IN THE COURT OF COMMON PLEAS
PHILADELPHIA COUNTY
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	**CP-51-CR-0113571-1982**
	:	
MUMIA ABU-JAMAL	:	
(legal name Wesley Cook)	:	

ORDER AND OPINION

Lucretia Clemons, J.

AND NOW, this 31st day of March, 2023, upon consideration of Defendant's counseled Petition for Habeas Corpus Relief Pursuant to Article I, Section 14 of the Pennsylvania Constitution and Statutory Post-Conviction Relief Under 42 Pa.C.S. § 9542 et seq. and Consolidated Memorandum of Law ("PCRA Petition"), Defendant's Petition is Dismissed without a hearing for the reasons set forth below.[1]

This is Defendant's sixth counseled PCRA Petition. It raises three issues premised upon documents that the Philadelphia District Attorney's Office ("DAO") disclosed to Defendant on or about January 3, 2019: First, Defendant argues that the trial prosecutor's recently disclosed handwritten notes from jury selection are evidence that the prosecutor violated *Batson v. Kentucky*, 476 U.S. 79 (1986), by exercising peremptory strikes to purposefully exclude Black prospective jurors. Second, Defendant asserts that the Commonwealth violated *Brady v.*

[1] Defendant asserts that "[t]o the extent this claim is not cognizable under the PCRA, [Defendant] has a remedy under Pennsylvania's habeas corpus statute." *See* PCRA Pet. at 6. However, if Defendant raises claims that are cognizable under the PCRA, then the PCRA is the sole remedy for those claims, even if those claims are procedurally barred in Defendant's case. *See Com. v. Peterkin*, 722 A.2d 638 (Pa. 1998). Defendant raises *Batson* and *Brady* claims that fall within the scope of the PCRA, specifically 42 Pa.C.S. § 9543 (a)(2). *See infra* note 8 (explaining that this is the only possible ground for relief). Therefore, Defendant's PCRA Petition is not cognizable as a petition for habeas corpus.

Maryland, 373 U.S. 83 (1963), by withholding evidence that an eyewitness, Robert Chobert, may have been promised compensation for his trial testimony that he saw Defendant shoot Officer Faulkner. Third, Defendant asserts that the Commonwealth violated *Brady* by withholding evidence that a second eyewitness, Cynthia White, may have been promised leniency in her future prosecutions in exchange for her testimony that she saw Defendant shoot Officer Faulkner.

First, Defendant's *Batson* claim is time-barred and waived, so this Court does not have jurisdiction to reach it. Second, Defendant's *Brady* claims lack merit: Even if the Court accepts all of Defendant's proffered facts as true, considers what Defendant could present at an evidentiary hearing, and draws all reasonable inferences in Defendant's favor, Defendant cannot show that the alleged *Brady* information was material to his first-degree murder conviction. For the reasons herein, Defendant's sixth PCRA Petition is subject to dismissal.

I. BRIEF PROCEDURAL HISTORY

The history of the past forty years of post-conviction litigation is helpful for understanding the procedural posture of Defendant's current Petition: On July 2, 1982, a jury found Defendant guilty of fatally shooting Philadelphia Police Officer Daniel Faulkner. Defendant was convicted of first-degree murder and possessing an instrument of crime. On July 3, 1982, after a penalty-phase hearing, Defendant was sentenced to death. On March 6, 1989, the Supreme Court of Pennsylvania (SCOPA) affirmed Defendant's conviction on direct appeal. *See Com. v. Abu-Jamal,* 555 A.2d 846 (Pa. 1989). The Supreme Court of the United States denied defendant's petition for a writ of *certiorari* on October 1, 1990. *See Abu-Jamal v. Pennsylvania,* 498 U.S. 881 (1990).

Defendant filed a timely first PCRA petition, which was dismissed after an extensive evidentiary hearing. *See Com. v. Cook a/k/a Mumia Abu-Jamal*, 1995 WL 1315980, 30 Phila. Co. Rptr. 1 (Phila. Ct. Com. Pl. Sept. 15, 1995). On October 29, 1998, SCOPA affirmed the dismissal of Defendant's first PCRA petition. *See Com. v. Abu-Jamal*, 720 A.2d 79 (Pa. 1998). Defendant next litigated a habeas corpus petition in the United States District Court for the Eastern District of Pennsylvania. On December 18, 2001, the Honorable William Hendricks Yohn granted limited relief on one of Defendant's penalty-phase claims,[2] and ordered that Defendant's death sentence be vacated and that Defendant either receive a resentencing hearing or be sentenced to life imprisonment.[3] *See Abu-Jamal v. Horn*, 2001 WL 1609690 (E.D. Pa. 2001) (unreported). Defendant filed a second PCRA petition in 2001, a third PCRA petition in 2003, and a fourth PCRA petition in 2009. Each of these petitions was dismissed by the PCRA Courts and the dismissals were affirmed by SCOPA. *See Com. v. Abu-Jamal*, 833 A.2d 719 (Pa. 2003); *Com. v. Abu-Jamal*, 941 A.2d 1263 (Pa. 2008); *Com. v. Abu-Jamal*, 40 A.3d 1230 (Pa. 2012) (mem.).

In 2016, Defendant filed his fifth PCRA petition. The PCRA Court granted partial relief by reinstating Defendant's direct appeal rights from the dismissal of his first four PCRA petitions. However, when defendant subsequently appealed the four dismissals *nunc pro tunc*, the Superior Court of Pennsylvania quashed the appeal on the ground that the PCRA court had

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[2] Defendant raised twenty-nine (29) distinct claims in that habeas petition, and twenty (20) of those claims stemmed from the guilt phase of Defendant's trial. In an opinion well over one hundred pages, Judge Yohn dismissed all of Defendant's guilt-phase claims, granted limited sentencing relief on one penalty-phase claim, and declined to reach the remaining penalty-phase claims.

[3] Ultimately, Defendant was not resentenced to life without parole until August 14, 2012. Judge Yohn's order was stayed while the Commonwealth appealed to the United States Court of Appeals for the Third Circuit and United States Supreme Court, and Defendant remained on death row until he was transferred to the general prison population on or about January 27, 2013. *See Com. v. Abu-Jamal*, 2013 WL 11257188, *1 (Pa. Super. Ct. July 9, 2013).

lacked jurisdiction to reinstate defendant's appellate rights since the fifth PCRA petition was time-barred. *See Com. v. Cook*, 266 A.3d 656, 2021 WL 4968874 (Pa. Super. Ct. Oct. 26, 2021) (unpublished table decision).[4] During proceedings stemming from Defendant's fifth PCRA, the trial prosecutor at Defendant's trial, Joseph McGill, submitted an affidavit ("McGill's Affidavit"), which the parties heavily cite in Defendant's current PCRA proceedings.

On January 3, 2019, one week after the PCRA Court entered its order granting partial relief in Defendant's fifth PCRA petition, the Commonwealth disclosed to the Court and Defendant that it had discovered six (6) previously undisclosed boxes from Defendant's case file (in addition to the thirty-two (32) boxes that had already been provided to the Court for review), and defense counsel was permitted to review the six boxes. *See* PCRA Petition, Ex. A; PCRA Petition, at 5-6. Defendant attaches several documents to the instant PCRA Petition that he asserts were found in those six boxes and were previously undisclosed to him; the Commonwealth does not contest this assertion.

Defendant filed his sixth counseled PCRA Petition on December 23, 2021, initiating the instant PCRA proceedings. On June 28, 2022, the Commonwealth filed Commonwealth's Motion to Dismiss Defendant's Sixth PCRA Petition ("Commonwealth's MTD"). On August 15, 2022, Defendant filed Petitioner's Brief in Opposition to the Commonwealth's Motion to Dismiss ("Defendant's Reply Brief"). On August 29, 2022, the Commonwealth filed Commonwealth's Response to Defendant's Brief in Opposition to the Motion to Dismiss the PCRA Petition ("Commonwealth's Reply Brief"). On October 12, 2022, Defendant sought the

[4] Defendant's fifth PCRA petition was premised upon newly discovered evidence that allegedly showed that former SCOPA Chief Justice Ronald Castille should have recused himself from participating in appeals from Defendant's first four PCRA petitions due to his former employment in the District Attorney's Office at the time of defendant's prosecution. The Superior Court determined that there was no such evidence presented in the PCRA court. *See id.* at **7-10.

PCRA Court's permission to file amended witness certifications. The Court accepted Defendant's amended witness certifications.

On October 26, 2022, the parties presented oral argument. On October 26, 2022, this Court filed its Notice of Court's Intent to Dismiss Without Hearing Defendant's Petition for Post-Conviction Relief Pursuant to Pa. R. Crim. P. 907 ("Notice").[5] On November 15, 2022, Defendant timely responded to the Notice by filing Petitioner's Response to the Court's Notice of Intent to Dismiss PCRA Petition ("Defendant's Notice Response"). On November 28, 2022, the Commonwealth filed its Response to Defendant's Rule 907 Filing ("Commonwealth's Notice Response").

On December 16, 2022, the Court again heard oral argument and posed questions to the parties. Through these questions, the Court determined that the defense team had only reviewed the six (6) boxes that the DAO disclosed in 2019; the prior PCRA judge, the Honorable Leon W. Tucker, reviewed the remaining thirty-two (32) boxes in camera for any evidence related to the issue raised in Defendant's fifth PCRA petition. *See* N.T. Hearing Volume 1 (12/16/22), at 54-59. The defense team professed that it had "never been provided access to those 32 boxes." However, the defense team acknowledged that it did not request access to those 32 boxes, and noted that "[w]e probably never expected we would be permitted to look through them for anything outside of the Judge Castille issue." *Id.* at 58-59. The Commonwealth stated that "the Defense has not requested to look through those 32 boxes. If they . . . want to, we would allow that. There hadn't been a request." *Id.* at 57. The Commonwealth's position was consistent with

[5] Defendant's Notice Response refers to the Court's Notice as a "Notice Opinion," but the Notice did not set forth a final decision. Instead, the purpose of the Court's filing of a detailed Rule 907 notice was to provide Defendant with a final opportunity to supplement the record and his legal arguments in support of his claim that he was entitled to a hearing. *See* Pa.R.Crim.P. 907(1).

their open file discovery policy that the DAO adopted on October 1, 2020.[6] Still perhaps not understanding that defense counsel could have reviewed 32 boxes of files anytime over the last two years by simply asking the DAO, defense counsel requested the court's permission to review the boxes, and the Court clarified that a court order was unnecessary, since the DAO was consenting to the file review. *Id.* at 60.

Because this file review fell at a late stage in the proceedings, this Court instructed the parties to present only the exhibits that they wished to introduce into evidence with succinct explanations of the exhibits. The Court reviewed the parties' submissions, and determined that additional briefings would be unnecessary, as the Court was able to easily ascertain whether the proffered documents related to existing claims. After reviewing these exhibits, the Court has determined that the additional evidence does not alter the Court's initial decision to dismiss Defendant's sixth PCRA petition without an evidentiary hearing.[7]

II. DEFENDANT'S PCRA CLAIMS

Defendant's PCRA Petition raises three claims:

1. McGill's handwritten notes from voir dire and McGill's affidavit provided during Defendant's fifth PCRA proceedings ("McGill's Affidavit") constitute new evidence that renews Defendant's *Batson* claim. *See* PCRA Petition, at pp. 26-40.
2. A letter written by eyewitness Robert Chobert to the trial prosecutor, Joseph McGill, and postmarked after Defendant was sentenced, is *Brady* evidence that the Commonwealth

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[6] *See Philadelphia DAO Policies On: (1) Disclosure of Exculpatory, Impeachment, or Mitigating Information, (2) Open-File Discovery* (effective date 10/1/2020), *available at* https://phillyda.org/wp-content/uploads/2021/11/DAO-Brady-Policy.pdf.

[7] One of the submitted exhibits warrants further discussion, but it was already part of the evidentiary record in prior PCRA proceedings. *See* Part III.B.3, *infra*.

promised to pay Chobert in exchange for his trial testimony against Defendant ("the Chobert Letter"). *See* PCRA Petition, at pp. 6-14.

3. A series of memoranda, letters, and notes written by several former employees of the DAO are *Brady* evidence that eyewitness Cynthia White testified against Defendant in exchange for the Commonwealth's declination to prosecute three of her open prostitution cases. *See* PCRA Petition, at pp. 15-26.

III. DISCUSSION

A claim warrants PCRA relief only if Defendant "pleads and proves by a preponderance of the evidence" that (1) his conviction or sentence resulted from one of the grounds specified at 42 Pa.C.S. § 9543 (a)(2),[8] and (2) the claim has not been previously litigated or waived. *See* 42 Pa.C.S. § 9543 (a). A PCRA petition does not warrant an evidentiary hearing if the PCRA Court reviews the parties' filings and relevant portions of the record relating to Defendant's claims, and "is satisfied from this review that there are no genuine issues concerning any material fact" that, if resolved in Defendant's favor, merit PCRA relief. *See* Pa. R. Crim. P. 907(1). Here, Defendant has failed to satisfy the Court that there are any genuine issues concerning any material facts that need to be resolved at an evidentiary hearing.

None of Defendant's claims warrants relief. Defendant's *Batson* claim is time-barred and waived, and thus this Court has no jurisdiction to decide this issue on its merits. Defendant's *Brady* claims are without merit since Defendant cannot prove that the alleged *Brady* evidence is

[8] Defendant's PCRA Petition, Reply Brief, and Notice Response do not state a specific ground for PCRA relief under 42 Pa.C.S. § 9543 (a)(2). However, as the Commonwealth points out, the only applicable ground for relief appears to be "[a] violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543 (a)(2)(i); *see also* Com.'s MTD, at 40.

material, i.e., that there is a reasonable probability that had it been disclosed the outcome of the proceeding would have been different.

A. Defendant's *Batson* Claim is Time-Barred and Waived

1. Time-Bar

Under the PCRA, all petitions, "including a second or subsequent petition," must be filed within one year of the date that judgment on the case became final. 42 Pa.C.S. § 9545(b); *see Commonwealth v. Bennett*, 930 A.2d 1264, 1267 (Pa. 2007). Furthermore, the statutory exceptions are themselves subject to a timeliness requirement and must be invoked "within one year of the date the claim could have been presented." 42 Pa.C.S. § 9545(b)(2); *Commonwealth v. Howard*, 249 A.3d 1229, 1233 (Pa. Super. 2021).

Defendant's judgment of sentence became final on October 1, 1990, when the Supreme Court of the United States denied defendant's petition for a writ of *certiorari* regarding his direct appeal. Therefore, defendant had until October 1, 1991, to timely file a PCRA petition. As defendant did not file the instant petition until November 10, 2021, more than 30 years later, his petition is facially untimely. Therefore, defendant must plead and prove that one of the three statutory exceptions to the timeliness requirement applies to his case, and he must have filed his petition within one year of when the claim could have been presented. 42 Pa.C.S. § 9545(b)(1) & (b)(2).

Only two of the three time-bar exceptions are arguably applicable here: the government-interference exception and the newly-discovered-facts exception. The government-interference exception applies if "the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States," § 9545 (b)(1)(i). The

newly-discovered-facts exception applies if "the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence[.]" § 9545 (b)(1)(ii). Importantly, although the "due diligence" language appears only in the newly-discovered-facts exception of § 9545, the due-diligence requirement equally applies to claims that fall under the government-interference exception. *See Com. v. Abu-Jamal*, 941 A.2d 1263, 1268 (Pa. 2008) (applying due-diligence requirement to *Brady* claim).

The PCRA's time bar is jurisdictional in nature, which means that courts must strictly apply the time-bar provisions and cannot apply principles of equitable tolling to extend filing periods beyond the three time-bar exceptions at 42 Pa.C.S. § 9545 (b)(1). *See Com. v. Fahy*, 737 A.2d 214, 222 (Pa. 1999). The PCRA Court cannot reach the merits of untimely PCRA claims if it does not have jurisdiction to review those claims. *See Com. v. Reid*, 235 A.3d 1124, 1167-68 (Pa. 2020) (listing cases in which SCOPA has instructed that PCRA courts do not have jurisdiction to reach substantive issues if claims do not surpass the PCRA's time bar).

Due diligence does not demand that the Defendant employ "perfect vigilance . . . but rather it requires reasonable efforts by a petitioner, based on the particular circumstances, to uncover facts that may support a claim for collateral relief." *Com. v. Burton*, 121 A.3d 1063, 1071 (Pa. Super. Ct. 2015) (en banc).

Here, defendant presents McGill's handwritten notes recorded during voir dire as new evidence supporting a *Batson* claim that defendant has unsuccessfully litigated several times. After carefully reviewing the record and all of the parties' filings, this Court finds that Defendant was not diligent in uncovering the information in the notes in that he failed to call McGill as a witness at Defendant's 1995 evidentiary hearing regarding his first PCRA petition, and thereafter

failed to uncover this information during the many previous times he attempted to litigate his *Batson* claim.

Batson v. Kentucky, 476 U.S. 79 (1986), held that a prosecutor denies a criminal defendant due process by exercising peremptory strikes against prospective jurors to purposefully exclude members of a particular race from the jury pool. If a defendant timely raises a *Batson* claim during voir dire, it proceeds in three phases:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Foster v. Chatman, 578 U.S. 488, 499 (2016) (internal quotations and citation omitted).

To satisfy the first prong of the *Batson* test, a defendant has to prove three elements to satisfy his burden to present a prima facie *Batson* claim: (1) the defendant is a member of a cognizable racial group; (2) the prosecution exercised peremptory challenges to strike members of the defendant's racial group; and (3) "these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude [those venirepersons] on account of their race." *See Batson*, 476 U.S. at 96. The second phase of *Batson* inquiries "does not demand an explanation that is persuasive, or even plausible. . . ['T]he issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.'" *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (quoting *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (plurality opinion)).[9]

[9] Notably, the United States Supreme Court handed down its decision in *Purkett v. Elem* on May 15, 1995, before Defendant's first PCRA petition was filed.

Batson did not exist when Defendant was tried in 1982, so the three-phase procedure outlined above did not occur during Defendant's voir dire. *Batson* can apply retroactively to a defendant's trial where, as here, the defendant's direct appeal was pending when *Batson* was decided. *See Com. v. Smith*, 17 A.3d 873, 893-95 (Pa. 2011). However, SCOPA has recognized that "it is exponentially more difficult to perform a reasoned assessment concerning the presence or absence of purposeful discrimination" in situations where no contemporaneous *Batson* objection was raised during voir dire, and thus "the record was not appropriately focused and . . . the trial court has not been asked to make the necessary findings that would . . . generate the deference undergirding the *Batson* burden-shifting construct." *Com. v. Uderra*, 862 A.2d 74, 85-86 (Pa. 2004). Thus, if no three-phase analysis was conducted at trial, the *Uderra* standard requires Defendant to plead and prove "actual, purposeful discrimination by a preponderance of the evidence, in addition to all other requirements essential to overcome the waiver of the underlying claim." *Com. v. Uderra*, 962 A.2d 74, 87 (Pa. 2004).

The record here establishes that while defendant made numerous *Batson* claims during the extensive proceedings that preceded the Sixth Petition, he failed to make any reasonable efforts to discover McGill's motivations for his use of peremptory strikes. Defendant raised a *Batson* issue for the first time in his direct appeal. SCOPA observed that "[t]here can be no doubt that . . . [Defendant] has waived any claim that the prosecutor engaged in discriminatory use of peremptory challenges," because Defendant failed to raise either a *Batson*-like objection or a *Swain*[10] objection. *Abu-Jamal*, 555 A.2d at 849. Nevertheless, SCOPA considered the merits of Defendant's *Batson* claim and rejected that claim on the merits. In its opinion, SCOPA stated

[10] In *Swain v. Alabama,* 380 U.S. 202 (1965), the United States Supreme Court recognized, pre-*Batson,* an equal protection violation based on a prosecutor's systematic use of peremptory challenges against African Americans over a period of time. 380 U.S. at 227.

that it had "examined the prosecutor's questions and comments during *voir dire*, along with those of the appellant and his counsel, and [found] not a trace of support for an inference that the use of peremptories was racially motivated." *Id.*

Defendant next raised a *Batson* claim in his first PCRA petition. The entire *Batson* argument was approximately three (3) pages long and merely argued that SCOPA's decision was premised upon an incorrect finding regarding the number of peremptory challenges that were used to strike Black prospective jurors from the panel. Def.'s Mem. in Supp. of [First] Pet. for Post-Conviction Relief, at pp. 144-47, June 5, 1995. By the time of Defendant's 1995 evidentiary hearing for his first PCRA petition, McGill had left the DAO, but McGill was subpoenaed and available on call as a witness during the evidentiary hearing. However, Defendant did not call McGill as a witness at that hearing, instead telling the PCRA court that McGill's testimony was not needed because the Commonwealth had stipulated to the testimony of three venirepersons who would prove that SCOPA had erred in its determination of the number of Black venirepersons McGill had used peremptory challenges to strike. N.T. PCRA Hearing (8/4/95), at 119-20.

The PCRA court's opinion reasoned that it was Defendant's burden to show that SCOPA's analysis of his *Batson* claim was incorrect. *See Cook a/k/a Mumia Abu-Jamal*, 1995 WL 1315980 at *104. Defendant's decision to enter a stipulation had failed to meet this burden because SCOPA's analysis did not turn on the number of peremptory strikes against Black jurors; "[r]ather, the court focused on the third prong of the *Batson* prima facie analysis—whether any other relevant circumstances existed to support an inference of discriminatory intent." *See id.* at **102-103 (internal citations and quotations omitted).

While Defendant's appeal from the denial of his first PCRA petition was pending, a training videotape surfaced in which former ADA Jack McMahon imparted strategies for

flouting *Batson* ("the McMahon videotape").[11] Citing the McMahon videotape, Defendant requested that SCOPA remand his case to the PCRA Court so that he could further explore his *Batson* claim. SCOPA denied that request but remanded the case for other considerations. *See Abu-Jamal*, 720 A.2d at 86 (Pa. 1998).[12] SCOPA then held that the stipulation entered at Defendant's PCRA hearing establishing that McGill had exercised two more peremptory strikes against Black prospective jurors than SCOPA had found (10 rather than 8 strikes) had no bearing on SCOPA's conclusion in 1989 that Defendant had failed to demonstrate a prima facie case of a *Batson* violation. *See id.* at 114. That 1989 rejection of Defendant's *Batson* claim was based not only on McGill's strike pattern, but on SCOPA's reasoning that the voir dire record revealed no evidence supporting an inference that McGill's use of peremptory strikes was racially motivated. *See id.* (quoting *Abu-Jamal*, 555 A.2d at 850).

Defendant also raised his *Batson* claim in a federal habeas petition. The Eastern District of Pennsylvania rejected Defendant's *Batson* claim, finding that the Pennsylvania state courts did not err by finding that Defendant had failed to prove a prima facie case of a *Batson* violation. *See Abu Jamal v. Horn*, 2001 WL 1609690, at **105-07 (E.D. Pa. 2001).[13] The district court also

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[11] *See Com. v. Basemore*, 744 A.2d 717, 729-32 (Pa. 2000) (extensively describing the McMahon video). The video was recorded at the DAO in 1987, but the general public did not learn of the video until 1997. *See Com. v. Hutchinson*, 25 A.3d 277, 289 n.6 (Pa. 2011). SCOPA has "condemned in the strongest possible terms the tactics and practices expounded in the McMahon lecture as violative of basic constitutional principles." *See id.* at 288. However, SCOPA has also repeatedly rejected claims based on the McMahon video where McMahon did not prosecute the defendant. *See id.* at 288-899 (collecting cases).

[12] SCOPA's opinion does not specify its reasoning for rejecting the remand on the McMahon videotape issue, but the federal district court emphasized that Defendant's trial occurred several years before the filming of the McMahon training video and McMahon did not prosecute Defendant. *Abu Jamal*, 2001 WL 1609690 at *109 (E.D. Pa. 2001).

[13] The specific standard of review applied to Defendant's *Batson* claim in his habeas petition was whether the state courts' rejection of Defendant's *Batson* claim "resulted in a decision that was contrary to, or

held that Defendant was not entitled to "an evidentiary hearing to present evidence regarding McGill's use of peremptories in [Defendant's trial] or other cases," because Defendant was at fault for "fail[ing] to develop an adequate state court record on this issue." *See id.* at *108. Specifically, this information regarding McGill's use of peremptory strikes "was available in 1995 at the time of petitioner's PCRA hearing. Petitioner, however, elected not to call the prosecutor to question him." *See id.* Moreover, the district court held that Defendant had "failed to demonstrate good cause for discovery of McGill's jury selection notes, especially in light of the fact that [Defendant] chose not to pursue McGill's testimony at the PCRA hearing." *See id.* at *109.

Finally, the United States Court of Appeals for the Third Circuit extensively examined and rejected Defendant's *Batson* claim. *See Abu-Jamal v. Horn*, 520 F.3d 272, 279-94 (3d Cir. 2008). The Third Circuit held as a matter of first impression that Defendant's *Batson* claim was barred because Defendant had failed to raise a "contemporaneous objection alleging an equal protection violation under *Swain* or otherwise object to the racial composition of the jury." *Id.* at 279-80, 284.[14] Additionally, the Third Circuit found that even if Defendant's failure to properly preserve a *Batson*-like objection at trial was *not* fatal to his claim, the state courts had not erred

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involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *See Abu-Jamal*, 520 F.3d at 293; *Abu Jamal*, 2001 WL 1609690 at *107.

[14] The Third Circuit reasoned that the United States Supreme Court had envisioned in *Batson* that an objection would be raised during the jury selection process, and that trial courts have a central role in conducting the fact-intensive analysis that *Batson* requires. *See Abu-Jamal*, 520 F.3d at 281. If a timely objection is made, the trial court can promptly consider alleged misconduct, develop a thorough record, and remedy any defects. *See id.* at 281-82. Moreover, because *Batson* violations harm both the objecting party *and* the venirepersons who are excluded from the jury through discriminatory peremptory strikes, addressing *Batson* violations on appeal rather than promptly at trial cannot redress the harm done to prospective jurors. *See id.* at 282 n.8.

by finding that Defendant had failed to prove a prima facie *Batson* claim. *See id.* at 284, 293-94.[15]

Because *Batson* did not exist at Defendant's trial, Defendant's first PCRA proceedings presented Defendant's first and best chance to create a meaningful evidentiary record that could have supported his *Batson* claim. It is undisputed that McGill was available for Defendant to call as a witness, and that Defendant chose not to call McGill. As the Third Circuit observed, it was Defendant's burden in that 1995 PCRA hearing to prove a prima facie case that *Batson* was violated, and because no case law would have allowed Defendant to prove a prima facie case solely based on McGill's strike pattern, it was particularly noteworthy that Defendant subpoenaed but failed to call the witness that might have provided relevant evidence to support Defendant's prima facie *Batson* case. *See Abu-Jamal*, 520 F.3d at 292, 292 n.19.

Defendant offers three main reasons that his failure to call McGill was not attributable to his own lack of due diligence: First, it was not necessary to call McGill because McGill's testimony was unnecessary for Defendant's particular defense strategy during that evidentiary hearing. Def.'s Reply Brief, at p. 26. Second, Defendant presumably would have altered this strategy if he had had access to these voir dire notes, but the Commonwealth "withheld" the notes from him, despite his valid requests for disclosure of the voir dire notes. *See* Def.'s Reply Brief, at pp. 26-27. Third, even if Defendant had called McGill as a witness, the PCRA court and Commonwealth would not have permitted Defendant to ask questions that might have revealed

[15] The Third Circuit reasoned that although Defendant had focused on the pattern of McGill's peremptory strikes to prove his prima facie case, the United States Supreme Court had never held that a prima facie case existed based on peremptory strikes alone without considering data about the percentage of Black people in the overall venire. *See Abu-Jamal*, 520 F.3d at 289-92. And although the Third Circuit had held that a prima facie *Batson* claim existed where the prosecutor used thirteen out of fourteen peremptory strikes to remove Black venirepersons, the Third Circuit had never found that a strike rate as low as Defendant's could make out a prima facie *Batson* claim. *See id.* at 292-93.

the information from McGill's notes that is now proffered as new evidence. Def.'s Reply Brief, at pp. 27-28.

First, Defendant's argument that McGill's testimony was not needed for defense counsel's *Batson* litigation strategy is unpersuasive. Defendant argues that because the Commonwealth was willing to enter a stipulation regarding the races of several prospective jurors, there was no need to call McGill as a witness—that was all that Defendant planned to accomplish through McGill's testimony regarding the *Batson* claim. *Batson* case law was clear by 1995 that it was necessary to meet a burden-shifting standard that would at least require Defendant to identify racially motivated strikes and to explain why McGill's seemingly race-neutral reasons for the strikes were merely pretext for racial discrimination. Moreover, SCOPA put Defendant on notice of this issue with his *prima facie Batson* case by emphasizing that there was no "trace of support for an inference that the use of peremptories was racially motivated." *See Abu-Jamal*, 555 A.2d at 850 (Pa. 1989); *Cook a/k/a Abu-Jamal*, 1995 WL 1315980 **103-04; *Abu-Jamal*, 720 A.2d at 114 (Pa. 1998). There was not at the time (nor is there now) a threshold number or proportion of racially motivated strikes that *per se* makes out a *prima facie Batson* claim. Thus, it is unclear why defense counsel believed that merely increasing the number of Black prospective jurors that McGill struck would make out a *Batson* claim. Moreover, if Defendant believed that this was a decent litigation strategy, Defendant would not have raised an (untimely) ineffective-assistance-of-counsel claim in his second PCRA petition in 2001 complaining in part that PCRA counsel botched his *Batson* claim by failing to call McGill as a witness during his 1995 evidentiary hearing.[16]

[16] In cataloguing prior defense counsel's ineffective representation, Defendant noted that "as a result of taking the decision not to put [McGill] on the stand . . . Attorney Weinglass and [A]ttorney Williams failed to investigate with him the racial bias in the manner in which he had conducted jury selection." *See*

Second, Defendant argues that he would have altered his defense strategy if he had had access to McGill's voir dire notes, but the Commonwealth "withheld" the notes, even though Defendant requested them. Defendant's accusations that the Commonwealth "withheld" and "concealed" McGill's voir dire notes until 2019 are baseless. Defendant had no right to discovery during his 1995 evidentiary hearing.[17] And even under today's standards, a PCRA court would be well within its discretion to deny a defendant's request for voir dire notes, because voir dire notes are attorney work product that a defendant generally is not entitled to receive absent a showing of good cause.[18] And even if a defendant demonstrates good cause to review a prosecutor's work product, a PCRA court could act within its discretion to require the Commonwealth to disclose only the *relevant content* within the work product, and not the entire work product in its original form. Here, even if Defendant's boilerplate discovery requests had

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Com.'s MTD, Ex. 2, at p. 4 of exhibit (or p. 37, ¶109 of excerpted second PCRA petition). The PCRA Court rejected Defendant's second PCRA petition as untimely filed, and SCOPA affirmed. *See Abu-Jamal*, 833 A.2d 719 (Pa. 2003).

[17] *See Abu-Jamal*, 720 A.2d at 91 (finding that PCRA court did not err in denying Defendant's discovery requests and noting that Defendant's discovery requests in his 1995 PCRA proceedings exceeded what would have been permitted even in pretrial discovery). According to the Comment to Pa. R. Crim. P. 902(e), which now governs requests for discovery in PCRA proceedings, Rule 902(e) was not enacted until 1997. Although there is now a limited right to discovery in PCRA proceedings, there was no such right in 1995. Under the current framework, in a first counseled PCRA petition in a capital case, discovery is permissible "upon leave of court after a showing of good cause." Pa. R. Crim. P. 902(e)(2). In all other cases (i.e., non-capital cases and subsequent PCRA petitions in capital cases), discovery is only permissible "upon leave of court after a showing of exceptional circumstances." Pa. R. Crim. P. 902(e)(1).

[18] *See Com. v. Williams*, 86 A.3d 771, 787-91 (Pa. 2014) (vacating PCRA court's discovery order requiring prosecutor to turn over notes regarding co-conspirators' interviews and trial preparation because the PCRA court failed to address work product doctrine, explain why the privilege should be defeated, or assess whether petitioner had shown good cause for discovery); *Com. v. Dennis*, 859 A.2d 1270, 1278-90 (Pa. 2004) (reversing PCRA court's discovery order requiring prosecutor to turn over voir dire notes, because petitioner's *Batson* claim had been previously litigated and there was no evidence of prosecutor's racial animus in the record, and because *Basemore*, 744 A.2d 717 (Pa. 2000), did not require PCRA courts to permit discovery to reconstruct a *Batson* record that was not created at trial); *Com. v. Tilley*, 780 A.2d 649, 652-54 (Pa. 2001) (vacating PCRA court's discovery order requiring Commonwealth to disclose all evidence of racial composition of jury panels and prosecutor's voir dire notes, because petitioner had failed to show good cause after failing to preserve *Batson* claim at trial).

arguably encompassed McGill's voir dire notes, Defendant failed to demonstrate good cause for the disclosure of the notes.

Defendant's lack of a legal basis to access McGill's voir dire notes based on his 1995 requests made it even more critical for Defendant to attempt to question McGill at the 1995 evidentiary hearing—McGill was, legally speaking, the only *available* source beyond the trial record for McGill's reasoning for accepting or striking various venirepersons. While McGill's notes may be newly disclosed to Defendant, McGill himself was a source for many of the facts. In *Commonwealth v. Lambert*, 884 A.2d 848 (Pa. 2005), SCOPA reviewed seven different *Brady* claims based on a newly disclosed file and concluded that one of the claims was *not* timely because that defendant already knew the underlying facts from a different source. *See id.* at 856. The *Lambert* Court held that "because the facts underlying this claim were known *or knowable* to appellant, it does not qualify under the newly discovered evidence exception and, thus, is untimely." *Id.* (emphasis added). Here, the *facts* underlying Defendant's *Batson* claim come from a newly disclosed source, but they were *knowable* to Defendant in 1995 because Defendant could have learned virtually all of the facts from McGill.

Third, Defendant argues that content of McGill's voir dire notes was not *knowable*: He could not have simply asked McGill about his reasoning for striking particular Black venirepersons because the trial court and the Commonwealth had restricted Defendant's bases for questioning McGill by requiring Defendant to make an offer of proof for McGill's testimony. *See* Def.'s Reply Brief, at 28.[19] Significantly, the Commonwealth opposed everything in

[19] In context, the Commonwealth's request for a narrow offer of proof for McGill was reasonable: Defense counsel submitted about three hundred (300) pages of filings for the first PCRA petition, including attachments. None of those attachments included an affidavit from ADA McGill or any representation of attempts to interview McGill. *See* N.T. PCRA Hearing (7/19/95), at 35-40. Initially, defense counsel refused to provide a more detailed offer of proof than the facts that (1) McGill was the

Defendant's offer of proof for the scope of McGill's testimony *except for* Defendant's proposed line of *Batson* questioning, and Defendant's proposed line of *Batson* questioning was phrased broadly enough to permit questions about McGill's intentions and strategy in conducting voir dire.[20] Finally, the Court rejects Defendant's contention that asking McGill about his reasoning would have been a "fishing expedition." *See* Def.'s Reply Brief, at 27-28. Rather, it was a rare opportunity for Defendant to fully litigate a retroactive *Batson* claim by expanding the evidentiary record.[21]

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trial prosecutor and that (2) defense counsel could question him about "18 volumes" of material (presumably the trial transcripts), although, as the Commonwealth pointed out, it would be impractical for the Commonwealth or McGill to prepare for questions about any or all of 4,000 pages. *See* N.T. PCRA Hearing (7/26/95), at 222-23, 226-29.

[20] Defendant's entire offer of proof for questioning McGill about the *Batson* claim was as follows:

> [McGill] provided [SCOPA] with an affidavit in which he set forth his conduct during the selection of the Jury indicating the racial makeup of the Jury. We've had a lot of testimony about this. We've heard from Mr. Jackson on this. You've heard from Mr. Gelb [appellate counsel's son] on this. You received an affidavit from Mr. Jackson. Tomorrow there will be an affidavit from Mr. McGill which he filed with the Supreme Court, and the brief in which we feel Mr. McGill was a party to a process that misrepresented to [SCOPA] by some 30 percent the pattern of racial exclusion which the Commonwealth engaged in in picking this Jury. We intend to question him on that.

N.T. PCRA Hearing (7/31/95), at 279-80. The only portion of the Commonwealth's response to Defendant's offer of proof that was relevant to the *Batson* claim was as follows:

> Your Honor, I would suggest to Your Honor and submit that if they 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. I think everything else they have mentioned [is cumulative of other witnesses or] a witch hunt and I would ask Your Honor to so find and preclude an inquiry in that regard.

Id. at 292. *Cf. id.* at 277-98 (arguing to strike all other lines of questioning).

[21] Defendant's defeatist reasoning is puzzling: Since Defendant never bothered to question McGill, Defendant cannot possibly know what he would have been able to learn about McGill's voir dire strategy before the Commonwealth objected or the Court admonished him. Defendant might have found himself in a vastly different litigation position today if Defendant had at least tried to create this evidentiary hearing record. The record would clearly reflect which questions the PCRA court permitted and foreclosed, and

In sum, Defendant's *Batson* claim is time-barred, because over the decades that he has litigated his *Batson* claim, he has failed to show due diligence in learning anything about McGill's thought process in jury selection, and he cannot cure that failure now with McGill's voir dire notes. Accordingly, this Court is without jurisdiction to reach the merits of defendant's claim.

2. Waiver

A PCRA petitioner must plead and prove by a preponderance of the evidence that each claim raised has not been waived. 42 Pa.C.S. § 9543 (a), (a)(3). "[A]n issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, . . . on appeal or in a prior state court proceeding." 42 Pa.C.S. § 9544(b). Defendant's *Batson* claim is waived, because Defendant failed to object *during voir dire* to the prosecutor's use of peremptory strikes to remove prospective Black jurors based on their race.

Until 1998, SCOPA had discretion to apply the relaxed-waiver doctrine in death-penalty cases. The relaxed-waiver doctrine allowed SCOPA to "relax[] its waiver rules as to any claim raised on direct appeal for which the record permits review." *Com. v. Albrecht*, 720 A.2d 693, 700 (Pa. 1998). In *Commonwealth v. Albrecht*, however, SCOPA abrogated the relaxed-waiver doctrine, and declared that "[h]enceforth, a PCRA petitioner's waiver will only be excused upon a demonstration of ineffectiveness of counsel in waiving the issue." *See id.*

Defendant's *Batson* claim received the benefit of the relaxed-waiver doctrine several times. First, on direct appeal, SCOPA noted that Defendant's *Batson* claim was clearly waived, but then mentioned the relaxed-waiver doctrine, and rejected the *Batson* claim on the merits. *See*

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this Court could easily ascertain which aspects of McGill's notes were known and knowable from Defendant's best efforts to litigate his *Batson* claim.

supra Part III.A.1. Second, during Defendant's first PCRA proceedings, the PCRA court noted that it had "relax[ed] the waiver rule and [made] findings and conclusions based on the merits of each issue presented," including Defendant's *Batson* claim. *See Cook a/k/a Abu-Jamal*, 1995 WL 1315980 at *70 n.28 (discussing relaxation of waiver rule), **101-04 (rejecting *Batson* claim on merits). Third, SCOPA reviewed and affirmed the PCRA court's conclusion that Defendant's *Batson* claim lacked merit, but SCOPA did not indicate whether the issue had been waived. *See Abu-Jamal*, 720 A.2d at 113-14 (Pa. 1998).

Because the relaxed-waiver doctrine no longer exists, this Court must apply all normal waiver principles to Defendant's *Batson* claim. *See Com. v. Uderra,* 962 A.2d 74, 87 (Pa. 2004) (defendant raising a retroactive *Batson* claim "must prove actual, purposeful discrimination by a preponderance of the evidence *in addition to all other requirements essential to overcome the waiver of the underlying claim"*) (internal citation omitted, emphasis added). This is made clear by numerous cases that involve retroactive *Batson* claims and evaluate whether the *Batson* claim was waived.[22] These cases establish that *Batson* can apply retroactively to a defendant whose voir dire predated the *Batson* decision, but only if the defendant has made some effort to preserve a claim that racial discrimination occurred during jury selection. *See Com. v. Smith*, 17 A.3d 873, 893-95 (Pa. 2011). If a defendant litigates *Batson* in PCRA proceedings, and he has not preserved the claim at trial and on direct appeal, then the *Batson* claim is waived, and Defendant must instead frame the *Batson* claim as an ineffective-assistance-of-counsel (IAC) claim that, but for trial counsel's or appellate counsel's ineffectiveness, Defendant could have prevailed on his *Batson* claim. *See id.* at 894-95. SCOPA has struck down retroactive-*Batson*

[22] *See, e.g., Com. v. Sneed*, 899 A.2d 1067, 1072-77 (Pa. 2006); *Com. v. Marshall*, 947 A.2d 714, 719-23 (Pa. 2008); *Com. v. Jones*, 951 A.2d 294 (Pa. 2008); *Com. v. Smith*, 17 A.3d 873, 891-98 (Pa. 2011); *Com. v. Roane*, 142 A.3d 79, 90-93 (Pa. Super. Ct. 2016).

claims that were made through layered IAC claims, explaining that counsel generally cannot be ineffective for failing to raise an issue that would require anticipating a change in the law. *See Com. v. Sneed*, 899 A.2d 1067, 1075-77 (Pa. 2006). Therefore, defendants can no longer make successful retroactive *Batson* claims if they did not make a *Swain* objection or a *Batson*-like objection at trial.[23]

Nevertheless, Defendant's Notice Response argues that Defendant's *Batson* claim is not waived because it is based on newly discovered evidence. *See* Def's Notice Response, at pp. 7-10. Defendant's Notice Response did not meaningfully engage with the *Uderra* line of cases. At oral argument, when the Court pointedly asked defense counsel to reconcile the pre-*Uderra* cases cited in his Notice Response with the *Uderra* line, defense counsel argued that "[n]one of these cases involve circumstances where there were new facts that were not known at the time of trial. Under the general waiver principles and under the principles that the Court cited, a claim cannot be waived if it is premised on new evidence that was not previously available." N.T. Hearing Volume 1 (12/16/22), at 29. However, this Court found that several cases that relied on *Uderra* involve alleged newly discovered evidence.[24]

For all of these reasons, Defendant's *Batson* claim is waived, and this Court declines to review the merits of the claim. For all of these reasons, Defendant's *Batson* claim is waived. SCOPA did not mince words in 1989 when it declared that "[t]here can be no doubt that . . .

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[23] While Defendant contends in his Notice Response that retroactive *Batson* claims premised upon newly discovered evidence cannot be waived, his claim is meritless. *See, e.g., Com. v. Daniels*, 963 A.2d 409, 434-34 (Pa. 2009) (rejecting *Batson* claim premised in part on new evidence because "no contemporaneous *Batson* objection was raised at trial"). All of the cases cited by defendant precede *Uderra,* which first set forth the current standard for retroactive *Batson* claims, and explicitly requires a defendant to demonstrate that his claim had not been waived. *Uderra,* 962 A.2d at 87.

[24] *See, e.g., Com. v. Daniels*, 963 A.2d 409, 434-34 (Pa. 2009) (rejecting *Batson* claim premised in part on new evidence because "no contemporaneous *Batson* objection was raised at trial" and appellant had failed to prove entitlement to relief under *Uderra*).

[Defendant] has waived any claim that the prosecutor engaged in discriminatory use of peremptory challenges," because Defendant failed to raise either a *Batson*-like objection or a *Swain* objection. *Abu-Jamal*, 555 A.2d at 849. And while it is not binding on this Court, the Third Circuit persuasively held more than a decade ago that Defendant's *Batson* claim is waived because he failed to preserve it at trial with a contemporaneous objection.

Accordingly, even if defendant's *Batson* claim were not time-barred, he would still not be entitled to relief on this claim.[25]

B. Defendant's Proferred *Brady* Evidence is Immaterial to his Conviction

To establish that a *Brady* violation has occurred, Defendant must prove that: "(1) the evidence at issue was favorable to the accused, either because it is exculpatory or because it impeaches; (2) the prosecution has suppressed the evidence, either willfully or inadvertently; and (3) the evidence was material, meaning that prejudice must have ensued." *Com. v. Bagnall*, 235 A.3d 1075, 1086 (Pa. 2020). *Brady* evidence is material "if there is a reasonable probability that had it been disclosed the outcome of the proceedings would have been different." *Com. v. Strong*, 761 A.2d 1167, 1174 (Pa. 2000). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985); *see also Com. v. Wholaver*, 177 A.3d 136, 158 (Pa. 2018).

Defendant presents two *Brady* claims based on documents found in the six boxes that the DAO permitted Defendant to review in 2019. Specifically, defendant contends that his proffered *Brady* evidence would establish that: (1) Robert Chobert was promised some payment as a result of his agreement to testify at Defendant's trial and (2) Cynthia White was promised leniency in

[25] The Court's Notice stated that Defendant's *Batson* claim was previously litigated and for that reason, it was also barred from PCRA review. *See* 42 Pa.C.S. § 9543(a)(3). The Court has decided not to reject defendant's *Batson* claim on that ground. *See Com. v. Chmiel*, 173 A.3d 617, 627 (Pa. 2017) ("[a]n issue is not previously litigated when it does not rely solely upon previously litigated evidence.").

future prosecutions if she testified at Defendant's trial. The Court finds that even if Defendant were able to prove his theories at an evidentiary hearing, there is not a reasonable probability that the disclosure of the alleged *Brady* evidence would have changed the outcome of Defendant's trial. The record establishes that the alleged *Brady* evidence would not cast Defendant's trial in such a different light as to undermine confidence in his first-degree murder conviction. Accordingly, defendant's *Brady* evidence is not material and he not entitled to relief on these claims.

1. Relevant Facts

A very basic understanding of the facts adduced at trial is necessary in order to understand the context of Defendant's *Brady* claims. According to the trial record, Officer Daniel Faulkner initiated a traffic stop of a Volkswagen driven by William Cook, defendant's brother, by the intersection of 13th and Locust Streets in Center City, Philadelphia, at about 4:00 a.m. on December 9, 1981. When police arrived at the scene, Faulkner had been shot in the upper back and directly between his eyes. Responding officers testified that Defendant was found slumped just a few feet from Faulkner; Defendant had a bullet in his upper chest, and his legally licensed firearm was on the ground a few inches away from his hand.

Four eyewitnesses testified at trial, and Defendant's *Brady* claims relate to the impeachment of two of those eyewitnesses: First, Robert Chobert, a taxicab driver, testified that he heard a shot as he was dropping off a passenger at the intersection of 13th and Locust Streets, and he looked up to see a "cop" fall to the ground, and then saw Defendant "standing over [the cop] and firing some more shots into him." *See* N.T. Trial (6/19/82), 210-11. He watched Defendant walk a few feet and fall by the curb. *See id.* at 211. A few minutes later, police

arrived, and Chobert told police that he saw the shooting and then identified Defendant as Defendant sat in a police wagon. *See id.* at 211-12.

Second, Cynthia White testified that she was standing on the corner of 13th and Locust Streets and saw a police officer pull over a Volkswagen and attempt to handcuff the driver. *See* N.T. Trial (6/21/82), at 4.92-94. She saw the Defendant run through a parking lot across the street, and when Defendant got to the curb, Defendant shot twice at the police officer's back. *See id.* at 4.93. She saw the police officer turn around, and although it seemed like the officer was grabbing for something, but it was out of her line of sight. *Id.* at 4.94, 4.104-05. Then Defendant stood over the police officer and fired more shots. *Id.* at 4.94. White was heavily impeached at trial, including for her record of more than thirty arrests for prostitution; at the time of her testimony, she was incarcerated in Massachusetts for a prostitution conviction and had three open prostitution cases in Philadelphia.[26] *See id.* at 4.79-81.

2. The Commonwealth's Alleged Nondisclosure of Robert Chobert's Letter is Not a *Brady* Violation Because it is Immaterial to Defendant's Conviction

Defendant correctly states that the prosecution's failure to disclose a witness's financial incentive to testify against a defendant could potentially violate *Brady*. *See, e.g.*, *Banks v. Dretke*, 540 U.S. 668 (2004). Defendant asserts that the Chobert Letter is evidence that the Commonwealth offered Chobert a financial incentive to testify against Defendant, and that the existence of this financial incentive is evidence withheld by the Commonwealth that Defendant could have used to impeach McGill. PCRA Petition, at 6-7. The parties agree to the authorship,

[26] White's arrest record was discussed most clearly at the beginning of the Commonwealth's direct examination. *See* N.T. Trial (6/21/82), at 4.79-81. Defense counsel cross-examined White for more than one day of trial. *See id.* at 4.116-4.203; N.T. Trial (6/22/82), at 5.25-5.164, 5.113-5.238 (recross examination).

post-trial postmark date[27], and explicit content of the Chobert Letter, which includes in relevant part:

> 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.

See PCRA Petition, Ex. B; PCRA Petition, at 7; Com.'s MTD, at 43. In McGill's Affidavit submitted during Defendant's fifth PCRA proceedings, McGill claimed that the Chobert Letter follows up on a discussion that McGill and Chobert had after Defendant's trial, where Chobert asked whether he could receive reimbursements for lost wages due to his participation in Defendant's trial, and McGill responded that he would "look into it." *See* PCRA Petition, Ex. C (McGill's 2019 Affidavit), at 2-3. However, McGill claimed that he had had no intention of looking into the compensation issue because he knew that, as a policy matter, the DAO did not compensate witnesses for lost wages. *See id.*[28]

A few reasonable inferences can be drawn from the Chobert Letter: (1) Chobert and McGill had previously discussed Chobert's desire to collect money that Chobert felt was owed to him; (2) Chobert's letter was following up on that conversation after more than one attempt to call McGill;[29] and (3) Chobert expected to hear back from McGill about this. But Defendant

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[27] *See* PCRA Petition, at 7 (stating that the letter is postmarked August 6, 1982); Com.'s MTD, at 42 (stating that Chobert sent the letter to McGill after Defendant's trial); PCRA Petition, Ex. C (McGill's affidavit does not contradict that the letter was sent post-trial). The Court is unable to read the postmark date in Defendant's submitted exhibit, but notes that August 6, 1982, is about one month after Defendant's trial ended.

[28] The Court does not accept anything in McGill's Affidavit as true or false at this stage of the PCRA proceedings. But the Court considers the Affidavit to reflect what McGill likely would say if he testified.

[29] "I have been calling" implies more than one call, but it is unclear whether Chobert actually reached McGill, since Chobert references McGill's week out of the office.

makes additional inferences from the Chobert Letter that require additional support: First, Defendant avers that because Chobert does not reference a specific dollar amount, Chobert must be asking for a sum that Chobert and McGill had previously agreed upon. PCRA Petition, at 8. Second, and more importantly, Defendant argues that Chobert specifically expected a money payment from the Commonwealth "in exchange for his testimony against" Defendant. *Id.* at 14. Defendant further argues that the Chobert Letter is fundamentally inconsistent with McGill's Affidavit, because Chobert clearly requests money that Chobert believes is owed to him and appears to reference a previously agreed upon sum rather than offering a calculation of Chobert's lost wages. *See id.* at 7-8.

It is unclear how Defendant expects to prove these additional inferences through witness testimony or further argument at an evidentiary hearing, because (1) McGill's Affidavit does not reflect that McGill will support these inferences; (2) Robert Chobert was unwilling to sign a witness certification for Defendant's private investigator; (3) defense counsel presents no successful attempts to discuss this letter with Chobert; and (4) Defendant presents no other evidence that Chobert remembers this letter written forty years ago. Thus, there is no evidence on record upon which this Court could credit defense counsel's bald assertion that "[u]pon information and belief, at an evidentiary hearing, Mr. Chobert will testify regarding the contents and context of the letter." *See* Witness Certificate for Robert Chobert submitted Oct. 12, 2022, at 2. However, it is unnecessary to resolve these factual issues at an evidentiary hearing, because Defendant cannot prove that the nondisclosure of this letter prejudiced him.

Assuming arguendo that Defendant *could* prove by a preponderance of the evidence at an evidentiary hearing that the Commonwealth promised Chobert some form of payment to incentivize his trial testimony against Defendant, then Defendant's Brady claim still fails. Even

if the jury had heard that the Commonwealth had promised to give Chobert some additional form of payment related to his testimony against Defendant, that impeaching information would not have been sufficient to undermine confidence in the outcome of the trial.

First, impeaching information about Chobert's financial incentives *to testify* is not particularly persuasive because Chobert immediately and steadfastly identified Defendant as the person who shot Faulkner, and Chobert never changed his statements or testimony regarding the shooter's identification. Chobert stayed at the scene after the shooting and identified Defendant as the person who shot Faulkner minutes after the shooting. *See* N.T. Trial (6/19/82), at 210-13. Three days later, Chobert gave detectives another statement identifying Defendant as the shooter. During Defendant's motion to suppress hearing, where Defendant personally questioned Chobert, Chobert told Defendant, "I saw you shoot [Faulkner], and I never took my eyes off you until you got in the back of the wagon." N.T. Motion to Suppress (6/2/82), at 2.75. At trial, Chobert unequivocally identified Defendant as the shooter, and his testimony was subject to strenuous cross-examination. *See* N.T. Trial (6/19/82), at 213 (in-court identification), 223-69 (cross-examination), 277-78 (recross examination). Chobert remained adamant fifteen years later at Defendant's 1995 evidentiary hearing that Defendant committed this homicide. N.T. PCRA Hearing (8.15.95), at 11, 16.

Defendant argues that there was one material difference in Chobert's police statement and Chobert's trial testimony: "on the night of the crime, [Chobert] told police officers that after the shooting, the shooter ran 30 feet away from the scene," but "[a]t trial, Mr. Chobert testified that the shooter only ran 10 feet." *See* Def.'s Notice Response, at p. 24. Defendant also impeached Chobert on this lapse in measurement at trial. *See* N.T. Trial (6/19/82), at 236-37. Even if Defendant had impeached Chobert with Chobert's alleged financial incentive to testify, it

is extremely unlikely that the jury would attribute this minor change between Chobert's statement and testimony to anything other than a lapse in measurement. And because Defendant fails to point to any other material difference between Chobert's statement to police and Chobert's testimony at trial, it is difficult to understand how any financial incentive impacted Chobert's testimony. Moreover, Defendant's argument that Chobert's testimony conflicts with that of other lay witnesses was already presented to Defendant's jury and apparently did not sway the verdict. *See* Def.'s Notice Response, at pp. 25-26 (citing witness discrepancies).

Second, at the 1995 evidentiary hearing, Chobert testified that he *did* rely on McGill for at least one benefit—assistance with getting his license reinstated—but that that benefit did not change his testimony against Defendant and was not the reason that he testified against Defendant. *See Abu-Jamal*, 720 A.2d at 95-96 (Pa. 1998). Finally, as discussed below, the considerable weight of the other evidence incriminating this Defendant not only corroborated Chobert's testimony, but independently warranted confidence in the jury's verdict. *See* Part III.B.4, *infra*.

For all of these reasons, even if Defendant were to call Chobert as a witness and Chobert were to contradict McGill's Affidavit by claiming that the Commonwealth had promised him money related to his trial testimony against Defendant, that admission would not be sufficient to carry Defendant's burden. Therefore, Defendant's *Brady* claim about Chobert lacks merit.

3. Defendant Was Not Prejudiced by The Commonwealth's Alleged Nondisclosure of the Commonwealth's Leniency in Cynthia White's Future Prosecutions in Exchange for Her Testimony

Defendant attaches to his PCRA Petition a series of seven memoranda, notes, and letters authored by various former DAO employees ("White's 1982 to 1983 prosecution documents") as proof of Defendant's *Brady* claim that the Commonwealth promised to drop Cynthia White's

three open misdemeanor prostitution cases in exchange for her testimony against Defendant. *See* PCRA Petition, Ex. D. After additional review of the Commonwealth's 32 file boxes, Defendant presented a transcript from a June 29, 1987, preliminary hearing for a prosecution against Cynthia White for an alleged knifepoint robbery, where the Commonwealth consented to White being released on her own signature. *See* Petitioner's Submission of Additional Documents, Descriptive Index List and Exhibit 6, filed February 22, 2023 ("White's 1987 preliminary hearing"). Finally, Defendant heavily criticizes statements in McGill's Affidavit, including McGill's avowals that he "never took any steps to intervene in the prosecution of Cynthia White for any crime," and "never suggested, directed or otherwise influenced the outcome of her cases and absolutely had no agreement with her to do so in exchange for anything." *See* PCRA Petition, at pp. 20-21, 23; Petition Ex. C, McGill's Affidavit, at p. 5.[30]

Defendant correctly states that the Commonwealth's nondisclosure of evidence of a witness's incentive to testify against a defendant in exchange for leniency in the witness's own criminal cases can be *Brady* evidence. *See Com. v. Strong*, 761 A.2d 1167 (Pa. 2000). However, after reviewing White's 1982 to 1983 prosecution documents, White's 1987 preliminary hearing transcript, McGill's Affidavit, and Defendant's amended Witness Certificates, this Court makes two findings: (1) Defendant would be unable to prove by a preponderance of the evidence at an evidentiary hearing that White formed a deal with the Commonwealth to testify against Defendant in exchange for leniency, and (2) even if White formed such a deal, she was so heavily impeached at trial that the incremental impeachment evidence would not have cast Defendant's trial in such a different light as to undermine confidence in the outcome of his trial.

[30] McGill also averred in relevant part that "[t]here was in fact no deal for White's testimony," and that McGill directed any ADA prosecuting White's prostitution offenses to contact McGill "for no other purpose than to track [White's] progress and to make the assigned prosecutor aware of her courageous participation in [Defendant's] case." *See* McGill's Affidavit, at p. 5.

a. Defendant's Proffered Evidence Would Not Prove that White was Promised Leniency in Future Prosecutions in Exchange for Her Testimony Against Defendant.

Defendant speculates that the efforts documented in the Cynthia White prosecution documents to (1) extradite White from Massachusetts after she was paroled there to Philadelphia and (2) give White an expedited trial date, are evidence of favorable treatment. Defendant's proffered evidence does not support these inferences.

First, the extradition documentation is equally, if not more, consistent with an effort to prosecute White before any speedy-trial claim warranted dismissal of her cases. Defendant supplies no extrinsic evidence supporting his claim that these were special efforts made for White. If the Commonwealth truly did not want to prosecute White, it only had to appear to bungle its efforts to extradite her so that the clock conveniently expired on her misdemeanor prostitution charges. Thus, even if the relevant witnesses are able to remember White's extradition, the Court does not find that testimony would reveal proof of a secret deal between White and the Commonwealth regarding White's open cases.

Second, Defendant proffers only speculation about the meaning of a December 6, 1982, memorandum written by Andre Washington (who was at the time the Chief of the DAO's Municipal Court Unit) to inform then-ADA Michael Weisberg that Weisberg was "specially assigned" to prosecute three cases against Cynthia White in Municipal Court for three separate counts of prostitution ("Washington's Memo"). Here are the relevant portions of Washington's Memo:

> This defendant was the witness in the recent police shooting case tried by Joe McGill. *There were no specific deals worked out for her testimony, so these cases should be vigorously prosecuted.* Please note that there is an outstanding Rule 6013 Petition [a speedy-trial motion] which will have to be litigated before trial.
>
> [Details about the interstate detainer omitted]

> There is no objection to a plea being agreed upon for these three cases. . . .
>
> *Before proceeding to trial please see [McGill] and discuss this case.* If possible, arrange for an earlier date for trial.

PCRA Petition, Ex. D (second out of seven memoranda) (emphasis added). Defendant speculates that the purpose of Washington's instructions to "vigorously prosecute" the case is "to bolster, in an official memo, the representation that Ms. White was offered no deals in exchange for her testimony," and that "[i]t is apparent that the memo was designed to make it seem that Ms. White would be vigorously prosecuted, but required the prosecutor to speak privately with A.D.A. McGill before moving forward." PCRA Petition, at pp. 23-24 (emphasis in original). Defendant supplies no extrinsic evidence about Washington's Memo besides this assertion of its subliminal messaging. It is not inherently contradictory for Washington to relay to a subordinate that no specific promises were made to White, to direct Weisberg to proceed with prosecuting White's cases, to authorize Weisberg to work out a plea agreement, and to instruct Weisberg to consult with McGill before bringing White to trial. Rather, Washington's Memo is entirely consistent with principles of prosecutorial discretion, where a prosecutor works through an assigned case with some level of autonomy, while reporting to a supervisor and sometimes consulting with employees in other units or stakeholders in other offices who have information that is relevant to the case.

Third, Defendant's witness certifications demonstrate that defendant would be unable to produce any witnesses to support Defendant's theories at an evidentiary hearing. Andre Washington is the only witness that has cooperated with defense counsel's belated attempt to

secure witness certifications.[31] The original text of Andre Washington's signed Witness Certificate stated, "I will testify regarding the contents and context of the memorandum," but Washington crossed out the words "and context," and signed his initials next to the edit. The Court interprets this to mean that Washington has agreed to testify only about the text of the memorandum, and Washington will not testify about any other conversations or interactions that he may have had about White's cases. Similarly, McGill would be available to testify at an evidentiary hearing, but nothing in McGill's Affidavit suggests that McGill will testify to forming an agreement with White that the Commonwealth would be lenient in future prosecutions if White testified against Defendant.[32] Defendant cannot call Cynthia White as a witness, because she died in 1992. *See Abu-Jamal*, 941 A.2d at 1265 n.5 (Pa. 2008). The Court is unaware of whether former ADA Weisberg is alive, available, and willing to contradict McGill's representation that McGill did not convey any specific deal to Weisberg and just wanted to put in a good word for White; Defendant has not submitted a witness certification or any recent information about Weisberg. Thus, even if Defendant were allowed an opportunity to present witnesses' testimony about the content of these memos, and even if the Court draws all reasonable inferences about the memos in Defendant's favor, these memos would not raise a

[31] On October 12, 2022, defense counsel submitted Witness Certificates [*sic*] representing that a defense investigator has failed to reach two additional authors of documents about White's municipal court cases (Alfred Little and Richard Di Benedetto), yet counsel believes that they will testify regarding "the contents and context" of the documents. The Court does not credit counsel's beliefs that these witnesses will remember the "context" of documents written in 1982 about a woman's misdemeanor prostitution cases; counsel's beliefs are unsupported by recent evidence about the witnesses, representations from those witnesses that they do remember what they wrote, or some other extrinsic proof.

[32] McGill's Affidavit denies that he formed an agreement with White and claims that McGill wanted to track White's open cases and speak with the assigned ADA to inform the ADA "of her courageous participation in [Defendant's] case." *See* PCRA Petition, Ex. C, at 5. As stated above, this Court does not accept anything in McGill's Affidavit as true or false at this stage of the PCRA proceedings. But the Court considers the Affidavit to reflect what McGill likely would say if he testified.

genuine issue concerning any material fact regarding Defendant's *Brady* claim that must be resolved at an evidentiary hearing.

Finally, Defendant has recently proffered White's 1987 Preliminary Hearing transcript from a knifepoint robbery prosecution in which the prosecutor asked the court to release White on her own recognizance, despite the court's note that White had a history of seventeen (17) prior failures to appear for court.[33] The Court did not permit Defendant to provide argument about this or other exhibits submitted as newly discovered evidence from the defense team's belated search of the DAO 's 32 boxes of files for this case, because this transcript was the only evidence presented that gave this Court pause, and although Defendant's interest in this transcript is plainly evident, this evidence is not probative of the *Brady* claim in the instant petition and it is not newly available evidence. Importantly, White's 1987 Preliminary Hearing transcript does not support Defendant's theory that an agreement was formed between McGill and White in which White would receive leniency in future prosecutions in exchange for her testimony against Defendant. Although it is perhaps surprising that someone with White's criminal record and history of failures to appear for court was released pretrial in a relatively serious case, it was apparently due to then-Homicide Unit Detective Douglas Culbreth's representations to the court that White had "received threats since she's been [in jail for the robbery case" and that White "was a Commonwealth witness in a very high profile case." *See* N.T. *Com. v. White*, Preliminary Hearing (6/29/87), at 31-32. In light of that information, the court deferred to the assigned prosecutor's recommendation that White should be able to sign her own bail. *See id.* at 32-33. Thus, it can be inferred from White's 1987 Preliminary Hearing

[33] *See* N.T. *Com. v. White*, Preliminary Hearing 6/29/87, at 30-33. Notably, the complainant testified that White seemed to know at least one of the responding police officers, and although the complainant told police that White had a knife, police allegedly did not search White. *See id.* at 11, 27.

transcript that at least the Philadelphia Police Department's Homicide Unit continued to look out for White years after she testified against Defendant. But nowhere does this transcript mention or implicate McGill or suggest that White and the Commonwealth formed an agreement for leniency in her future prosecutions in exchange for her testimony against Defendant.

The Court was immediately curious about why this transcript from a 1987 preliminary hearing would appear in boxes for this Defendant's case, but not have been revealed to Defendant. Unfortunately, Defendant failed to represent to the Court that White's 1987 Preliminary Hearing transcript was already in defense counsel's possession and introduced by Defendant as an exhibit on June 30, 1997, after SCOPA remanded Defendant's first PCRA petition for additional development of the record. During the 1997 remand proceedings, defense counsel called former-detective Culbreth as a witness, almost verbatim quoted Culbreth's testimony from White's 1987 Preliminary Hearing, and extensively questioned him about his decision to attest to White's danger in custody at that 1987 hearing. *See* N.T. PCRA Hearing (6/30/97), at 96-114. Therefore, White's 1987 Preliminary Hearing transcript is *not* new evidence that Defendant was previously unaware of, and it does not provide additional evidence of a deal struck between White and McGill for leniency in her future prosecutions in exchange for her testimony.

b. Even if White *Was* Promised Leniency in Future Prosecutions in Exchange for Testimony Against Defendant, this Evidence Is Immaterial to Defendant's Conviction

Assuming arguendo that Defendant can prove by a preponderance of the evidence his theory that McGill promised White leniency in her open matters in exchange for White's testimony against Defendant, then this *Brady* claim still fails, because this impeachment evidence would have been immaterial to Defendant's trial outcome. Although the Court does not

agree that White's testimony was as incredible as Defendant argues,[34] the Court finds that White was already thoroughly impeached at trial with information that the jury was free to credit as White's self-interest in cooperating with the Commonwealth because she had open cases.

Most importantly for Defendant's current *Brady* claim, White freely admitted to being incarcerated in a Massachusetts jail for an eighteen-month sentence for prostitution at the time of her trial testimony, to having perhaps thirty (30) or more prostitution arrests, and to having three open Philadelphia cases stemming from prostitution arrests. *See* N.T. Trial (6/21/82), at 4.79-85.[35] White testified that she had no arrangement or deal with the Commonwealth regarding her open cases or her Massachusetts conviction. *See id.* at 4.81-86. Thus, the jury had ample information from which it could infer that White testified against Defendant due to her own self-interest in leniency in her own pending criminal cases, and the jury was free to believe or disbelieve White's testimony that she would not receive any favorable treatment.

Moreover, Defendant presents no persuasive argument or compelling evidence that any changes in White's statements and testimony were attributable to some agreement for leniency. While there appear to be some inconsistencies across White's statements and testimonies, White apparently always maintained that she saw a police officer attempt to arrest a man, and then she

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[34] Defendant argues that White was incredible, inconsistent, and heavily impeached at trial, in order to strengthen his point that the alleged *Brady* evidence about Chobert is material because Chobert was the Commonwealth's "star witness." *See* PCRA Petition, at 10-13. If White's testimony was as incredible and weak as Defendant claims it was, then it is unclear why further impeachment of her testimony would have had any bearing on Defendant's trial.

[35] Additionally, White admitted to using aliases and false addresses during encounters with police, and Defendant extensively cross-examined her about this as proof of her past dishonesty with law enforcement. *See* N.T. Trial (6/21/82), at 4.80, 4.116-4.131. White admitted to receiving two benefits from the Commonwealth: (1) hotel lodging for security reasons during two hearings for Defendant and one trial for Defendant's brother, and (2) the Commonwealth's agreement to allow one of White's friends to sign his own bail after an arrest for theft. *See id.* at 4.85-4.92. Additionally, White had provided at least five statements to police and had testified at the preliminary hearing for Defendant and his brother, *see id.* at 4.132, and Defendant extensively cross-examined White about her prior inconsistent statements.

watched another man – this Defendant – run across a parking lot and shoot multiple times at the police officer. For these reasons, even if Defendant could prove his factual allegations in support of his *Brady* claim regarding Cynthia White by a preponderance of the evidence, the withheld evidence was ultimately immaterial to Defendant's trial outcome.

Finally, Defendant's Notice Response contests that "there is a qualitative difference" between the impeachment that Defendant was able to present at trial and the newly alleged impeachment evidence of White's incentive to testify in exchange for leniency. *See* Def.'s Notice Response, at p. 27. Evidence of leniency in future prosecutions would, of course, be a different type of impeachment evidence from evidence of an extensive criminal history or open cases. But proffered evidence that police and the Commonwealth were lenient toward White in prosecutions after Defendant's trial is not of such a different character from the impeachment evidence available at trial that it could cast Defendant's trial in a different light sufficient to undermine the Court's confidence in Defendant's first-degree murder conviction.

4. Defendant's Two *Brady* Claims Do Not Reflect Cumulative Prejudice

If a defendant presents multiple *Brady* claims with arguable merit, the Court must consider the cumulative impact of those claims rather than each individual piece of evidence. For the reasons stated above, the evidence proffered by Defendant in support of each of his *Brady* claims, if proven at a hearing, would provide only minimal incremental impeachment of Chobert and White. The proffered impeachment evidence, combined, does not undermine confidence in the jury's verdict.[36]

[36] Moreover, the jury's verdict was supported by compelling evidence in addition to the testimony of Chobert and White. This evidence included considerable other trial testimony, including the corroborative testimony of scene witnesses Michael Scanlan and Albert Magilton, and the testimony of various officers that the Court has no basis to discredit.

Accordingly, the record establishes that defendant's *Brady* evidence is not material and that Defendant's *Brady* claims are, therefore, without merit.

IV. CONCLUSION

In sum, Defendant's *Batson* claim is time-barred and waived, and defendant's *Brady* claims are meritless. Therefore, Defendant's sixth PCRA Petition is dismissed without an evidentiary hearing.

BY THE COURT:

Lucretia Clemons, J.
Dated: March 31, 2023

Scanlan testified that he was in his car, at a stoplight, when he witnessed a police officer attempting to "subdue" one man with either a flashlight or a baton, while another man ran through a parking lot across the street with his arm extended to shoot at the officer. Scanlan could not identify either Defendant or Defendant's brother as the shooter or man being beaten, but Scanlan was able to identify clothing linking Defendant as the shooter. *See* N.T. Trial (6/25/82), at 8.4-8.73.

Magilton testified that he saw an officer pull a Volkswagen over and the driver and Faulkner exit their cars; Magilton crossed the street and noticed Defendant moving quickly through a parking lot to cross the street, holding his hand behind his back. Magilton heard gun shots behind him, and when he looked back in the direction of the police officer, he could not see the police officer. He walked toward the men and saw the officer laying on the ground, and then saw Defendant sitting on the curb by the Volkswagen. *See id.* at 8.75 -8.79.

Defendant had many opportunities to discredit law enforcement witnesses at trial and unsuccessfully attempted to discredit several law-enforcement witnesses in prior litigation. But Defendant presents no new claims about any of these witnesses. The jury was free to credit or discredit the testimony of various officers. One group of officers testified that when officers arrived at the scene, Defendant was feet away from Faulkner; Defendant had a gunshot wound in his chest; Defendant was wearing a shoulder holster; and Defendant's lawfully registered gun was inches away from Defendant. Additionally, two officers and a hospital security guard claimed at trial that Defendant admitted to killing Faulkner when Defendant was at the hospital.

Commonwealth v. Mumia Abu-Jamal
CP-51-CR-0113571-1982

PROOF OF SERVICE

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