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IN THE
SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

1206 EDA 2023

COMMONWEALTH OF PENNSYLVANIA

V.

WESLEY COOK, a/k/a MUMIA ABU-JAMAL

COMMONWEALTH'S BRIEF FOR APPELLEE

Defense Appeal from the March 31, 2023 Order of the Court of Common Pleas of Philadelphia County Dismissing Defendant's Sixth PCRA Petition Filed in Docket No. CP-51-CR-0113571-1982.

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COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

I. Did defendant's *Brady* claim provide a basis for relief?

-Answered in the negative by the court below.

II. Did defendant's *Batson* claim provide a basis for relief?

-Answered in the negative by the court below.

COUNTER-STATEMENT OF THE CASE

Forty-one years ago, defendant was convicted of killing Philadelphia Police Officer Daniel Faulkner. He appeals from the order dismissing his sixth PCRA petition attacking his first-degree murder conviction. He raises two claims, both based on documents he obtained during his attorneys' 2019 review of the Commonwealth's casefile.

He argues he was entitled to relief because the Commonwealth allegedly violated *Brady v. Maryland*, 373 U.S. 83 (1963), by not disclosing that the prosecutor supposedly promised witness Robert Chobert money in exchange for his testimony. His claim is based on a letter Chobert sent the prosecutor after trial asking about money he believed he was owed and whether he needed to sign anything to receive it.

Defendant did not offer to present any evidence that would have established that the money Chobert believed he was owed was in relation to a deal he had struck with the prosecutor, as opposed to statutorily-permitted witness fees, reimbursement for expenses or lost wages, or other legitimate reasons. Additionally, the PCRA court found that even if defendant had offered to present such evidence, his claim still failed. This was because, based on the strong evidence of defendant's guilt, there is no reason to believe this impeachment evidence would have made a difference at trial.

Defendant also argues he should have been permitted to relitigate a claim that the prosecutor violated *Batson v. Kentucky*, 476 U.S. 79 (1986), by striking Black jurors. Defendant based this claim on notes the prosecutor took during jury selection in which he marked the race and other demographic features of some of the prospective jurors. Defendant, however, conceded that the prosecutor took these notes so he could respond to a claim of racial discrimination in jury selection—one the defense had announced before *voir dire* it intended to bring.

The PCRA court did not need to reach the merits of the claim because it found it was untimely. Defendant litigated a *Batson* claim in his first PCRA petition, more than twenty-five years ago, and during those proceedings the Commonwealth stated it had no objection to him questioning the prosecutor about his jury-selection practice. Defendant, however, elected not to call the prosecutor at the 1995 hearing. Thus, the PCRA court concluded he did not act with due diligence in uncovering the information upon which his claim is based.

The PCRA court also found the *Batson* claim waived. This was because defendant did not object at trial to the prosecutor's use of his peremptory challenges. In fact, near the conclusion of *voir dire*, defense counsel specifically stated that he and defendant were pleased with the way jury selection had progressed.

The relevant facts and procedural history of this case are lengthy. But a full recounting is necessary to place defendant's claims in their proper context, which will show that no relief is due.

Statement of Facts

The trial evidence showed that during the early-morning hours of December 9, 1981, Officer Faulkner stopped a Volkswagen driven by defendant's brother, William Cook, near the corner of 13th and Locust Streets in Philadelphia. Faulkner was in uniform and driving a marked police car. Shortly after stopping the car, he sent a radio message requesting the assistance of a police van. Faulkner stood behind Cook and was apparently about to frisk him when Cook turned and punched him in the face.

As Faulkner attempted to subdue and handcuff Cook, defendant ran from a parking lot across the street. Defendant ran to the officer, whose back was toward him, and shot him in the back with a five-shot revolver. Faulkner turned, grabbed for his own sidearm, and managed to fire one shot that hit defendant in the chest. Faulkner fell to the ground and lay face-up. Defendant stood over him and repeatedly fired at him. One of defendant's bullets struck the officer between the eyes and entered his brain.

Officers Robert Shoemaker and James Forbes drove to 13th and Locust in response to Faulkner's radio message. A taxi driver stopped them and stated an of-

ficer had been shot. Shoemaker approached the shooting scene with his gun drawn and saw defendant sitting on the curb. Shoemaker said, "freeze," but defendant instead reached for a gun that was on the sidewalk beside him, about eight inches from his hand. When defendant ignored his second order to "freeze," Shoemaker kicked defendant and knocked him to the ground. He then kicked the gun out of defendant's reach. Forbes covered defendant's brother, who was frisked and found unarmed. Defendant's brother said, "I ain't got nothing to do with this."

When the police attempted to handcuff defendant and place him in a police van to transport him to the hospital, he resisted. He continued to struggle against the officers when they subsequently brought him inside the hospital, the same one to which Faulkner had been brought. The officers carrying defendant—he refused to walk—temporarily placed him on the floor of the lobby next to the entrance to the emergency room. While lying there, defendant said, "I shot the mother fucker and I hope the mother fucker dies." A few moments later, as the officers were about to carry him into the emergency room, defendant repeated, "Yeah, I shot the mother fucker and I hope the mother fucker dies." Shortly thereafter, Faulkner was pronounced dead.

Robert Chobert's Pretrial Testimony

Robert Chobert testified at defendant's suppression hearing. He stated he was in his parked taxicab when he heard a gunshot. He looked up and saw a police officer fall to the ground. Another man, whom he identified as defendant, then stood over the fallen officer and fired multiple shots at him. After discharging his gun, defendant walked a short distance and fell. Chobert stayed at the scene, and when police arrived, he identified defendant as the person who shot the officer. Upon questioning by defendant himself at the hearing,[1] Chobert emphatically stated, "I saw you shoot him, and I never took my eyes off you until you got in the back of the [police] wagon." Chobert specifically testified that nobody suggested to him that defendant was the person who shot the officer (N.T. 6/2/82, 2.56-2.60, 2.75).

The day the trial was supposed to begin, the prosecutor, Joseph McGill, stated that, for security reasons, the Commonwealth had placed Chobert in a hotel (N.T. 6/18/82, 2.47).

[1] Defendant had backup counsel but represented himself during this hearing.

Pretrial Proceedings Regarding Jury Selection

The issue of jury selection was discussed during the pretrial hearings. At one of the hearings, defense counsel accused the Commonwealth of having a general policy of discriminating against Black people during jury selection. Defense counsel further put the prosecutor on notice that, during the upcoming jury selection process, he would be monitoring his use of peremptory strikes for racial bias. Prosecutor McGill objected to defense counsel's statement that his office had a policy of striking jurors based on race. The judge also pushed back on defense counsel's comments and warned him not to turn the case "into a political or racial thing," especially since race had not been a factor up until that point (N.T. 3/18/82, 11-16).

Jury Selection

On the first day of jury selection, but before any potential jurors were questioned, defense counsel asked the judge if the potential jurors could be asked to orally state their race for the record. Defense counsel indicated it was necessary to keep track of the race of the prospective jurors because he would potentially advance a claim that the prosecutor engaged in discrimination during jury selection (N.T. 6/7/82, 17-20).

The prosecutor opposed the request because he believed it would seem odd to the jurors if they were asked to state their race when they were sitting in plain view in the courtroom. Instead, he suggested that if race became an issue during

jury selection, the parties themselves could provide the relevant information for the record. The judge indicated he would not ask the prospective jurors to state their race for the record, but he informed defense counsel that he could ask the jurors to do so if he wanted (*id.*).

Jury selection lasted a week and a half. The defense did not ask each prospective juror to state their race for the record, but only posed that question to some of them. As accurately described by the federal appellate court, the record, which was supplemented at a PCRA hearing, shows the following:

> During *voir dire*, the prosecution exercised fifteen out of its twenty available peremptory challenges and removed ten black potential jurors from the venire. Abu-Jamal did not object to any of the peremptory challenges. Abu-Jamal struck at least one black juror that had been accepted by the prosecution. At the close of jury selection, the jury was composed of nine white jurors and three black jurors. The court later dismissed one of these black jurors, for unrelated reasons, after the trial began. The final empaneled jury consisted of ten white jurors and two black jurors. The record does not reveal the total number of venirepersons or the racial composition of the venire.

Abu-Jamal v. Horn, 520 F.3d 272, 287 (3rd Cir. 2008).

Although defense counsel made clear before jury selection that he would be looking for racial discrimination in the prosecutor's use of peremptory challenges, at no time during jury selection or at its conclusion did he allege that the prosecutor engaged in discrimination. In fact, after eleven jurors were selected, counsel stated that he and defendant were pleased with how jury selection had progressed. Counsel said that "in our view, Mr. Jamal's and mine, the jurors in the jury selection

process proceeded in a manner which suggested to us that we could indeed obtain jurors in in [sic] this matter who would be fair and impartial" (N.T. 6/16/82, 266).

Trial

At trial, the Commonwealth presented three eyewitnesses to the shooting, two of whom identified defendant as the shooter. The third eyewitness provided a consistent version of events and identified a jacket recovered from the hospital emergency ward where defendant was taken following the shooting as the jacket worn by the shooter. A fourth witness testified to seeing defendant quickly approach the scene with his hand behind his back just before the shooting. The four witnesses did not know one another.

Robert Chobert

Taxi driver Chobert testified he had just let off a fare and was filling out paperwork at 13th and Locust when he heard a shot:

> I looked up, I saw the cop fall to the ground, and then I saw [defendant] standing over him and firing more shots into him.

Chobert demonstrated how defendant stood over the fallen officer and fired at his face multiple times. Chobert remained on the scene and identified defendant to the police as the person who shot the officer (N.T. 6/19/82, 209-16, 276-77).

Cynthia White

Cynthia White testified she was standing on the corner at 13th and Locust and saw Officer Faulkner stop the Volkswagen driven by defendant's brother William Cook. She saw Cook punch Faulkner in the face. As Faulkner attempted to handcuff Cook, defendant ran toward the officer from the parking lot across the street. Defendant shot twice from behind the officer. Faulkner staggered and grabbed for something at his side; White could not see what it was because defendant moved into her line of view. Faulkner fell to the ground. Defendant then stood over him and fired down at him several times. Less than twenty minutes after the shooting, White provided a statement to police describing what she saw (N.T. 6/21/82, 4.92-4.107, 4.164; 6/22/82, 5.179).

Michael Scanlan

Michael Scanlan testified he was in his car waiting for the light to change at 13th and Locust when he saw an encounter between Faulkner and a man who was driving a Volkswagen (who would subsequently be identified as defendant's brother William Cook). During this encounter, Faulkner spoke with Cook and directed him to stand "spread-eagle" in front of the police car. While Cook was standing "spread-eagle," he turned around and punched Faulkner in the face. As Faulkner tried to subdue Cook, another man (who would subsequently be identi-

fied as defendant) came "running out from a parking lot across the street towards the officer." Faulkner's back was to the man. Scanlan testified:

> 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.

Defendant shot at Faulkner's face two or three times. One bullet struck its target, as Scanlan saw that Faulkner's "whole body jerked" following one of the gunshots. Scanlan identified a jacket recovered from the emergency ward where defendant was taken—a jacket stained with human blood and that had been struck by a bullet—as the jacket worn by the gunman who shot Faulkner (N.T. 6/24/82, 177-87; 6/25/82, 8.4-8.11, 8.18-8.28, 8.62-8.63).

Albert Magilton

A fourth witness, Albert Magilton, did not see the shooting but testified he saw an officer stop a Volkswagen at 13th and Locust. The officer and driver then met on the sidewalk. Magilton continued walking and 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. Moments later, Magilton heard a number of gunshots. When he looked back toward the Volkswagen, he no longer saw the officer. Magilton crossed the street and approached the stopped vehicle. When he

got to the sidewalk, he saw Faulkner lying there. Defendant was sitting on the curb nearby.

Each of these witnesses testified that the only people at the shooting were Faulkner; defendant's brother, who moved toward the wall of a building and did nothing; and defendant. Nobody else was at the spot of the shooting, although Scanlan confirmed the other eyewitnesses' presence in the general area (N.T. 6/19/82, 212, 227-28, 233-34; 6/21/82, 4.106; 6/22/82, 5.134-5.135; 6/25/82, 8.20-8.21, 8.29-8.30). Two additional witnesses, a hospital security guard and a police officer, testified to the incriminating statements defendant made at the hospital, where he stated he shot Faulkner and hoped he would die (N.T. 6/24/82, 28-30, 33, 113-16, 135-36).[2]

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James Forbes testified he was one of the two officers who first arrived at the shooting scene and that he recovered two handguns: the gun defendant had been reaching for, a five-shot Charter Arms .38-caliber revolver with a two-inch barrel; and, from the street, a standard police-issue six-shot Smith & Wesson .38-caliber Police Special revolver with a six-inch barrel. The police gun was registered as issued to Faulkner and contained six Remington .38 Special cartridges, only one of

[2] A third witness—one presented by defendant—testified at a PCRA hearing that he also heard this confession.

which had been fired. The Charter Arms gun had five cartridges, all of which had been fired (N.T. 6/19/82, 152-54, 162-63, 175-76; 6/23/82, 6.18-6.23, 6.90-6.100).

Defendant had purchased the Charter Arms gun, and it was registered to him. All his ammunition was the "+P" high-velocity type: four Federal .38-caliber "+P" and one Smith & Wesson .38-caliber "+P." The manager of the store where defendant purchased the gun explained that "+P" is known in the gun trade as a "devastating bullet" because "[w]hen it hits the target, it just almost explodes" (N.T. 6/21/82, 4.32-4.59).

The bullet that struck defendant entered his chest and was surgically removed. Ballistics testing confirmed that it was fired from Faulkner's gun. A bullet was removed from Faulkner's head. It was too deformed to be ballistically matched to a particular gun, but was caliber .38/.357 (.38 and .357 calibers are interchangeable), consistent with defendant's .38-caliber handgun. It had a hollow base, a characteristic of ammunition manufactured by the Federal firearms company; four of the five spent shells in defendant's gun were of Federal manufacture. A copper bullet jacket, two flattened and distorted bullet specimens, and fragments were recovered from the shooting scene, all unusable for ballistics matching. However, one of the flattened bullet specimens, like the bullet taken from Faulkner's head, had a hollow base—as did defendant's Federal-brand ammunition. The bullet taken from Faulkner's head was fired from a gun barrel with eight lands, eight

grooves, and a right-hand twist, all of which matched defendant's gun. Faulkner's and defendant's clothing tested positive for primer lead residue, showing both were shot at a range of less than twelve inches (N.T. 6/19/82, 152-55; 6/23/82, 6.2-6.5, 6.100-6.114, 6.163-6.168; 6/26/82, 10-18, 32).

The defense witnesses presented at trial were mostly character witnesses. None observed the shooting;[3] nor did they exculpate him. Neither defendant nor his brother testified. In closing argument, defense counsel suggested that defendant's brother or some other unidentified person may have shot and killed Faulkner. He told the jurors they should find defendant guilty of first-degree murder or not guilty of anything, that they should not "compromise" their verdict "in anyway whatsoever" and find him guilty of a lesser degree of homicide (N.T. 7/1/82, 79-82, 137-38).[4]

On July 2, 1982, the jury convicted defendant of first-degree murder and possessing an instrument of crime. After a penalty hearing, the jury sentenced defendant to death, and the court imposed a consecutive sentence of 2½ to 5 years of incarceration for the weapons offense.

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[3] One exception was Cynthia White, who had already testified for the Commonwealth. Defendant called her to see if she could remember in which hand the gunman held the gun. She could not (N.T. 6/29/82, 180-96).

[4] During a sidebar, defense counsel and the judge agreed the evidence did not support voluntary manslaughter. Nevertheless, the then-applicable law required a voluntary-manslaughter charge (N.T. 7/1/82, 191-94).

Direct Appeal

The Pennsylvania Supreme Court affirmed defendant's judgments of sentence. *Commonwealth v. Abu-Jamal*, 555 A.2d 846 (Pa. 1989). One of the claims defendant raised was that the prosecutor violated *Batson* by using his peremptory challenges to exclude Black jurors based on race. The Court found defendant waived the claim by not raising it at trial:

> There can be no doubt that under the longstanding teaching of *Commonwealth v. Clair*, 326 A.2d 272 (Pa. 1974), the appellant has waived any claim that the prosecutor engaged in discriminatory use of peremptory challenges to obtain an unrepresentative jury. Not only did he fail to advance the issue in any form resembling that adopted by the Supreme Court in *Batson*, he made no attempt even to frame the issue under the then prevailing rules of *Swain v. Alabama*, 380 U.S. 202 (1965).

Id. at 849 (parallel citations omitted).[5]

Nevertheless, because defendant was then sentenced to death, the Court addressed the merits of the claim under its relaxed-waiver doctrine for capital cases.[6] The Court "[did] not hesitate" to find no *prima facie* case existed that the prosecutor used peremptory challenges in a racially-motivated manner. *Id.* at 850. The Court explained:

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[5] The U.S. Supreme Court recognized the prohibition against discriminating against potential jurors based on race in *Swain v. Alabama*, *supra*. *Batson*, decided after defendant's trial, clarified the standard for establishing such a violation.

[6] The doctrine no longer exists, even for cases tried when it did. *Commonwealth v. Rainey*, 928 A.2d 215, 224 (Pa. 2007).

> We agree with the Commonwealth that mere disparity of number in the racial make-up of the jury, though relevant, is inadequate to establish a prima facie case. The ultimate composition of the jury is affected not only by the prosecutor's use of peremptories, but by the defendant's use of such, by challenges for cause (more acute in capital cases because of the *Witherspoon* inquiry),[7] and by jurors' inability to serve for personal reasons. The Commonwealth cites at least one instance where the appellant removed a black juror already passed as acceptable by the Commonwealth; it cannot be determined whether any of the venire, who were dismissed when it was the appellant's turn to first pass on their acceptability, were black and might have been acceptable to the Commonwealth. Moreover, we find no "pattern" in the use of peremptories. The Commonwealth used fifteen of the twenty available challenges. The record reflects that eight of these venirepersons were black.[8] Had the appellant not peremptorily challenged the black venireperson acceptable to the Commonwealth, the first two jurors seated would have been black. We also note our agreement with the Commonwealth's argument that the replacement of the first juror chosen, a black woman, with an alternate, a white man, was entirely beyond the Commonwealth's control, and the resulting disparity in numbers of blacks and whites on the jury is no basis for an inference of purposeful discrimination. Finally, we have examined the prosecutor's questions and comments during *voir dire*, along with those of the appellant and his counsel, and find not a trace of support for an inference that the use of peremptories was racially motivated.

Id.

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[7] Referring to *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and a juror's willingness to impose capital punishment (this and subsequent footnote inserted by the Commonwealth).

[8] The Court noted that defendant claimed eleven of the fifteen jurors struck by the prosecutor were Black people, but that the race of several of them was not of record. *Abu-Jamal*, 555 A.2d at 848-50.

First PCRA Petition

Defendant filed his first PCRA petition in 1995 raising numerous claims, including a *Batson* claim and a *Brady* claim involving Robert Chobert. Extensive hearings were held in 1995, and also in 1996 and 1997 after two remands from the Pennsylvania Supreme Court. The PCRA court denied defendant's petition.

Batson Claim

Defendant re-raised his *Batson* claim. During the PCRA hearings, he was given the opportunity to further develop a record in support of it. To that end, he had prosecutor McGill under subpoena, and McGill (who was then in private practice) made himself available to testify (N.T. 7/18/95, 56-59; 7/26/95, 222-23, 228; 7/27/95, 28-29, 156; 8/4/95, 118). Additionally, the Commonwealth stated it had no objection to defendant questioning McGill about his jury-selection practice. In fact, the Commonwealth specifically stated the defense "should be given full latitude" to question McGill regarding *Batson* "so this claim could be litigated once and for all" (N.T. 7/31/95, 292).

Defendant decided not to call McGill at the hearing (N.T. 8/4/95, 119-20). Instead, with regard to his *Batson* claim, he limited himself to presenting a stipulation that ten Black jurors were peremptorily struck by McGill.[9]

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[9] The stipulation initially indicated that eleven Black jurors were peremptorily struck by McGill, but defendant subsequently withdrew the stipulation with regard (footnote continued . . .)

The PCRA court rejected defendant's claim for multiple reasons. *Commonwealth v. Cook*, 1995 WL 1315980, at *101-04. The judge—who was also the trial judge—stated that "[t]he Commonwealth did not intentionally or racially discriminate against African-American jurors in its use of peremptory strikes in violation of *Batson* and its progeny." *Id.* at *102. The court further stated that, at the PCRA hearing, the Commonwealth withdrew any objection to defendant presenting evidence on the subject. Although the trial prosecutor was available to testify for defendant, he declined to call him. While defendant did provide the stipulation that the prosecutor peremptorily removed ten (rather than eight) Black people from the jury, the court found that the stipulation did not in any way undermine the Supreme Court's conclusion that there was no *Batson* violation.

Robert Chobert

Defendant also claimed prosecutor McGill violated *Brady v. Maryland*, *supra*, by not disclosing he had agreed to help Chobert—a cab driver—regain his suspended driver's license. Defendant presented Chobert as a witness at the PCRA hearing.

Chobert explained that at some point—he did not remember when, but it "probably" was "sometime during the trial," and maybe after he testified—he

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to one of them. *Commonwealth v. Cook*, 1995 WL 1315980 (Pa.Com.Pl. 1995), at *102.

asked McGill "if he could help me find out how I could get my license back." McGill responded he would "look into it." Chobert stated he knew McGill did not have the power to get his license back for him; he was simply asking him to explain the law regarding what steps he had to take to get it restored. McGill never followed up with Chobert about the matter, and at the time of the PCRA hearing, more than ten years after trial, Chobert still had not gotten his license back. Chobert further explained that during trial he was housed in a hotel for his protection (N.T. 8/15/95, 4-19).

Chobert stated that when he testified against defendant at trial it was not "because I was trying to get my license back," and he made clear nobody influenced his testimony. Instead, he explained, he testified truthfully at trial based on what he saw the night of the incident (*id.*, 7, 11, 16). Although defendant claimed McGill attempted to influence Chobert's testimony by promising to help him regain his license, he did not ask Chobert if McGill offered him any other assistance.

The court found Chobert's PCRA testimony credible, and based on that finding, determined that defendant failed to prove the Commonwealth withheld any material evidence. *Cook*, 1995 WL 1315980, at *64-65, 71, 80. Accordingly, it rejected defendant's *Brady* claim.

First PCRA Appeal

The Pennsylvania Supreme Court affirmed the denial of PCRA relief, *Commonwealth v. Abu-Jamal*, 720 A.2d 79 (Pa. 1998), holding the following regarding the above *Batson* and *Brady* claims.

Batson Claim

The Supreme Court considered defendant's *Batson* claim based on the stipulation presented at the PCRA hearing that ten Black jurors were peremptorily struck by the prosecutor—rather than eight as the record showed on direct appeal. This evidence did not alter the Court's conclusion that the claim was meritless. The Court explained:

> This court's analysis of this issue on direct appeal indicated that the record reflected that the prosecution employed peremptory challenges to strike eight African-American venirepersons. It now appears, via a stipulation, that there may have been two more African-American venirepersons stricken by the prosecution. That evidence does not alter our original conclusion. Significantly, in concluding on direct appeal that Appellant failed to establish a *prima facie* case of discrimination, we stated: "… we have examined the prosecutor's questions and comments during *voir dire*, along with those of the appellant and his counsel, and find not a trace of support for an inference that the use of peremptories was racially motivated." 555 A.2d at 850. Even assuming that ten, rather than eight, stricken venirepersons were African-Americans, we would still arrive at the same resolution of this issue that we did on direct appeal. Appellant's current claim, thus, warrants no relief.

Abu-Jamal, 720 A.2d at 114 (parallel citations omitted).

Robert Chobert

The Supreme Court also upheld the PCRA court's rejection of defendant's *Brady* claim regarding Chobert. The Court explained that "the record reveals that no promise was offered by the Commonwealth to Mr. Chobert regarding his license." *Id.* at 95, 112. The Court further stated that "Chobert's pretrial statements, which were consistent with his trial testimony and which were introduced by the Commonwealth, were made prior to this supposed 'deal.'" *Id.* at 96.

The Court also rejected a *Brady* claim defendant brought regarding witness Cynthia White, alleging she was provided favorable treatment in return for her testimony. The Court noted that the record did not support the claim. *Id.* at 97-100, 106-07. Also, with respect to both *Brady* claims, the Court explained that, in addition to Chobert's and White's testimony, there was the "unequivocal testimony of Michael Scanlon and Albert Magilton, both of whom presented damaging testimony at trial." *Id.* at 107 n.34. Scanlan's and Magilton's testimony, the Court stated, made it "unlikely" that the claims regarding alleged deals with Chobert and White, "either singularly or cumulatively, could compel a different verdict." *Id.*

Second PCRA Petition

Defendant filed a second PCRA petition in 2001. He attacked prior PCRA counsel's decision not to present prosecutor McGill as a witness at the PCRA hearing in regard to his *Batson* claim (Corrected PCRA Petition, filed July 16, 2001, ¶510). He stated that, "as a result of taking the decision not to put Assistant District Attorney McGill on the stand," his prior attorneys "failed to investigate with him the racial bias in the manner in which he had conducted jury selection" (*id.* ¶¶109, 517).

In support of his petition, defendant presented a declaration from one of the attorneys who litigated his first PCRA petition. She conceded that during the PCRA hearing her co-counsel had "inexplicably waived trial prosecutor Joseph McGill as a witness, after he had been subpoenaed, thereby failing to make a record about his misconduct … in jury selection" (Wolkenstein declaration, filed Sept. 5, 2001, ¶74).

Defendant also claimed that Chobert was pressured to fabricate evidence against him, and he confirmed that in 1995 a defense investigator twice interviewed Chobert (Corrected PCRA Petition, filed July 16, 2001, ¶¶265, 460).

The PCRA court dismissed defendant's petition as untimely, and the Supreme Court affirmed. *Commonwealth v. Abu-Jamal*, 833 A.2d 719 (Pa. 2003).

Third and Fourth PCRA Petitions

Defendant filed his third and fourth PCRA petitions in 2003 and 2009. They were dismissed by the PCRA court, and the Supreme Court affirmed the dismissals. *Commonwealth v. Abu-Jamal*, 941 A.2d 1263 (Pa. 2008), 40 A.3d 1230 (Pa. 2012).

Federal *Habeas Corpus* Petition

In 1999, defendant filed a federal *habeas corpus* petition raising numerous claims. The district court rejected defendant's trial-related claims but granted a new penalty hearing due to instructional error at the penalty hearing. *Abu-Jamal v. Horn*, 2001 WL 1609690 (E.D.Pa. 2001).

Batson Claim

Defendant raised a *Batson* claim. The federal court held that the state courts' findings—during the litigation and appeal of the first PCRA petition—that defendant had not demonstrated a *prima facie* case of racial discrimination was not an unreasonable application of *Batson*. *Id.* at *103-09.

The court pointed out that the record lacked much of the relevant information for a *Batson* claim. The court emphasized that the absence of that information was especially noteworthy because defendant had the opportunity to supplement the record at the PCRA hearing—including with prosecutor McGill's testimony—but did not do so except for the stipulation regarding the race of two of

the stricken jurors. *Id.* at *106. "The prosecutor was available as a witness," the court noted, "but [defendant] chose not to call him. There was no reason for the government to have done so." *Id.*

During the proceedings, defendant requested discovery of McGill's jury-selection notes. *Id.* at *107. The federal court rejected the request because defendant "failed to demonstrate good cause for discovery of McGill's jury selection notes, especially in light of the fact that [he] chose not to pursue McGill's testimony at the PCRA hearing." *Id.* at *109.

Robert Chobert

Defendant also claimed the Commonwealth violated *Brady* by not disclosing the alleged deal Chobert had with McGill regarding the restoration of his driver's license. The court rejected the claim, stating that at the PCRA hearing there was evidence "that Chobert never expected a favor for testimony." *Id.* at *22. The court also found the consistencies in Chobert's statements and testimony "strongly indicate that the PCRA court's finding that he had no cooperation agreement with the prosecution was not unreasonable." *Id.* at *23.

Federal Appeal

The federal appellate court affirmed the district court's decision. With respect to the *Batson* claim, the court held that, because defendant "did not object to the prosecutor's use of peremptory challenges at any point during *voir dire* or at his 1982 trial," he had "forfeited" the claim. *Abu-Jamal*, 520 F.3d at 283-84.

The court held that even assuming defendant's failure to object "is not fatal to his claim," it would still fail because he "failed to meet his burden in proving a prima facie case." *Id.* at 284. The court focused on defendant's failure to provide the necessary record for a *Batson* claim. *Id.* at 290-93. The court stated that "[defendant] had the trial prosecutor under subpoena and had the opportunity to call him. But [he] did not take this action." *Id.* at 292. The court found defendant's "failure to take the opportunity to elicit the prosecutor's testimony [was] noteworthy considering the absence of a developed record to support a prima facie case." *Id.* at 292 n.19. Finally, the court explained it had "never found a prima facie case based on similar facts" as here, where ten of fifteen peremptory strikes were used against members of a racial group. *Id.* at 293.

Life Sentence

The Commonwealth did not seek a new capital sentence, and defendant was sentenced to life-imprisonment. He appealed, raising claims regarding the imposition of sentence, and this Court affirmed. *Commonwealth v. Abu-Jamal*, 2013 WL 11257188 (Pa.Super. 2013).

Fifth PCRA Petition

Defendant filed a fifth PCRA petition in 2016. Relying on *Williams v. Pennsylvania*, 579 U.S. 1 (2016), he argued he was entitled to *de novo* review of his prior PCRA appeals. This was because even though (unlike in *Williams*) Justice Castille was not the District Attorney who sought the death penalty, he served as DA during his direct appeal and subsequently sat as jurist in his PCRA appeals. In *Williams*, the Court held that Justice Castille should have recused himself from Williams' PCRA appeal because, as DA, he had approved the trial prosecutor's request to seek the death penalty in that case.

During the PCRA proceedings, the Honorable Leon W. Tucker directed the Commonwealth to provide its casefile for his review. The Commonwealth delivered thirty-two boxes, which it believed constituted the complete file.

Judge Tucker denied defendant's *Williams*-based claim. But he reinstated defendant's PCRA appellate rights based on a letter the Commonwealth produced during the proceedings. The letter was written by DA Castille to the governor, urg-

ing him to sign death warrants in cases where the direct appeals had concluded. The letter did not refer to defendant—as his direct appeal was then ongoing—but Judge Tucker believed it called into question Justice Castille's impartiality in cases involving the murder of a police officer, and thus he should have recused himself from defendant's PCRA appeals.

Discovery of Documents

After defendant's appellate rights were reinstated, the Commonwealth in December of 2018 found six additional boxes containing documents relating to this case. The Commonwealth informed Judge Tucker and defendant's attorneys of this discovery and made the boxes available to defense counsel for review.[10]

Contained within the boxes were the documents forming the basis of defendant's present claims: (1) portions of prosecutor McGill's jury-selection notes showing he noted the race and other demographic features of some of the prospective jurors; and (2) a letter written by Chobert to McGill after trial asking about

[10] The Commonwealth informed Judge Tucker and defendant of the discovery by a letter to Judge Tucker filed in court on January 3, 2019. Defendant incorrectly states this was "after a notice of appeal had been filed transferring jurisdiction to [this Court]" (Brief for Appellant, 5). In fact, no notice of appeal was filed until more than three weeks later, on January 25, 2019, when both parties appealed. Defendant began his review of the boxes eleven days earlier, on January 14, 2019 (PCRA Court Amended Order, n.1, filed Jan. 24, 2019). The Commonwealth subsequently withdrew its appeal and, as explained below, this Court found the PCRA court did not have jurisdiction to reinstate defendant's appellate rights and quashed his appeal.

money he believed he was owed and whether he needed to sign anything to receive it.

Proceedings During Reinstated Appeals

Defendant subsequently filed his brief in this Court for his reinstated appeals. On the same date, he filed a remand motion for the PCRA court to consider the above documents and additional documents relating to another witness. The Commonwealth filed a response, stating that "[w]ithout, at the present time, taking a position on the relevance and/or significance of these newly-discovered documents, the Commonwealth does not oppose a remand so that the documents may be presented to the PCRA court."

After the Commonwealth filed this response, Officer Faulkner's widow, Maureen Faulkner, filed a King's Bench petition asking the Supreme Court to remove the Philadelphia District Attorney's Office from the case and replace it with the Attorney General's Office. Mrs. Faulkner contended such removal was necessary because of alleged conflicts of interest that supposedly prevented the DA's Office from properly handling the case.

In support of her assertion that the Commonwealth was being derelict due to its alleged conflicts of interest in not opposing defendant's remand motion, Mrs.

Faulkner provided an affidavit from prosecutor McGill addressing the documents defendant now relies upon.[11]

McGill's Response to Jury-Selection Notes

McGill stated in the affidavit that he did *not* exercise peremptory challenges based on race. He acknowledged that his jury-selection notes contain references to the race of some of the potential jurors, as well as other demographic information. But he explained that noting the race of prospective jurors is not improper and that, at least today, the rules of criminal procedure require the prospective jurors to identify their race on the jury-questionnaire forms provided to the attorneys during jury selection. McGill confirmed that he did not note the race of the jurors for any impermissible reason.

McGill's Response to Chobert's Letter

McGill stated in his affidavit that he never promised Chobert anything for his testimony. The letter Chobert sent him reflected Chobert's belief he could be compensated for time he lost from work due to his involvement in the case.

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The Supreme Court dismissed the King's Bench petition. On October 26, 2021, this Court quashed defendant's appeal. *Commonwealth v. Cook*, 2021 WL 4958874 (Pa.Super. 2021). This Court found that the letter DA Castille had written

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[11] The affidavit is attached to defendant's PCRA petition.

to the governor could not be the predicate for a claim of bias under the PCRA's newly-discovered-facts exception. Accordingly, this Court held that defendant's fifth PCRA petition was untimely, and Judge Tucker did not have jurisdiction to restore defendant's PCRA appellate rights. Because this Court quashed the appeal, it found it did not have jurisdiction to consider defendant's remand application based on the newly-discovered documents and denied the application as moot.

Sixth PCRA Petition

On December 23, 2021, defendant filed his sixth PCRA petition, the one involved in the present appeal. He claimed that Robert Chobert's letter established that prosecutor McGill promised Chobert money in exchange for his favorable testimony. He also claimed that McGill's jury-selection notes established that he violated *Batson* by relying on race in exercising his peremptory challenges.[12] Defendant submitted three supplemental filings.

The Commonwealth filed a motion to dismiss defendant's petition and responses to defendant's supplemental filings, and oral argument was heard by the Honorable Lucretia Clemons on October 26 and December 16, 2022. The Commonwealth also permitted defense counsel to review the thirty-two casefile boxes it

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[12] Relying on other documents, defendant also alleged the Commonwealth promised witness Cynthia White leniency in her prostitution cases in return for her favorable testimony. The documents defendant supplied contradicted his claim; the PCRA court rejected the claim; and defendant has abandoned it on appeal.

previously presented to Judge Tucker. On March 31, 2023, Judge Clemons dismissed defendant's petition after concluding that the alleged impeachment evidence was not material under *Brady* and that the *Batson* claim was untimely and waived.

SUMMARY OF ARGUMENT

I. The PCRA court properly denied defendant's claim that the prosecutor violated *Brady v. Maryland* by not disclosing that he promised witness Robert Chobert money in exchange for his testimony. The evidence defendant offered to support his claim—a letter Chobert sent the prosecutor after trial and an affidavit from the prosecutor—did not establish there was such a deal; nor did defendant offer to present any other evidence that would make out his claim.

Additionally, Chobert identified defendant as the gunman immediately after the shooting, and before he met the prosecutor, and in his subsequent statements and testimony he consistently stated that defendant was the person who shot the victim. His testimony was corroborated by the other overwhelming evidence of defendant's guilt. Any attempt to impeach Chobert by alleging that the prosecutor paid him for his testimony would not have altered the verdict.

II. The PCRA court properly denied defendant's claim that the prosecutor violated *Batson v. Kentucky* by noting the race and other demographic features of some of the prospective jurors during *voir dire*. Defendant's claim is untimely

because he did not act with due diligence in obtaining the facts upon which it is based. Defendant raised a *Batson* claim in his first PCRA petition and was granted a hearing. He subpoenaed the prosecutor, and the Commonwealth agreed he "should be given full latitude" to question him so the *Batson* claim "could be litigated once and for all." Defendant, thus, had the opportunity to examine the prosecutor about jury selection, including the notes he took during the proceedings. Defendant, however, elected not to question the prosecutor and thereby gave up the opportunity to learn the information upon which his claim is based.

Defendant's claim is also meritless. Before jury-selection began, defendant's attorney communicated his intent to accuse the prosecutor of engaging in racial discrimination in selecting the jury, and it was *defense counsel* who suggested that the race of the prospective jurors be memorialized so he could bring such a claim. Under these circumstances, the prosecutor's notation of the race of some of the jurors does not show he engaged in discrimination. In fact, defendant has previously conceded that the prosecutor took the notes so he could "rebut any claim of discrimination." Because the notes do not establish a *Batson* violation, defendant may not use them to relitigate his *Batson* claim, which has already been found by the Supreme Court to be both waived and meritless.

ARGUMENT

The PCRA Court Properly Denied Post-Conviction Relief

Defendant claims the PCRA court improperly dismissed his sixth PCRA petition challenging his 1982 murder conviction. The petition was untimely, and the evidence he offered to support it did not provide a basis for relief. Accordingly, the PCRA court properly dismissed the petition, and appellate relief should be denied.

"A second or subsequent request for PCRA relief will not be entertained unless the petitioner presents a strong *prima facie* showing that a miscarriage of justice may have occurred." *Abu-Jamal*, 941 A.2d at 1267. When reviewing the denial of PCRA relief, an appellate court "is limited to determining whether the PCRA court's findings are supported by the record and without legal error." *Id.* This Court may affirm if there is any basis in the record to support the PCRA court's decision and may rely on grounds different than those relied upon below. *Commonwealth v. Pou*, 201 A.3d 735, 740 (Pa.Super. 2018).

Defendant filed his petition beyond the PCRA's one-year filing deadline. To obtain review of his claims, he had to demonstrate they fell within one of the exceptions to that deadline and that he filed the petition within one year of the date the claims could have been presented. 42 Pa.C.S.A. §9545(b). This rule "requires a petitioner to plead and prove that the information on which he relies could not have

been obtained earlier, despite the exercise of due diligence." *Commonwealth v. Albrecht*, 994 A.2d 1091, 1094 (Pa. 2010).[13]

I. Defendant's *Brady* Claim Provides no Basis for Relief.

Defendant claims he was entitled to post-conviction relief based on a letter witness Chobert sent to prosecutor McGill following trial asking about money he believed he was owed and whether he needed to sign anything to receive it. According to defendant, the letter is evidence that Chobert "was offered money in exchange for favorable testimony for the Commonwealth" (Brief for Appellant, 22). He maintains that the Commonwealth's failure to disclose this alleged deal violated *Brady v. Maryland*, *supra*.

Defendant's claim that there was such a deal is based on nothing more than speculation. It is not supported by the record and was not supported by an offer to present evidence that would make the claim out. Additionally, due to the evidence presented at trial, there is no reason to believe that an attempt to impeach Chobert's testimony with allegations of such a deal would have made a difference in the verdict. Accordingly, the PCRA court properly denied the claim.

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[13] Defendant acknowledges that the due-diligence requirement applies to the newly-discovered-facts and government-interference exceptions but says he "preserves an argument that it should not apply to the latter" (Brief for Appellant, 42 n.6). Defendant did not advocate for this change of law below; nor does he develop an argument for it now.

Initially, defendant did not demonstrate that he acted with due diligence in learning the facts upon which his claim is based or in bringing the claim. During the litigation of his first PCRA petition in 1995, he asserted that the Commonwealth violated *Brady* by not disclosing that McGill agreed to help Chobert regain his suspended driver's license. Defendant was provided an evidentiary hearing, and he called Chobert as a witness at the hearing (N.T. 8/15/95, 3-29). Although he questioned him about the alleged promise regarding his driver's license, he did not ask him if McGill offered him anything else in connection with his testimony—a natural question given the allegation he was making.

Defendant also previously represented that his investigator interviewed Chobert on multiple occasions in relation to his first PCRA petition, where he claimed McGill agreed to help him regain his license (Corrected PCRA Petition, filed July 16, 2001, ¶¶265, 460). But defendant has not stated whether his investigator asked Chobert if McGill promised him anything else in connection with his testimony—or, if the investigator asked such a question, what Chobert's response was. As described below, there are legitimate reasons why McGill may have told Chobert he was entitled to receive money in connection to the case, and Chobert may have shared that information with defendant's investigator when he spoke with him decades ago. It was defendant's burden to demonstrate otherwise, and he did not even attempt to do so.

Under these circumstances, defendant did not show that he acted with due diligence in bringing this claim and thus did not establish that he complied with the PCRA's timeliness requirements. *See Commonwealth v. Porter*, 35 A.3d 4 (Pa. 2012) (appellant's *Brady* claim, which was based on information he obtained from a witness sixteen years after his conviction became final, was untimely under the PCRA where he did not explain why his lawyers or investigators could not have obtained the information from the witness years earlier).

Even if timely, defendant's claim failed because he did not present—or offer to present—any evidence demonstrating that the Commonwealth promised Chobert money in exchange for favorable testimony. The letter defendant relies on states 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

The fact that Chobert wrote McGill after trial asking about money he believed he was owed did not mean McGill promised him money in exchange for his testimony. Chobert testified at the suppression hearing and at trial, and during trial

he stayed in a hotel for "[m]ore than a week" due to safety concerns (N.T. 8/15/95, 8-9, 15). There are multiple reasons why someone in his position may have written the prosecutor in reference to money he believed he was owed that would not have been related to an improper inducement.

For example, Chobert was statutorily entitled to receive compensation based on his role as a witness. 42 Pa.C.S.A. §5903.[14] It also would have been appropriate for him to seek reimbursement for expenses he incurred during his lengthy hotel stay. Additionally, according to an affidavit *provided by the defense*, McGill believed the letter referred to a conversation he and Chobert had during which Chobert asked if he could be compensated for time he missed from work due to his involvement in the case.[15]

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[14] At the time of defendant's 1982 trial, this statute provided that a witness "shall be paid at the rate of $5 per day during the necessary period of attendance" and that even if he is not called to testify he is entitled to this compensation while attending the matter under subpoena. 42 Pa.C.S.A. §5903(b), (g). Chobert testified at the suppression hearing, which took place over four days, and at trial, which lasted two weeks, and included two Saturdays.

[15] Defendant argues that McGill's explanation is contradicted by Chobert's testimony at the 1995 PCRA hearing. This is because McGill's affidavit states this conversation occurred after trial, but Chobert testified at the hearing that he did not speak to McGill after trial. While that is technically true, Chobert testified at the hearing that at some point he spoke with McGill but was unclear when the conversation occurred. He stated it "probably" was "sometime during the trial," and maybe after he testified (N.T. 8/15/95, 4, 16-17, 20, 28-29). It was during this conversation that he asked McGill if he could help him find out how to get his driver's license restored, and this also may have been when Chobert asked McGill about (footnote continued . . .)

These are all appropriate reasons why Chobert may have written the prosecutor asking about money. Indeed, the fact that he asked in the letter if he needed "to sign anything" to receive the money indicates he was presenting a legitimate request and not attempting to cash in on some secret and inappropriate deal with the prosecutor. Under these circumstances, the letter itself does not establish a *Brady* violation. *See Commonwealth v. Treiber*, 121 A.3d 435, 462 (Pa. 2015) (prosecution's nondisclosure that it provided housing for a witness and his girlfriend for approximately a month did not constitute a *Brady* violation because the housing was "not used as inducement or payment in exchange for [the witness's] testimony").

Because the letter itself does not establish a *Brady* violation, defendant was required to offer to present some other evidence that, if credited, would have made out his claim. *See* 42 Pa.C.S.A. §9543(a) (to be eligible for relief, the petitioner "must plead and prove" his claim"). But he did not do this. The only certification

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receiving compensation for time missed from work. That Chobert's and McGill's memories differ regarding *when* such a conversation may have occurred does not mean it *did not* occur. This is especially so given that Chobert's PCRA testimony took place thirteen years after trial, and McGill provided his affidavit thirty-seven years after trial. Defendant also argues that Chobert could not have been asking about being compensated for time missed from work because he testified that during his lengthy hotel stay the police would drive him to and from work. But Chobert, who was a taxi driver, would not have been able to work during the periods he testified at the suppression hearing and at trial and also when he was in the courthouse in anticipation of possibly being called as a witness.

he presented from a witness who potentially had any relevant knowledge was the affidavit from McGill. But in that affidavit McGill specifically stated that he "never at any time before, during, or after I was assigned as the prosecutor in the case promised Chobert anything of value in exchange for his testimony."[16]

McGill's assertion is corroborated by Chobert's prior PCRA testimony. At the 1995 hearing, Chobert made clear that nobody influenced his trial testimony. His testimony, he explained, was the truth and was based on what he saw at the time of the crime (N.T. 8/15/95, 11, 16). The PCRA court credited this testimony and adopted it "as fact." *Cook*, 1995 WL 1315980, at *64-65, 79-80. The Pennsylvania Supreme Court and federal district court both upheld that credibility finding. *Abu-Jamal*, 720 A.2d at 95-96; *Abu-Jamal*, 2001 WL 1609690, at *23.

Thus, the record contradicts defendant's claim that McGill influenced Chobert's testimony by supposedly promising him money in exchange for it, and on that basis alone, his claim should be rejected. *See Commonwealth v. Chmiel*, 30 A.3d 1111, 1134 (Pa. 2011) (rejecting *Brady* claim where the supposedly-influenced witness testified at the PCRA hearing that he testified truthfully at trial, and the PCRA court credited that testimony).

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[16] Defendant presented an affidavit from one of his attorneys who stated she "attempted to speak with Mr. Chobert through a private investigator," and he "was not willing to sign a witness certificate." Chobert was already called as a defense witness at the earlier PCRA hearing, and he spoke with a defense investigator on at least two prior occasions.

Defendant also faults the PCRA court for not granting an evidentiary hearing. But, as stated above, he did not offer to present any specific evidence at a hearing that would make out his claim. Instead, it appears he wanted to use the hearing as a discovery tool to see if he could find some evidence that might support his speculative claim. But as the Supreme Court has made clear, this is not an appropriate basis for granting a hearing. *See Commonwealth v. Sneed*, 45 A.3d 1096 (Pa. 2012) (a PCRA hearing "is not meant to function as a fishing expedition for any possible evidence" that might support a defendant's "speculative" claim); *id.* at 1107 ("PCRA hearings are not discovery expeditions"). Thus, the PCRA court properly denied the request.

Additionally, as the PCRA court found, there is no reason to believe that attempting to impeach Chobert with allegations that he was promised money in exchange for his testimony would have resulted in a different verdict. Chobert identified defendant as the person who shot Officer Faulkner immediately after the shooting occurred and before he met McGill (*e.g.*, N.T. 6/19/82, 211-12, 272-73). He provided a number of statements to the police, and as the Pennsylvania Supreme Court, the first PCRA court, and the federal district court all recognized, those statements were consistent with one another and with his testimony. *Abu-Jamal*, 720 A.2d at 96; *Cook*, 1995 WL 1315980, at *65; *Abu-Jamal*, 2001 WL 1609690, at *23.

Additionally, Chobert's testimony was corroborated by an abundance of other evidence. He testified at trial that he heard a shot, looked up, saw Faulkner fall, and then saw defendant shoot him in the face. Defendant then walked to the curb and fell (N.T. 6/19/82, 209-11). Cynthia White saw defendant run from the parking lot and shoot Faulkner in the back. After the officer fell, defendant stood over him and shot down at him; then, defendant slouched and sat on the curb (N.T. 6/21/82, 4.83-4.94).[17]

Michael Scanlan testified he saw a man doing the same things the other witnesses saw defendant do: run from the area of the parking lot, shoot the officer from behind, and then stand over him and shoot him in the face. He also identified a jacket that was recovered from the hospital emergency ward where defendant

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[17] Defendant attempts to discredit White's testimony. For example, he claims "her version of the events changed significantly over time;" notes her prostitution arrests; and suggests that McGill had concerns about her credibility by pointing to a comment he made in summation, when he stated "at times she wasn't very good at an explanation" (Brief for Appellant, 13-14). The record, however, shows that White gave a detailed description of the shooting right after it occurred (N.T. 6/2/82, 2.36; 6/21/82, 4.165-4.166). In the months between the shooting and trial she provided several statements and testified multiple times; each time she gave substantially the same version of events. She consistently stated that defendant ran up to Faulkner, shot him several times, and then went over and sat on the curb (*e.g.*, N.T. 1/8/82, 13-20, 86; 1/11/82, 81-84; 6/2/82, 2.18-2.21; 6/21/82, 4.93-4.94, 4.185-4.186; 6/22/82, 5.165-5.194). And the prosecutor's comment defendant points to was actually part of his explanation as to why White's testimony was reliable: although White, a prostitute, was not the most articulate or sophisticated individual, she gave substantially the same description of events as the other witnesses (N.T. 7/1/82, 182).

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 Faulkner (N.T. 6/24/82, 177-87; 6/25/82, 8.4-8.11, 8.18-8.28, 8.62-8.63).[18]

Albert Magilton testified that he saw defendant, who had a hand behind his back, moving "across the street fast" toward Faulkner. Magilton heard a number of gunshots and then saw Faulkner lying on the ground and defendant sitting on the curb nearby (N.T. 6/25/82, 8.75-8.79, 8.138).

Thus, there were multiple eyewitnesses who corroborated Chobert's testimony. In fact, during his first PCRA appeal, defendant claimed he was entitled to a new trial based on newly-discovered evidence that supposedly could have been used to impeach Chobert's and White's testimony and that supposedly was suppressed by the Commonwealth in violation of *Brady*. The Supreme Court rejected the claim. In doing so, it held that based on the "damaging testimony" of Scanlan and Magilton alone, it is "unlikely" that attacks on Chobert's and White's credibil-

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[18] Defendant suggests that Scanlan did not see the shooting. In fact, Scanlan testified:

> 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.

Scanlan stated that Faulkner's "whole body jerked" following one of the gunshots (N.T. 6/25/82, 8.5-8.11).

ity, "either singularly or cumulatively, could compel a different verdict." *Abu-Jamal*, 720 A.2d at 107 n.34.

Beyond the testimony presented by White, Scanlan, and Magilton, there was still more evidence that corroborated Chobert's testimony. When the police arrived on the scene moments after the shooting, they found defendant sitting on the curb. The officers ordered him to "freeze," but he refused their command and reached for a gun that was on the sidewalk about eight inches from his hand. The gun was registered to defendant and was consistent with having been the one that fired the bullet that killed Faulkner. Defendant physically resisted the officers. After he arrived at the hospital, he twice stated that he shot Faulkner and hoped he would die.

Given the overwhelming evidence of defendant's guilt and the fact that Chobert identified him as the gunman immediately after the shooting, there is not a reasonable probability that attempting to impeach Chobert with an allegation that he was paid for his testimony would have made a difference in the verdict. Accordingly, the PCRA court properly rejected this claim. *See Commonwealth v. Bryant*, 855 A.2d 726, 751 (Pa. 2004) (rejecting *Brady* claim where appellant failed to demonstrate that the nondisclosed evidence was material to his guilt or innocence).

II. Defendant's *Batson* Claim Provided no Basis for Relief.

Defendant's second claim is that he was entitled to post-conviction relief based on a portion of prosecutor McGill's jury-selection notes, which show that during *voir dire* he noted the race, among other demographic features, of some of the prospective jurors. According to defendant, the notes demonstrate that McGill violated *Batson v. Kentucky*, *supra*, by engaging in racial discrimination in selecting the jury.

Defendant's claim provides no basis for relief. His own attorneys have conceded that McGill's purpose in listing the race of the prospective jurors was "to build a record to rebut any claim of discrimination."[19] It was necessary for McGill to do this because before jury selection began, defendant's attorney announced his intention to accuse him of discrimination. In fact, it was the defense who suggested that the race of the jurors be tracked.

Under these circumstances, the notes do not demonstrate a *Batson* violation. Thus, the PCRA court properly precluded defendant from relitigating his *Batson* claim, which the Supreme Court has already found both waived and meritless.

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[19] Defendant's Sixth PCRA petition, ¶59; defendant's Response to the Commonwealth's Motion to Dismiss, p.35.

Initially, defendant's claim is untimely because he did not act with due diligence in obtaining the facts upon which it is based.[20] Defendant filed his first PCRA petition in 1995, and one of the many issues he raised was a *Batson* claim. He was granted an evidentiary hearing, which took place over a number of weeks. The defense subpoenaed McGill, who was then in private practice, and McGill made himself available to testify (N.T. 7/18/95, 56, 58-59; 7/26/95, 222-29; 7/27/95, 28-29, 155-56; 8/4/95, 117-18).

During the PCRA proceedings, the Commonwealth stated it did not oppose the defense questioning McGill about his jury-selection practice. In fact, the Commonwealth encouraged defendant to call McGill to the witness stand so the *Batson* issue could be resolved "once and for all":

> **[THE PCRA PROSECUTOR]:** Your Honor, I would suggest to Your Honor and submit that if they [the defense] want to inquire of Mr. McGill with respect to the *Batson* issue, I think they should be given full latitude so this claim could be litigated once and for all, whatever their additional evidence is.

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[20] Defendant argues that this claim falls within the governmental-interference and newly-discovered-facts exceptions to the PCRA's one-year filing deadline. By its terms, the governmental-interference exception does not apply. It applies where "the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim *in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States*." 42 Pa.C.S.A. §9545(b)(1)(i) (emphasis added). As the PCRA court properly found, the Commonwealth had no obligation to provide McGill's jury-selection notes (PCRA Court Opinion, 17-18). In any event, the due-diligence requirement applies to both exceptions. *Abu-Jamal*, 941 A.2d at 1268; *Commonwealth v. Vinson*, 249 A.3d 1197, 1205 (Pa.Super. 2021).

(N.T. 7/31/95, 292).

Defendant, thus, had the opportunity to question McGill with respect to his jury-selection practice. During this examination, he could have asked him about the notes he took during *voir dire* and why he accepted certain jurors and rejected others. *See Commonwealth v. Daniels*, 963 A.2d 409, 432-33 (Pa. 2009) (where the appellees called the prosecutor to testify at the PCRA hearing regarding their *Batson* claim, they were able to learn the prosecutor's reasons for striking jurors and that he kept track of the race of the jurors in his *voir dire* notes). Defendant, however, decided not to call McGill and thereby forwent this opportunity to question him on the subject (N.T. 8/4/95, 119-20). Thus, as the PCRA court found, he did not act with due diligence in obtaining the facts upon which his claim is based (PCRA Court Opinion, 9).

Defendant disagrees with the PCRA court and contends he acted with due diligence. In support of his argument, he points to a discovery motion he filed during the 1995 PCRA proceedings and a subpoena he served (during those proceedings) on the prosecutor who drafted the Commonwealth's direct-appeal brief. In neither of those filings did he ask for McGill's jury-selection notes. But even if he had, and even if the requests had been denied, he could have obtained the information when the Commonwealth announced it had no objection to his examining McGill in regard to *Batson*. Defendant declined to take that opportunity.

Defendant also argues that if he had called McGill at the 1995 PCRA hearing he would have been limited to questioning him about the racial makeup of the jury and nothing beyond that. In fact, the Commonwealth specifically agreed that the defense "should be given full latitude" to question McGill regarding *Batson* "so this claim could be litigated once and for all, whatever their additional evidence is" (N.T. 7/31/95, 292). No constraints were placed on him with respect to the *Batson* issue.[21]

That defendant's *Batson*-related questioning of McGill was not limited to simply establishing the racial makeup of the jury but could go beyond that has been recognized not only by the most recent PCRA court but also by earlier reviewing courts. For example, as noted above, in 1999, defendant filed a federal *habeas corpus* petition in which he raised a *Batson* claim. The federal court rejected the claim and explained that during the PCRA hearing defendant was permitted to present evidence regarding the claim. *Abu-Jamal*, 2001 WL 1609690, at *106. The

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[21] Earlier, defense counsel was asked what the defense intended to question McGill about at the hearing. Counsel stated they were going to ask McGill about "18 volumes of his performance," *i.e.*, the entire trial-court record. The PCRA prosecutor responded, "There are 4,000 pages of notes of testimony," and asked for an offer of proof (N.T. 7/26/95, 226-29). Later, the defense gave a long list of the subjects they wanted to question McGill about. The PCRA prosecutor objected to questioning McGill about the subjects that were not related to *Batson*. But with respect to *Batson*, as shown above, he placed no limits on the scope of the questioning (N.T. 7/31/95, 279-98).

federal court emphasized that "Prosecutor McGill was under subpoena" and "was available as a witness, but [defendant] chose not to call him." *Id.*

During those federal court proceedings, defendant "argue[d] that he need[ed] discovery of McGill's jury selection notes." *Id.* at *107. The federal court rejected the request. *Id.* at *109. The court explained that "because [defendant] has failed to demonstrate good cause for discovery of McGill's jury selection notes, *especially in light of the fact that [he] chose not to pursue McGill's testimony at the PCRA hearing*, [his] request for discovery [of the notes] will be denied." *Id.* (emphasis added). Thus, the federal court recognized that defendant could have learned of the relevant information by questioning McGill when he made himself available at the 1995 PCRA hearing.

On appeal, the Third Circuit, in rejecting defendant's *Batson* claim, also (and repeatedly) pointed out that defendant failed to question McGill during the PCRA hearing. *Abu-Jamal*, 520 F.3d at 282, 292 & nn. 7 & 19. The court explained:

> At the 1995 PCRA evidentiary hearing, which occurred nine years after *Batson* was decided, Abu-Jamal had the trial prosecutor under subpoena and had the opportunity to call him to testify. But Abu-Jamal did not take this action. At the first *Batson* step, it was Abu-Jamal's burden to establish a prima facie case, and the trial prosecutor's testimony might have provided relevant evidence to support a prima facie case.

Id. at 292.

The court continued:

> Abu-Jamal's failure to take the opportunity to elicit the prosecutor's testimony is noteworthy considering the absence of a developed record to support a prima facie case.

Id. at 292 n.19.

But it is not just the courts that have recognized that defendant failed to avail himself of the opportunity to question McGill about his jury-selection practice during the 1995 PCRA hearing. In his second PCRA petition, defendant specifically argued that the attorneys who represented him during his first PCRA petition were ineffective because they did not question McGill about the alleged *Batson* violation. For example, he stated in the petition that, "as a result of taking the decision not to put Assistant District Attorney McGill on the stand," prior PCRA counsel "failed to investigate with him the racial bias in the manner in which he had conducted jury selection" (Corrected Second PCRA Petition, filed July 16, 2001, ¶109; *see also id.*, ¶¶510, 517).

Defendant also provided a declaration from one of his prior PCRA attorneys, who accused fellow defense-team members of providing ineffective assistance by not questioning McGill at the hearing. Prior counsel stated that lead counsel "inexplicably waived trial prosecutor Joseph McGill as a witness, after he had been subpoenaed, thereby failing to make a record about his misconduct . . . in jury selec-

tion" (declaration of Rachel H. Wolkenstein, Esq., in support of defendant's second PCRA petition, filed September 5, 2001, ¶74).

Defendant's failure to call McGill at the 1995 PCRA hearing is significant. Had he examined him then—when he would have been given "full latitude" to question him regarding *Batson*—he could have learned of the relevant information and litigated his *Batson* claim "once and for all"—as the PCRA prosecutor stated—more than twenty-five years ago. Under the PCRA's due-diligence requirement, he may not now—*more than forty years after trial*—revive a *Batson* claim he could have fully litigated decades earlier.

Even if defendant's claim was not untimely, he would not be entitled to relief. Given the actions of his own attorney before and during jury-selection, it is not at all remarkable that McGill noted the race of some of the prospective jurors, and it certainly does not establish a *Batson* violation.

Months before trial, defendant's attorney made clear he intended to inject racial issues into the case, including—and very prominently—with respect to jury selection. For example, counsel alleged that there was "a racial factor" in the case, with "the police officer being white, Mr. Jamal being black." Defense counsel further asserted that in his experience, "as well as the experience of the defense Bar," the District Attorney's Office routinely strikes "each and every black juror that

comes up peremptorily." McGill disagreed with this characterization and objected to counsel's comments (N.T. 3/18/82, 11-16).

The pretrial judge also pushed back. The judge stated that, although there had been publicity about the case, up until that point he had not "seen any evidence that anybody has turned this into a racial incident." At least neither the court nor the Commonwealth had done so, the judge indicated. On the contrary, the judge suggested, it was the defense that was attempting to inject race into the matter, as defense counsel had referred to the alleged racial component of the case "several times this morning." The judge even warned defense counsel, "I understand the facts of life. But I am not going to let you turn this into a political or racial thing" (*id.*).[22]

Despite the judge's admonition, defense counsel continued to focus on race and made clear he was attempting to set up a basis to subsequently claim that McGill had improperly struck jurors based on their race. On the first day of *voir dire*, but before any jurors were questioned, defense counsel asked the judge if the potential jurors could be asked to orally state their race for the record. Defense counsel explained that "it may be obvious" to those in the courtroom what race a

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[22] The judge's rejection of the assertion that there was "a racial factor" to the case simply because of the different races of defendant and the victim was appropriate. *Commonwealth v. Richardson*, 473 A.2d 1361,1363 (Pa. 1984) ("[a] criminal prosecution is not [ ] rendered racially sensitive by the *mere* fact that the defendant is black and the crime victim is white").

particular prospective juror might be, "but the record, of course, cannot reflect what is obvious to the eye." Defense counsel stated it was necessary to ask the prospective jurors to orally state their race because "[i]n the event [defendant] was convicted and there was a challenge to the jury," the race of the jurors would need to be shown on the record (N.T. 6/7/82, 17-20).

McGill responded that he had no objection to the venirepersons being questioned about whether there was "anything about this defendant's race" that might prevent them from being fair and impartial. However, he thought that asking the jurors to orally state their race for the record would seem "kind of ridiculous" to them and even "embarrassing"—at least that was the impression he had when jurors were asked to do that in another case he tried (*id.*).

Rather than asking each potential juror to orally state his or her race on the record, McGill suggested that if race became a potential issue during jury selection, the parties could provide the relevant information for the record. He explained, "If at the end of the jury selection process and the jurors are selected counsel wishes to enumerate for the record the racial composition of the jury, well, that's fine, that can be done easily enough." Although McGill made clear that he did not intend to ask the prospective jurors to state their race for the record, the judge informed the defense that if they wanted to ask the prospective jurors to identify themselves by race, "[G]o ahead. I'm not going to worry about that" (*id.*).

Jury selection began later that day and continued for a week and a half. The defense did not ask each prospective juror to state his or her race for the record but, instead, asked only some of the jurors.[23] Notably, although defense counsel made clear before jury selection began that he would be on the lookout for racial discrimination in the prosecutor's use of peremptory challenges, at no time during jury selection or at its conclusion did he allege that the prosecutor had engaged in racial discrimination in exercising his peremptory challenges. On the contrary, after eleven of the jurors were selected, counsel specifically stated that he and defendant were pleased with the way jury selection had progressed. Counsel said "in our view, Mr. Jamal's and mine, the jurors in the jury selection process proceeded in a manner which suggested to us that we could indeed obtain jurors in in [sic] this matter who would be fair and impartial" (N.T. 6/16/82, 266).

Thus, the record shows that it was *the defense* who attempted to inject a racial component into the case; that before jury selection began the defense communicated its intention to accuse McGill of improperly striking jurors based on race; and that it was *the defense* who suggested that the race of the prospective jurors

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[23] McGill's instincts in opposing the request to have the prospective jurors orally state their race for the record were correct. As he essentially predicted, some jurors appeared confused when asked to announce their race (N.T. 6/7/82, 170; 6/8/82, 2.62, 2.93, 2.114-2.115; 6/15/82, 233). Additionally, the Supreme Court has warned that care should be taken not to needlessly risk "creating racial issues in a case where such issues would not otherwise have existed." *Commonwealth v. Richardson*, 473 A.2d at 1364.

should be tracked so that a jury-discrimination claim could subsequently be litigated.

Additionally, as defendant acknowledges, McGill's notes indicate that he would list a prospective juror's demographics while the juror was being individually questioned by the parties or the judge (*e.g.*, Brief for Appellant, 35). Immediately at the conclusion of that questioning, when the prospective juror was still sitting in front of counsel, the attorneys would announce whether they were using a peremptory strike against the juror.

Thus, this is *not* a situation where a prosecutor listed the race of the prospective jurors *before* jury-selection and used that information to strategically determine how to ensure that as few Black people, if any, would make it onto the jury.[24]

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[24] Compare *Foster v. Chatman*, 578 U.S. 488 (2016), a case cited by defendant. There, before jury selection began, members of the prosecutor's office identified on the venire list which of the prospective jurors were Black people; compiled a list of six "definite No's," the first five of which were the five qualified Black jurors; and drafted a document indicating that members of a particular church should not be selected because it was a "*Black* church." *Id.* at 493-95. There were more references in the prosecutor's file to the race of the prospective jurors—"[t]he sheer number of references to race in that file is arresting," *id.* at 513—including an investigator's comment that "if we had to pick a black juror I recommend that [this juror] be one of the jurors." *Id.* at 494. The prosecutor did not "have to pick a black juror," because he used his peremptory challenges to strike each of them. Compare also *Miller-El v. Dretke*, 545 U.S. 231 (2005), another case cited by defendant. There, the prosecutors struck ten of the eleven Black prospective jurors and did so "in a selection process replete with evidence that [they] were selecting and rejecting potential jurors because of race." *Id.* at 265. While the Court referenced that the prosecutors had "marked the race of each prospective juror on their
(footnote continued . . .)

Nor is this a situation where the race of the jurors was noted during the questioning of prospective jurors, but peremptory strikes were not exercised until some later point, when the individual jurors were no longer right in front of the attorneys, and the prosecutor might then use the notes as a reminder of which potential jurors were of what race and strike or accept them on that basis.[25]

Instead, as defendant has conceded, the notes "indicate that Mr. McGill was seeking to build a record to rebut any claim of discrimination" (Sixth PCRA Petition, ¶59; Response to the Commonwealth's Motion to Dismiss, p.35). And since defendant had already made clear he intended to accuse the prosecutor of discrimination, far from serving as a *Batson* violation, this protective measure was justified.[26]

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juror cards," this was to show they were following a jury-selection manual implementing the office's "formal policy to exclude minorities from jury service." *Id.* at 264, 266.

[25] This latter version of *voir dire*, described in Pa.R.Crim.P. 631(F)(2), is called the "pass the pad" method.

[26] Nowadays, the rules of criminal procedure require prospective jurors to fill out forms where they identify their race and other demographic features. Pa.R.Crim.P. 632(H). The rules state that "the attorneys shall receive copies of the completed questionnaires for use during *voir dire*." Pa.R.Crim.P. 632(A)(3). This rule did not exist during defendant's trial. Thus, it appears that in a case like this—where the defense announced its intention to bring a jury-discrimination claim—it was necessary for the prosecutor himself to keep track of the race of the jurors.

Any reliance by defendant on *Commonwealth v. Edwards*, 177 A.3d 963 (Pa.Super. 2018), is misplaced. There, the court staff listed the race of the prospective jurors on the peremptory-strike sheet provided to counsel during jury selection. This Court found the court staff's listing of the race of the jurors on the strike-sheet did not, by itself, establish a *Batson* violation. *Id.* at 967, 971-72. While this Court considered the act relevant under "the totality of the circumstances" an appellate court must consider when reviewing a *Batson* claim, *id.* at 975 n.20, it found there were "other factors" that supported a finding of discrimination. *See id.* at 975. Among them was that the prosecutor exhausted her peremptory challenges and used each of them against minorities, all of whom, with the exception of one person, were Black people. *Id.* at 975-76. *See also Commonwealth v. Murray*, 248 A.3d 557 (Pa.Super. 2021) (distinguishing *Edwards*).

Here, the Supreme Court has twice considered defendant's *Batson* claim and both times concluded there was "not a trace of support for an inference that the use of peremptories was racially motivated." *Abu-Jamal*, 720 A.2d at 114; *Abu-Jamal*, 555 A.2d at 850. The only "new evidence" defendant presented in support of his claim are the prosecutor's jury-selection notes listing the race and other demographic features of some of the prospective jurors. But as the Supreme Court has already held 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, es-

tablish a violation, the case does not support defendant's claim that there was a violation here.[27]

Under these particular circumstances, where it was the defense who suggested that the race of the prospective jurors be tracked and where it was necessary for McGill to note the race of the jurors, among other information, so he could respond to the defense's expected jury-discrimination claim, the recently-revealed notes are *not* evidence of a *Batson* violation. Thus, the notes did not provide defendant an opportunity to relitigate his *Batson* claim, which has been rejected by the Supreme Court and federal courts as both waived and meritless.[28]

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[27] It is also noteworthy that, as the 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). As indicated above, under that method, a panel of jurors is questioned. Afterward, the attorneys pass back and forth a pad listing the jurors' names and take turns marking which jurors they are peremptorily striking. Pa.R.Crim.P. 631(F)(2). If, as in *Edwards*, the race of the jurors is listed by their names, an attorney might use the notations as a reminder of which jurors are what race and then strike or accept them on that basis. Here, however, the "pass the pad" method was not used. Instead, after each prospective juror was individually questioned, the attorneys announced—while the juror was still sitting in front of them—whether they were exercising a peremptory challenge. Thus, unlike in *Edwards*, the listing of a juror's race could not have influenced McGill's decision to accept or strike the juror.

[28] *Compare Commonwealth v. Chmiel*, 173 A.3d 617 (Pa. 2017) (appellant's claim that his conviction and death sentence were based on unreliable microscopic-hair-comparison analysis was not previously litigated, even though he challenged the evidence's admission at trial, where the new claim was based on the FBI's new "watershed" admission that that type of evidence was no longer considered scientifically reliable); *Commonwealth v. Basemore*, 744 A.2d 717, 732-34 (Pa. 2000) (footnote continued . . .)

That defendant may not litigate his claim under these circumstances is demonstrated by a number of cases, including the Supreme Court's decision in *Commonwealth v. Daniels*, *supra*. There, the appellees raised a *Batson* claim based on new evidence they elicited at a PCRA hearing. This included the fact that the prosecutor noted the race of the jurors in his handwritten *voir dire* notes, which according to the appellees, showed that "race featured very prominently in his thought process." *Id.*, 963 A.2d at 433. The Supreme Court rejected the claim, explaining that the appellees had not raised a *Batson* claim at trial, and "for this reason alone," the claim failed. *Id.* at 434-35.[29]

In fact, because defendant did not raise any jury-discrimination claim at trial—on the contrary, the defense specifically stated they were pleased with how jury selection progressed (N.T. 6/16/82, 266)—and because defendant's trial took place before *Batson*, he is not entitled to the application of *Batson* to this case. *See*

(under the "unique" and "highly unusual circumstances alleged"—the discovery of a videotaped lecture containing the prosecutor's "public admission to personally engaging in a pervasive pattern of discrimination" against Black jurors—it was "at least arguable" that the jury-discrimination claim was not waived even though no such claim was raised at trial).

[29] *See also Commonwealth v. Lark*, 746 A.2d 585, 587-89 (Pa. 2000) (appellant could not revive his waived *Batson* claim where the newly-discovered evidence did not "in and of itself" establish a *Batson* violation); *Commonwealth v. Maxwell*, 232 A.3d 739 (Pa.Super. 2020) (*en banc*) (appellant's discovery that the prosecutor told a police officer he did not think there would be any Black people on the jury—a statement that allegedly was evidence the prosecutor violated *Batson*—did not allow him to relitigate his previously-rejected claim).

Commonwealth v. Smith, 17 A.3d 873, 894 (Pa. 2011) ("[t]o be entitled to the retroactive benefit of *Batson*, Appellant had to challenge the Commonwealth's use of peremptory challenges both at trial and on direct appeal") (citing cases).

Because the PCRA court properly dismissed defendant's claim, appellate relief should be denied.

CONCLUSION

For the foregoing reasons, including those in the PCRA court's opinion, the Commonwealth respectfully requests that this Court affirm the order dismissing defendant's post-conviction petition.

Respectfully submitted,

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IN THE
SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	**:**	**1206 EDA 2023**
V.	**:**	
WESLEY COOK, a/k/a MUMIA ABU-JAMAL	**:**	
Appellant		

CERTIFICATION OF COMPLIANCE

The Commonwealth hereby certifies that its brief complies with Pa.R.A.P. 2135. Based on the word-count feature of Microsoft Word, the brief, excluding supplementary matters, contains 13,987 words.

The Commonwealth further certifies that it has complied with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania.

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