IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
TRIAL DIVISION–CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	**:**	**CP-51-CR-0113571-1982**
V.	**:**	
MUMIA ABU-JAMAL, a/k/a WESLEY COOK	**:**	**PCRA**

COMMONWEALTH'S RESPONSE TO DEFENDANT'S BRIEF IN OPPOSITION TO THE MOTION TO DISMISS THE PCRA PETITION

TO THE HONORABLE LUCRETIA CLEMONS:

LAWRENCE S. KRASNER, District Attorney of Philadelphia County, by his Assistants, GRADY GERVINO, Assistant District Attorney, and TRACEY KAVANAGH, Supervisor, PCRA Unit, responds to defendant's brief in opposition to the Commonwealth's motion to dismiss his PCRA petition, and respectfully represents the following:

Introduction

In December of 2021, defendant filed his sixth PCRA petition collaterally attacking his nearly forty-year-old first-degree murder conviction for the shooting death of Philadelphia police officer Daniel Faulkner. The Commonwealth subsequently filed a motion to dismiss the petition, and defendant has filed a brief in opposition to the Commonwealth's motion. The Commonwealth presents this filing in response to a number of misstatements or misrepresentations in the defense filing and to address a case defendant cites in that filing.

Multiple Witnesses Viewed the Shooting

In its motion to dismiss defendant's PCRA petition, the Commonwealth pointed out that the Pennsylvania Supreme Court has already held that, based on the "damaging testimony" of Albert Magilton and Michael Scanlan alone, it is "unlikely" that attacks

on Robert Chobert's (and Cynthia White's) credibility, "either singularly or cumulatively, could compel a different verdict" (*see* Commonwealth's Motion to Dismiss, 47; *quoting Commonwealth v. Abu-Jamal*, 720 A.2d 79, 107 n.34 (Pa. 1998)). Defendant responds by asserting, among other things, that "neither [Mr. Magilton nor Mr. Scanlan] even claimed to have seen the shooting" (Petitioner's Brief in Opposition to the Commonwealth's Motion to Dismiss (hereinafter "Petitioner's Brief"), 13).

Defendant is in error. Mr. Scanlan testified that he saw the shooting. Specifically, he stated that he initially observed the encounter between Officer Faulkner and a man who was driving a Volkswagen (who would be identified at trial as defendant's brother William Cook). During the encounter, William Cook punched Officer Faulkner in the face. Mr. Scanlan testified that as Officer Faulkner tried to subdue William Cook, another man came "running out from a parking lot across the street towards the officer." Officer Faulkner's back was to that man. According to Mr. Scanlan:

> I saw a hand come up, like this, and I heard a gunshot. There was another gunshot when the man got to the policeman, and the gentleman he had been talking to. And then the officer fell down on the sidewalk and the man walked over and was standing at his feet and shot him twice. I saw two flashes.

One of the bullets struck its target, as Mr. Scanlan was able to see that the officer's "whole body jerked" following one of the gunshots (N.T. 6/25/82, 8.5-8.11).

Thus, contrary to what defendant states, Mr. Scanlan *did* "claim[ ] to have seen the shooting" (Petitioner's Brief, 13). And while he was not able to make an identification of the shooter himself, Mr. Scanlan identified a jacket that was recovered from the hospital emergency ward where defendant was taken following the shooting—and which had been struck by a bullet and was stained with human blood—as being the jacket that

was worn by the gunman who shot Officer Faulkner (N.T. 6/24/82, 177-87; 6/25/82, 8.62-8.63; 6/26/82, 31-33).

Further, while the additional witness, Mr. Magilton, did not see the actual shooting, he testified that he saw defendant, who was on foot and holding his right hand behind his back, moving "across the street fast" in the direction of the stopped Volkswagen. A few moments later, he heard a number of gunshots. Mr. Magilton crossed the street and cautiously approached the Volkswagen. When he got to the sidewalk, he saw Officer Faulkner lying there, and defendant sitting on the curb nearby (N.T. 6/25/82, 8.75-8.79, 8.104-8.112, 8.137-8.138). Given this testimony from Mr. Scanlan and Mr. Magilton, which corroborated Mr. Chobert's and Ms. White's, it is not surprising that the Supreme Court has found that attacks on Mr. Chobert's and Ms. White's credibility would not likely change the verdict.

The Supreme Court Concluded There was no Credible Evidence Suggesting that Defendant's Confession was Fabricated

Referring to the Supreme Court's statement that Mr. Scanlan's and Mr. Magilton's "damaging" and "unequivocal" testimony made it "unlikely" that attacks on Mr. Chobert's (and Ms. White's) testimony "could compel a different verdict," *Commonwealth v. Abu-Jamal*, 720 A.2d at 107 n.34, defendant points out that the Supreme Court, in that specific context, "did not even mention" the "alleged admission [by him] at the hospital after the shooting" (Petitioner's Brief, 13 n.4).[1] Defendant suggests that the

[1] The evidence presented at trial and at a prior PCRA hearing established that when defendant arrived at the hospital following the shooting, he twice stated words to the effect, "I shot the mother fucker and I hope the mother fucker dies" (N.T. 6/24/82, 28-30, 33, 113-16, 135-36; 8/1/95, 25).

Supreme Court did not "mention" his "alleged hospital statement" because it "is highly dubious" that he actually made it (*id.*). In support of this assertion, he points out that Officer Gary Wakshul, who guarded him at the hospital during the relevant period, testified at a PCRA hearing that he told the investigating detectives that he (defendant) made no comments (*id.*).

In advancing this argument, defendant ignores that, in that same opinion, the Supreme Court considered and rejected his claim "that the confession was concocted." *Commonwealth v. Abu-Jamal*, 720 A.2d at 92. Specifically, defendant argued "that if Officer Wakshul had testified at trial, he would have exposed this 'confession' as false" and that, therefore, he was a "crucial *Brady* witness." *Id.* at 92-93.[2] In dismissing this claim, the Supreme Court pointed out that two other witnesses, police officer Gary Bell and hospital security guard Patricia Durham, testified to the confession at trial. *Id.* at 92. And although Officer Wakshul acknowledged at the PCRA hearing that on the morning of the shooting he told detectives defendant "made no comments," he also testified at that PCRA hearing that, in fact, defendant had confessed to the shooting (N.T. 8/1/95, 25).

The Supreme Court explained that while Officer Wakshul did not initially report this confession in the statement he gave to the detectives just hours after the shooting, he did report it in a subsequent statement to police. *Commonwealth v. Abu-Jamal*, 720 A.2d at 92. Further, the Supreme Court noted that Officer Wakshul explained that his failure to initially report defendant's statement resulted from the distraught emotional state he was in after hearing the confession and then seeing the body of Officer Faulk-

[2] Referring to *Brady v. Maryland*, 373 U.S. 83 (1963).

ner, who was a friend, lying on a gurney. *Id.* at 92-93. This explanation was found credible by the PCRA court. *Id.* at 93.

The Supreme Court continued by explaining that, "[i]n addition, hospital security guard Patricia Durham reported the exact same admission to her superiors the day after [defendant] made it." *Id.* The Supreme Court also pointed out that Officer Wakshul testified that when he reported the confession to police he was unaware that Ms. Durham, whom he did not know, had similarly reported the confession, and Ms. Durham testified that she did not mention the confession to anyone other than her superiors. *Id.* Thus, the record established that Officer Wakshul and Ms. Durham independently reported defendant's confession.

In disposing of the claim, the Supreme Court explained that "[g]iven all this, *we agree with the PCRA court's conclusion that there was no credible evidence to suggest that Wakshul fabricated the confession*." *Id.* (emphasis added). Accordingly, the Supreme Court's opinion itself refutes defendant's suggestion that the Court had doubts about whether defendant really confessed to the crime. On the contrary, the Court's opinion shows that, based on the record, there is no reason to doubt the validity of the evidence establishing that defendant made the confession.

Both the Trial Court Judge and Defendant's own Witnesses Indicated that Cynthia White had no Reason to Fear Being Prosecuted for Prostitution in Philadelphia

In its motion to dismiss, the Commonwealth stated that Cynthia White had no reason to fear being prosecuted for prostitution in Philadelphia, and thus the prosecutor had no leniency to offer her, because those convicted of prostitution in the city did not face jail time (*see* Commonwealth's Motion to Dismiss, 59). Defendant responds to this by stating, among other things, that "[t]he Commonwealth's sole support for this asser-

tion is [the trial judge's] offhand remark to that effect at a sidebar" (Petitioner's Brief, 16 n.7).

In fact, the Commonwealth pointed out that the trial judge made comments to this effect on two different occasions (*see Commonwealth's Motion to Dismiss*, 59). During one sidebar, the trial judge stated to defense counsel:

> You see those 38 arrests there. She wouldn't be out on the street if they put her in jail for prostitution. We don't do that here in Philadelphia. You know that and I know that.

(N.T. 6/22/82, 5.85; Commonwealth's Motion to Dismiss, 15, 59).

During a different sidebar, the trial judge reiterated that Ms. White did not face potential jail time on the prostitution charges:

> [To defense counsel]: You're talking about prostitution now. You know in Philadelphia nobody goes to jail for prostitution.

(*id.* at 5.205; Commonwealth's Motion to Dismiss, 15, 59).

But it was not only the trial judge who stated that prostitutes did not face jail time in Philadelphia. As the Commonwealth stated in its motion to dismiss, defendant's own witnesses confirmed that those who were arrested for prostitution in Philadelphia had no reason to fear that the charges would result in jailtime or other serious consequences (*see* Commonwealth's Motion to Dismiss, 27, 59 (citing N.T. 8/10/95, 172, and defendant's Second PCRA Petition, ¶ 271 & Exhibit E, ¶ 11)). Thus, defendant does not accurately represent the Commonwealth's filing when he asserts that the Commonwealth's "sole support" for this point was an "offhand remark" by the trial judge (Petitioner's Brief, 16 n.7).

The Prosecutor Objected to the Prospective Jurors Being Asked to Orally State Their Race During *Voir Dire*

Defendant asserts that, in its motion to dismiss, "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 [his] trial" (Petitioner's Brief, at 31) (emphasis added) (citing Commonwealth's Motion to Dismiss, 68).[3] This is a misstatement on defendant's part, as the prospective jurors did not fill out a questionnaire at trial.

Jury selection began on June 7, 1982. At the prior listing, which was held on June 4, 1982, the trial judge denied defendant's request to present a written questionnaire to the prospective jurors. The court stated that a written questionnaire would not be used as part of the jury selection process because the rules of criminal procedure did not permit that practice. Instead, the judge explained, all questions would be orally presented to the prospective jurors during individual *voir dire*. When defendant indicated that he wanted to ask the prospective jurors questions that went beyond those commonly asked during *voir dire*, the court instructed him to write up a list of the questions and stated that at the following listing, when jury selection was scheduled to begin, he would decide which questions could be asked during the individual *voir dire* (N.T. 6/4/82, 4.123-4.136).[4]

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[3] Defendant mistakenly indicates that the Commonwealth cited to the notes of testimony from June **17**, 1982, regarding the above. The Commonwealth's citation is actually to the notes of testimony from June **7**, 1982.

[4] When defendant asked for permission to have the jurors fill out a written questionnaire—a request that was denied—he did not state that he wanted the prospective jurors to identify on the questionnaire what their race was. In fact, he indicated he did (footnote continued . . .)

At the following listing, which was the first day of jury selection, defendant presented the list of questions that he wanted to orally ask the prospective jurors. One of those "questions" was a request for the prospective jurors to state their race for the record. Defendant was representing himself at that point of the proceedings (he had assistance from backup counsel), and backup counsel specifically stated that defendant would be the person who would ask each juror to state his or her race for the record (N.T. 6/7/82, 17-20).

The prosecutor objected to the jurors being asked to orally state their race for the record because he thought the jurors, who would be sitting right in front of them, would find the request "kind of ridiculous" and "embarrassing." The prosecutor further stated that if race became a potential issue during jury selection, the parties could provide the relevant information for the record (N.T. 6/7/82, 17-20). Contrary to what defendant states, a jury questionnaire was not "used" at trial (at least not a written one that was filled out by the jurors), and when the prosecutor objected to asking the jurors to state their race for the record, he was objecting to them being asked to do so orally during individual *voir dire*.

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not have "specific questions" but rather "issues" that he wanted to address in the questionnaire. After the court stated that it would not permit the use of a written questionnaire, it instructed defendant to bring to the next listing a list of the questions he wanted to orally ask the jurors. Defendant replied that he would do so and stated that he had already compiled a list of 115 questions, with more to be added (N.T. 6/4/82, 4.123-4.136).

Commonwealth v. Edwards Does not Support Defendant's Claim

In his response to the Commonwealth's motion to dismiss, defendant cites *Commonwealth v. Edwards,* 177 A.3d 963 (Pa.Super. 2018). In *Edwards*, the Superior Court awarded the appellant a new trial after finding a *Batson*[5] violation. One of the factors the court relied on in granting relief was that the court staff had listed the race of the prospective jurors on the peremptory strike sheet they provided counsel during jury selection.

Contrary to what defendant believes, *Edwards* does not support his claim that *Batson* was violated in the present case. If anything, the case undermines his claim. In *Edwards*, the court found that the listing of the race of the prospective jurors on the peremptory strike sheet did not, by itself, establish a *Batson* violation. *Id.* at 967, 971-72. While the court considered the act as being relevant under "the totality of the circumstances" an appellate court must consider when reviewing a lower court's *Batson* ruling, *id.* at 975 n.20, it found that there were "other factors" that supported a finding of discrimination on the prosecutor's part. *See id.* at 975. Among them was the fact that the prosecutor had exhausted her peremptory challenges and that she had used every single one of them against a minority, all of whom, with the exception of one person, were African American. *Id.* at 975-76.

In the present case, the Pennsylvania Supreme Court has twice considered defendant's *Batson* claim and both times concluded that there was "not a trace of support for an inference that the use of peremptories was racially motivated." *Commonwealth v. Abu-Jamal*, 720 A.2d at 114; *Commonwealth v. Abu-Jamal*, 555 A.2d 846, 850 (Pa.

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5 *Batson v. Kentucky*, 476 U.S. 79 (1986).

1989). The only "new evidence" defendant has advanced in support of his *Batson* claim in his current petition is the prosecutor's jury selection notes in which he listed the race of some of the prospective jurors. But as the Supreme Court has already held that there is no evidence of a *Batson* violation in this case, and as *Edwards* indicates that the listing of the race of the prospective jurors does not, by itself, establish a violation, the case does not support defendant's argument that there was a violation here.

It is also noteworthy that, as the Pennsylvania Supreme Court has explained, jury selection in *Edwards* was conducted via the "pass the pad" method. *Commonwealth v. Edwards*, 272 A.3d 954, 957 (Pa. 2022). Under that method, a panel of jurors is questioned. Afterwards, the attorneys pass back and forth a pad listing the jurors' names and take turns marking which jurors they are striking with peremptory challenges. *See* Pa.R.Crim.P. 631(F)(2) (describing this method of jury selection). If, as was the case in *Edwards*, the races of the jurors are listed next to their names, then, at least in theory, an attorney might use the notations as a reminder of which potential jurors were of what race and then strike or accept them on that basis.

In this case, however, the "pass the pad" method was not used. Rather, after each prospective juror was questioned, the attorneys announced, while the juror was still sitting right in front of them, whether they were exercising a preemptory challenge. Thus, unlike in *Edwards*, the listing of a juror's race could not have influenced the prosecutor's decision to accept or strike the juror. Instead, as defendant has conceded in both his PCRA petition and his response to the Commonwealth's filing, the record indicates that the prosecutor's purpose in listing the race of the prospective jurors was "to build a record to rebut any claim of discrimination" (defendant's Sixth PCRA Petition, ¶

59; Petitioner's Brief, 35). And since defendant had already made clear that he intended to accuse the prosecutor of discrimination, this protective measure was justified and cannot serve as the basis for finding a *Batson* violation.

Defendant has Failed to Provide the Required Witness Certifications and Identify the Specific Facts he Would Present at an Evidentiary Hearing that Would Entitle him to Relief

In its motion to dismiss, the Commonwealth noted that defendant had not provided necessary witness certifications and offered to present any specific evidence at an evidentiary hearing that would entitle him to relief. In his response to the Commonwealth's filing, defendant has attached what he claims are witness "certifications." The certifications, however, do not comply with the PCRA's requirements and do not identify any specific testimony that the witnesses would present. Thus, they do not provide a basis for the granting of an evidentiary hearing.

The PCRA states that "[w]here a petitioner requests an evidentiary hearing, the petition shall include a certification signed by each intended witness stating the witness's name . . . and substance of testimony." 42 Pa.C.S.A. § 9545(d)(1)(i). The PCRA further states that "[i]f a petitioner is unable to obtain the signature of a witness," he "shall include a certification, signed by the petitioner or counsel, stating the witness's name . . . and substance of testimony" and must "specify . . . the petitioner's efforts to obtain the witness's signature." *Id.* § 9545(d)(1)(ii). The failure to "substantially comply" with these requirements "shall render the proposed witness's testimony inadmissible." *Id.* § 9545(d)(1)(iii).

The certifications defendant attaches to his response to the Commonwealth's motion to dismiss are not signed by the witnesses he proposes to call at an evidentiary

hearing. Nor has he specified the efforts he made, if any, to obtain the witnesses' signatures. He has also failed to provide the substance of the proposed witnesses' testimony, but instead has simply identified the general area about which they would testify.[6] Because defendant has failed to substantially comply with the PCRA's witness-certification requirements, he is not entitled to an evidentiary hearing. *See Commonwealth v. Salmond*, 1975 EDA 2019, 2020 WL 6707229 (Pa.Super. 2020) (unpublished decision), at *4-5 (rejecting the appellant's PCRA claim where he "did not include the requisite Section 9545(d)(1) certifications in either his *pro se* or amended PCRA petitions").

[6] In his original filing, defendant provided an affidavit from the trial prosecutor, Joseph McGill, Esquire. That affidavit complies with the PCRA's certification requirements. However, as the Commonwealth explains in its motion to dismiss, the substance of the affidavit does not support defendant's claims and therefore cannot serve as the basis for the granting of an evidentiary hearing.

Answer

Defendant's claims for relief are specifically denied. The record does not establish a basis for granting PCRA relief, and he has not submitted the requisite witness certifications and offered to present any specific evidence at an evidentiary hearing that would entitle him to relief. Accordingly, his PCRA petition should be dismissed. *See Commonwealth v. Eichinger*, 108 A.3d 821, 849 (Pa. 2014) (if a PCRA petitioner's offer of proof is insufficient to establish a *prima facie* case that PCRA relief is warranted, or if his allegations are refuted by the existing record, the petition may be dismissed without a hearing).

WHEREFORE, the Commonwealth respectfully requests that this Court dismiss defendant's PCRA petition.

Respectfully submitted,

/s/ Grady Gervino

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