IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
Respondent,	:	CP-51-CR-0113571-1982
v.	:	Nos. 1357-1359 (1981)
MUMIA ABU-JAMAL,	:	
Petitioner.	:	

PETITIONER'S BRIEF IN OPPOSITION
TO THE COMMONWEALTH'S MOTION TO DISMISS

Petitioner, Mumia Abu-Jamal filed this PCRA Petition on December 23, 2021 based upon newly discovered evidence establishing that Mr. Abu-Jamal's trial was tainted by: (a) a failure to disclose material evidence discrediting the Commonwealth's two key witnesses in violation of the United States and Pennsylvania Constitutions; and (b) the discriminatory removal of prospective Black jurors in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). On June 28, 2022, the Commonwealth filed a Motion to Dismiss Mr. Abu-Jamal's petition. This brief is respectfully submitted in opposition to the Commonwealth's motion.

The Commonwealth's motion to dismiss this petition without a hearing alleges that the evidence described and presented in the petition does not establish either a *Brady* or a *Batson* claim. Commonwealth's Motion to Dismiss, 6/28/22 at 5. The motion also alleges that the petition does not specify the evidence that Mr. Jamal would present at a hearing that would demonstrate these constitutional claims. *Id.* Both of the Commonwealth's allegations are incorrect.

LEGAL STANDARDS

Pennsylvania Rule of Criminal Procedure 907 establishes that a court may only dismiss a PCRA petition without a hearing if "there is no genuine issue concerning any material fact." Pa. R. Crim. P. 907(1). The Comment accompanying Rule 907 states "the judge is permitted, pursuant to paragraph (1) to summarily dismiss a petition for post-conviction relief in certain limited cases." Pa. R. Crim. P. 907(1) (Comment) (emphasis supplied). The Comment then identifies those limited circumstances in which summary dismissal is permitted: if the petition is patently frivolous and without support in the record; if the facts alleged do not provide legal grounds for relief; or if there are no genuine issues of fact. *See id.*

Pennsylvania case law makes it clear that, if a PCRA petition is dismissed, appellate courts are to examine each dismissed claim to determine whether the PCRA court correctly determined that there were no genuine issues of fact. *Commonwealth v. Wah,* 42 A.3d 335, 338 (Pa. Super. 2012) (quoting *Commonwealth v. Hardcastle*, 549 Pa. 450, 454, 701 A.2d 541, 542– 543 (1997)) (holding, "it is the responsibility of the reviewing court on appeal to examine each issue raised in the PCRA petition in light of the record certified before it in order to determine if the PCRA court erred in its determination that there were no genuine issues of material fact in controversy and in denying relief without conducting an evidentiary hearing"). Dismissal of a PCRA petition when there are genuine issues of material fact requires reversal so that a hearing may be held. *Commonwealth v. Burton*, 121 A.3d 1063, 1074 (Pa. Super. 2015) (reversing dismissal and remanding for hearing due to petition "rais[ing] genuine issues of material fact that warrant development"); *Commonwealth v. Williams*, 244 A.3d 1281, 1286 (Pa. Super. 2021) ("petition raises material issues of fact and entitles [petitioner] to an evidentiary hearing"). Genuine issues of material fact exist when the claims raised in a petition are not "patently frivolous."

Commonwealth v. Granberry, 942 A.2d 903, 906 (Pa. Super. 1994) ("A post-conviction petition may not be summarily dismissed, however, as 'patently frivolous' when the facts alleged in the petition, if proven, would entitle the petitioner to relief").

The PCRA petition filed by Mr. Abu-Jamal in this case is certainly not "patently frivolous" such that summary dismissal would be appropriate. On the contrary, it presents meritorious claims based on the contents of newly disclosed documents from the district attorney office's own files. Since there is no dispute as to the authenticity of these documents, this Court has the authority to grant the petition without a hearing if it finds that the inferences raised by the content of these documents, justify relief as a matter of law. *See* Pa. R. Crim. P. 907(2). At a minimum, the petition herein and the Commonwealth's answer and motion reveal numerous disputes on material questions of fact for each of Mr. Abu-Jamal's claims, such that a hearing is warranted. These issues of fact are enumerated below in connection with each separate claim. *See infra.*

EVIDENCE BASED UPON INFERENCE

In its motion, the Commonwealth's basic assertion is that the evidence detailed in Mr. Abu-Jamal's petition does not conclusively establish certain key facts that support his legal claims. However, the Commonwealth overlooks the Petitioner's main point: that the evidence relied upon raises strong inferences of these facts.

For example, the petition submits an extraordinary letter signed by key trial witness Robert Chobert, which was withheld by the Commonwealth for over 35 years. The post-trial letter was addressed to and received by trial prosecutor Joseph McGill.[1] The letter stated in part, "I have been calling you to find out about the money own (sic) to me. So here is a letter finding out about

[1] As with the other pieces of documentary evidence that form the basis of Mr. Abu-Jamal's claims, the letter was in the files of the Philadelphia District Attorney's Office and turned over to defense counsel in January 2019, some 37 years after it was received by ADA McGill.

money." PCRA Petition, 12/23/21, Ex. B. This communication by the prosecution's star witness shortly after Mr. Abu-Jamal's trial raises an unmistakable inference that the witness expected to be paid for his testimony pursuant to an agreement or understanding with the prosecution. The fact that the letter does not specifically mention an agreement does not mean that an agreement cannot be inferred. In fact, the strongest inference to be drawn from a letter asking for money owed, is that there was a prior agreement or understanding for payment. That inference is even more compelling because, as explained below, the Commonwealth makes implausible assertions in arguing that the letter does not reveal such an agreement or understanding.

Inferences or circumstantial evidence of facts are as good as direct evidence. *See A.B. ex rel. Bennett v. Slippery Rock Area School Dist,* 906 A.2d 674, 678-79 (Pa. Commw. Ct. 2006) ("when properly proved, circumstantial evidence is entitled to as much weight as direct evidence"); *Commonwealth v. Holt,* 273 A.3d 514, 532 (Pa. 2022); *Commonwealth v. Chambers,* 599 A.2d 630, 635 (Pa. 1991) (stating that circumstantial evidence is sufficient to sustain a conviction).

Petitioner's *Brady* claims stem from newly discovered evidence of secret non-disclosed agreements or understandings for payment or leniency between two key witnesses and the Commonwealth. Naturally, the failure to disclose these agreements or understandings was improper. Pennsylvania courts have recognized that when it comes to improper or conspiratorial agreements, direct evidence is "rarely available," and is "almost always proven through circumstantial evidence." *Commonwealth v. Murphy,* 844 A.2d 1228, 1238 (Pa. 2004); *Commonwealth v. Johnson,* 985 A.2d 915, 920 (Pa. 2009); *Commonwealth v. Chambers,* 188 A.3d 400, 410 (Pa. 2018). Moreover, in *Commonwealth v. Strong*, 761 A.2d 1167, 1174 (Pa. 2000), after a PCRA hearing, the Court found that circumstantial evidence was sufficient to prove an agreement between a witness and the Commonwealth.

Petitioner's *Batson* claim is premised on the prosecutor's long withheld jury selection notes, which demonstrate that he was actively tracking the race information of many jurors at trial, and that he identified characteristics as important during jury selection but did not apply those characteristics in a race-neutral way. These new facts are precisely the kinds of facts that have been repeatedly relied upon by the United States Supreme Court to establish an inference that the prosecutor was influenced by race in the selection of one or more prospective jurors in violation of *Batson*. And this persuasive inference of discrimination is confirmed by the fact that, in its motion to dismiss, the Commonwealth resorts to the kinds of post-hoc justifications that the Supreme Court has repeatedly rejected.

In sum, the Commonwealth's allegations that Mr. Abu-Jamal has not established facts on the face of the petition to support his claims are based on its refusal to acknowledge the significance of the new evidence, which the Commonwealth concealed for many years, and the natural inferences to be drawn from that new evidence. The inferences raised by newly disclosed direct evidence are entitled to fair consideration. The Commonwealth offers alternative inferences that, in its view, may be drawn from the new evidence. The weaknesses and implausibility of these suggested inferences and how they raise factual disputes will be addressed below. Nevertheless, from the outset it should be recognized that this Court, not the Commonwealth, must decide which inferences to draw.

LEGAL BASES FOR RELIEF

I. The PCRA Petition States a Meritorious Claim for a *Brady* Violation Regarding the Testimony of Robert Chobert

A. Concealed Evidence and Questions of Fact

The Commonwealth does not dispute that on August 6, 1982, two months after the conclusion of Mr. Abu-Jamal's trial, ADA McGill received a letter from Robert Chobert, which said the following:

Mr. McGill
I have been calling you to find out about the money own [sic] to me.
So here is a letter, finding out about money. Do you need me to sign anything.
How long will it take to get it.
How was your week off good I hope.
Let me know soon, write me back
/s/ Robert Chobert

PCRA Petition, 12/23/21, Ex. B.

For over a generation, the Commonwealth concealed this disturbing letter showing that its principal witness expected to be paid in connection with his testimony. The content of this letter raises an undeniable inference that the witness expected to be paid for his testimony pursuant to an agreement or understanding with the prosecution. As stated in his petition, Mr. Chobert is clearly asking for money *owed* to him. PCRA Petition, 12/23/21, ¶¶ 11-12. This implies a previous understanding that he was to be paid. The letter is strong circumstantial evidence of an agreement for payment. The fact that Mr. Chobert mailed the letter shortly after trial and following unanswered phone calls even closer to the trial ("I have been calling you to find out about the money own [sic] to me"), confirms the inference that the expected payment was for Mr. Chobert's testimony. That inference is further substantiated by the lack of any mention of any reason for seeking reimbursement such as for lost wages or incidental expenses at a hotel, as now suggested by the Commonwealth. *See* Motion to Dismiss, 6/28/2022 at 45.

As an exhibit to his petition, Mr. Abu-Jamal provided a 2019 affidavit signed by ADA McGill that addresses Mr. Chobert's letter. Because Mr. McGill provided this affidavit in connection with Maureen Faulkner's Kings Bench Petition,[2] Mr. Abu-Jamal was on notice of what ADA McGill's response would be to the allegation that Mr. Chobert's letter implied that he was promised money and that this fact should have been disclosed. Mr. McGill's assertions were proffered to this Court by Petitioner as part of Petitioner's argument that the inferences suggested by ADA McGill are not supported by the record. *See* PCRA Petition, 12/23/21, ¶¶ 11-12.

In its motion to dismiss, the Commonwealth offers explanations for the letter that are contradicted by the record. The Commonwealth's reliance on these implausible assertions strengthens the inference that there was an agreement or understanding between Mr. Chobert and the prosecution in connection with his testimony against Mr. Abu-Jamal. Implausible explanations by a party seeking to dismiss the weight of circumstantial evidence not only fail to combat, but contribute to, the finding of a contested fact in the opposing party's favor. *See, e.g.*, *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (judges "may (and probably will)" find "implausible or fantastic justifications" to be "pretexts for purposeful discrimination"); *Com. v. Foreman*, 797 A.2d 1005, 1012-13 (Pa. Super. 2002) (lack of a credible explanation for possession of stolen goods permits inference that defendant knew they were stolen); *Reeves v. Sanderson Plumbing Prods*., 530 U.S. 133, 147 (2000) (it "is permissible for a trier of fact to infer the ultimate fact of [employment] discrimination from the falsity of the employer's explanation"); *Fuentes v. Perskie*, 32 F.3d 759, 764-65 (3d Cir. 1994) ("weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in a party's explanation of circumstantial evidence permits an inference that it is a

[2] The King's Bency Petition was denied by the Pennsylvania Supreme Court on December 15, 2020.

"post hoc fabrication"). At a minimum, the discrepancies between the inference urged by Petitioner and the inferences urged by the Commonwealth create important questions of fact for the court to resolve.

In particular, the Commonwealth argues in its motion that, according to Mr. McGill's affidavit, Mr. Chobert was asking to be reimbursed for time he lost from work due to his involvement in the case. Motion to Dismiss, 6/28/22 at 47. But Mr. Chobert's letter says nothing about lost pay. Nor does it provide any dollar figure or supporting papers regarding any lost income. *See* PCRA Petition, 12/23/21, Ex. B. Rather, the Commonwealth is asking this Court to make inferences that have no support in the record.

In fact, the Commonwealth's suggested inference is contradicted by the record. ADA McGill claims in his affidavit that:

> As with all witnesses who testify bravely and truthfully, **after** the trial I thanked him for his work as a witness and asked if I could help him in any way. Chobert asked me in response if he could be compensated for the time he lost from his taxi cab business. This request was made well after his testimony.

PCRA, Petition, 12/23/21, Ex. C ¶ 8 (emphasis in original).

The record from the 1995 PCRA hearing contradicts this claim in two ways. First, Mr. Chobert testified during the hearing that while he was living at a hotel during the trial, members of the police department took him to and from work. PCRA Tr. 8/15/95 at 9. Thus, contrary to Mr. McGill's assertion that Mr. Chobert's letter reflects a post-trial conversation in which he sought to be "compensated for the time he lost from his taxi cab business" during trial, the record shows that Mr. Chobert was not only working during trial, but police officers took him to and from work. Second, Mr. Chobert also testified that after he got off the witness stand at the trial, Mr. McGill

shook his hand, said thank you, PCRA Tr. 8/15/95 at 28, and that he "never talked to him [Mr. McGill] after the trial." *Id.* at 20.

In its motion, the Commonwealth speculates about two additional possible inferences that could, in its view, be drawn from Mr. Chobert's letter: "Mr. Chobert may have believed he was entitled to reimbursement for expenses incurred as a result of his hotel stay. He also may have been requesting payment of witness fees, which are expressly allowed by statute." Motion to Dismiss, 6/28/22 at 47 (emphasis supplied). The Commonwealth offers no support or rationales for these proposed inferences, which were nowhere mentioned in Mr. McGill's 2019 affidavit. They are implausible. One cannot imagine what sort of significant expenses Mr. Chobert incurred as a result of his hotel stay, especially with police officers in the next room. *See* PCRA Tr. 8/15/95 at 9. As to the suggestion that Mr. Chobert was requesting witness fees, the Commonwealth cites the relevant statute, 42 Pa. C.S. § 5903, but does not mention that these fees are limited to five dollars per day and Mr. Chobert only testified for one day, June 19, 1982. *Id.*

The inferences urged in Mr. McGill's affidavit and by the Commonwealth in its Motion are not plausible. At best (for the Commonwealth), they raise disputes of fact that the Court will need to resolve after a hearing.

B. Findings from Earlier Proceedings

The Commonwealth states that Mr. Chobert testified in the 1995 PCRA hearing that, "nobody influenced his trial testimony," Motion to Dismiss, 6/28/22 at 46, and suggests that this must be treated as a conclusively proven fact, especially because it was credited by the PCRA Court. *Id.* But in 1995, Mr. Chobert's letter asking for the money owed him was not disclosed to Mr. Abu-Jamal's counsel, so Mr. Chobert was not confronted with it at the hearing.[3] Nor did the

[3] The Commonwealth does not claim that Mr. Abu-Jamal's *Brady* claim is untimely. The Commonwealth does assert in a footnote, however, that because Mr. Chobert testified in the 1995

court know of its existence. The Commonwealth tries to bolster its argument by asserting that both the Pennsylvania Supreme Court and the federal district court upheld the PCRA Court's credibility finding. *Id.* But the Pennsylvania Supreme Court simply found that the PCRA Court's credibility finding was supported by the record, *see Commonwealth v. Abu-Jamal,* 720 A.2d 79, 96 (Pa. 1998), and the record did not include the recently disclosed letter asking for payment owed in connection with Mr. Chobert's testimony. Moreover, pursuant to the Federal Habeas Corpus Statute, 28 U.S.C. § 2254(d), the federal court found nothing more than that the credibility finding was not unreasonable. *See Abu-Jamal v. Horn,* 2001 WL 1609690 (E.D. Pa.) at *18. Plus, as with the Pennsylvania Supreme Court, the recently disclosed letter was not revealed to the federal court.

In addition, the Commonwealth's argument is unpersuasive because ultimately it does not matter whether Mr. Chobert characterized his testimony as not "influenced" by anyone. All that matters is that there was an undisclosed agreement or understanding, which was relevant to the jury's assessment of his credibility, and the jury was therefore entitled to know about it. When, "as here, the witness's credibility 'was an important issue in the case[,] evidence of any understanding or agreement'" of an inducement to testify "would be relevant to [the] witness's credibility and the jury was entitled to know if it.'" *Tassin v. Cain,* 517 F.3d 770, 778 (5th Cir. 2008) (quoting *Giglio v. United States*, 405 U.S. 450, 454-55 (1972)) (alterations omitted). This is because "'[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of

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PCRA hearing and had been interviewed by a defense investigator, Petitioner should explain why he did not learn of an alleged agreement back then. Motion to Dismiss, 6/28/22 at 42 n.16. This suggestion misses the point that the Commonwealth concealed the letter Mr. Chobert wrote making clear his understanding that he was owed money by the prosecution for his testimony. No one from Petitioner's team could have been expected to guess and then ask whether he had written to Mr. McGill asking for money after the trial; nor does the Commonwealth even assert that Mr. Chobert would have disclosed the existence of such a letter had he been asked.

guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.'" *Id.* at 781 (quoting *Napue v. Illinois* 360 U.S. 264 (1959)).

The Commonwealth also cites *Commonwealth v. Chmiel*, 30 A.3d 1111 (Pa. 2011), in support of its argument that Mr. Chobert's testimony in 1995 that his trial testimony was truthful must defeat Mr. Abu-Jamal's present *Brady* claim. Motion to Dismiss, 6/28/22 at 44. *Chmiel* does not support the Commonwealth's argument for two reasons.

First, the *Chmiel* Court was reviewing the denial of a PCRA petition after a hearing in the Court of Common Pleas. *Chmiel,* 30 A.3d at 1136 ("the PCRA court conducted hearings on the claims over an extended period.") Here, the Commonwealth seeks dismissal without a hearing. Second, the PCRA court and the Supreme Court upheld the denial of Chmiel's *Brady* claim due to lack of materiality, not because of a finding that there had not been any agreement. *See id.* at 1133 ("The [PCRA] court then opined that, 'assuming arguendo that the Commonwealth had provided the alleged considerations to Buffton in exchange for his testimony, [Appellant] has not established the requisite prejudice to prove a *Brady* violation.'").

In sum, Mr. Chobert's characterization of his own testimony as truthful is not controlling. The jury was deprived of evidence of a promise of payment that would have been part of its evaluation of Mr. Chobert's credibility, which means Mr. Abu-Jamal was denied his constitutional right to a fair trial. *See, e.g.*, *Giglio*, 405 U.S. at 454-55; *Napue*, 360 U.S. at 269. As discussed below, in sharp contrast to the facts in *Chmiel*, the promise or understanding of payment to Mr. Chobert was highly material under the *Brady* standard.

C. The Concealed Evidence Is Material

Mr. Abu-Jamal's petition lays out in detail why there is at least a reasonable probability that the disclosure of any offer of payment by the prosecution or the police to Mr. Chobert would

have affected the trial's outcome. PCRA Petition, 12/31/21, ¶¶ 17-29. Robert Chobert one of only two witnesses who claimed to have seen Mr. Abu-Jamal shoot Officer Faulkner. The credibility of the other, Cynthia White, was poor and her version of the events changed significantly over time. Thus, Mr. Chobert was the Commonwealth's most important witness.

The Commonwealth has asserted that two other witnesses corroborated Mr. Chobert's testimony. Motion to Dismiss, 6/28/22 at 47. As explained in the petition, this is not the case. PCRA Petition, 12/23/21, ¶¶ 23-25. Neither of the other witnesses claimed to have seen Mr. Abu-Jamal shoot Office Faulkner. And their testimony was inconsistent with Mr. Chobert's account in important respects. One of the most important discrepancies between the testimony of the other two witnesses and Mr. Chobert is that both of the other witnesses denied seeing Mr. Chobert's taxicab where he testified it was parked. *See* Trial Tr. 6/25/82 at 20; Trial Tr. 6/25/82 at 85-86.

The Commonwealth cites the Pennsylvania Supreme Court's opinion affirming the denial of Mr. Abu-Jamal's first PCRA petition, arguing that according to a footnote in that opinion, that Court "held" it was, "'unlikely' that attacks on Mr. Chobert's (and Ms. White's) credibility, 'either singularly or cumulatively, could compel a different verdict.'" Motion to Dismiss, 6/28/2022 at 47. This misrepresents what the Supreme Court said, however. The language quoted by the Commonwealth was not in any way a holding. Rather, it was contained in a footnote concerning an element of the test under a prior version of the PCRA, 42 Pa. C.S. § 9543(a)(2)(vi), concerning PCRA claims based on newly discovered exculpatory evidence. *See Commonwealth v. Abu-Jamal*, 720 A.2d 79, 94, 106-107 & n. 34 (Pa. 19998). In addition, contrary to the Commonwealth's recitation, the Supreme Court did not say that attacks on Mr. Chobert's or Ms. White's credibility would not compel a different verdict or undermine confidence in the outcome (the standard under *Brady*). Instead, the court said, it was "unlikely that any of the <u>above claims</u>" compel a different

verdict. *See Commonwealth v. Abu-Jamal*, 720 A.2d at n.34 (emphasis supplied). That Court was not considering a claim showing that Mr. Chobert's testimony could have been based on an undisclosed promise or understanding for money. The question of whether a promise for financial benefits would have been material impeachment evidence has never been decided by any court. And, while the Pennsylvania Supreme Court referred to the testimony of Mr. Scanlan and Mr. Magilton in that footnote, it certainly never held that the testimony from those witnesses—neither of whom even claimed to have seen the shooting—meant that new powerful evidence impeaching the prosecutor's principal eyewitness would have been immaterial.[4]

In *Kyles v. Whitley*, the Supreme Court held that omitted impeachment evidence established a reasonable probability of a different result, even though the remaining evidence was far stronger than here: the prosecution presented two other eyewitnesses whose testimony was not impeached by the new evidence. 514 U.S. 419, 434, 444 (1995) ("the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others, as we have said before."). *Kyles* is controlling here. The prosecution's failure to disclose a promise of payment to

[4] The Commonwealth refers briefly to an alleged admission by Mr. Abu-Jamal at the hospital after the shooting, *see* Motion to Dismiss, 6/28/22 at 47, but the Pennsylvania Supreme Court did not even mention that statement in this footnote. With good reason. Mr. Abu-Jamal's alleged hospital statement is highly dubious, as it was not reported by multiple police officers who were at the hospital. Indeed, at the 1995 PCRA hearing, police officer Gary Wakshul testified that he and his partner stood guard over Mr. Abu-Jamal in the hospital during the time that Mr. Abu-Jamal was alleged to have made this statement. PCRA Tr. 8/1/95 at 38. Officer Wakshul admitted that shortly thereafter, he reported to investigating detectives that Mr. Abu-Jamal made no comments. *Id.*

Mr. Chobert deprived Mr. Abu-Jamal of important impeachment evidence about the prosecution's most important witness. It is reasonably probable that this would have affected the trial's outcome.

II. The PCRA Petition States a Meritorious Claim for a *Brady* Violation Regarding Testimony of Cynthia White

A. Concealed Evidence and Questions of Fact

Cynthia White testified at trial that she was an eyewitness to the shooting. Because the prosecution recognized that there were credibility concerns with her testimony, Mr. McGill portrayed Robert Chobert as an exceptionally reliable witness. *See* PCRA Petition, 12/23/21, ¶ 18. Nevertheless, as one of just two eyewitnesses, Cynthia White's testimony was enormously important, and the prosecution sought to show she had no motive to lie, eliciting testimony from Ms. White that she was not promised leniency. The recently disclosed memoranda from the district attorney's files raise a strong inference that this was not true, thereby undermining the reliability of Mr. Abu-Jamal's conviction and requiring a new trial under *Brady v. Maryland*.

The Commonwealth begins its motion to dismiss this claim by saying that these memoranda themselves are not *Brady* material since they were all written after the trial concluded. They do however raise the inference that Cynthia White was promised or offered leniency in her pending cases before she testified. Thus, the memoranda reveal that *Brady* was violated since that agreement or understanding[5] was never disclosed.

The Commonwealth lists the newly disclosed memoranda and argues that none of them contains evidence of an agreement. Motion to Dismiss, 6/28/2022 at 49-52. These arguments will

[5] *Brady* jurisprudence is clear that an arrangement or general understanding of potential benefits in exchange for testimony must be disclosed even if there was not a firm promise. *See Tassin v. Cain*, 517 F.3d 770, 778 (5th Cir. 2008); *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Commonwealth v. Strong*, 761 A.2d 1167, 1171-72 (Pa. 2000).

be addressed below. To put these arguments in context, there are two overarching and important inconsistencies in the Commonwealth's reasoning:

(1) Mr. McGill states in his affidavit that after trial, he followed Ms. White's pending Philadelphia cases in order to "track her progress," and "make the assigned prosecutor aware of her courageous participation in the Jamal case." PCRA Petition, 12/23/21, Ex. C ¶ 8. Thus, by ADA McGill's own account, he wanted to make other prosecutors aware of her testimony against Mr. Abu-Jamal, in order to put in a good word for her, or in other words, pass along to the Municipal Court ADA information that would weigh in her favor. But, at the same time, the Commonwealth argues that the December 6, 1982 memorandum bolsters its claim of no agreements because the memo states that, despite Ms. White's testimony against Mr. Abu-Jamal, the prostitution cases against her should be "vigorously prosecuted." *See* Motion to Dismiss, 6/28/2022 at 52. In other words, while Mr. McGill acknowledged that he was tracking Ms. White's cases and seeking to put in a good word for her, the Commonwealth cites the December 1982 memorandum for the assertion that the cases against Ms. White were to be "vigorously prosecuted." The natural inference explaining this inconsistency is that the line about prosecuting Cynthia White for the crime of prostitution "vigorously," was deliberately written in an official memo in order to back up the representation that Ms. White was offered no deals in exchange for her testimony.[6] Notably, that very same memo directs the prosecuting Assistant to "before proceeding to trial please see A.D.A. Joseph McGill, in the Homicide Unit, and discuss this case." *See* PCRA Petition, 12/23/21, Ex. D (second page).

[6] This brings to mind the Shakespearean line about how someone "doth protest too much." *See* WILLIAM SHAKESPEARE, HAMLET, Act 3, Scene 2.

(2) The second major inconsistency is that on the one hand, the Commonwealth argues that since Ms. White's pending charges were all for the crime of prostitution, and that the crime of prostitution in Philadelphia never results in jail time, she had no incentive to cooperate with the prosecution simply for leniency in those charges.[7] Motion to Dismiss, 6/28/2022 at 59. At the same time, the Commonwealth describes its internal memoranda, which document the path of Ms. White's pending prostitution cases, as evidence that the Commonwealth was determined in its efforts to bring her to justice by having her brought to Philadelphia from Massachusetts as soon as possible and in time to avoid dismissal of these prostitution cases due to speedy trial problems. *See* Motion to Dismiss, 6/28/2022 at 56-57. The clear inference from these memoranda is that Ms. White was facing significant legal problems, and before and during Mr. Abu-Jamal's trial there were conversations and assurances between Ms. White and the prosecution about efforts that would be made to help her dispose of her pending cases with the least amount of difficulty for her. Even if Philadelphia rarely sentenced people to jail for prostitution offenses, Ms. White had fairly serious criminal legal problems at the time of Mr. Abu-Jamal's trial. She was serving time in Massachusetts for violating terms of her probation and already had an extensive criminal record with at least 38 prior arrests, along with at least one open bench warrant in Philadelphia. She may very well have been worried about her open cases with failures to appear. In fact, the September 15, 1982 letter from the Philadelphia D.A's Deputy for Intergovernmental Affairs to the Massachusetts facility in which Ms. White was serving jail time, reveals that this Deputy spoke with Ms. White while she was in Philadelphia to testify against Mr. Abu-Jamal and that Ms. White told the Deputy that she would waive any waiting period she was entitled to before being returned

[7] The Commonwealth's sole support for this assertion is Judge Sabo's offhand remark to that effect at a sidebar during Mr. Abu-Jamal's trial. Motion to Dismiss, 6/28/2022 at 59.

to Philadelphia a second time from Massachusetts. PCRA Petition, 12/23/21, Ex. D (first page). This also suggests that Ms. White wanted to return to Philadelphia as soon as possible and that the efforts to move up her Philadelphia trial date(s) and expedite her discharge from Massachusetts were to accommodate her wishes.

With regard to the individual memoranda, Mr. Abu-Jamal discusses the inferences of a pre-trial understanding of leniency they raise in his Petition. PCRA Petition, 12/23/21, ¶¶ 31-38. Petitioner would like to briefly address the Commonwealth's proposed inferences.

August 31, 1982 Memorandum:[8] While this short memo merely reports that Cynthia White was transported that day from Massachusetts to Philadelphia, the memo is just addressed to Joe McGill. Unless homicide prosecutor Mr. McGill was looking after Ms. White's pending cases, there would be no reason to specially inform him of this two months after the completion of her trial testimony.

September 15, 1982 Letter: This was from the Philadelphia D.A's Deputy for Intergovernmental Affairs to the Massachusetts facility in which Ms. White was serving jail time. It reveals that this Deputy spoke with Ms. White while she was in Philadelphia to testify against Mr. Abu-Jamal and that Ms. White told the Deputy that she would waive any waiting period she was entitled to before being returned to Philadelphia a second time from Massachusetts. PCRA Petition, 12/23/21, Ex. D (first page). As discussed above, Ms. White seemed to want to be brought back to Philadelphia as soon as possible.

November 1, 1982 Memorandum: This memo from the DA's Extraditions Unit reports to the Municipal Court Unit that Ms. White's cases were continued to January 14, 1983. It concludes by saying, "Please have the assigned ADA contact Joe McGill prior to trial." The message that Ms.

[8] All of the documents listed in this section are part of Exhibit D in the Petition.

White should not be tried until the line prosecutor speaks with ADA McGill clearly implies that Mr. McGill has instructions to deliver, even beyond putting in a favorable word for her.

November 22, 1982 Memorandum: This memo informs the DA's Municipal Court Unit that a witness in the Cynthia White case had appeared to testify and was informed by the bailiff that there, "is no need for him to come back." This makes no sense since the case was continued until January 1983, unless the bailiff was informed that even in January, the cases would be resolved without a trial. The reasonable inference is that the bailiff received information from the prosecutor about this, as it is highly unlikely that a bailiff would excuse a witness from further appearances on their own. Furthermore, the memo advises the Municipal Court Unit Chief that the Cynthia White file "is currently signed out to ADA Joseph McGill of the Homicide Unit." The Commonwealth argues that it was perfectly logical that ADA McGill would have Ms. White's file in his office since "she was questioned about those cases at defendant's trial." Motion to Dismiss, 6/28/2022 at 54 n. 22. This argument is not logical however, since Mr. Abu-Jamal's trial had been completed 5 months earlier.

December 6, 1982: Once again, this memo from the Chief of the Municipal Court Unit to the ADA handling Ms. White's cases concludes with an instruction to see ADA McGill, "before proceeding to trial" and "discuss this case." *See also* discussion regarding the November 1, 1982 memorandum above.

April 28, 1983 Memorandum: The Commonwealth argues that this memo, which reports the final disposition of Ms. White's cases, proves that even though the cases against her were dismissed, the dismissal was against the wishes of the prosecutor. Motion to Dismiss, 6/28/2022 at 54. It must be noted that this memo written by the prosecutor in the courtroom was addressed not to his supervisor or chief, but solely to ADA McGill. The ADA reports to Mr. McGill on the efforts he

made to prevent dismissal. This appears to be communicating to Mr. McGill that the record was protected and that the DA's Office would not be open to the charge that they were helping Ms. White. Additionally, despite what the prosecuting attorney may have said on the record, it seems odd that a defendant's cases would be dismissed over the DA's objection with the defendant having failed to appear. This outcome raises the inference that, off-the-record, the prosecutor gave a different impression to the court.[9] The Commonwealth also cites *Commonwealth v. Kinard*, 95 A.3d 279 (Pa. Super. 2014), and *Commonwealth v. Spotz,* 896 A.2d 1191 (Pa. 2006), for the proposition that a favorable disposition of a witness' case or a letter of support after testimony for the prosecution alone does not signify an agreement. Motion to Dismiss, 6/28/2022 at 56. But the recently disclosed memoranda contain numerous facts raising an inference of an agreement or understanding—and the prosecution's effort to create a paper record that departed from what was actually happening—far beyond the final dismissal of Ms. White's cases. Moreover, Kinard and Spotz were both granted an evidentiary hearing on their PCRA *Brady* claims of an agreement, and the petitions were denied only after a hearing. *See Kinard*, 95 A.3d at 290; *Spotz,* 896 A.2d at 1206.

B. This Claim Is Meritorious and Should Not be Dismissed Without a Hearing

The Commonwealth asserts that the newly disclosed documents regarding Ms. White's cases prove that she was not promised lenient treatment in exchange for her trial testimony. Motion to Dismiss, 6/28/2022 at 52. This assertion is based upon the fact that some of the documents state that no agreement was made. *See id.* If, as Petitioner has explained, the documents suggest an effort to help Ms. White with her cases, but conceal that undisclosed arrangement, one would expect them to deny an agreement or favors. And, to reiterate, the documents go out of their

[9] Upon information and belief, ADA Weissberg, Ms. White's prosecutor that day, has been deceased since 1999.

way to suggest that Ms. White should be vigorously prosecuted even while they also make clear that line prosecutors handling Ms. White's case had to consult Mr. McGill—a prosecutor in a different division of the office who handled Mr. Abu-Jamal's trial—and even though Mr. McGill himself admits he tracked Ms. White's cases

There are thus multiple issues of fact related to the newly disclosed documents. The explanations for the major inconsistencies listed above alone require a factual resolution by the Court in addition to the other inferences suggested in these memoranda and letters. Findings regarding what the contents of these memoranda show are for the Court to make after a full hearing.

In support of the Commonwealth's Motion to Dismiss Without a Hearing, it cites three cases, *Commonwealth v. Reid,* 259 A.2d 395 (Pa. 2006); *Commonwealth v. Busanet,* 54 A.3d 35 (Pa. 2012); and *Commonwealth v. Clark*, 961 A.2d 80 (Pa. 2008). Motion to Dismiss, 6/28/2022 at 59. The Commonwealth argues that in these cases as in Petitioner's case, the "record establishes that there was no agreement or understanding between the Commonwealth and Ms. White regarding her prostitution cases," *id.* and therefore, his claim "necessarily fails." *Id.* However, the record in each of those cases included evidence heard at a PCRA hearing. *See Reid*, 259 A.2d at 423; *Busanet,* 54 A.3d at 42 (mentioning that the PCRA court held several evidentiary hearings) and *Clark,* 961 A.2d at 89-90. None supports the dismissal of this claim without a hearing.

C. The Concealed Evidence Was Material

Mr. Abu-Jamal's petition lays out in detail why there is at least a reasonable probability that the disclosure of an agreement for leniency between the prosecution and Cynthia White would have affected the trial's outcome. PCRA Petition, 12/23/31, ¶¶ 43-44. Ms. White's criminal history was disclosed to the jury. Yet, the incentive to testify stemming from obtaining a way to avoid prosecution on pending charges would have constituted a different category of impeachment. *See Banks*, 540 U.S. 668, 702 (2004) (rejecting State's argument that evidence key witness was a paid

informant was "merely cumulative" to other categories of impeachment that had been presented at trial).

Significantly, the prosecutor made it clear to the judge and the jury that whether or not Ms. White had been offered leniency on her pending cases in exchange for her testimony was a highly significant factor in an assessment of her credibility. After ADA McGill informed the court and defense counsel that "there has been no agreement in reference to her charges," Tr. 6/21/82 at 72, he began his direct examination of this key witness by eliciting testimony that no deals or agreements had been made with regard to her pending cases, *id*. at 81-82, or with the Massachusetts court system. *Id.* at 84-85. This line of questioning elevated the importance of this issue in the eyes of the jury. The materiality of the misinformation is substantial. The United States Supreme Court made this exact point in finding a due process violation in *Napue v. Illinois*, 360 U.S. 264, 270-271 (1959), emphasizing "that the Assistant State's Attorney himself thought it important to establish before the jury that no official source had promised [the relevant witness] consideration is made clear by his redirect examination."

Cynthia White was not a witness whose credibility was so strong that a promise of leniency was unlikely to put a dent in it. Contrary to the Commonwealth's assertion that her accounts of the night of the shooting were consistent, Motion to Dismiss, 6/28/2022 at 61, they were not. Prior to trial, Ms. White signed three statements for the police on three different days about the shooting—each significantly different from the others. Examples of the inconsistencies include contradictory statements about whether: there was an altercation between Officer Faulkner and Mr. Abu-Jamal's brother; how many shots were fired before Officer Faulkner fell; and the relative heights of the Officer, the shooter and Mr. Abu-Jamal's brother. *See* Tr. 6/21/82 at 159-90. She was confronted with these at trial. *See id.* Furthermore, witness Michael Scanlan who saw the shooting, but could

not identify the shooter, testified that he didn't see anyone else there, *See* Tr. 6/25/82 at 21, casting doubt on whether Ms. White was actually there or where she said she was standing.

As with the materiality of the undisclosed letter from Robert Chobert, the Commonwealth cites the Pennsylvania Supreme Court's 1998 opinion arguing that according to a footnote in that opinion, that Court "held" it was, "'unlikely' that attacks on Mr. Chobert's (and Ms. White's) credibility, 'either singularly or cumulatively, could compel a different verdict.'" Motion to Dismiss, 6/28/2022 at 47. But as explained above in Petitioner's Chobert *Brady* argument, that argument mischaracterizes the relevant footnote in the Pennsylvania Supreme Court's opinion, which was not part of the Court's holding, addressed a different legal issue, and was specifically focused on the specific "claims" then before the Court. The Pennsylvania Supreme Court was not aware of and thus not addressing the powerful new evidence submitted in this petition, or the *Brady* violations established by this new evidence.

The disclosure to the jury of an agreement or understanding with Ms. White for leniency would have created a reasonable probability of a different outcome. Yes, Ms. White was confronted with her prior record and even her inconsistent statements. And her numerous, "I don't remember" answers, Tr. 6/21/82 at 115 et. seq., probably cast doubt on her credibility. However, the disclosure of a leniency agreement in four pending cases against a person with a serious criminal history would have supplied an answer to the important question "why would she lie?" An agreement would not have been a cumulative form of impeachment, but rather a key piece of information the jury could have used to assess her credibility. The prosecution's failure to disclose it is therefore material. *See, e.g.*, *Tassin*, 517 F.3d at 781; *Giglio*, 405 U.S. at 454-55; *Napue*, 360 U.S. at 269.

III. Evidence Withheld by the Commonwealth for over 35 Years Establishes a *Batson* Violation and, at a Minimum, Requires an Evidentiary Hearing.

Mr. Abu-Jamal's *Batson* claim is premised on the prosecutor's jury selection notes, which the Commonwealth withheld for over 35 years. Those notes show that: (a) the trial prosecutor in this case actively tracked jurors by race during selection, and (b) he deemed certain characteristics important for selecting jurors but struck prospective Black jurors who were more favorable with respect to those criteria than non-Black panelists whom he did not strike. *See* PCRA Petition, 12/23/21, ¶¶ 57-70. This new evidence establishes a *Batson* violation by a preponderance of the evidence. At a minimum, it creates material disputed facts about whether the prosecutor was influenced by race in striking at least one prospective juror, thereby requiring an evidentiary hearing. *See* Pa. R. Crim. P. 907; *Com. v. Williams*, 244 A.3d 1281, 1286 (Pa. Super. 2021).

The Commonwealth moves to dismiss this claim, but its arguments are premised on mischaracterizations of the record and a failure to apply controlling precedent. Because Mr. Abu-Jamal's claim is based on newly discovered evidence from the prosecution's own files, it is timely and not waived. On the merits, the Commonwealth disregards the reasons the trial prosecutor offered for tracking jurors by race in a recent affidavit, and instead proposes a new theory for why the prosecutor did so. But the Supreme Court has repeatedly admonished that such post-hoc justifications are irrelevant to the *Batson* inquiry. And the Commonwealth's new theory does not, in any event, dispel the inference of discrimination. Further, the Commonwealth simply ignores the new evidence showing that the prosecutor identified characteristics that he deemed important in selecting jurors, but then applied them in a racially disparate manner. Its motion to dismiss this claim should be denied.

A. Mr. Abu-Jamal's *Batson* Claim Rests on New Evidence and Is Timely.

Mr. Abu-Jamal raised this new *Batson* claim within one year (indeed, within 60 days) of his first opportunity to do so after the Commonwealth finally disclosed the prosecutor's jury selection notes. *See* PCRA Petition, 12/23/21, ¶¶ 7-8. The claim is therefore timely for two independent reasons. First, Mr. Abu-Jamal's failure to raise the claim previously resulted from "interference by government officials . . . in violation of the Constitution or laws" of the Commonwealth or the United States. 42 Pa. C.S. § 9545(b)(ii); *see also Commonwealth v. Howard*, 788 A.2d 351, 355 (Pa. 2002) (recognizing that the governmental interference exception applies when the district attorney fails to disclose documents, if the petitioner "identif[ies] a specific claim that he was unable to discover due to the District Attorney's conduct"). Second, "the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence." 42 Pa. C.S. § 9545(b)(iii).

The Commonwealth disagrees, claiming that neither exception applies because—even though the Commonwealth withheld this evidence establishing a *Batson* violation for over 35 years—in its view, Mr. Abu-Jamal should have discovered that evidence earlier. *See* Motion to Dismiss, 6/28/22 at 62-65. The Commonwealth thereby asks this Court to adopt a "rule . . . declaring 'prosecutor may hide, defendant must seek,'" a rule that the United States Supreme Court rejected in a similar case as "not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 694 (2004).

It is troubling that the Commonwealth urges the Court to adopt a rule that the Supreme Court has rejected as contrary to our fundamental constitutional principles. It is especially troubling that the Commonwealth seeks to foreclose consideration of Mr. Abu-Jamal's jury discrimination claim: a claim that implicates not only Mr. Abu-Jamal's constitutional right to a

fair trial by an impartial jury, but that also implicates the constitutional rights of excluded jurors, public confidence in the rule of law, and "the very integrity of the courts." *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005). As the Pennsylvania Supreme Court has emphasized, "'the harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community," as the purposeful exclusion of "'black persons from our juries undermine[s] public confidence in the fairness of our system of justice.'" *Commonwealth v. Basemore*, 744 A.2d 717, 733-34 (2000) (quoting *Batson v. Kentucky*, 476 U.S. 79, 87-88 (1986)). These considerations weigh in favor of careful consideration of a *Batson* claim based on a "full and complete record." *Id*.

Nor does the Commonwealth cite a single case where a court held that a post-conviction petitioner was not diligent for not previously discovering evidence known only to the prosecution or police. In the PCRA context specifically, the Pennsylvania Supreme Court has held that the statute of limitations clock for claims premised on previously withheld evidence from the Commonwealth's own files, and not available through other sources, does not begin running until the Commonwealth discloses the relevant files. *See Commonwealth v. Lambert*, 884 A.2d 848, 852 (Pa. 2005) (holding that a claim premised on documents contained within an archived police file, which revealed facts not previously known to petitioner, was timely when petitioner raised it in a timely manner after the files were first disclosed to him); *see also Basemore*, 744 A.2d at 733-34 (recognizing that the Commonwealth's prior non-disclosure of the McMahon tape describing discriminatory practices, if proven, could defeat the Commonwealth's argument that a *Batson* claim was waived because it had not been litigated previously, and remanding for an evidentiary hearing); *Commonwealth v. Basemore*, 2001 WL 36125302 (Pa. Com. Pl. Dec. 19, 2001) (on remand, finding *Batson* violation).

The Commonwealth nonetheless asserts that Mr. Abu-Jamal should have discovered this evidence by calling Mr. McGill as a witness during his first PCRA petition and asking him about his jury selection process. *See* Motion to Dismiss, 6/28/22 at 63. That assertion is inconsistent with the Pennsylvania Supreme Court's decision in *Lambert*, which found a claim based on evidence previously withheld from the Commonwealth's own files timely without any consideration of whether petitioner could have called police officers or the prosecutor to testify earlier. *See Lambert*, 884 A.2d at 852. Moreover, at the time of the PCRA hearing, Mr. Abu-Jamal had no notice that the prosecutor had made notes during jury selection probative of discrimination. A PCRA petitioner does not have an obligation to call his trial prosecutor to the stand to blindly ask questions that the petitioner has no hint would lead to fruitful answers. If the rule were different, for preservation purposes, every PCRA hearing would result in lengthy fishing expeditions by PCRA petitioners seeking to cross-examine their former prosecutors.

Indeed, while the Commonwealth now emphasizes that Mr. Abu-Jamal subpoenaed Mr. McGill but ultimately did not call him to testify at the first PCRA hearing, *see* Motion to Dismiss, 6/28/22 at 63, it ignores which facts were known to Mr. Abu-Jamal's counsel at that time—and which facts were not known because the Commonwealth was concealing them. The record makes clear that Mr. Abu-Jamal's counsel intended to call Mr. McGill to testify because counsel knew that Mr. McGill had struck more Black panelists than had been indicated by the direct appeal record. Once the Commonwealth agreed to a stipulation about the race of the relevant jurors, Mr. Abu-Jamal's counsel explained that Mr. McGill's testimony was not necessary. *See* Tr. 8/4/95 at 119-20 (Mr. Abu-Jama's counsel explaining that "Mr. McGill was going to be called . . . to ask him questions pertaining to the jurors he struck and the representations made" on direct appeal; in

light of the "stipulation in the record as of . . . yesterday" concerning the race of the jurors whose race was not disclosed on direct appeal, "we don't need the testimony of Mr. McGill").

Because the Commonwealth withheld the relevant information, Mr. Abu-Jamal's counsel had no reason to know he should call Mr. McGill to ask him about tracking jurors by race during juror selection or of the racially disparate application of his own jury selection criteria. In fact, Mr. Abu-Jamal repeatedly sought discovery during PCRA proceedings, including of the prosecution's file and with respect to his *Batson* claims. *See Commonwealth v. Abu-Jamal*, 720 A.2d 79, 85-86 (Pa. 1998) (noting that Mr. Abu-Jamal repeatedly sought discovery during the first PCRA proceedings, including discovery of the entire prosecution files, and specifically with respect to *Batson*). But, the Commonwealth opposed Mr. Abu-Jamal's discovery requests, insisting "[w]e are not going to be providing any discovery." Tr. 7/12/95 at 89. And the courts denied Mr. Abu-Jamal's discovery requests. *See* 720 A.2d at 85-86 (describing opinions of Court of Common Pleas and prior opinion of the Pennsylvania Supreme Court).

In sum, the Commonwealth refused to provide Mr. Abu-Jamal the discovery he would have needed to know he should have asked Mr. McGill about his jury selection notes, but now blames Mr. Abu-Jamal for not exploring that topic earlier. When the Commonwealth's PCRA attorney said during the 1995 hearing that Mr. Abu-Jamal's counsel "'should be given full latitude'" to question Mr. McGill, it was "'so this claim could be litigated once and for all, <u>whatever their additional evidence is.</u>'" Motion to Dismiss, 6/28/22 at 63 (quoting Tr. 7/31/95 at 22) (emphasis added). Because the Commonwealth withheld the key evidence in the prosecutor's jury selection notes, the only "additional evidence" Mr. Abu-Jamal's attorneys had access to at that time was the race of certain panelists whose race was omitted from the direct appeal record. And, to underscore the point, the Commonwealth's PCRA attorney repeatedly argued that Mr. McGill could only be

called about matters where Mr. Abu-Jamal's counsel had specifically identified the subject matter they intended to ask him about. At a hearing just days earlier, the Commonwealth's attorney had insisted that Mr. Abu-Jamal's counsel provide "an oral offer of proof" as "to what Mr. McGill's testimony is going to be," and referred to a motion the Commonwealth had filed to preclude Mr. McGill's testimony unless Mr. Abu-Jamal's counsel could provide such an offer of proof. Tr. 7/26/95 at 223; *see id.* at 226. The Court agreed with the Commonwealth, telling Mr. Abu-Jamal's counsel "if you want to call him [Mr. McGill] as a witness, tell him why you are calling him," as Mr. McGill would have to be "prepared to come in here with whatever things you want to bring out." *Id.* at 227. Counsel for the Commonwealth then emphasized that even Mr. Abu-Jamal's counsel's statement that he would ask Mr. McGill about matters of public record from the trial was not sufficient notice, and that he needed a more specific offer of proof. *See id*. at 229. In sum, Mr. Abu-Jamal's counsel had to provide notice about the subjects they wanted to call Mr. McGill about; counsel could not have simply called Mr. McGill to conduct the fishing expedition the Commonwealth now suggests they should have.

Curiously, the Commonwealth also highlights that it refused to provide this evidence when Mr. Abu-Jamal sought discovery of it during federal habeas proceedings. *See* Motion to Dismiss, 6/28/22 at 64. This simply confirms that, notwithstanding his due diligence, Mr. Abu-Jamal was unable to obtain this evidence before the Commonwealth disclosed it in 2019. And while the federal district court denied Mr. Abu-Jamal's motion for discovery into the prosecutor's jury selection notes, that was because, under federal law, a habeas petitioner needs to present "'good cause that the evidence sought would lead to relevant evidence'" supporting the claims in the petition. *Abu-Jamal v. Horn*, 2001 WL 1609690, at *14 (E.D. Pa. 2001) (citation omitted). At the time of the federal habeas proceedings, Mr. Abu-Jamal did not have any specific reason to present

to the court demonstrating such good cause to believe that there were jury selection notes that would provide evidence of discrimination, and the court denied his discovery request. *See id.* *109. The court also noted that Mr. Abu-Jamal did not call Mr. McGill to testify at the PCRA hearing, but it never suggested that this was a dispositive point or that it would be Mr. Abu-Jamal's fault if the Commonwealth was withholding evidence of discrimination in Mr. McGill's notes.

Mr. Abu-Jamal's *Batson* claim is timely because it is premised on previously withheld evidence about "the inherently covert nature of conduct constituting the underlying violation," i.e., a jury discrimination claim that is premised on the prosecutor's state of mind during trial. *Basemore*, 744 A.2d at 733. The Commonwealth's argument that the claim is untimely because Mr. Abu-Jamal nonetheless should have discovered this evidence earlier is based on a mischaracterization of the record; is inconsistent with precedent from the Pennsylvania Supreme Court; and is "not tenable in a system constitutionally bound to accord defendants due process." *Banks*, 540 U.S. at 694.

B. The New Evidence Presented by Mr. Abu-Jamal Establishes a *Batson* Violation and Requires an Evidentiary Hearing.

On the merits, the new evidence is highly probative of a *Batson* violation. It shows that Mr. McGill actively tracked the race of many (but not all) prospective jurors in his jury selection notes, including by prominently placing the letter "B" next to the names of many prospective Black jurors. *See* PCRA Petition, 12/23/21, ¶¶ 57-58 & Ex. E. And it also shows, for the first time, characteristics that Mr. McGill identified as significant in selecting jurors, such as jurors' employment and marital status; an examination of those characteristics shows that Mr. McGill struck prospective Black jurors with characteristics more favorable to the prosecution than prospective white jurors he did not strike. *See id.* ¶¶ 68-70. Under settled law, Mr. McGill's actively tracking jurors' race on his jury selection notes, and these side-by-side juror comparisons

strongly support a *Batson* violation. *See, e.g.*, *Foster v. Chatman*, 136 S. Ct. 1737, 1744, 1748 (2016); *Miller-El v. Dretke*, 545 U.S. 231, 241, 266 (2005). At a minimum, this new evidence creates issues of material fact as to whether Mr. McGill may have been motivated by race during jury selection, thereby requiring an evidentiary hearing. *See, e.g.*, *Commonwealth v. Hutchinson*, 25 A.3d 277, 321 (Pa. 2011) (recognizing that a PCRA "hearing is required when there is an outstanding issue of material fact"); *accord Com. v. Williams*, 244 A.3d 1281, 1286 (Pa. Super. 2021). In its motion to dismiss, the Commonwealth ignores the side-by-side comparisons entirely, and offers impermissible post-hoc justifications for Mr. McGill's notes tracking jurors by race that do nothing to undermine the inference of discrimination.

i. The New Evidence Showing the Prosecutor Tracked Jurors by Race Is Highly Probative of a *Batson* Violation.

The U.S. Supreme Court has unequivocally held that, in evaluating a *Batson* challenge, the touchstone is the intent of the trial prosecutor, not arguments created by post-conviction counsel for the State. *See Foster*, 578 U.S. at 513 (citing *Miller-El*, 545 U.S. at 246). As the Court explained in *Miller-El*, a "*Batson* challenge does not call for a mere exercise in thinking up any rational basis" for the prosecutor's peremptory strike, and if the reasons provided by the prosecutor "do not hold up" the pretextual nature of the strike "does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." *Miller-El*, 545 U.S. at 252. Similarly, arguments constructed many years later by post-conviction counsel seeking to explain a prosecutor's notes tracking jurors' race "reek of afterthought" and do not dispel the inference of discrimination from such notes. *Foster*, 578 U.S. at 513.

Here, the trial prosecutor provided a single justification in his 2019 affidavit for tracking race in his jury selection notes: he claimed it "was a standard practice" at the time of Mr. Abu-Jamal's 1982 trial, and akin to the questionnaire currently mandated by Pennsylvania Rule of

Criminal Procedure 632, which asks jurors to identify their race. *See* PCRA Pet., 12/23/21, Ex. C at p. 4; *see also id*. (trial prosecutor's affidavit further claiming his notes reflect a "standard and acceptable part of the jury selection process"). In its Motion to this Court, the Commonwealth abandons that explanation. With good reason. As the Commonwealth acknowledges, at the time of Mr. Abu-Jamal's trial, "these types of forms [i.e., the Rule 632 questionnaire referred to in Mr. McGill's affidavit] were not required by the rules of criminal procedure and seemingly were not used." Motion to Dismiss, 6/28/22 at 72.

Moreover, the Commonwealth highlights a portion of the transcript showing that the prosecutor successfully objected to jurors being asked to identify their race on the questionnaire used at Mr. Abu-Jamal's trial. *See id*. at 68 (citing 6/17/82 at 17-20). In support of this objection, Mr. McGill argued that asking jurors on the questionnaire "'What is your race,' I think that is unnecessary," *id*. at 18; that it "might be wise to say it's not necessary for it to be on the record that they are black or white, simply not necessary," *id.* at 19; and that including such a question on the questionnaire "makes no sense," as it would be "irrelevant in my opinion and embarrassing maybe." *Id*. at 19.

Thus, while the trial prosecutor now justifies his tracking jurors by race in his personal notes as comparable to asking jurors their race on a public jury questionnaire, at trial he successfully objected to jurors being asked this question on their questionnaire as "irrelevant." The comparison between a jury questionnaire and a prosecutor's internal notes is also untenable for the reasons explained in Mr. Abu-Jamal's petition: asking for demographic information on jury questionnaires allows courts and litigants to determine whether jury pools represent a fair cross-section of the community as required by the federal constitution, and creates a clear record as necessary to evaluate *Batson* claims. Neither is true of a prosecutor's private notes. *See* PCRA

Petition, 12/23/21, ¶ 62. Moreover, and contrary to the suggestion in his affidavit, Mr. McGill did not track "the basic demographic information of each potential juror," *id.* Ex. C at p. 4 (emphasis added), as would be necessary for a fair evaluation of a cross-section or *Batson* claim. His notes show that he tracked race information for about half of the jurors, but not the others. *See id.* ¶ 57, Ex. C.

Lacking any record-supported or race-neutral justification for the trial prosecutor's decision to track some (but not all) jurors by race, the Commonwealth does what Supreme Court precedent prohibits: it invents a new post-hoc justification. The Commonwealth insists that defense counsel "made clear that he was going to attempt to inject racial issues into the case" prior to jury selection, as defense counsel pointed to the cross-racial nature of the case, and noted that, in his experience, the district attorney's office had a pattern of excluding prospective Black jurors. *See* Motion to Dismiss, 6/28/22, at 67-72. According to the Commonwealth, the prosecutor's notes simply show he was taking "steps that would enable him to fairly respond" to any future claim of jury discrimination given that the "*the defense* . . . attempted to inject a racial component into the case." *Id*. at 66, 69 (emphasis in Commonwealth's brief).

As an initial matter, the Commonwealth's suggestion that the defense was improperly injecting racial "issues into the case" by raising concerns about potential racial discrimination in jury selection is troubling. Defense counsel's statement about a pattern of racial discrimination in the Philadelphia District Attorney's Office at the time of Mr. Abu-Jamal's 1982 trial is well-supported by other evidence, including a judicial recognition by then-Justice Kidd in another capital trial that very same year. *See* PCRA Petition, 12/23/21, ¶ 65. And the cross-racial nature of a criminal case, where a defendant is accused of a crime against "an individual of a different race," has been specifically recognized by the Pennsylvania Superior Court as creating a "special

incentive" for the prosecutor "to select jurors who are of the same racial background as the victim." *Commonwealth v. Jackson*, 562 A.2d 338, 345 (Pa. Super. 1989); *see also Simmons v. Beyer*, 44 F.3d 1160, 1168 (3d Cir. 1995) (similar).

The Commonwealth's post-hoc theory for the prosecutor's notes also mirrors almost exactly the untenable argument that post-conviction counsel for the State made in *Foster*. Specifically, in *Foster*, counsel for the State argued before the Supreme Court that notes in the prosecution's file identifying prospective jurors by race were not probative of discrimination because, *inter alia*, the prosecution was seeking to "'develop and maintain detailed information on those prospective jurors in order to properly defend against any suggestion that decisions regarding [its] selections were pretextual.'" *Foster*, 578 U.S. 488, 513 (2016) (quoting State's brief). The Supreme Court squarely rejected this post-hoc argument, which had never been made before and "'reek[ed] of afterthought.'" *Id.* (quoting *Miller-El*, 545 U.S. at 246). This Court should do the same here.

In any event, even if it had been advanced by Mr. McGill, this theory would not support a motion to dismiss Mr. Abu-Jamal's *Batson* claim without an evidentiary hearing. The Commonwealth asserts that Mr. McGill was creating a record so he could "fairly respond" to a future jury discrimination challenge, Motion to Dismiss, 6/28/22 at 71, but the record belies that assertion. When Mr. Abu-Jamal raised a *Batson* claim on direct appeal, Mr. McGill filed a short affidavit in which he emphasized that he had accepted prospective juror J.B., a Black male, and defense counsel struck him. *See* PCRA Petition, 12/23/21, ¶ 59 & Ex. G. And Mr. McGill's jury selection notes make clear he had been preparing to present this narrative at trial, as he wrote on his notes about J.B., "I accepted but D rejected this Black male." *See id.* & Ex. E (seventh page) (juror's name redacted).

But Mr. McGill was selective in the record he constructed. Although his notes show that prospective juror A.A., whom Mr. McGill struck, was Black, he omitted that important fact from the affidavit he submitted on direct appeal. This was one of the reasons the Pennsylvania Supreme Court thought Mr. McGill had struck fewer prospective Black jurors than he actually did. See PCRA petition, 12/23/21, ¶ 63 & Exs. E, G.

Thus, Mr. McGill did not use his handwritten notes to "fairly respond" to the *Batson* claim raised by Mr. Abu-Jamal on direct appeal—he used them to construct a one-sided account that made his strike pattern appear less severe than it was. And his notes respecting J.B. ("I accepted but D rejected this Black male") indicate that Mr. McGill was highly conscious of race during jury selection but wrongly thought he was immune to any jury discrimination challenge simply because he accepted a Black juror whom the defendant struck. *See* PCRA Petition, 12/23/21 ¶ 59; *see also id*. ¶ 60 (discussing Mr. McGill's invocation of the "forbidden stereotype," *Powers v. Ohio*, 466 U.S. 400, 416 (1991), that on average prospective Black jurors would be less favorable to the prosecution).

Mr. McGill may well have believed he could discriminate in the exercise of peremptory strikes so long as he accepted some prospective Black jurors because, at the time of Mr. Abu-Jamal's 1982 trial, such discrimination had been upheld so long as it did not occur "'in case after case, whatever the circumstances . . . with the result that no [Black people] ever serve on petit juries.'" *Commonwealth v. Henderson*, 438 A.2d 951, 956 (Pa. 1981) (quoting *Swain v. Alabama*, 380 U.S. 202, 223 (1965)). But, *Batson*, which is applicable to Mr. Abu-Jamal's case because it was pending on direct appeal at the time *Batson* was decided, *see Griffith v. Kentucky*, 479 U.S. 314 (1987), rejected that premise. In *Batson*, the Supreme Court held that the Constitution "forbids striking even a single prospective juror for a discriminatory purpose," and established a framework

"for determining when a strike is discriminatory." *Foster*, 578 U.S. at 499 (citation and internal quotation marks omitted).

In sum, as both parties recognize, the "notes 'indicate that Mr. McGill was seeking to build a record to rebut any claim of discrimination,'" but they do not support the Commonwealth's post-hoc theory that he was trying to do so "fairly" or in accordance with the law for adjudicating jury discrimination claims, Motion to Dismiss, 6/28/22 at 71. On the contrary, they suggest he was seeking to create a one-sided record, relying on the false premise that he would be immune from a jury discrimination challenge if he could point to a prospective Black juror whom he accepted but defense counsel objected to.

The Commonwealth also seeks to dismiss the significance of Mr. McGill's notes on the ground that they were made during voir dire, and contemporaneously with the exercise of peremptory strikes, meaning Mr. McGill would not need notes to reflect his recollection about the race of prospective jurors. *See* Motion to Dismiss, 6/28/22 at 70. But notes showing that a prosecutor was actively tracking jurors by race are probative of discrimination whether made before, or contemporaneously with, the exercise of peremptory strikes. For example, a prosecutor seeking to limit the number of Black jurors—but who recognizes the need to include at least some Black people on the jury—may make such notes to keep track of how many Black jurors have been selected out of the pool and to construct a record to attempt to hide the discriminatory use of peremptory strikes.

Supreme Court precedent likewise provides no support for the Commonwealth's arguments. The Commonwealth highlights that, in finding a *Batson* violation in *Foster*, the Court relied on notes in the prosecution's file created prior to the jury selection process. *See* Motion to Dismiss, 6/28/22 at 70 n.27. But the Commonwealth ignores the fact that the Court in *Foster* also

relied on notes in the prosecution's file identifying jurors by race that were made during the jury selection process. *See Foster*, 578 U.S. at 494. The Court did so even though, unlike here, it was unclear whether the prosecutor who actually struck jurors had made those notes or if instead they had been made by someone else in the prosecution's office. *See id.* at 501.

With respect to *Miller-El*, the Commonwealth's only argument is this: "While the Court referenced the fact that the prosecutors had 'marked the race of each prospective juror on their juror cards,' this was to show that they were following a jury-selection manual that implemented the office's 'formal policy to exclude minorities from jury service.'" Motion to Dismiss, 6/28/22, at 70 n.27 (quoting *Miller-El*, 545 U.S. at 264, 266). But the "formal policy" at issue in *Miller-El* was "a 20-year-old manual of tips on jury selection," and there was no evidence this manual was even in circulation for approximately a decade before Mr. Miller-El's trial. *Miller-El*, 545 U.S. at 266 (further explaining manual was written in 1968 and in circulation through 1976). Here, the evidence that the district attorney's office had a policy or practice of discriminating against prospective Black jurors at the time of Mr. Abu-Jamal's 1982 trial is at least as strong as the evidence of the district attorney's office policy or practice in *Miller-El*, and indeed includes judicial recognition of the existence of such a practice. *See* PCRA Petition, 12/23/21, ¶ 65. Thus, Mr. McGill's notes actively tracking jurors by race are just as, if not more, probative that he was following a discriminatory office-wide practice as were the notes at issue in *Miller-El*.

And his notes are far more probative than similar notes the Pennsylvania Superior Court found probative of discrimination in *Commonwealth v. Edwards*, 177 A.3d 963 (2018). In *Edwards*, it was not the prosecutor, but the court's staff, who tracked jurors' races on the peremptory strike sheets they handed counsel during voir dire. *See id.* at 968. Even though the prosecutor did not create these notes, the Superior Court recognized that they were a "relevant

circumstance that raised an inference that the prosecutor struck the jurors based on their race," and indeed described this fact as "strongly indicative of discriminatory intent." *Id*. at 973, 975. Certainly, when the prosecuting attorney himself is tracking jurors' races, the inference of discrimination is stronger.

In sum, Mr. McGill's jury selection notes show he was actively tracking the race of many jurors, identifying them as "B" or "W," even though he had objected to including a race question on the jury questionnaire on the ground that it would be "irrelevant." The Commonwealth does not even attempt to defend the only explanation Mr. McGill provided for his race-conscious approach in his 2019 affidavit (i.e. that it was standard practice and akin to asking about jurors' race on a public questionnaire). And the Commonwealth's own post-hoc justification (that the prosecutor was attempting to "fairly respond" to a subsequent jury discrimination challenge) is belied by the record, which shows the prosecutor's response to that challenge was anything but fair. The jury notes are highly probative of a *Batson* violation. At a minimum, the significance of the prosecutor's undeniably race-conscious approach to jury selection raises an "outstanding issue of material fact" concerning his intent that must be explored at an evidentiary hearing. *Hutchinson*, 25 A.3d at 321.

ii. <u>Mr. McGill's Notes Demonstrate that He Did Not Apply the Characteristics He Deemed Important During Jury Selection in a Racially Neutral Manner.</u>

There is an additional category of new evidence revealed by the prosecutor's jury selection notes, which is highly probative of a *Batson* violation. Mr. McGill admits in his 2019 affidavit that his notes reflect the fact that, other than race, he recorded information about prospective jurors including "the section of the city where they live, their vocation, the work of their relatives, and numerous other aspects of their lives." PCRA Petition, 12/23/21, Ex. C at p. 4. These notes provide further evidence of discrimination.

First, as Mr. Abu-Jamal pointed out in his petition, the "section of the city" where a juror lives is highly correlated with race, and neither Mr. McGill in his affidavit nor the Commonwealth in its brief to this Court offer any race-neutral justification for Mr. McGill's focus on where jurors lived. *See* PCRA Petition, 12/23/21, ¶ 68. Moreover, the other characteristics Mr. McGill focused on in his jury notes, notably prospective jurors' "vocation [and] the work of their relatives" provide further support for an inference of discrimination because Mr. McGill struck prospective Black jurors whose characteristics in these respects were more favorable to the prosecution than non-Black panelists whom Mr. McGill did not strike.

For example, Mr. McGill struck G.G. and B.G., prospective Black jurors who were employed and living with family members (for G.G. her husband, and for B.G. her mother) who were also employed. *See* PCRA Petition, 12/23/21, ¶ 68. There was nothing in their jobs (G.G. worked in a clothing factory, and her husband as a hospital supervisor; B.G. was a data entry operator and her mother a nurse) suggesting a pro-defense perspective. *See id.* And there would be no race-neutral reason for Mr. McGill to strike these prospective Black jurors given his focus on a juror's "vocation" and the "work of their relatives," *id.*, Ex. C at p. 4, when he accepted prospective non-Black jurors who were unemployed and lived with spouses who were also unemployed. *See id.* ¶ 70 n.12. Thus, just as in *Miller-El*, the new evidence in this case allows "side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve," which provide "evidence tending to prove purposeful discrimination." 545 U.S. at 241.

The Commonwealth has no answer on the merits to this significant evidence. It instead suggests it is a "factor" previously known to Mr. Abu-Jamal. *See* Motion to Dismiss, 6/28/22 at 75. That is incorrect. Although jurors' voir dire testimony has been known since trial, Mr. Abu-Jamal did not know the juror characteristics the prosecutor identified as significant until the

disclosure of his jury selection notes. It is this new disclosure that allows side-by-side juror comparisons with respect to the characteristics the prosecutor identified as significant, and show there is no race-neutral justification for his disparate application of these characteristics in selecting jurors.

For all these reasons, Mr. Abu-Jamal has presented a meritorious *Batson* claim, and has certainly presented sufficient evidence to create an issue of material fact about Mr. McGill's intent that warrants an evidentiary hearing. *See Hutchinson*, 25 A.3d at 321.

iii. A Hearing Is Required Regardless of Whether the Burden-Shifting Framework Applies

In a footnote, the Commonwealth claims that the *Batson* burden-shifting framework is inapplicable here because, when a *Batson* claim is not raised at trial, a petitioner bears the burden of showing discrimination by a preponderance of the evidence without any burden-shifting framework. *See* Motion to Dismiss at 76 n.30. Because the Commonwealth raises this argument only in a footnote, it is not properly before the Court. *See, e.g.*, *Madison Const. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 109 n.8 (Pa. 1999). It is also wrong. The cases cited by the Commonwealth stand for the proposition that *Batson*'s burden-shifting framework does not apply when a petitioner seeks to raise a *Batson* claim that is waived because it is based on evidence that was available at prior stages of litigation. Indeed, the Commonwealth recognizes as much, explaining that this requirement for the petitioner to prove discrimination by the preponderance of the evidence without reference to *Batson*'s burden-shifting framework is something "a defendant must meet 'to overcome the waiver of the underlying claim.'" Motion to Dismiss at 76 n.30 (quoting *Commonwealth v. Uderra*, 862 A.2d 74, 87 (Pa. 2004)). But, unlike the cases cited by the Commonwealth, Mr. Abu-Jamal did not waive the *Batson* claim he seeks to raise here because it rests on newly discovered evidence so he could not have raised it sooner. *See* Pa. C.S. § 9544(b)

(recognizing that an issue is waived for PCRA purposes only "if the petitioner could have raised it but failed to do so" in prior litigation).[10]

In any event, even if *Batson*'s burden shifting framework did not apply, the new evidence would demonstrate a *Batson* violation by a preponderance of the evidence. It is stronger than evidence the Supreme Court has relied on in other cases to find a *Batson* violation by a preponderance of the evidence even under the clearly erroneous standard of review. *See, e.g.*, *Snyder v. Louisiana*, 552 U.S. 472, 480-84 (2008) (finding *Batson* violation because the prosecutor's stated reason for striking one prospective Black juror appeared suspicious given the juror's actual testimony on the subject, and a side-by-side comparison suggested the reason was pretextual). At a minimum, it is sufficient to require an evidentiary hearing because it raises genuine material facts about Mr. McGill's intent which, burden-shifting aside, is the ultimate touchstone that the Commonwealth agrees is applicable here.

C. This *Batson* Claim Was Not Previously Litigated

Finally, the Commonwealth argues that Mr. Abu-Jamal's claim should be rejected as having previously been litigated. *See* Motion to Dismiss at 72-76. But, the Pennsylvania Supreme

[10] For the same reason, the Commonwealth's extraordinary suggestion in a throwaway line at the end of its footnote that *Batson* should not apply at all here is wrong. The precedent cited by the Commonwealth stands for the proposition that a *Batson* claim resting on evidence available to defense counsel at trial is waived if defense counsel does not raise a contemporaneous objection, and therefore must be litigated through the lens of an ineffective assistance of counsel claim. *See Commonwealth v. Smith*, 17 A.3d 873, 894 (Pa. 2004) (citing additional cases applying this waiver analysis). Here, to repeat, Mr. Abu-Jamal relies on new and previously unavailable evidence to support his *Batson* claim, which means the claim was not waived. And, without conceding the effectiveness of defense counsel based on the record that was available at trial, defense counsel also did not know of the new evidence when he made the statement highlighted by the Commonwealth, *see* Motion to Dismiss, 6/28/22 at 69, that the jury selection process was proceeding in a manner suggesting "that we could obtain . . . fair and impartial" jurors.

Court has unequivocally ruled that "an issue is not previously litigated when it does not rely solely upon previously litigated evidence." *Commonwealth v. Chmiel*, 173 A.3d 617, 627 (Pa. 2017) (citing *Commonwealth v. Miller*, 746 A.2d 592, 602 nn.9 & 10 (2000)). It is undisputed that Mr. Abu-Jamal's *Batson* claim does not "rely solely upon previously litigated evidence." On the contrary, his claim is premised on the new evidence, long suppressed by the Commonwealth, showing that the prosecutor: (1) actively tracked jurors by race; and (2) struck Black jurors who were more favorable to the prosecution than non-Black jurors whom the prosecutor accepted with respect to the characteristics the prosecutor had himself identified as important in jury selection. Because Mr. Abu-Jamal's claim rests on new evidence, it was not previously litigated.

The Commonwealth is wrong to characterize this language from *Chmiel* as dicta and to suggest this Court should disregard it. *See* Motion to Dismiss, 6/28/22 at 73. The "legal rule, or 'holding,' of a case includes the reasoning essential to and in support of it." *Crocker v. Workers' Compensation Appeal Board*, 225 A.3d 1201, 1210 (Pa. Commw. Ct. 2020). The Pennsylvania Supreme Court's instruction that a claim is not previously litigated if it does not "rely solely upon previously litigated evidence" was central to its reasoning in *Chmiel*, as the Court proceeded to explain how the petitioner's challenge to forensic hair analysis rested on new evidence showing that such analysis was unreliable. *See Chmiel*, 173 A.3d at 628. Even though the petitioner had previously raised a challenge to the reliability of the forensic hair analysis, because the prior challenge did not "rest upon the evidence and arguments" supporting his new challenge to the reliability of that analysis, it was not waived. *Id*. The same reasoning applies here.

Indeed, the Commonwealth appears to acknowledge that an issue is not previously litigated under *Chmiel* when it rests on a "watershed revelation." Motion to Dismiss at 74. The Commonwealth asserts that the new evidence at issue here does not constitute such a revelation,

but that is because the Commonwealth denies the significance of new evidence showing that the prosecutor was actively tracking jurors by race and struck prospective Black jurors even though they were more favorable compared to non-Black jurors he did not strike with respect to the prosecutor's own jury selection criteria.

For the same reasons, the Commonwealth's repeated references to prior opinions in Mr. Abu-Jamal's case finding not a "'trace of support for an inference that the use of peremptories was racially motivated,'" Motion to Dismiss at 73, 76, are irrelevant. When the Pennsylvania Supreme Court made these statements, the Court was unaware of the key new evidence supporting an inference of discrimination. And this is precisely why the claim was not previously litigated within the meaning of Pa. C.S. § 9543(a)(3): the Pennsylvania Supreme Court never had the opportunity to consider the new, watershed evidence establishing the *Batson* violation.

The Commonwealth also cites *Commonwealth v. Lark*, 746 A.2d 585 (2000) on this point, even though *Lark* involves application of the PCRA statute of limitations provision in Pa. C.S. Pa. C.S. § 9545 rather than whether a claim was previously litigated within the meaning of Pa. C.S. Pa. C.S. § 9543(a)(3). In any event, *Lark* confirms that Mr. Abu-Jamal's *Batson* claim is properly before this Court because it rests on new evidence. In *Lark*, the Pennsylvania Supreme Court held the petitioner's jury discrimination claim that rested on newly discovered evidence (i.e., the McMahon tape) *was* timely. *See Lark*, 764 A.2d at 588. The Court held that claim failed on the merits because McMahon was not the prosecutor in Lark's case, and the McMahon tape "'does not demonstrate that there was discrimination in *his* case.'" *Id.* at 589 (internal quotation marks omitted).[11]

[11] On federal habeas review in *Lark*, the federal courts relied on other evidence presented by Lark and found that the prosecutor had violated *Batson*, requiring a new trial in his case. *See Lark v. Beard*, 2012 WL 3089356 (E.D. Pa. July 30, 2012), *aff'd* 566 F. App'x 161 (3d Cir. 1994).

Here, unlike *Lark*, the new evidence does not concern a "different prosecutor" who simply "worked in the same office." *Id.* It concerns the lead trial prosecutor himself and is highly probative of a *Batson* claim. And, unlike *Lark* (and contrary to the Commonwealth's assertion, *see* Motion to Dismiss at 75), Mr. Abu-Jamal is not principally relying on "other factors" about which he was previously aware to support his new *Batson* claim. Mr. Abu-Jamal's *Batson* claim rests squarely on the new evidence showing that Mr. McGill was actively tracking jurors by race and that, had he neutrally applied the characteristics he deemed important during jury selection, there was no basis for striking several prospective Black jurors. Mr. Abu-Jamal's PCRA petition also discusses Mr. McGill's strike pattern, which is not new evidence, but that is because under Pennsylvania Supreme Court precedent, a petitioner must provide evidence about the prosecution's strike pattern for the court to consider in adjudicating a *Batson* claim. *See, e.g., Commonwealth v. Thompson*, 106 A.3d 742, 751-52 (Pa. 2014). Indeed, the Commonwealth itself recently stressed this point in a brief to the Superior Court in this case. *See* Commonwealth Br., 290 EDA 2019, 2/3/2021 at 82 n.25.

In sum, *Lark* confirms that Mr. Abu-Jamal's *Batson* claim is timely and not waived.[12]

[12] The Commonwealth also cites *Commonwealth v. Maxwell*, 232 A.3d 739 (Pa. Super. 2020). *Maxwell*, like *Lark*, is a case about timeliness under Pa. C.S. § 9545 rather than previous litigation under Pa. Stat. 9543, and it is inapposite here. In *Maxwell*, the only "new" evidence cited by the petitioner in support of a *Batson* claim the courts had previously adjudicated was a hearsay statement by the petitioner's brother that he had, many years earlier, overhead the prosecutor tell a police officer that he did not believe any African Americans would serve on the jury. *See* 232 A.3d at 742. This highly attenuated evidence was, at best, a "newly-willing testimonial source [who] had come forward to corroborate" a *Batson* claim the petitioner had previously raised. *Id.* at 746 (citing another case for the proposition that "newly-discovered corroborative sources of publicly known discriminatory jury selection practices" do not constitute new facts as required for a PCRA petition to be timely under Pa. C.S. § 9545(b)(1)(ii)). Here, by contrast, Mr. Abu-Jamal raises a new *Batson* claim based on concrete evidence that is not "corroborative" of previously available evidence, but rather is fundamentally different from previously available evidence about the prosecutor's conduct during jury selection.

CONCLUSION

For over 35 years, the Commonwealth concealed evidence that its two principal witnesses had powerful inducements to testify, and that its lead prosecutor was motivated by race during jury selection. This new evidence establishes meritorious claims under *Brady v. Maryland* and *Batson v. Kentucky*. Petitioner respectfully submits that this Court should either grant relief based on the evidence already before the Court or, in the alternative, schedule the case for an evidentiary hearing. In paragraph 71 of the PCRA Petition, counsel indicated the witnesses that would be called at such a hearing and the anticipated content of their testimony. Counsel hereby attaches certifications with respect to the anticipated testimony as well. *See* Pa. R. Crim. P. 902(a) (setting forth a substantial compliance requirement for all sub-sections, including sub-section (15)).

Petitioner also respectfully requests an opportunity for oral argument before the Court on the issues raised by the PCRA Petition and the Commonwealth's Motion to Dismiss.

Respectfully Submitted,

/s/ *Judith L. Ritter*

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Counsel for Mumia Abu-Jamal

IN THE COURT OF COMMON PLEAS
ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	Criminal Division
Respondent,	:	
	:	CP-51-CR-0113571-1982
v.	:	
	:	Nos. 1357-1359 (1981)
MUMIA ABU-JAMAL	:	
Petitioner.	:	

Witness Certificate

AND NOW COMES Judith Ritter, Esquire, and respectfully represents as follows:

1. The undersigned is an attorney licensed to practice law in the Commonwealth of Pennsylvania
2. Counsel represents Petitioner Mumia Abu-Jamal in the case of *Commonwealth v. Abu-Jamal* and filed a Petition for Post-Conviction Relief in this court on December 23, 2021.
3. In that PCRA Petition, Petitioner requested that the Court hold an evidentiary hearing and asserted that "Were a hearing to be scheduled, Mr. Abu-Jamal would call as witnesses the individuals who wrote the letters and memoranda in question who would testify to the facts contained therein." *See* PCRA Petition at ¶ 71
4. Pursuant to Petitioner's request for an evidentiary hearing, counsel intends to call Robert Chobert as a witness if such a hearing is granted.

5. Upon information and belief, Mr. Chobert is available and will testify if called to do so at a hearing in this matter.[1]

6. At an evidentiary hearing, Mr. Chobert will testify regarding the contents and context of the letter appended as Exhibit B to the PCRA petition.

Respectfully submitted,

/s/ Judith L. Ritter
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Dated: August 15, 2022

[1] Counsel has omitted the witness' current residence from this certification out of respect for their privacy, but that information will be provided upon request by the Court.

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4. Pursuant to Petitioner's request for an evidentiary hearing, counsel intends to call Richard Di Benedetto as a witness if such a hearing is granted.

5. Upon information and belief, Mr. Di Benedetto is available and will testify if called to do so at a hearing in this matter.[1]

6. At an evidentiary hearing, Mr. Di Benedetto will testify regarding the contents and context of the letters and memoranda bearing his signature appended to the Petition within Exhibit D.

Respectfully submitted,

/s/ Judith L. Ritter
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4. Pursuant to Petitioner's request for an evidentiary hearing, counsel intends to call Joseph McGill as a witness if such a hearing is granted.

5. Upon information and belief, Mr. McGill is available and will testify if called to do so at a hearing in this matter.[1]

6. At an evidentiary hearing, Mr. McGill will testify regarding the contents and context of the letter appended to the Petition as Exhibit B, the affidavit appended as Exhibit C, the memoranda and letters appended as Exhibit D, the jury selection notes appended as Exhibit E, and the bases for his jury selection decisions in the 1982 trial.

Respectfully submitted,

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3. In that PCRA Petition, Petitioner requested that the Court hold an evidentiary hearing and asserted that "Were a hearing to be scheduled, Mr. Abu-Jamal would call as witnesses the individuals who wrote the letters and memoranda in question who would testify to the facts contained therein." *See* PCRA Petition at ¶ 71
4. Pursuant to Petitioner's request for an evidentiary hearing, counsel intends to call Andre Washington as a witness if such a hearing is granted.

5. Upon information and belief, Mr. Washington is available and will testify if called to do so at a hearing in this matter.[1]

6. At an evidentiary hearing, Mr. Washington will testify regarding the contents and context of the memorandum bearing his name appended to the Petition within Exhibit D.

Respectfully submitted,

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3. In that PCRA Petition, Petitioner requested that the Court hold an evidentiary hearing and asserted that "Were a hearing to be scheduled, Mr. Abu-Jamal would call as witnesses the individuals who wrote the letters and memoranda in question who would testify to the facts contained therein." *See* PCRA Petition at ¶ 71
4. Pursuant to Petitioner's request for an evidentiary hearing, counsel intends to call Edward Wilbraham as a witness if such a hearing is granted.

5. Upon information and belief, Mr. Wilbraham is available and will testify if called to do so at a hearing in this matter.[1]

6. At an evidentiary hearing, Mr. Wilbraham will testify regarding the contents and context of the memoranda bearing his name appended to the Petition within Exhibit D.

Respectfully submitted,

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