, of the sentencing range). In other words, “all constitutionally cognizable ineffectiveness claims are cognizable under the PCRA *without regard to innocence*, including cases involving guilty pleas.” *Commonwealth v. Lynch*, 820 A.2d 728, 732 (Pa. Super. 2003) (emphasis added).
  - b. Under subsection (iii), the petitioner pleads and proves his conviction “resulted from... [a] plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.”
108. Here, Bueno’s claims are based on subsection (ii) and (iii), meaning his Matthew Potts’s ineffectiveness resulted in his decision to plead guilty to a crime he did not commit.

## TRIAL COUNSEL INEFFECTIVENESS STANDARD

109. As noted, the only way Bueno can collaterally challenge his guilty plea is to prove Matthew Potts's ineffectiveness. In his *pro se* PCRA petition, Bueno challenges Potts's ineffectiveness. To prove Potts's ineffectiveness, Bueno must meet the following standard. The standard, as noted, is difficult to meet, especially if Bueno is not awarded discovery and investigative resources.
110. Bueno 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).
111. Although Bueno pled guilty, he still had a right to effective representation during the pre-plea and actual plea stages. *See Hill v. Lockhart*, 474 U.S. 52 (1985); *Commonwealth v. Lewis*, 63 A.3d 1274, 1280 (Pa. Super. 2013) ("The right to effective assistance of counsel during the plea bargaining process has been recognized for decades."). This is so because:

The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.

*Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

112. To prevail on an ineffectiveness claim, Bueno must demonstrate that 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.

113. 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.<sup>50</sup>
114. In the guilty plea context, therefore, entry of a guilty plea will serve as a basis for relief only if the ineffectiveness caused the defendant to enter an involuntary or unknowing plea. *See Commonwealth v. Allen*, 557 Pa. 135, 732 A.2d 582 (1999). A guilty plea’s voluntariness “depends on whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases.” *Commonwealth v. Lynch*, 820 A.2d 728, 733 (Pa. Super. 2003); *accord Hill v. Lockhart*, 474 U.S. at 56 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)); *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).
115. To prove prejudice, in the guilty plea context, the defendant must show it is reasonably probable that, but for counsel’s errors, he would not have pled guilty and would have gone to trial, or in Bueno’s case, continued with his trial. *See Hill v. Lockhart*, 474 U.S. at 59, 106 S.Ct. 366, 88 L.Ed.2d 203. The “reasonable probability test is not a stringent one.” *Commonwealth v. Hickman*, 799 A.2d 136, 141 (Pa. Super. 2002); *Cf. Nix v. Whiteside*, 475 U.S. 157, 175, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986) (reasonable probability standard less demanding than preponderance standard). As the U.S. Supreme Court said in *Hill v. Lockhart*, 474 U.S. at 59:

In many guilty plea cases, the “prejudice” inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error “prejudiced” the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led

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<sup>50</sup> 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 (1998).

counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial

116. Lastly, counsel “cannot be deemed ineffective for advising the tactical decision to avoid a possible death penalty through a plea bargain. Such advice had a reasonable basis designed to effectuate appellant's interests and does not invalidate a subsequent guilty plea.” *Commonwealth v. Flood*, 627 A.2d at 1202; accord *Brady v. United States*, 397 U.S. 742 (1970).

### **DUE PROCESS AND DISCOVERY IN THE POST-CONVICTION PROCESS**

117. The Fourteenth Amendment’s Due Process Clause provides that no State “shall... deprive any person of life, liberty, or property, without due process of Law ...” U.S. Const. amend. XIV, § 1. Article 1, Section 9 of the Pennsylvania Constitution states in part, “In all criminal prosecutions the accused ... [cannot] be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land.” Pa. Const. art. 1, § 9. The Pennsylvania Supreme Court has interpreted Article 1, Section 9 as the functional equivalent of the Federal Due Process Clause. *Commonwealth v. Kratsas*, 764 A.2d 20, 27 n. 5 (Pa. 2001).

118. Due process requires post-conviction proceedings to be fundamentally fair. See *Pennsylvania v. Finley*, 481 U.S. 551, 556-557 (1987); *Evitts v. Lucey*, 469 U.S. 387, 401 (1985); *Commonwealth v. Haag*, 809 A.2d 271, 283 (Pa. 2002).<sup>51</sup> In other words, “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 1264, 1273 (Pa. 2007). A petitioner can meaningfully present his claims only if he has: (1) effective counsel; (2) adequate discovery; and (3) investigative resources to develop the factual basis of his claims, particularly his ineffectiveness claims. All three are critically important, but the last two (discovery and investigation) are absolutely necessary because PCRA proceedings are aimed at addressing *off-the-record* claims.

119. In terms of effective counsel, Bueno has a rule-based right to effective PCRA counsel. See *Commonwealth v. Bennett*, 930 A.2d at 1273–1274; *Commonwealth v. Pursell*, 724 A.2d 293, 303 (Pa. 1999); *Commonwealth v. Albrecht*, 720 A.2d 693, 699–700 (Pa.

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<sup>51</sup>While States have no constitutional obligation to provide collateral (or post-conviction) relief, see *Pennsylvania v. Finley*, 481 U.S. at 551, 557 (1987), if a State creates a comprehensive post-conviction process that is “an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,” *Griffin v. Illinois*, 351 U.S. 12, 18 (1956), the procedures used in adjudicating post-conviction petitions “must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.” *Evitts v. Lucey*, 469 US 387, 393 (1985). Here, the post-conviction process is an “integral part” of Pennsylvania’s legal system for adjudicating a defendant’s guilt and innocence because post-conviction represents the first time a defendant can challenge trial counsel’s decision-making and advocacy (or lack thereof). See *Commonwealth v. Holmes*, 79 A.3d 562, 583 (Pa. 2013) (re-affirming *Commonwealth v. Grant*, 813 A.2d 726, 738 (Pa. 2002)), which holds that defendant may raise ineffectiveness claims only during PCRA proceedings).

1998). For counsel to be effective and to meaningfully investigate Bueno's case and evaluate his PCRA claims, however, he needs adequate discovery and investigative funds. Here, Bueno has a state statutory and federal constitutional right to discovery and investigative funds. *See infra*.

120. At this point, undersigned counsel ***cannot meaningfully evaluate*** Bueno's constitutional claims without additional discovery and investigative resources to interview witnesses relevant to Bueno's state and federal claims.

### **A. Requested Discovery**

121. Bueno respectfully requests the following discovery:

- a. The transcripts from Bueno's trial
- b. The (color) autopsy and crime scene photographs
  - i. According to Andrew Kehm's September 8, 2011 shooting reconstruction report, he reviewed the 336 digital photographs taken at the crime scene and autopsy.
- c. All Pennsylvania State Police ("PSP") forensic reports.
  - i. According to Andrew Kehm's September 8, 2011 shooting reconstruction report, he reviewed at least two PSP forensic reports. Counsel requests these and all other PSP forensic reports.
- d. In regards to Amarilys Soto's March 2, 2010 interview:
  - i. Detective John Buckwalter's (Allentown Police Department) notes taken during the interview and his post-interview report, if he wrote one.
- e. In regards to Amarilys Soto's March 3, 2010 interview:
  - i. Detective John Buckwalter's notes taken during the interview and his post-interview report, if he wrote one.
  - ii. Soto's video statement, a copy of which is in the BPD evidence room according to Detective DiLuzio's report.
- f. In regards to Dennis Velez's March 18, 2010 interview:
  - i. Detective John Buckwalter's notes taken during the interview and his post-interview report, if he wrote one.

- ii. Detective Joseph Vazquez's (Lehigh County DA's Office) notes taken during the interview and his post-interview report, if he wrote one.
- g. In regards to Dennis Velez's March 23, 2010 interview:
  - i. Detective John Buckwalter's notes taken during the interview and his post-interview report, if he wrote one.
  - ii. Detective Joseph Vazquez's notes taken during the interview and his post-interview report, if he wrote one.
  - iii. Velez's videotaped statement, a copy of which is in the BPD evidence room according to Detective DiLuzio's report.
- h. In regards to Dennis Velez's March 25, 2010, polygraph exam
  - i. Detective Thomas Fallstich's (Leigh County DA's Office) report regarding Velez's polygraph exam.
  - ii. Velez's videotaped statement, a copy of which is in the BPD evidence room according to Detective DiLuzio's report.
- i. In regards to Dennis Velez's April 7, 2010 interview:
  - i. Detective John Buckwalter's notes taken during the interview and his post-interview report, if he wrote one.
  - ii. Detective Joseph Vazquez's notes taken during the interview and his post-interview report, if he wrote one.
  - iii. Velez's videotaped statement, a copy of which is in the BPD evidence room according to Detective DiLuzio's report.
- j. Any and all reports, memos, or videotapes regarding the Commonwealth's interviews of Bueno's alibi witnesses: Pedro Medina, Jose Nunez, and Victor Villard.
  - i. On June 22, 2011, Potts provided Medina's, Nunez's, and Villard's phone numbers to ADA Kevin McCloskey.
  - ii. On September 16, 2011, Potts provided Medina's, Nunez's, and Villard's dates of birth to ADA McCloskey.
- k. The AFIS results regarding the unknown fingerprint lifted from the driver's window frame of the green minivan.

- i. According to detective Mouser’s (BPD) September 8, 2007 report, he “dusted the driver’s side door with black silk dusk and found numerous fingerprint smudges with no ridge detail... [and] **found a partial print on the upper part of the window frame.**” Detective Mouser “lifted the print using a fingerprint lifter and secured it with the other items taken.” Detective Mouser compared the unknown print to Robberson’s prints, but the print was not from Robberson, at which point he submitted the unknown print to AFIS.

## B. PCRA Discovery

### 1. State Statutory Right to Discovery

122. Rule 902(E)(1) requires Bueno 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 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).

123. Here, there are exception circumstances warranting discovery:

124. **First**, Bueno 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 review trial counsel’s decision-making, and to adequately plead and supplement Bueno’s current ineffectiveness claims, if trial counsel’s pre-plea investigation, decision-making, and plea hearing advocacy were objectively unreasonable.

125. **Second**, because Bueno 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 Bueno received effective trial representation. Thus, to meaningfully evaluate Bueno’s state and federal claims, counsel needs access to 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 Bueno’s constitutional claims, preventing him from adequately developing and presenting potentially meritorious ineffectiveness claims on his behalf.<sup>52</sup>

126. **Third**, beside the trial transcripts, each item of requested discovery, if it existed before trial, should have been disclosed before trial for the following reasons:

- a. On May 5, 2011, Matthew Potts filed a pre-trial discovery motion requesting the very discovery counsel is now requesting. Thus, if the requested discovery existed then, the Commonwealth had a duty to disclose it before trial. Moreover, if it had a duty to disclose before trial, that duty continues into PCRA proceedings. *See Commonwealth v. Williams*, 86 A.3d 771, 788 (Pa. 2012) (“*Brady* imposes an affirmative and **continuing** duty upon the government to disclose exculpatory 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).
- b. If the requested discovery existed before trial, Rule 573 required mandatory or discretionary discovery because each requested item was material to Potts’s defense preparation and requesting the item was reasonable because it was material to preparing and presenting a complete defense. *See* Pa. R. Crim. P. 573(B)(1)(a-6) and 573(B)(2)(a-d).

127. **Forth**, Bueno 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).

128. **Fifth**, the requested discovery will expedite the judicial process because counsel will not have to seek alternative avenues to obtain information 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.”).

129. **Sixth**, post-conviction is also the first time Bueno 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 US 419 (1995) (discussing *Brady* obligations). While the prosecutors in Bueno’s case are presumed to have “properly discharged their official duties,” *Bracy v. Gramley*, 520 US 899, 909

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<sup>52</sup> 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.*

(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

130. Bueno has a substantive liberty interest in obtaining relief based on ineffective assistance of counsel. Under 42 Pa. C.S. §9543(a)(2)(ii), Bueno 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.” 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.”).
131. Bueno liberty interest is entitled to due process protection, meaning “in some circumstances,” the protected liberty interest 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[.]”).
132. Here, to vindicate his *substantive* liberty interest of obtaining relief based on ineffective assistance of counsel, Bueno 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 Bueno’s *substantive* state and federal claims.

## INVESTIGATIVE FUNDING

133. It is in the PCRA court’s sound discretion as to whether it will appoint a petitioner funds to hire an investigator. See *Commonwealth v. Gelormo*, 475 A.2d 765, 768 (Pa. Super. 1984). To warrant such funds, the petitioner must demonstrate 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*, 553 Pa. 266, 719 A.2d 233, 241-42 (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.
134. A qualified PCRA investigator is “reasonably necessary” to develop facts relevant to the claims presented in Bueno’s PCRA petition and to make the post-conviction process fundamentally fair. See, *e.g.*, *Commonwealth v. Bennett*, 930 A.2d 1264, 1275 (Pa. 2009)

(“[D]ue process requires that the post conviction process be fundamentally fair.”); *Commonwealth v. Haag*, 809 A.2d at 283 (Pa. 2002). In short, providing adequate funds to hire a qualified investigator provides Bueno with the opportunity to meaningfully develop and present his PCRA claims. *See Commonwealth v. Bennett*, 930 A.2d at 1273 (“[P]etitioners must be given the opportunity for the presentation of claims at a meaningful time and in a meaningful manner.”).

135. Specifically, counsel must interview **Manuel Gonzalez**, but counsel, himself, cannot interview Gonzalez out of fear he will make himself a potential witness at an evidentiary hearing. Thus, counsel must hire an investigator to interview Manuel Gonzalez.

### **PRAYER FOR RELIEF**

136. **WHEREFORE**, Bueno requests the following relief:

- a. An order granting the requested discovery pursuant to Pa. R. Crim. P. 902(E).
- b. A copy of the trial transcripts, at the public’s expense, because, at this point, Bueno and his family has exhausted available funds to pay for the transcripts.
- c. A hearing on his discovery claims. A hearing is set for October 22, 2014. Counsel requests that this hearing be used to resolve Bueno’s outstanding discovery requests.
- d. The right to amend his PCRA petition, *see* Pa. R. Crim. P. 905(A), once Bueno obtains and reviews the requested discovery
- e. The right to seek additional discovery if the new facts are developed via investigation or discovery.
- f. The right to seek additional funding if, after reviewing the requested discovery and trial transcripts, counsel identifies additional “material” witnesses.
- g. And any other relief the Court deems necessary to protect and vindicate Bueno’s state and federal constitutional rights during his initial-review PCRA proceedings.

Respectfully submitted this the **10th day of October, 2014**.

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### **Certificate of Service**

On **October 3, 2014**, counsel mailed the foregoing *Amended PCRA Petition* to the following individuals or offices via standard USPS mail:

1. The Honorable Maria L. Dantos
  2. The Lehigh County District Attorney's Office, and
  3. The Lehigh County Court Administrator's Office
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