IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY, PENNSYLVANIA

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

PETITIONER'S RESPONSE TO THE
COURT'S NOTICE OF INTENT TO DISMISS PCRA PETITION

Petitioner Mumia Abu-Jamal submits this Response to this Court's Notice of Intent to Dismiss Without a Hearing (hereinafter "Notice Opinion") filed on October 26, 2022. The primary reasons offered for dismissal are that Petitioner's current PCRA raised a *Batson* claim that is procedurally defaulted due to its being waived, previously litigated, or, in the alternative, untimely based on this Court's assessment that the new evidence it is predicated upon could have been ascertained earlier through the exercise of due diligence; and, that Petitioner's *Brady* claims were immaterial due to this Court's assessment that, even if a jury was presented with the newly-discovered evidence regarding suppressed inducements to testify to the prosecution's two principal witnesses, there still remained sufficient evidence in the record that could have sustained a conviction. The Court's Notice of Intent to Dismiss, however, reveals critical misapprehensions about the factual basis and controlling case law for each of Petitioner's claims, as well as a misapplication of the standard for granting an evidentiary hearing under the PCRA. This

submission is respectfully provided in order to clarify the basis of Petitioner's claims, the controlling legal standards, and to request that an evidentiary hearing be scheduled due to the existence of multiple disputes of material fact.

I. Petitioner's *Batson* Claim Is Premised on Newly Discovered, Highly Significant Evidence Supporting an Inference of Discrimination, and Requires an Evidentiary Hearing.

Petitioner respectfully submits that none of the procedural grounds identified by this Court in its Notice Opinion would support dismissing the petition without a hearing. Mr. Abu-Jamal has presented a *Batson* claim based on newly discovered evidence, which he was diligent in seeking to obtain. This means his claim is timely, and it is neither waived nor previously adjudicated.

Before turning to these procedural doctrines, Petitioner addresses this Court's statement that he did not delineate which portions of his *Batson* claim are based on new evidence. *See* Notice Opinion at 7-8. Petitioner recognizes that his *Batson* claim must be premised on newly discovered evidence, and he begins by describing the multiple categories of new evidence identified in his PCRA petition.

First, the newly discovered evidence includes long-withheld handwritten notes by the trial prosecutor Joseph McGill showing he was actively tracking prospective jurors by race during voir dire, including by placing the letter "B" prominently next to the names of many prospective Black jurors, and the letter "W" prominently next to the names of many prospective white jurors. *See* PCRA Petition, 12/23/21 ("PCRA Pet.") ¶¶ 48, 57-58 & Ex. E. This Court described these notations as "facially neutral observations of race," which Petitioner and his counsel likely could have "observe[d] with their own eyes during voir dire." Notice Opinion at 11. But the prosecutor's act of tracking jurors' race in private notes is relevant to the prosecutor's state of mind even if the races of prospective jurors were observable to everyone in the courtroom. Such jury notes—even

if not "*per se* intentional racial bias," Notice Opinion at 11—are therefore probative evidence in support of a *Batson* claim. This is clear under controlling United States Supreme Court and Pennsylvania Superior Court precedent, which this Court did not address in its Notice Opinion. *See Foster v. Chapman*, 578 U.S. 488, 493-94, 500-01, 513 (2016) (identifying, as one category of evidence supporting petitioner's *Batson* claim, notes from the prosecution's files in which the "letter 'B' . . . appeared next to each black prospective juror's name" on a voir dire list); *Miller-El v. Dretke*, 541 U.S. 231, 266 (2005) (emphasizing that the prosecutors made "notes of the race of each potential juror" as evidence in support of a *Batson* claim). Indeed, in *Commonwealth v. Edwards*, 177 A.3d 963 (2018), the Pennsylvania Superior Court considered it "strongly indicative of discriminatory intent" that court staff tracked jurors' race on voir dire sheets they handed counsel. *Id.* at 973, 975. *Edwards* applies with even more force when, as here, the prosecutor himself tracked jurors' race in private notes.

This Court also stated it was "unsurprising" that Mr. McGill tracked race in his private notes in light of defense counsel's "pretrial efforts to request that the trial court elicit race-based information about prospective jurors." Notice Opinion at 11. But this is a post-hoc justification presented by the Commonwealth in opposing Mr. Abu-Jamal's PCRA petition, *see* Commonwealth's Motion to Dismiss, 6/29/22 at 66, 71, which Mr. McGill did not offer in his November 2019 affidavit addressing his notes. Far from asserting that he had a specific reason for tracking race in Mr. Abu-Jamal's case as the Commonwealth now asserts, in that affidavit, Mr. McGill said that he did so as part of a "standard and acceptable part of the jury selection process and nothing more." PCRA Pet. Ex. C at 4; *see also id.* at 3 (claiming his notes tracking jurors by race was a "standard practice"). Nor is the Commonwealth's post-hoc justification that Mr. McGill was just trying to make sure there was a clear record so he could "fairly respond" to any subsequent

jury discrimination challenge, Motion to Dismiss, 6/29/22 at 71, consistent with Mr. McGill's actual conduct at trial. During trial, Mr. McGill objected to jurors being asked to openly identify their race, even though it would have created a clear record from which to adjudicate any future jury discrimination. Mr. McGill asserted that such questions were "unnecessary" and "irrelevant," and that it made "no sense" to ask them. Tr. 6/7/82 at 18-19.

The Supreme Court has squarely rejected post-hoc justifications for the trial prosecutor's conduct during jury selection, including a post-hoc justification that mirrors the Commonwealth's argument here that a prosecutor's race-conscious notes simply reflected a fair effort to address any future jury discrimination challenge. *See Foster*, 578 U.S. at 513; *see also Miller-El*, 545 U.S. at 246. In any event, competing explanations for why Mr. McGill made these jury selection notes raise a genuine dispute about a material fact that requires an evidentiary hearing. *See, e.g.*, *Commonwealth v. Williams*, 244 A.3d 1281, 1286 (Pa. Super. 2021); *Commonwealth v. Wah*, 42 A.3d 335, 338 (Pa. Super. 2012).

Second, the newly discovered jury selection notes show that the prosecutor made a specific notation about one of the prospective jurors: "I accepted but D rejected this Black male." PCRA Pet. ¶ 59 & Ex. E. Like his prominent notations of the race of many prospective jurors, this statement shows that Mr. McGill was not exercising his "strikes in a 'color-blind' manner." *Foster*, 578 U.S. at 513. Moreover, it provides evidence of a point this Court recognized in a different context: that the prosecutor appears to have engaged in "a race conscious jury selection strategy" in which Mr. "McGill made an effort to select a few Black jurors" while using the vast majority of his peremptory strikes against prospective Black jurors. Notice Opinion at 13. Such a strategy is clearly unconstitutional under *Batson*, which "forbids striking even a single prospective juror for a discriminatory purpose." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019).

Third, the newly discovered jury selection notes show that, at trial, Mr. McGill identified prospective juror A.A. as Black. *See* PCRA Pet. ¶ 63 & Ex. E. However, on direct appeal, the Commonwealth asserted that the record did not reveal A.A.'s race; as a result, the Pennsylvania Supreme Court did not recognize the full scope of the prosecutor's discriminatory strike pattern in its direct appeal opinion. *See id.* & Exs. F at 20 n.6, G; *see also Commonwealth v. Abu-Jamal*, 555 A.2d 846, 850 (Pa. 1989) (noting "the Commonwealth disputes the representations made by the appellant as to the race of several prospective jurors, peremptorily excused, whose race does not appear of record," and ultimately deciding Mr. Abu-Jamal's claim based on the false premise that the prosecutor had used peremptory strikes against only eight Black panelists). Even though Mr. McGill submitted an affidavit in that appeal to address Mr. Abu-Jamal's *Batson* claim, he omitted this important fact. *See* PCRA Pet. ¶ 63 & Ex. G. This new evidence further undermines the Commonwealth's post-hoc explanation that Mr. McGill was focused on race in his private notes to ensure that he could "fairly respond" to any subsequent jury discrimination challenge. *See* Commonwealth's Motion to Dismiss, 6/29/22 at 71.

Fourth, the newly discovered jury selection notes, and Mr. McGill's new November 2019 affidavit explaining those notes, identify characteristics of prospective jurors that Mr. McGill highlighted during jury selection, including "the section of the city where they live" (which correlates closely with race), "their vocation," and "the work of their relatives." PCRA Pet. ¶ 67. Focusing on the characteristics that Mr. McGill himself highlighted as important in his jury selection notes shows that he struck prospective Black jurors while accepting white jurors who were similarly situated, or even less favorable to the prosecution. *See* PCRA Pet. ¶ 70. For example, Mr. McGill struck prospective Black jurors who were employed and living with employed family members, while accepting prospective non-Black jurors who were unemployed

and lived with spouses who were also unemployed. *See* PCRA Pet. ¶¶ 68, 70 & n.12. Such "side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to service" provide "evidence tending to prove purposeful discrimination." *Miller-El*, 545 U.S. at 241; *see also Foster*, 578 U.S. at 508-09.

In its Notice Opinion, this Court stated that Mr. Abu-Jamal had not "clearly explain[ed] which aspects of the prosecutor's jury-selection criteria are 'new' and not apparent in the record." Notice Opinion at 11 n.12. Petitioner therefore emphasizes that the criteria highlighted in Mr. McGill's jury selection notes and November 2019 affidavit, including his focus on jurors' employment and the vocation of their relatives, are new. *See* PCRA Pet. ¶ 67. Prior to their disclosure, Petitioner had no basis for knowing what criteria Mr. McGill deemed important characteristics for selecting jurors at trial. And, it is the characteristics that the trial prosecutor identifies as important compared with his application of those factors in making strikes—not simply the characteristics of venirepersons—that matter in a comparative juror inquiry under *Batson*. *See, e.g.*, *Miller-El*, 545 U.S. at 252.[1] Mr. Abu-Jamal was never previously able to present a side-by-side comparison based on characteristics the trial prosecutor indicated were important to him in selecting jurors. Those comparisons provide powerful evidence in support of a *Batson*

[1] In *Miller-El*, the Supreme Court relied on juror characteristics the prosecutor identified as important based on justifications he provided at a post-trial hearing for striking prospective Black jurors. *See Miller-El*, 545 U.S. at 236. Here, the relevant characteristics are supplied by the trial prosecutor's own notes, and his recent affidavit describing those notes. In both cases, the evidence in question allows for side-by-side comparisons based on reasons the trial prosecutor himself identified as important, which is what matters in analyzing whether the "inherently subjective reasons that underlie use of a peremptory challenge" were tainted by racial discrimination. *Id.* at 267 (Breyer, J., concurring); *see Batson*, 476 U.S. at 105 (emphasizing that a court must assess the prosecutor's motives for striking jurors). Alternatively, Mr. McGill's notes are new evidence creating a sufficient factual predicate to identify the characteristics he deemed important at trial, such that an evidentiary hearing is warranted where he can be questioned further about why he struck prospective Black jurors.

claim—indeed, the evidence is so powerful that the Commonwealth has not even tried to offer an explanation for it.

In sum, Petitioner's *Batson* claim rests on multiple categories of newly discovered evidence—evidence similar to the evidence the Supreme Court has repeatedly relied on in finding *Batson* violations. On the merits, that evidence is surely sufficient to require an evidentiary hearing. Petitioner therefore now turns to the procedural issues identified by this Court.

A. Because It Is Based on Newly Discovered Evidence, Mr. Abu-Jamal's *Batson* Claim Is Not Waived.

As this Court recognized, an issue is waived only "'if the petitioner could have raised it but failed to do so'" at a prior stage in the proceedings. Notice Opinion, 10/26/22 at 8 (quoting 42 P.a. C.S. § 9544(b)). A claim therefore cannot be waived if the petitioner did not have an opportunity to raise it in a prior proceeding. *See, e.g.*, *Commonwealth v. Fulton*, 830 A.2d 567, 571-72 (Pa. 2003) (explaining that a PCRA petition "represented the first proper opportunity to challenge trial counsel's ineffectiveness," and the "claim is therefore not waived").

The Pennsylvania Supreme Court has repeatedly applied these principles in the *Batson* context, and the Court has made clear that the touchstone is whether the facts supporting a *Batson* claim were previously available. If trial counsel fails to make a jury discrimination challenge, a *Batson* claim is waived if it is premised on facts known at trial, even if the trial occurred before *Batson*. In those circumstances, as this Court pointed out in its Notice Opinion, a petitioner cannot rely on the retroactive application of *Batson* to support a waived jury discrimination challenge; instead, the petitioner must raise any such challenge through an ineffective assistance of counsel claim. *See* Notice Opinion at 8; *Commonwealth v. Smith*, 17 A.3d 873, 893-94 (Pa. 2011) (agreeing with Commonwealth's argument that appellant's *Batson* claim was "waived because counsel did not object to the prosecutor's peremptory strikes during voir dire," and because the *Batson* claim

was not preserved, petitioner would have to rely on an ineffective assistance of counsel claim, which was not waived); *Commonwealth v. Sneed*, 899 A.2d 1067, 1075 (Pa. 2006) (similar).

On the other hand, the failure to raise a jury discrimination challenge at trial does not result in the waiver of a *Batson* claim when that claim is later premised on newly discovered evidence. In *Commonwealth v. Basemore*, the petitioner raised a *Batson* claim for the first time in a supplemental petition for PCRA relief, and the Court of Common Pleas denied relief without a hearing. *See* 744 A.2d 717, 727, 729 (Pa. 2000). The Commonwealth argued the *Batson* claim was waived, but the Pennsylvania Supreme Court held that the petitioner had presented a sufficient factual predicate to show the claim was based on newly discovered evidence, such that an evidentiary hearing was required. *See id.* at 733.

Specifically, the petitioner's claim in *Basemore* relied on the McMahon tape, which had only recently been made public. *See id.* at 727, 733. The Pennsylvania Supreme Court explained that, although the tape did not discuss McMahon's conduct at Basemore's trial specifically, it "may constitute circumstantial evidence of what occurred in the selection of the jury at Basemore's trial." *Id.* at 732. Given the "previous nondisclosure of the videotape at the time of trial and thereafter," and "the inherently covert nature of conduct constituting the underlying violation," a hearing was required to adjudicate both the waiver issue and the merits of petitioner's *Batson* claim. *See id.* at 733. On remand, the Court of Common Pleas held an evidentiary hearing at which it received testimony from the prosecutor, and ultimately found a *Batson* violation requiring a new trial. *See Commonwealth v. Basemore*, No. 1762-65, 2001 WL 36125302 (Ct. Common Pleas Dec. 19, 2001).[2]

[2] Petitioner recognizes that this Court is bound only by decisions of the U.S. Supreme Court, Pennsylvania Supreme Court, and Pennsylvania Superior Court; Petitioner simply includes this

Similarly, in *Commonwealth v. Lark*, 746 A.2d 585 (Pa. 2000), the Pennsylvania Supreme Court addressed the merits of new evidence presented by the petitioner in support of a *Batson* claim. As in Mr. Abu-Jamal's case, in *Lark*, the trial occurred before *Batson*, and Lark's counsel did not raise a jury discrimination challenge at trial. *See id.* at 589. In PCRA proceedings, Lark raised a *Batson* claim for the first time, pointing in part to the newly discovered McMahon tape. *See id*. at 588. The Pennsylvania Supreme Court held that the Court of Common Pleas had erred by not considering the merits of the claim to the degree it was premised on newly discovered evidence. *See id.* Having considered the new evidence on the merits—and finding it unpersuasive because it concerned a different prosecutor—the Court explained that Lark's *Batson* claim actually depended upon facts that "have been present since the inception of his trial," and "any *Batson* claim predicated upon these previously existing facts" was both untimely and waived. *See id.* at 589 (citing both Pa. C.S. § 9545(b)(1)(ii), regarding timeliness, and Pa. C.S. § 9544(b), regarding waiver).

Mr. Abu-Jamal's *Batson* claim is not waived because it rests on newly discovered evidence. Here, as in *Basemore*, the newly discovered evidence goes directly to the state of mind of the prosecutor in Mr. Abu-Jamal's case; unlike *Lark*, Mr. Abu-Jamal presents new evidence about the thoughts and strategies of the prosecuting attorney who selected a jury at his trial. He is not seeking to "revive [a] waived *Batson* claim through the assertion of . . . newly-discovered" evidence about a different prosecutor. *Lark*, 746 A.2d at 589. Therefore, as in *Basemore*, the proper course is to hold an evidentiary hearing so that Petitioner may have "the opportunity to develop a record

unpublished order from the Court of Common Pleas in *Basemore* to illustrate how the Court of Common Pleas handled the issue on remand.

concerning the asserted violation, [the trial prosecutor's] conduct and its implications with respect to his trial." *Basemore*, 744 A.2d at 733.

As the Pennsylvania Supreme Court also stressed in *Basemore*, the opportunity for such a hearing is especially important given the nature of Mr. Abu-Jamal's claim. Racial discrimination in jury selection imposes unique harms that "impugn the legitimacy of the judicial process." *Id*. "'The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.'" *Id.* at 733-34 (quoting *Batson*, 476 U.S. 79, 87-88 (1986)). Under those circumstances, the merits of Mr. Abu-Jamal's *Batson* claim, as well as the waiver issue, are "best determined on a full and complete record" after a hearing. *Id.* at 734.

B. Because It Is Based on Newly Discovered Evidence, Mr. Abu-Jamal's *Batson* Claim Was Not Previously Litigated.

The Pennsylvania Supreme Court has determined that "[a]n issue is not previously litigated when it does not rely solely upon previously litigated evidence." *Commonwealth v. Chmiel*, 173 A.3d 617, 627 (Pa. 2017). Applying that standard, Mr. Abu-Jamal's *Batson* claim cannot be barred as previously litigated. Far from "rely[ing] solely upon previously litigated evidence," *id.*, his claim is premised on newly discovered evidence, viz., long withheld jury selection notes and Mr. McGill's November 2019 affidavit addressing those notes.

In reaching a contrary conclusion, this Court stated that the new evidence presented by Mr. Abu-Jamal does not constitute a "watershed revelation." Notice Opinion at 11. But that is the standard suggested by the Commonwealth in opposing Mr. Abu-Jamal's PCRA Petition, *see* Commonwealth's Motion to Dismiss, 6/29/22 at 74, not the standard established by the Pennsylvania Supreme Court. While the Court in *Chmiel* quoted an article referring to the new

evidence there as "marking a 'watershed in one of the country's largest forensic scandals,'" *Chmiel*, 173 A.3d at 625, that was in an earlier part of the Court's opinion, which did not form any part of its discussion of the legal standard for determining whether a claim is previously litigated.

In any event, the new evidence Mr. Abu-Jamal has presented is highly significant under any standard. As set forth above, that new evidence shows:

- Mr. McGill was not exercising his "strikes in a 'color-blind' manner,'" *Foster*, 578 U.S. at 513, but instead made prominent notations identifying many prospective jurors by race (e.g., using the letters "B" and "W" next to their names), even after he had urged the court not to ask jurors to identify their race for the record because doing so was supposedly "unnecessary" and "irrelevant." *See* PCRA Pet. ¶¶ 48, 57-58 & Ex. E; Tr. 6/7/82 at 18-19.

- Mr. McGill wrote a note emphasizing "I accepted but D rejected this Black male," which confirmed the race-conscious nature of his jury selection process and indicated he thought simply accepting some Black jurors would be sufficient to defeat any jury discrimination challenge. *See* PCRA Pet. ¶ 59 & Ex. E.

- Mr. McGill's notes identify the race of a prospective Black juror whose race was not clear in the direct appeal record. He omitted this material information from the affidavit he submitted to the Pennsylvania Supreme Court on direct appeal, thereby confirming that he was not simply using his notes to create a record that would ensure that any future jury discrimination challenge could be fairly adjudicated. *See* PCRA Pet. ¶ 63 & Exs. E, F, G; *Abu-Jamal*, 555 A.2d at 850.

- Mr. McGill identified characteristics of prospective jurors that were significant to him during jury selection, including their employment status and that of their relatives. With this new information, side-by-side comparisons are, for the first time, possible to determine if the prosecutor applied those criteria equally to Black and non-Black jurors. And the record shows he did not. *See* PCRA Pet. ¶¶ 67-68, 70 & n.12.

The new evidence in this case fundamentally changes the evidentiary picture concerning Mr. Abu-Jamal's *Batson* claim, which the Pennsylvania Supreme Court previously denied because, based solely on the prosecutor's questions during voir dire, there was not "a trace of support for an inference that the use of peremptories was racially motivated." *Abu-Jamal*, 555 A.2d at 850; *see* Notice Opinion at 15. If the Court has any remaining questions concerning the strength of that new evidence and how it compares to evidence that was previously presented,

Petitioner respectfully submits that the proper course is to hold a hearing to consider both the merits and any procedural issues. As the Pennsylvania Supreme Court explained in the waiver context in *Basemore*, where "the merits and waiver questions appear to be intertwined," the "best course would be to permit [petitioner] the opportunity to develop a record" addressing both issues. 744 A.2d at 733. So too here with respect to all of the Commonwealth's procedural arguments.

C. Because Mr. Abu-Jamal Was Diligent in Seeking Evidence in Support of His *Batson* Claim, His Claim Is Timely.

It is undisputed that the Commonwealth withheld the new evidence supporting Mr. Abu-Jamal's *Batson* claim until January 3, 2019. *See* PCRA Pet. ¶¶ 6, 8 & Ex. A. It is likewise undisputed that, consistent with the requirements of 42 Pa. S.C. § 9545(b), Mr. Abu-Jamal filed this PCRA petition within one year of his first opportunity to do so. Indeed, he filed the Petition within 60 days of when the Pennsylvania Superior Court dismissed the appeal of his prior PCRA petition. *See* PCRA Pet. ¶ 6; *see also id.* ¶ 7 (discussing *Commonwealth v. Lark*, 746 A.2d 585, 588 (2000)). Therefore, the only issue with respect to the timeliness of this claim is whether Mr. Abu-Jamal was diligent in litigating it previously.

As this Court recognized, *see* Notice Opinion at 12-13, the Superior Court established the standard for assessing diligence in *Commonwealth v. Burton*, 121 A.3d 1063 (Pa. Super. 2015): "[D]ue diligence requires neither perfect vigilance nor punctilious care, 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." *Id*. at 1071. The "[i]nquiry is fact-sensitive and dependent upon the circumstances presented." *Id*. at 1070. When there are questions about the evidence that petitioner previously had access to and his diligence in seeking to obtain it, the proper course is to hold an evidentiary hearing addressing those issues before the Court dismisses a petition as untimely. *See id.* at 1073-74.

As this Court also recognized, here, "Defendant's first PCRA proceedings presented Defendant's first chance to create a meaningful evidentiary record that could have supported his *Batson* claim." Notice Opinion at 15. The Court concluded that the attorneys who represented Petitioner during those proceedings were not diligent in developing facts in support of this claim other than by showing Mr. McGill struck more prospective Black jurors than the record previously disclosed. *See id.* at 15-17. Petitioner respectfully submits that this Court's conclusion is incorrect, and that, during that hearing he made "reasonable efforts . . . based on the particular circumstances, to uncover facts that may support a claim for collateral relief," *Burton*, 121 A.3d at 1071, thereby establishing diligence. At a minimum, Petitioner submits that the evidence creates genuine material facts on this issue, such that a hearing is required before the Court resolves this diligence issue. *See id.* at 1074.

As this Court recognized, Petitioner filed a motion for discovery in connection with his 1995 PCRA hearing. In that motion, he requested discovery "in advance of the evidentiary hearing on petitioner's PCRA petition to further substantiate the legal claims." Defendant's Motion for Discovery at 2; attached hereto as Exhibit A. His very first discovery request was "[a]ny material evidence favorable to the petitioner which is relevant to guilt or punishment, and which is currently within the possession and/or control of the Commonwealth and/or its agents or which was in the possession and/or control of the Commonwealth at any time subsequent to events underlying this prosecution and conviction." *Id.* at 5. If Petitioner's motion for discovery had been granted, this request would in fact have "compelled the Commonwealth to disclose McGill's voir dire notes." Notice Opinion at 16 n.15. For the reasons described above, *see* pp. 2-7, *supra*, Mr. McGill's notes were "material evidence favorable to the petitioner," and they were relevant to "guilt or punishment," Motion for Discovery at 2, because a successful *Batson* claim would have required

a new trial concerning both Mr. Abu-Jamal's guilt and his capital sentence (which was still in place at the time of the 1995 PCRA). And those notes where "within the possession and/or control of the Commonwealth"—they were in boxes maintained in the Philadelphia District Attorney's Office but not disclosed until January 2019.

Moreover, Petitioner's counsel made more specific efforts to obtain discovery in support of his *Batson* claim. In the same discovery motion, he sought discovery of "[t]he name, address and race of each member of the jury venire questioned to sit on the jury in petitioner's case," as well as "[t]he voting districts from which juror questionnaire forms were mailed for the jury venire in petitioner's case." Motion for Discovery at 22. The former request, if granted, would have also led to the discovery of Mr. McGill's notes as those notes showed the race of several members of the jury venire who were questioned to sit on the jury in petitioner's case, but whose race is not otherwise available from the record.

At a hearing before the Court on July 12, 1995, Petitioner's counsel reiterated the importance of discovery, explaining: "ample discovery is necessary under the circumstances." Tr., 7/12/95 at 9; *see also id.* at 82-83, 86 (Mr. Abu-Jamal's counsel emphasizing the importance of discovery to the PCRA proceedings, and for Mr. Abu-Jamal's counsel to have adequate time to review it). In response, counsel for the Commonwealth insisted: "We are not going to be providing any discovery." *Id.* at 89. Judge Sabo agreed with the Commonwealth and denied Petitioner's discovery motion on July 14, 1995. *See Commonwealth v. Abu-Jamal*, 720 A.2d 79, 85 (Pa. 1998) (describing Judge Sabo's order). Mr. Abu-Jamal then appealed that denial of discovery, but the

Pennsylvania Supreme Court denied relief. *See* Exhibit B, attached hereto, at 2 (describing prior proceedings).[3]

Petitioner made yet another effort to obtain discovery related to his *Batson* claim. On August 1, 1995, he subpoenaed Marianne Cox, who represented the Commonwealth on direct appeal, to testify at the PCRA proceedings. Exhibit B, Commonwealth's Motion to Quash Subpoena, see subpoena to Marianne Cox attached to Motion. The subpoena also instructed Ms. Cox to bring copies of "all records relied upon for the factual assertions included in Point I, A (pp. 16-22) of the Brief for Appellee filed" in direct appeal, i.e., the Commonwealth's *Batson* argument on direct appeal. *See id*. This subpoena, had it been complied with, may have resulted in the disclosure of Mr. McGill's jury selection notes. Ms. Cox made one representation on direct appeal that tracked Mr. McGill's notes. *See id.* at 18 (emphasizing that defendant struck a Black venireperson whom Mr. McGill accepted). And Mr. McGill's notes were also relevant to other representations she made in the brief, including that the race of "seven stricken prospective jurors is not of record," and that there was no "record support" for Mr. Abu-Jamal's claim that three of them were Black, *id.* at 19, even though Mr. McGill's notes showed that one of the prospective jurors in question was Black. *See* Pet. ¶ 63, Exs. E, F, G. And Ms. Cox made assertions about how "the cold record" supposedly "indicate[d] non-racially motivated reasons for the prosecutor's exercise of his discretionary challenges." *Id.*, Ex. E at 20. Mr. McGill's notes concerning the juror characteristics that he actually deemed important were directly relevant to Ms. Cox's claims about whether there were "non-racially motivated reasons" for his strikes.[4] And, regardless of whether

[3] To be clear, Petitioner is not seeking to relitigate these previous denials of his discovery motions. His point is simply that he sought to obtain discovery, showing his reasonable efforts to obtain evidence in support of this claim.

[4] As this Court acknowledged, Mr. Abu-Jamal also continued to seek discovery in support of this claim after the 1995 PCRA hearing, asking the Pennsylvania Supreme Court to remand his *Batson*

this subpoena would have resulted in the discovery of Mr. McGill's notes specially, it clearly represents another effort by petitioner's counsel to engage in "reasonable efforts . . . based on the particular circumstances, to uncover facts that may support a claim for collateral relief." *Burton*, 121 A.3d at 1071. Far from pursuing a "narrow litigation strategy," Notice Opinion at 15, Mr. Abu-Jamal's counsel vigorously attempted to develop evidence in the Commonwealth's possession that would support Mr. Abu-Jamal's *Batson* claim.

However, the Commonwealth moved to quash the subpoena to Ms. Cox, arguing, *inter alia*, that "courts recognize that it is bad policy for defendants to call prosecutors as defense witnesses" and "is not acceptable unless required by a compelling and legitimate need." Motion to Quash, 8/2/95 at 3. According to the Commonwealth, that standard was not satisfied because Mr. Abu-Jamal's counsel had "failed to provide a specific offer of proof as to why the defense contends that Ms. Cox could provide admissible, material and favorable testimony for the defense." *Id*. at 4; *see also id.* ("A defendant's offer of proof must contain sufficient factual specificity to establish that the proposed witness has material and relevant testimony.").

The record thus shows that Petitioner made repeated efforts to obtain discovery during his first PCRA proceedings about materials in the prosecution's files that would support his *Batson* claim. He certainly undertook "reasonable efforts . . . based on the particular circumstances, to uncover facts that may support a claim for collateral relief." *Burton*, 121 A.3d at 1071. The Commonwealth simply refused to provide the materials.

In its Notice Opinion, the Court emphasized that Mr. Abu-Jamal's PCRA attorneys did not call Mr. McGill as a witness despite having an opportunity to do so. *See* Notice Opinion at 15, 17.

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claim for further discovery. *See* Notice Opinion at 16 n.16. Petitioner submits this confirms that he was diligent in investigating this claim.

But, the standard for assessing diligence is whether Petitioner undertook "reasonable efforts" to uncover relevant information, not whether he acted with "perfect vigilance []or punctilious care." *Burton*, 121 A.3d at 1071. And, for several reasons, it was not unreasonable for Petitioner not to call Mr. McGill and ask him about his jury selection notes, and whether they showed he was tracking race, during the 1995 PCRA hearing.

First, Petitioner was not on notice that Mr. McGill took jury notes showing he was tracking jurors by race. After all, at trial, Mr. McGill had specifically asserted that asking jurors to identify their race was "irrelevant" and "unnecessary." Tr. 6/7/82 at 18-19. The law of diligence does not require the petitioner to make "unreasonable assumptions" that are inconsistent with the prosecution's stated position at trial. *Commonwealth v. Davis*, 86 A.3d 883, 890-91 (2014). Then, as discussed above, Petitioner's counsel sought discovery about evidence in the prosecution's files that—if granted—would have resulted in the disclosure of those notes. Their requests were denied.

Second, counsel for the Commonwealth, and the Court, made clear that Petitioner could only question Mr. McGill about subjects on which they were able to first present a specific offer of proof. During the PCRA hearing on July 26, 1995, counsel for the Commonwealth stated it was "ridiculous" for Mr. Abu-Jamal's counsel to state that he was calling Mr. McGill because he was the trial prosecutor in the case, and argued that, absent a specific offer or proof, Mr. McGill should be precluded from testifying. Tr., 7/26/95 at 226-27. The Court likewise indicated that a specific offer of proof would be required as Mr. McGill "has to be prepared to come in here with whatever things you want to bring out." *Id*. at 227.

On July 31, 1995, counsel and the Court took up the matter again. Counsel for the Commonwealth argued Mr. McGill's subpoena to testify should be quashed if defense counsel was "not going to provide the necessary proofs," with the Court then stating: "I told him to give

you these proofs. Will you, please. We will always have this problem if you don't do that." Tr., 7/31/95 at 278-79. The attorney for the Commonwealth then moved to quash the subpoena, at which point defense counsel offered the specific offer of proof that had been insisted upon by the Commonwealth and the Court. *See id.* at 279-80. In that offer of proof, counsel referred to the only matters he was on notice of at the time concerning jury selection, namely the affidavit Mr. McGill provided to the Pennsylvania Supreme Court, which, according to Mr. Abu-Jamal's counsel showed that "'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 about that.'" Notice Opinion at 17 n.18 (quoting Tr., 7/31/06 at 279-80) (alteration in this Court's opinion). Petitioner respectfully submits that the offer of proof was not "phrased broadly enough to permit questions about McGill's intentions and strategy" generally, Notice Opinion at 17, but rather was focused on the one specific issue counsel had notice of about which Mr. McGill could present relevant testimony, viz., Mr. McGill's affidavit to the Pennsylvania Supreme Court "'in which he set forth his conduct during the selection of the Jury indicating the racial makeup of the jury.'" *Id*. at n.18 (quoting Tr., 7/31/95 at 279-80) (emphasis added); *see* PCRA Pet. Ex. G (copy of Mr. McGill's direct appeal affidavit). When the attorney for the Commonwealth responded by stating "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," Tr., 7/31/95 at 292, he was clearly referring back to the "additional evidence" Mr. Abu-Jamal's counsel had presented in his offer of proof, which was focused specifically on the "racial makeup of the jury" and how the "pattern of racial exclusion" was different than what had been presented to the Pennsylvania Supreme Court on direct appeal, *id.* at 279.

Then, when the parties were able to reach a stipulation about the racial makeup of the jury, the issue that Mr. Abu-Jamal's counsel had intended to ask Mr. McGill about—and the issue counsel had identified in his offer of proof—was resolved. This is clear from Mr. Abu-Jamal's counsel's statement at the hearing on August 4, 1995, explaining why he was not planning to call Mr. McGill: "Mr. McGill was going to be called . . . to ask him questions pertaining to the jurors he struck and the representations made to the Supreme Court of Pennsylvania." Tr., 8/4/95 at 119. Counsel continued by stating that, with the "stipulation in the record" about the race of additional jurors whom Mr. McGill struck, but whose race was not in the record at the time of direct appeal, "we don't need the testimony of Mr. McGill." *Id*. at 119-20.

In sum, the record shows that Mr. Abu-Jamal's counsel was required by the court to present a specific offer of proof about any matters he wished to have Mr. McGill testify about, and the only matter he had notice of to create a specific offer of proof relating to *Batson* was the racial makeup of the jury and how it differed from the Pennsylvania Supreme Court's understanding on direct appeal. Petitioner does not challenge this Court's determination that, "[i]n context, the Commonwealth's request for a narrow offer of proof for McGill was reasonable." Notice Opinion at 17 n.17. But Petitioner respectfully submits that, in light of this narrow offer of proof, it was reasonable for him not to call Mr. McGill to the stand to ask him questions on topics about which counsel had no notice were likely to reveal evidence favorable to a *Batson* claim, such as whether Mr. McGill was tracking jurors by race in his private notes.

Third, even if Mr. Abu-Jamal's counsel could have asked Mr. McGill questions about whether he had made private jury selection notes that included evidence probative of a *Batson* violation, such questions are not required under Pennsylvania case law concerning diligence. Indeed, the Commonwealth has not pointed to a single case in which the Commonwealth withheld

favorable evidence contained only in its files—and not in any other source—but the Petitioner was deemed not diligent for not discovering the evidence sooner. Contrary to this Court's statement, *Commonwealth v. Lambert*, 884 A.2d 848 (Pa. 2005) does not suggest that a PCRA petitioner has a duty to obtain evidence "straight from [the prosecutor]," Notice Opinion at 18, when it is not available from any third-party source. In fact, in the claim at issue in *Lambert*, the Court held that the petitioner was not diligent because the prosecution had already disclosed a separate document setting forth the facts he claimed were newly discovered (that a witness failed a polygraph test and then changed his story). *See Lambert*, 884 A.2d at 856. And, while this Court emphasized that, in *Basemore*, "there was no reason for the defendant to have been aware of the comments that former-ADA McMahon . . . made in the [McMahon] video" prior to the public disclosure of that video, Notice Opinion at 18, the same is true here: there was no reason for Mr. Abu-Jamal to know about the favorable evidence in Mr. McGill's private jury selection notes until they were disclosed (which it is undisputed did not occur until January 2019, *see* PCRA Pet. ¶ 6 & Ex. A).

When the prosecution withholds evidence exclusively in its possession, "no amount of 'reasonable efforts' to find" such evidence by Petitioner "would have gained him access to the DA's files as they are not public records." *Com. v. Hart*, 199 A.3d 475, 482 (Pa. Super. 2018) (citing 65 P.S. § 67,708(b)(16). Indeed, in *Commonwealth v. Davis*, the Superior Court rejected the Commonwealth's argument that the petitioner was not diligent even though, unlike here, he could have previously discovered the favorable evidence by obtaining transcripts from other cases. *See Davis*, 86 A.3d at 890-91. In that case, the Court declined to hold that a PCRA petitioner should be required to make "unreasonable assumptions" that the prosecution permitted its witnesses to commit perjury. *Id.*

For all of the foregoing reasons, Petitioner acted diligently by making reasonable efforts to discover evidence in support of his *Batson* claim during the 1995 PCRA proceedings. Yet, despite his reasonable efforts, the Commonwealth denied his discovery requests and withheld the prosecutor's critical jury selection notes until January 2019. Petitioner's claims premised on those notes are timely. If the Court has any outstanding questions concerning Petitioner's diligence, they would be best addressed at an evidentiary hearing. *See Burton*, 121 A.3d at 1073-74.

II. Petitioner's *Brady* Claims Are Premised on Compelling Evidence that the Commonwealth Suppressed Inducements to its Two Key Witnesses, Which Require an Evidentiary Hearing.

A. In Its Notice Opinion, This Court Applied an Incorrect Materiality Standard.

The failure of the prosecution to disclose impeachment evidence in violation of *Brady v. Maryland* requires a new trial when there is a reasonable probability that, had the inducement offered by the Government been disclosed to the defense, the result of the trial would have been different. *Commonwealth v. Lambert,* 884 A.2d 848, 854 (Pa. 2005) (citing *Strickler v. Greene,* 527 U.S. 263, 280 (1999) and *United States v. Bagley,* 473 U.S. 667, 682 (1985)). The United States Supreme Court has further stressed that the adjective "reasonable" in the reasonable probability test "is important." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). A petitioner need not demonstrate that it is "more likely than not" the verdict would have been different had the evidence been disclosed, but simply that he did not "receive a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* "A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Id.* (quoting *Bagley*, 473 U.S. at 678); *Commonwealth v. Lambert,* 884 A.2d at 854.

Most notably, both the United States and the Pennsylvania Supreme Courts have held in no uncertain terms that, "the materiality inquiry is <u>not</u> just a matter of determining whether, after

discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Commonwealth v. Lambert*, 884 A.2d at 854 (quoting *Kyles v. Whitley*, 514 U.S. at 435) (emphasis supplied); *Banks v. Dretke*, 540 U.S. 668, 699 (2004) (quoting *Kyles*).

The *Kyles v. Whitley* Court explained this aspect of the *Brady* materiality standard as follows:

> The second aspect of *Bagley* materiality bearing emphasis here is that it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Kyles v. Whitley, 514 U.S. 434-35.

In its Notice of Intent to Dismiss, this Court applied the sufficiency of the evidence test that has been expressly rejected by the United States and Pennsylvania Supreme Courts. *See* Notice Opinion at 23 ("The jury could have convicted Defendant of first-degree murder even if Mr. Chobert had not identified Defendant. Defendant might not agree with this evidence, but that does not render Mr. Chobert's testimony necessary to Defendant's first-degree murder conviction"); *id.* at 28 ("Even if White's testimony were completely removed from Defendant's trial, Defendant could have been convicted based on the testimony of other witnesses"); *id.* at 29-30 ("Although the testimony of Ms. White and Mr. Chobert certainly contributed to Defendant's conviction, sufficient evidence existed for jurors to have lawfully convicted Defendant of first-degree murder

even absent the testimony of both eyewitnesses, if jurors had chosen to credit the ample circumstantial evidence presented at trial").

In essence, this Court performed its materiality analysis by asking whether, even if the undisclosed impeachment evidence had been disclosed and used by the defense to impeach Mr. Chobert's or Ms. White's (or both of their) testimony, and such testimony was consequently discounted by the jury, there was a legally sufficient amount of other evidence to sustain the jury's guilty verdict. This is precisely the approach that the Pennsylvania Supreme Court in *Lambert* and the United States Supreme Court in *Kyles* deemed incorrect. Instead, to determine the materiality of the *Brady* violations in this case, the Court should have considered: (1) whether there was a reasonable probability that the jury would have acquitted (or convicted of a lesser offense) after seeing the case in a different light having learned that Robert Chobert, the prosecution's linchpin witness, had been promised financial payment in exchange for his testimony; and (2) whether there was a reasonable probability that the jury would have acquitted after seeing the case in a different light having learned that Cynthia White, the prosecution's second principal witnesses, had been promised leniency in her pending criminal cases in exchange for her testimony; or (3) whether there was a reasonable probability that the jury would have acquitted after seeing the case in a different light having learned that both main witnesses for the government were offered favors in exchange for their testimony. And in performing this analysis, it is important to underscore that a "reasonable probability" does not mean it is "more likely than not" the verdict would have been different had the evidence been disclosed. *Kyles v. Whitley,* 514 U.S. at 433; *Commonwealth v. Dennis,* 17 A.3d 297, 308 (Pa. 2011).

B. The Nondisclosure of a Financial Incentive for Robert Chobert's Testimony Is Material.

In its Notice Opinion, the Court asserted that the nondisclosed evidence would not have been persuasive to the jury 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 degree of culpability." Notice Opinion at 22. However, this was not the case. Upon cross-examination by defense counsel, Mr. Chobert admitted to changing an important part of his story. Mr. Chobert admitted that on the night of the crime, he told police officers that after the shooting, the shooter ran 30 feet away from the scene. Tr. 6/19/82 at 236-37. At trial, Mr. Chobert testified that the shooter only ran 10 feet. *Id.* This was particularly significant since, according to the Commonwealth's case, Mr. Abu-Jamal was found with a gunshot wound himself on the curb right near to Officer Faulkner, and the Volkswagen. Tr. 6/19/82 at 116. If the jury believed that Mr. Chobert saw the shooter run 30 feet from the scene, that would cast doubt on whether Mr. Abu-Jamal was the shooter. In addition, defense witness Dessie Hightower testified at trial that after hearing shots, he saw someone running away from the scene. Tr. 6/28/82 at 126-27. Had the jury learned that Mr. Chobert was offered money in exchange for favorable testimony for the Commonwealth, it may have seen that as the explanation for why at trial Mr. Chobert changed his statement and claimed the shooter only ran 10 feet.

This Court also points to Mr. Chobert's identification of Mr. Abu-Jamal as the shooter at the scene, at a pre-trial suppression hearing, at trial and at a PCRA hearing as additional support for its conclusion that disclosure of a promise of financial benefits would not have been likely to impact the verdict. Notice Opinion at 22-23. But Mr. Abu-Jamal was the chief and only suspect from the moment the first police officers arrived at the scene. Tr. 6/19/82 at 211-212. Mr. Chobert did not identify Mr. Abu-Jamal as the shooter until Mr. Abu-Jamal was already in police custody

inside of the police wagon. *Id.* A jury might reasonably surmise that Mr. Chobert, on probation and driving a taxi without a license, would want to support the viewpoint of law enforcement. Moreover, if the prosecutor offered Mr. Chobert money for his testimony, Mr. Chobert's identification of the Defendant at a suppression hearing, at trial and at a PCRA hearing only suggest that he kept to a pro-prosecution story in order to earn the payment.

This Court considered Mr. Chobert's 1997 testimony that the prosecutor's offer to help him reinstate his driver's license did not influence his testimony as further evidence that an offer of payment would not have been material even if it had been disclosed. Notice Opinion at 23. But Mr. Chobert's assertion that he was not influenced by a different inducement does not undermine the materiality of the nondisclosed inducement at issue here. The materiality test under *Brady* is about whether the petitioner's trial was fundamentally fair, *see Kyles*, 514 U.S. at 434, 454, and a trial is only fair when the jury has an opportunity to evaluate the credibility of key prosecution witnesses in light of inducements offered to them. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend"); *see also Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (explaining that a prosecution witness's "credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it").

Lastly, this Court's statement that other evidence corroborated Mr. Chobert's testimony, *see* Notice Opinion at 23, overlooks important discrepancies between the various witnesses' accounts. For example, at trial, Mr. Chobert denied seeing a woman at the shooting scene at the

location where Cynthia White testified she was located. Tr. 6/19/82 at 234. Additionally, both of the other witnesses interviewed that night told the police that they did not see a taxicab parked in the spot at which Mr. Chobert testified he parked his cab. *See* Tr. 6/25/82 at 20 (testimony of Mark Scanlon); Tr. 6/25/82 at 85-86 (testimony of Albert Magilton); Tr. 6/19/82 at 228 (testimony of Robert Chobert).

Moreover, in *Kyles v. Whitley*, the Supreme Court held that omitted impeachment evidence established a reasonable probability of a different result, even though the prosecution in that case presented two other eyewitnesses whose testimony was not impeached by the new evidence. *See Kyles,* 514 U.S. at 434. In rejecting the State's argument that the existence of these two other eyewitnesses meant there was no reasonable probability of a different result, the Supreme Court explained: "the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others, as we have said before." *Id*. at 444 (citing *United States v. Agurs*, 427 U.S. 97, 112-13 (1976)).

As Mr. Abu-Jamal highlighted in his Petition, the prosecuting attorney relied quite heavily on the credibility of Mr. Chobert's testimony in his closing argument Tr. 7/1/82 at 179. In *Kyles v. Whitley*, just as in this case, the prosecution's closing argument supported a finding of prejudice. The Court explained that "[t]he likely damage" to the prosecution's case from the hidden impeachment evidence concerning two prosecution witnesses was "best understood by taking the word of the prosecutor," who highlighted those two witnesses during closing. *Kyles*, 514 U.S. at 444. So too here, where the prosecutor relied heavily on Mr. Chobert and vouched for his trustworthiness in closing. Tr. 7/1/82 at 179; *see also Banks*, 540 U.S. at 685, 701 (relying on prosecutor's closing argument to confirm the importance of a witness to the prosecution's case, such that the failure to disclose a $200 payment to the witness was material).

In summary, the proper materiality standard is whether there is a showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *Kyles*, 514 U.S. at 434-35. Especially given that there were significant discrepancies both between Mr. Chobert's account at trial and his account in earlier statements and between his account and that of other witnesses, there is a reasonable probability that the jury might have seen the case in a different light if it had been informed that Mr. Chobert was offered money by the trial prosecutor.

C. The Nondisclosure of an Offer of Leniency to Induce Cynthia White's Testimony Is Material.

The Court's main basis for finding that evidence of an offer of leniency to Cynthia White was not material nondisclosed *Brady* information is that Cynthia White was impeached about her numerous prior criminal charges, her open Philadelphia cases, and her inconsistent statements at Mr. Abu-Jamal's trial. Notice Opinion at 27-28. However, there is a qualitative difference between these forms of impeachment and a promise of leniency. Ms. White's prior record, inconsistent statements and open charges speak to her character. On the other hand, evidence that a witness with a substantial prior criminal history was offered leniency or even dismissal for four pending charges speaks to Ms. White having an interest in testifying for the prosecution. There is a reasonable probability that the addition of evidence of an offer of leniency would be the additional piece of impeachment that would have influenced the jury's verdict. *See, e.g.*, *Banks v. Dretke*, 540 U.S. at 673 (finding materiality because the nature of the impeachment that was absent due to nondisclosure was of a different nature than other forms of impeachment used at the trial).

D. The Commonwealth's Failure to Disclose the *Brady* Evidence Regarding Robert Chobert and Cynthia White, Cumulatively Undermines Confidence in the Outcome of Mr. Abu-Jamal's Trial.

This Court recognized that it must consider the cumulative impact of more than one *Brady* claim. *See* Notice Opinion at 28. Indeed, the Supreme Court has consistently emphasized this. *See e.g., United States v. Bagley*, 473 U.S. 667 (1985); *Kyles v. Whitley*, 514 U.S. at 421-22. There are at least two ways in which it is reasonably probable that the cumulative effect of the nondisclosed evidence may have affected the outcome in this case.

First, the recently disclosed impeachment evidence involved both of the two eyewitnesses to the crime. Mr. Chobert and Ms. White were the only witnesses who claimed to have seen both the actual shooting and to be able to identify the shooter. *See* PCRA Pet. ¶¶ 19, 22, 23. Second, the cumulative effect of a promise of money to one crucial witness and of leniency to another would have undermined the reliability of the investigation and discredited the government's methods in assembling the case. *See Kyles v. Whitley,* 514 U.S. at 446.

The consideration of the cumulative materiality or impact of nondisclosed *Brady* evidence underscores the importance of the law's rejection of a standard that looks at whether, absent the impeached testimony, the remaining evidence was sufficient to support the conviction. As in this case, courts must instead consider whether the disclosure of secret agreements or understandings with witnesses would have altered the jury's view of the case regardless of the legal sufficiency of the remaining evidence.

E. Petitioner Has Proffered Sufficient Proof of *Brady* Violations to Warrant a Hearing.

This Court's Notice Opinion is based upon its view that even if there had been either (or both) an undisclosed offer of payment to induce Robert Chobert's testimony and an undisclosed offer of leniency to induce Cynthia White's testimony, they would not constitute *Brady* violations

due to a lack of materiality. *See* Notice Opinion at 20-30. Nevertheless, with regard to both witnesses, this Court also expressed reservations about whether Mr. Abu-Jamal has demonstrated that, even at a hearing, he would be able to prove the existence of offers or agreements to Mr. Chobert or Ms. White. Petitioner respectfully disagrees.

With respect to Mr. Chobert, there is no dispute that he wrote to ADA McGill shortly after trial requesting the "money own (sic) to me." PCRA Pet. Ex. B. This Court acknowledges that one reasonable inference from this letter is that "Chobert and McGill had previously discussed Chobert's desire to collect money that Chobert felt was owed to him." Notice Opinion at 21. Yet this Court finds that it is unclear how Defendant expects to "prove these additional inferences" that the money was in exchange for Chobert's testimony. *See id.* However, this reasoning is inconsistent with the concepts of fact-finding through inference, and that any fact may be found based purely upon circumstantial (inferential) evidence. *See, e.g., A.B. ex rel. Bennett v. Slippery Rock Area School Dist,* 906 A.2d 674, 678-79 (Pa. Commw. Ct. 2006) ("when properly proved, circumstantial evidence is entitled to as much weight as direct evidence"); *Commonwealth v. Holt,* 273 A.3d 514, 532 (Pa. 2022); *Commonwealth v. Chambers,* 599 A.2d 630, 635 (Pa. 1991) (stating that circumstantial evidence is sufficient to sustain a conviction); *Commonwealth v. Thomas*, 350 A.2d 847, 849 (1976) (same).

An inference need not be "proved" with direct or conclusive evidence, but rather an inference may be drawn by the fact-finder from direct proof of facts that gives rise to the inference of other facts. *See* Pennsylvania Suggested Standard Criminal Jury Instructions (Pa. SSJI (Crim)), §7.02A ("circumstantial evidence . . . is testimony about facts that point to the existence of other facts that are in question. Whether or not circumstantial evidence is proof of the other facts in question depends in part on the application of common sense and human experience"). Thus, in

this instance, the proven fact of the letter to Mr. McGill and its contents asking for money owed may give rise to the inference that there was an agreement or understanding between the prosecution and Mr. Chobert, such that he expected to be paid for testifying for the prosecution. There may be alternative inferences; however, the strongest inference is that Mr. Chobert, who testified for the prosecution in a homicide case, wrote one month later to the prosecutor asking for money that was owed to him because he was promised money. The Court is permitted to draw this inference without any further proof. Indeed, given that Mr. Chobert testified in a PCRA hearing that he did not speak with McGill after trial, PCRA Tr. 8/15/95 at 20, the most reasonable inference is that the offer or promise of money was made before Mr. Chobert testified. As Petitioner explained in his Opposition to the Commonwealth's Motion to Dismiss, *see* Opposition to Commonwealth's Motion, 8/16/22 at 7-9, the explanation for the letter offered by McGill in his 2019 Affidavit, PCRA, Petition, 12/23/21, Ex. C, and the alternative possible explanations suggested by the Commonwealth in its Motion to Dismiss, *See* Motion to Dismiss, 6/29/22 at 47, are not reasonable nor even plausible. And these implausible justifications provide additional evidence that this Court may properly rely on in drawing an inference in Petitioner's favor. *See* Opposition to Commonwealth's Motion, 8/16/22 at 7 (citing numerous cases).

In sum, there are disputed material facts concerning Mr. Abu-Jamal's *Brady* claim, including disputes about the most reasonable inferences to be drawn from documentary evidence disclosed by the Commonwealth. An evidentiary hearing is required to resolves those factual disputes. *See, e.g.*, *Commonwealth v. Williams*, 244 A.3d at 1286; *Commonwealth v. Wah*, 42 A.3d at 338.

III. The Witness Certificate Requirement of the PCRA Was Intended to "Make it Easier" to Obtain an Evidentiary Hearing Involving Hostile Witnesses, and Petitioner Has Satisfied its Provisions.

This Court stated in its Notice of Intent to Dismiss that "It is unclear how Defendant expects to prove these additional inferences through witness testimony or further argument at an evidentiary hearing" because Mr. McGill's affidavit did not support Petitioner's inferences, and because Mr. Chobert did not sign a witness certificate or discuss the matter with Defendant's counsel. Petitioner respectfully offers that this Court's reasoning is inapposite in two regards: first, because Mr. McGill's affidavit *does* support the inferences drawn by Petitioner due to its containing assertions that are not credible in regard to the *Batson* claim, assertions belied by the record in regard to the Chobert evidence, and assertions admitting to his efforts to put in a favorable word for Cynthia White.

Second, the Pennsylvania Superior Court has recognized that the drafters of the PCRA framed the witness certificate requirement according to the common reality that many witnesses are "hostile." As explained by the Superior Court: "A principal architect of the 1995 Legislative Amendments to the PCRA, Senator Stewart Greenleaf, spoke on this question as follows:

> In addition, when we held the hearing there was concern about the fact that when you file a petition, we want to make sure that it is a meritorious petition, we do not want to have a frivolous petition, that there are some witnesses that would be available to testify, so the original bill required that each witness had to sign a statement and have a notarized, sworn statement at the end of the statement indicating that this was a true and correct representation of what he would testify to at the coming collateral hearing. <u>There were objections to that, feeling that that was too onerous to require a defendant to go out and obtained notarized statements from all of his witnesses, some of which would be hostile witnesses, and I agreed with that.</u>
>
> So as a result, this amendment allows a defendant to merely present a summary of the statement so we know generally what that witness is going to say and merely sign a certification. Either the witness, his attorney, the defendant's attorney, or the petitioner himself, the defendant himself can sign a certification saying to his best knowledge that this was an accurate statement of what the witness would testify to. So I think it is an effort, again, not to take anyone's rights away from him but also

> to help that defendant in the processing of his appeal and hopefully to make it easier for him to obtain a hearing, which we want him to obtain.

Com. v. Brown, 767 A.2d 576, 583 (Pa. Super. 2001) (emphases added). Mr. Abu-Jamal has presented this Court with the requisite certifications confirming that the witnesses he intends to call are available and the general subjects they will testify to.

Mr. McGill's affidavit reinforces the need for this Court to hear from him directly, as Petitioner has demonstrated that his claims pertaining to the Chobert evidence are contradicted by the PCRA record. *See* Opposition to Commonwealth's Motion, 8/16/22 at 8-9. Additionally, his explanation for his tracking of the race of jurors curiously refers to a court questionnaire that was not, in fact, in existence in 1982. Certainly, the Court has an obligation to explore these matters in an evidentiary hearing and should not rely on an affidavit with assertions that are factually untenable or contradicted by the record in making a credibility determination.

Whether Mr. Chobert remembers writing a letter or not is something the Court should hear from Mr. Chobert. Further, his memory of a specific letter is incidental to the key question of whether he was remunerated for his testimony. Even testimony that does not admit to this fact could support Petitioner if that testimony is incredible or contradicts the testimony of other witnesses. *See* Opposition to Commonwealth's Motion, 8/16/22 at 7 (citing numerous cases).

Mr. McGill and Mr. Chobert are hostile witnesses, and it is improper to predetermine the content of their testimony or its credibility by erecting a barrier that was rejected as "too onerous" by the Pennsylvania General Assembly, which wanted "to make it easier for [a petitioner] to obtain a hearing[.]" *Brown*, 767 A.2d at 583.

Respectfully Submitted,

/s/ *Judith L. Ritter*

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Counsel for Mumia Abu-Jamal

Exhibit A – 1995 Discovery Motion

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

(CRIMINAL TRIAL DIVISION)

COMMONWEALTH	:	
	:	
vs.	:	
	:	NOS. 1357-1359
MUMIA ABU-JAMAL	:	
a/k/a WESLEY COOK	:	

MOTION FOR DISCOVERY

Petitioner, MUMIA ABU-JAMAL, by and through undersigned counsel, hereby makes the following demand for discovery:

On behalf of the petitioner, MUMIA ABU-JAMAL, demand is hereby made for discovery and inspection of the information and material listed below. Discovery is essential to allow petitioner to further investigate and prepare in establishing the new issues of fact raised in his petition for post-conviction relief pursuant to 42 Pa.C.S. section 9541 et. seq. ("The Post-Conviction Relief Act" or "PCRA"). The demand is a continuing one from the time of petitioner's arrest and trial and includes information or materials identified below which are not presently in the possession and/or control of the Commonwealth or its agents, but were previously in the possession and/or control of the Commonwealth or its agents or which come within the control of the Commonwealth or its agents at any time hereafter. If information does not exist, please so state. If any of

the information or material sought does exist, but the Commonwealth declines to make it available to the petitioner, please identify the information or material being withheld and the reason for withholding the information or material. The petitioner requests that the Commonwealth provide the discovery sought herein in advance of the evidentiary hearing on petitioner's PCRA petition to further substantiate legal claims and to facilitate meaningful cross-examination at that proceeding. This request is made pursuant the petitioner's rights under the laws of the Commonwealth, petitioner's rights to due process, equal protection, compulsory process, and effective assistance of counsel under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their parallel provisions under the Pennsylvania Constitution.

Petitioner sets forth in his Petition for Post-Conviction Relief, filed simultaneous with this discovery demand, a claim for reversal of the conviction based on a number of Brady violations and other legal claims. The petition and accompanying exhibits demonstrate suppression and falsification at the criminal trial of key aspects of the Commonwealth's case, such as the alleged identification of the petitioner and petitioner's alleged confession to the crime. The volume and seriousness of these Brady violations mandate that the prosecution provide full, complete discovery at this time. A reasonable basis exists to assert that full discovery and compliance with Brady will now result in disclosure of numerous and substantial other examples of withheld or altered information and documents favorable to the petitioner.

Although prior to trial petitioner received copies of over 100 witness statements, these were all without addresses, phone numbers or social security numbers. The large

number of statements turned over to the defense under circumstances in which the petitioner lacked meaningful funds for an investigator and scientific experts constituted a means to obscure the selective and biased nature of the concocted police investigation. There was a failure and refusal to comply with Brady at the most basic level. Where there was putative compliance, it was selective. The prosecution neither fully disclosed all witness statements, nor are the witness statements a fair, accurate and reliable account of what the witness actually saw and reported to the police. Exculpatory information was ignored. Some witnesses were threatened, others were promised favorable treatment in return for changing their statements. There was an outright failure to turn over reports which would have revealed material favorable to the defense.

The following specific instances of Brady violations have been discovered and underscore the need for full discovery in preparation for an evidentiary hearing on petitioner's PCRA claims.

1. Subsequent to trial, petitioner learned that one of the individuals who signed police Investigation Interview Record(s) had been threatened, intimidated and coerced into signing a false statement in which he denied seeing the shooting. The purpose of the coercion was to suppress the information that this witness had seen someone other than petitioner shoot the police officer and run away and that the main prosecution witness, Cynthia White, was not on the scene until after the police arrived.

2. Prior to trial, petitioner received a copy of one statement by Veronica Jones taken on December 15, 1981 by Homicide Division Police officers Bennett and Harmon. That statement recites that Veronica Jones saw two men jog from the scene. There

were no other reports or notes of another interview with V. Jones disclosed to the petitioner. During her trial testimony it was learned for the first time that she was arrested and questioned for about five hours by Sixth District Police officers and reports of that interview were not disclosed to the petitioner. During that interview she was promised favorable police treatment if she would change her statement. Following that interview, at trial she recanted her prior testimony that she saw two black men fleeing the shooting.

3. The petitioner received copies of three statements pre-trial by Robert Harkins, Jr. who said he witnessed the shooting of the police officer and could identify the shooter. However, he was not called to testify at trial. Mr. Harkins, a cab driver, was on parole at the time. Petitioner has since learned that Mr. Harkins was shown photographs to identify the man who shot Officer Faulkner and that he had been interviewed by police in his home. The petitioner received no reports, documents, statements or notes of any kind that Mr. Harkins had been shown photographs to identify the shooter. Nor did he receive any reports of a police interview which took place in his home.

4. The Commonwealth presented evidence of a confession purportedly made by petitioner in the hospital shortly after the shooting. On information and belief, the prosecution suppressed police logs, reports and memoranda as well as hospital security reports which demonstrate that the petitioner did not make any such statements at the hospital.

5. The key defense witness testified that he saw a black man run from the scene

immediately after hearing the shots fired. The police asked him to take a polygraph test which he passed. The defense was not informed that a polygraph was administered to that witness, nor was given any documents, reports or notes on the test questions and results.

6. The Philadelphia Police Department conducted intensive surveillance of petitioner since the time of his youth and maintained records on that surveillance. Despite their constant scrutiny, police found no basis for linking petitioner to any criminal activities during those years.

These are only some of the examples of Brady violations by the Commonwealth in this case. Others will be addressed after full discovery is made.

Wherefore, the petitioner hereby makes this demand for discovery and inspection of the information and material listed below. Specific reports which are currently in petitioner's possession as indicated in the attached memo, Exh. 1, are excluded from this demand.

Brady Material

1. Any material evidence favorable to the petitioner which is relevant to quilt or punishment, and which is currently within the possession and/or control of the Commonwealth and/or its agents or which was in the possession and/or control of the Commonwealth at any time subsequent to events underlying this prosecution and conviction.

Record of Petitioner's Statements

2. a. Any and all written or otherwise recorded statement attributed to the

petitioner, whether or not the statement is inculpatory and including but not limited to biographical information or the substance of any oral statement attributed to the petitioner, which statement is in the possession and/or the control of the Commonwealth and/or its agents, and the identity of the person(s) to whom the statement was made. This demand, furthermore, is a request for all recorded versions of a single statement, including handwritten notations that record all or part of the contents or circumstances of such statements. The request therefore includes for example, not only formal police reports of such statements but also handwritten notes made by a Commonwealth agent regarding the statement pending subsequent inclusion of the statement in a formal police report. State the time, date and place of said contact with the defendant and provide the names and badge numbers of any police officers or agents or any other person(s) who were present during any portion of the contact being described.

This demand includes but is not limited, to all documents, reports, recordings and memoranda of contact with the petitioner including but not limited to any patrol log (75-158), incident report (75-48), offense report (75-49), offense report worksheet (75-49A), homicide report (75-52), arrest report (75-50) and activity sheets, prepared, signed by police officers Gary Wakshul (#7363), Stephen Trombetta (#7324), James Forbes (#9811), Robert Shoemaker (#9780), Garry Bell (#1217), and Inspector Alfonzo Giordano and any other police officer or hospital security guard or any other hospital personnel who had contact with petitioner at any time.

b. Any and all documents, reports or memoranda stating, recording or noting contact with the petitioner and which do not include a report of any statements made by

the petitioner, or which state that the petitioner made no statement, comment or admission. State the time, date and place of said contact with the defendant and provide the names and badge numbers of any police officers or agents or any other person(s) who were present during any portion of the contact being described. This demand includes but is not limited, to all documents, reports, recordings and memoranda of contact with the defendant, including but not limited to: patrol log (75-158), incident report (75-48), offense report (75-49), offense report worksheet (75-49A), homicide report (75-52), arrest report (75-50) and activity sheets, prepared, signed by police officers Gary Wakshul (#7363), Stephen Trombetta (#7324), James Forbes (#9811), Robert Shoemaker (#9780), Garry Bell (#1217), and Inspector Alfonzo Giordano and any other police officer or hospital security guard or any other hospital personnel who had contact with petitioner at any time.

Witness Statements, Generally

3. a. All written or otherwise recorded statements, whether signed or unsigned, of any and all witnesses, or the substance of any oral statement attributed to a witnesses which was or is in the possession and/or control of the Commonwealth and/or its agents, and the identity of the persons to whom the statement was made or who were present when the statement was made. This demand includes but is not limited to any maps, charts, drawings or other demonstrative evidence constructed by the witness alone or aided by another, including a commonwealth agent. Petitioner does not have in his possession or control a copy of any statements of the following named witnesses who appear on a March 1, 1982 letter from the District Attorney's Office to Anthony E.

Jackson, attached hereto as Exh. 2: Frank Allen, Beulah Campbell, Sharon Cook, Delores Fox, Pasquale Marcovecchio, Anthony Merrone, Robert Schmidt, William Stapleton, Reginald Thompson, Mark Turnock, Otis Williams, Michael Burns (#6203), John Kidwell (#6363), William Maahs (#3689), Edward Markowski (#9547), Brian McDonnell (#6208), Brian Shu (#3260), Joseph Schuck (#7368). Nor does petitioner have in his possession or control the December 9, 1981 Investigation Interview Record of Gary Wakshul (#7363).

b. All tape recordings made of statements or conversations of witnesses, whether or not they testified at trial as well as the name or names of the individual(s) who made the recording and the names of all person(s) present at any time during the recording.

c. All notes or memoranda, handwritten or typed, or taped recordings by police officers or other investigating officers of their conversations with persons pertaining to the investigation into this matter and the names of all other persons present when the conversations or other events recorded in the notes took place.

d. The names and addresses of all witnesses to, or who have knowledge of, the crime or the events leading to the commission thereof.

e. Copy of the all the records, memorandum, and notes, including but not limited to: incident reports (75-48), homicide reports (75-52), arrest reports (75-50), offense report (75-49), activity sheets, patrol logs (75-158), radio card (75-163), JAD record card (75-163), investigator's activity log (75-232), investigator's aid to interview (75-229), investigators interview report (75-483), chronology of interrogation and custody (75-485) which were written, prepared, or otherwise used by officers investigating the crime

involved in the above-entitled action or any other crimes investigated by law enforcement as a result of the petitioner's arrest.

f. Names and addresses of all persons interviewed by the police, the District Attorney's office, its investigators or agents, or any other law enforcement agency known to the District Attorney or his representative in relation to this case and the names and addresses of all persons present during any portion of the interview.

g. Any witnesses, including their statements, or any physical evidence that might reasonably be anticipated being used by the Commonwealth to rebut any defense evidence or argument, whether at trial or at sentencing. Any information that might cause the defense to give pause as to the presentation of any conceivable defense witness or strategy. This request is made pursuant to Commonwealth v. Ulen, ___Pa.___. 650 A.2d 416 (1994) which mandates such disclosure.

h. All evidence and/or witnesses tending to support any of the mitigating circumstances set forth in 42 PA CSA sec. 9711(e)

Documents Evidencing Promises and/or Threats to Witnesses

4.a. The names, addresses, alias, and prior criminal record (including FBI extract) of any and all potential witnesses, any criminal charges pending against said witnesses, or whether any of the witnesses were arrested for any criminal charges prior to July 3, 1982, the subject of any investigation for criminal charges, the target of any grand jury investigation, subpoenaed to testify before any grand jury, or on parole or probation at any time during the period from December 9, 1981 to July 3, 1982.

b. Any promise and/or inducement or representation of any kind made to any

potential witness and/or the witness' relations, friends or associates by any Commonwealth agent to encourage or induce a witness to assist the commonwealth in its investigation and or prosecution, or to induce a potential witness to testify for the prosecution or to modify their statement or testimony in any way. Provide the name and badge number of all police officers and agents who participated in any way in interviews or discussions with witnesses or who had any knowledge of said promise, inducement or representation.

c. Any warning, threat, promise or representation of any kind made to any potential witness and/or the witness' relations, friends or associates by any Commonwealth agent to dissuade a witness from assisting the defense in any way, or to induce or coerce a potential witness into modifying or changing his statement or testimony in any way. Provide the name and badge number of all police officers and agents who participated in any way in interviews or discussions with witnesses or who had any knowledge of said warning, threat, promise or representation.

d. Any information relevant to the impeachment of any witness that the prosecution called at the trial or intends at the upcoming PCRA evidentiary hearing, including any threats, promises, inducements, offers of reward or immunity, affirmative representations made or implied and any record of convictions, or of pending charged, probation, or parole.

This request is meant to apply to any police informants involved at any level in this case and any people interviewed and contacted by the police, or an investigative or prosecuting agent relative to this matter whether or not the Commonwealth obtained a

statement from the person or whether or not the person was called or testified as a witness.

This request applies to all documents, memorandum, notes, tapes of any promise, threat, inducement or representation.

State whether any witness and/or witness' relations, friends or associates received any favorable treatment by any governmental agency as a result of the witness' testimony at petitioner's trial or as a result of the fact that he did not testify at petitioner's trial, and provide documents evidencing the same; and any memorandum, communication, whether written or oral, by the Commonwealth or its agents to any governmental or private agency concerning witness;

e. State all contact, whether in person, in writing, telephonic or otherwise between the prosecution and any witness (as described above) subsequent to July 3, 1982 and down to the present, provide specifically the date, time and place of said contact and provide a copy of all documents, memorandum, tapes, or notes of any such contact or communication. Provide the names of all those who participated in said contacts and all those with knowledge of said contacts.

Photo array or other identification procedures which did or did not result in identifying petitioner as the shooter

5. Through motion, shortly after petitioner's arrest, the Commonwealth obtained permission to photograph petitioner for the purpose of identification procedures. However at trial none of the prosecution witnesses reported that they had undergone a photo identification procedure.

Circumstances and results of any identification procedure that was conducted or that occurred in connection with this case or in the course of investigation of this case. As used herein, the term "identification procedure" includes any form of identification procedure conducted by the Commonwealth or its agents, as well as any identification made or obtained by "inadvertent" display of the defendant or other person to the identifying witness or inadvertent encounter between the petitioner or other person and the identifying witness. This demand includes but is not limited to the following:

a) identification procedures involving the petitioner, petitioner's brother, and any other person, including suspects, whether or not charged with any offense;

b) identification by voice or photograph, as well as in person identification procedures;

c) all photographs used in a photographic identification procedure, and the name, police photo number, and the criminal record of all the "fillers";

d) the identity of the person(s) conducting the identification procedure and all persons present at any time at the identification procedure; provide the badge number of all police officers;

e) the results of any identification procedure, including the witness' positive or qualified identification of the petitioner or petitioner's brother, the witness' failure to identify the defendant or other prime suspect;

f) Examination of all photographs, video tapes, motion pictures, composites or likenesses shown to witnesses and prospective witnesses in this case for the purpose of establishing the identity of suspects in the crime charged against the defendant and all

reports concerning the display of such;

g) Copies of all photographs, and film negatives, taken of the petitioner and petitioner's brother, William Cook, by the police, the prosecution or their agents from the period December 9, 1981 until July 3, 1982.

Scientific Tests and Physical Evidence

6. a. Results of polygraph test performed on any witness and all written or otherwise recorded notes, memos or reports of said polygraph examinations, including but not limited to: the name and date of each polygraph; name of the person(s) administering the test and the names of all those present at any time during the examination or who interviewed the examinee immediately after the examination. Provide the names of all persons who were provided information concerning the results of the examination.

b. Results or reports, including rough notes, memoranda or tape recordings, of any or all laboratory or scientific tests, including but not limited to ballistics and firearms reports, expert opinions concerning any testing or examination of physical evidence connected with the investigation of this case. Provide the names of all individuals present when said tests were performed and the names of all persons who were provided information concerning the results of the tests or examination of physical evidence.

c. Results or reports, memoranda, including rough notes, regarding the use of the neutron activation test and/or any other gun residue tests by the police and their agents for the three year period immediately preceding petitioner's arrest, including but not limited to, any formal or informal police guidelines as to when the test should be used;

numbers, statistics or other description of its use or non-use; cost of purchasing each kit and the name and badge number of the police department or other personnel responsible for the purchase, maintenance and deployment of these kits by the Mobile Crime Unit. Provide a copy of such a kit.

d. Examination of all physical evidence obtained during the investigation, including but not limited to, physical examination of the weapons and bullets and bullet fragments found at the scene or removed from the body of decedent and petitioner.

e. All tangible, physical or demonstrative objects of evidence, including but not limited to, documents, photographs, or clothing, as well as any property receipts regarding such evidence.

f. All police reports, notes, property receipts, memoranda regarding the recovery of the weapons and the bullets from the scene and the names and badge numbers of all the police officers who participated in any way in the investigation and or search of the area and the names of all police officers or prosecutors who received information regarding the results of said investigation or search. This demand includes, but is not limited to, all photographs and transparencies, slides, diagrams, motion pictures, video recordings, drawings, taken or prepared at or near the time of the offense, in the possession of any police department, the District Attorney, or any other person or agency and available to the prosecution, of the scene of the alleged offense.

g. Copy of any crime scene analysis and measurements and examination of all photographs, contact sheets, transparencies, slides, diagrams, motion pictures and video tapes taken or prepared at or near the time of the offense, in the possession of any

police department, the District Attorney, or any person or agency and available to the prosecution of the scene of the alleged offense.

h. A complete list of manufacturers and models of each and every weapon which is capable of firing the bullets alleged to have been found in the body of the decedent and in the area surrounding the incident.

i. A copy of all police radio communication tapes including but not limited to any communication from or to police officer Faulkner, to or from any of the police who arrived on the scene and to or from any vehicle transporting petitioner and the decedent to the hospital and any reports, notes or memoranda reducing to writing the content of said tapes.

Medical Records

7. a. Results or reports of medical examinations of the decedent, including but not limited to the entire hospital record on decedent, including particulars of any operation or other medical procedure performed; names and addresses of all hospital staff who treated or assisted in the treatment of decedent, and the names of addresses of all other person(s) present while said treatment took place.

b. All reports, memoranda, notes, including rough notes, regarding the preparation of the Findings of the Medical Examiner, dated 12/9/81, and the names and addresses of all police and hospital personnel who were present at any time during the preparation of said report.

c. Copies of all reports, memoranda, notes, including rough notes taken or transcribed of the autopsy, including autopsy slides, photographs and M.E. tapes as the

autopsy was performed.

d. Results of reports of medical treatment and examinations of the petitioner, including but not limited to the entire hospital record on petitioner.

Police Reports, Generally

8. a. Copy of the all the records, memoranda, and notes, including but not limited to: homicide daily case summary sheet, incident reports (75-48), homicide reports (75-52), arrest reports (75-50), offense reports (75-49), activity sheets, patrol logs (75-158), radio card (75-163), JAD record card (75-163), investigator's activity log (75-232), investigator's aid to interview (75-229), investigators interview report (75-483), chronology of interrogation and custody (75-485) which were written, prepared, or otherwise used by officers investigating the crime involved in the above-entitled action or whom were present at the crime scene or at Jefferson Hospital at any time from 3:30 AM December 9, 1981 until July 3, 1982.

b. All records, memorandum, notes, interviews, written or recorded, dictated or executed by or under the direction of Det. William Thomas (#744) regarding the investigation and/or prosecution of this case.

c. Copy of the Roundhouse visitor's log for December 9 and 10, 1981 and any notes, memoranda, or writing regarding any visitor to the Roundhouse who is in any way whatsoever connected to or associated with this case.

d. A copy of the Location and Complaint files regarding any and all calls concerning this crime.

e. All reports, notes, memoranda, writing of any sort contained in any police

report or form or separate document or tape recording of anyone reporting that they saw a person or persons running from the scene of the incident on December 9, 1981 on or about 3:50 AM or shortly thereafter.

f. All reports, notes, memoranda, including but not limited to Complaint or Incident reports, Patrol logs and Police Activity Sheets pertaining to Bill Cook, Ken Freeman and Ron Freeman, the owners and/or operators of a vendor stand located at 16th and Chestnut Streets from the period January 1-December 30, 1981.

g. All reports, notes, memoranda concerning police officer Gary Wakshul's (#7363) work and vacation record for the period June 1--July 15 1982, including but not limited to, any and all information concerning days off and vacation schedule, providing any and all written records of requests and approvals of time off during this period and any written or taped communication between Officer Wakshul, other police officers and Commonwealth agents concerning his days off duty and/or sick and/or vacation during that period of time.

Police Surveillance Records

9. Petitioner received 700 pages of FBI surveillance files which establish that the Philadelphia police were actively engaged in political surveillance of him and attempts to charge him with criminal offenses from at least 1969, when he was fifteen years old until at least 1974. Numerous police officers were involved in this work and would have been familiar with and biased against petitioner. It is public knowledge that former Police Commissioner and Mayor Frank Rizzo maintained extensive surveillance files on thousands of Philadelphia citizens. This demand is for all Philadelphia police files which

were maintained on petitioner or which name or mention him.

a. State the department or units of the Philadelphia Police Department which were engaged in political surveillance or the recording of information and/or the maintenance of any sort of files on citizens for any reason other than criminal arrest and/or conviction from the period of 1969 through 1981. State whether there was any unit or department of the Philadelphia Police Department which specifically reported on activities and persons active in the black community.

b. Provide the names and badge numbers of all Philadelphia police officers assigned to the Civil Disobedience and/or Intelligence Units at any time during the period of 1968-1982 and state which police unit or district each police officer was assigned during the period of Dec 1981-July 3, 1982.

c. Provide the name and badge number of any and all Philadelphia police officers who participated in or witnessed the FBI-led raids on Black Panther Party offices and Webb's Bar on October 6, 1969 and on the Black Panther Party offices on August 31, 1970, or ordered Philadelphia police officers to participate in or be present at said raids.

d. State the names and badge numbers of any of the police officers who worked in any capacity on investigating petitioner in this case who were at any time assigned to the Civil Disobedience or Intelligence Units.

e. Copies of all files on or containing information on Mumia Abu-Jamal, aka Wesley Cook, including but not limited to all written or otherwise recorded reports, memoranda, notes, documents, information, photographs, newspaper clippings, eavesdropping tapes which were compiled, maintained or otherwise collected or used by

Philadelphia Police Department or its agents, including but not limited to the Civil Disobedience Unit and the Intelligence Unit, from 1968 through the present. If said files are no longer in the control or custody of the Philadelphia Police Department, or any other Commonwealth office or agent, state the location of said files and the date they were removed from Commonwealth custody and control.

f. State whether former Police Commissioner and Mayor Frank Rizzo or any of his agents maintained any identifiable files, documents, records on Philadelphia media whether print, radio or television journalists. State whether said files contained any information, records, notes, documents, tapes on or concerning Mumia Abu-Jamal and provide copies of all files, memoranda, notes, newsclips, etc. concerning or naming petitioner.

h. State whether the Philadelphia Police Department maintains surveillance and or intelligence files on the MOVE organization and/or persons believed to be MOVE supporters. Provide copies of any and all such files, documents, records, notes, memoranda, newsclippings, tapes about or which include any reference to petitioner.

Records of Police Corruption

10. a. State the name and badge numbers of all Philadelphia police officers arrested and indicted, or named as an unindicted co-conspirator or as an informant, in the federal investigation into corruption in the Philadelphia Police Department from January 1980 through 1986, specifically those police officers who were also involved in any way or supervised in any way those involved in the investigation and prosecution of petitioner.

b. Provide a copy of the indictment charging any police officer with the commission of a crime or otherwise naming a police officer as an unindicted co-conspirator or informant, who was involved in the investigation and prosecution of the petitioner, stating the outcome of the proceeding, including the sentence, if any imposed on each police officer.

c. Provide a copy of reports, memoranda, notes, tapes concerning the 1980-1886 federal investigation and prosecution of police officers assigned to the 6th District on corruption charges, including but not limited to those police officers involved in the investigation and prosecution of petitioner.

d. Provide the names and addressees of any police or civilian informants in investigation, who also had any connection to petitioners arrest and prosecution, whether or not they testified at trial in the above referenced federal prosecutions.

Police Misconduct Personnel Files

11. Copies of the following materials regarding the decedent Daniel Faulkner and the police officers, including but not limited to the officers who questioned witnesses Cynthia White, Veronica Jones, Robert Chobert, Robert Harkins, Dessie Hightower, Michael Scanlon, William Singletary, involved in the investigation and prosecution of petitioner:

a. The name, date of birth or approximate age, address and telephone number of each person who has filed a complaint with the Department for any of the acts of misconduct checked below:

(1) unnecessary aggressive behavior;

(2) violence and/or attempted violence;

(3) excessive force and/or attempted excessive force;

(4) prejudice based on race, ethnicity or national origin;

(5) prejudice or bias based on sex or sexual orientation;

(6) false arrest;

(7) illegal search or seizure;

(8) fabrication of charges;

(9) fabrication of evidence;

(10) false or misleading police reports;

(11) obtaining statements from suspects or witnesses by means of coercion, threats or force;

(12) obtaining statements from suspects or witnesses by means of promises of leniency, special treatment or release from custody;

(13) obtaining statements from suspects in violation of their Miranda rights;

(14) other acts of dishonesty or improper tactics no matter how catalogued by the Police Department (such as conduct unbecoming an officer, neglect of duty and miscellaneous).

This request does not include complaints concerning conduct which occurred more than five years before the date of the incident in the above-entitled case, but it does include complaints concerning conduct which occurred after that date.

b. All statements, oral or written, by each person who has brought a complaint

described in item a. above.

c. The name, date of birth or approximate age, address and telephone number of every witness to the acts of misconduct described in item a. above, whether or not such witness was actually interviewed by the Department, its investigators or other personnel during its investigation in to the complaint described in item a. above; and all other persons interviewed by the department, its investigators or other personnel during its investigation into the complaints described in item a.

d. All statements, written or oral, by each person described in item c. above. This includes statements given by the above referenced officers.

e. All investigative reports and all other records, reports, notes, memoranda and any other writings in possession of the department as result of its investigation into the complaint described in item a. above.

f. Disclosure of the fact whether discipline was imposed on the above named officer(s) for any of the acts described in item a. above.

Miscellaneous

12. a. The name, address and race of each member of the jury venire questioned to sit on the jury in petitioner's case.

b. The voting districts from which juror questionnaire forms were mailed for the jury venire questioned to sit in petitioner's case.

13. a. All records, reports, documents, notes and memoranda concerning the establishment and functioning of the Philadelphia County Homicide Court, including but not limited to information on the criteria for the selection of judges who sit on the

homicide court, a record of the judges which have sat on that court (and for how long) over the period of the last twenty years, the racial composition of judges who sat on the homicide court in the months of June and July 1982.

14. Copies of the pre-trial motions filed by the defense in the above-captioned case and the answers filed by the prosecution.

Respectfully submitted,

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Exhibit B – Commonwealth Motion to Quash Subpoena, August 2, 1995

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

Commonwealth of Pennsylvania	:	January Session, 1982
	:	
v.	:	
Mumia Abu-Jamal, a/k/a Wesley Cook	:	Nos. 1357-1358

O R D E R

AND NOW, this _____ day of _____ August, 1995, upon consideration of the Motion to Quash Subpoena Duces Tecum, and any response thereto, it is hereby ORDERED and DECREED that Defendant's subpoena served on Assistant District Attorney Marianne Cox is hereby QUASHED.

By the Court

_____
Sabo, J.

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

Commonwealth of Pennsylvania	:	Criminal Division
	:	
v.	:	
Mumia Abu-Jamal, a/k/a Wesley Cook	:	Nos. 1357-1358
	:	(January Session, 1982)

MOTION TO QUASH SUBPOENA DUCES TECUM

TO THE HONORABLE ALBERT F. SABO, JUDGE OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY:

Lynne Abraham, District Attorney of Philadelphia County, and Marianne Cox, Assistant District Attorney, by their counsel, Sarah B. Vandenbraak, Chief, Civil Litigation, respectfully request that this Court quash the subpoena duces tecum issued by the defense, and in support thereof represent as follows.

INTRODUCTION

1. At 2:15 p.m. on August 1, 1995 the defense served a subpoena duces tecum commanding Assistant District Attorney Marianne Cox to testify in this case. This subpoena, which was served with less than 24 hours notice, also commands that Ms. Cox produce "[c]opies of all records relied upon for factual assertions included in Point I, A (pp. 16-22) in the Brief of Appellee filed in this case in the Supreme Court of Pennsylvania, Eastern District, E.D. Appeal Docket 1983, No. 51." A copy of this subpoena and the related portion of the appellate brief are attached hereto.

2. This Court should quash the subpoena. This subpoena constitutes an improper attempt to circumvent appropriate discovery procedures. In addition, the defense improperly seeks to present this prosecutor as a witness even though she cannot offer relevant, admissible or material testimony. Finally, this court must quash this subpoena as it seeks to violate the attorney work product doctrine. Each one of these reasons, in and of itself, requires that this Court quash the subpoena.

REASONS WHY THIS COURT MUST QUASH THE SUBPOENA

The defense impermissibly seeks to avoid this Court's adverse discovery ruling through the use of a subpoena.

3. The defense has previously requested that this Court require the Commonwealth to produce various records. The defense requested records relating to their claim that the prosecution impermissibly struck potential jurors on the basis of their race, (See Defendant's Motion for Discovery, page 22., ¶12.a.(seeking "the name, address and race of each member of the jury venire questioned to sit on petitioner's case")). This Court denied the motion. The defense sought review of this discovery ruling from the Pennsylvania Supreme Court, which also denied relief. There are no changed circumstances that would warrant modification of this court's discovery ruling.

4. Defendant seeks to reverse this Court's ruling through the impermissible use of a subpoena. Subpoenas are not authorized as a means for obtaining information from the Commonwealth and as such, the subpoena issued in this case has no force or effect. In any event, because Ms. Cox is not in custody or control of the

Commonwealth's file, she is not the appropriate party to produce any of the requested records. Defendant is likewise not entitled to subpoena these records since the appellate brief in question, on its face, clearly refers to the notes of testimony in the trial record. These notes are equally available to the defense.

The defense has not demonstrated the requisite necessity for the testimony of the appellate prosecutor.

5. The defendant is not entitled to subpoena a prosecutor to testify unless he can establish that he or she possesses information vital to the defense. See United States v. Newman, 476 F.2d 733 (3d Cir. 1973) (court may refuse to allow defense to call prosecution as a witness when the court does not believe that the prosecutor possesses information vital to the defense); United States v. Nanz, 471 F.Supp. 968 E.D. Wisc. 1979) (defendant must meet a high standard of necessity --"rising to the level of compelling and legitimate need"--before a court should allow a prosecutor to be called as a defense witness.

6. The courts recognize that it is bad policy for defendants to call prosecutors as defense witnesses. Calling a prosecutor as a defense witness inevitably confuses distinctions between advocate and witness, argument and testimony, and is not acceptable unless required by a compelling and legitimate need. United States v. Schwartzman, 527 F.2d 249, 253 (2nd Cir. 1975), cert. denied, 96 S.Ct. 1410 (1976).

7. Defendant fails to show any compelling need for testimony from Assistant District Attorney Cox. Ms. Cox was not the trial prosecutor, but instead represented the Commonwealth in defendant's

direct appeal to the Pennsylvania Supreme Court. Ms. Cox has no direct knowledge of the factual allegations raised by defendant in this PCRA matter.

8. Defendant has failed to provide a specific offer of proof as to why the defense contends that Ms. Cox could provide admissible, material and favorable testimony for the defense. A defendant's offer of proof must contain sufficient factual specificity to establish that the proposed witness has material and relevant testimony. See Commonwealth v. Coffey, 230 Pa. Super. 49, 331 A.2d 829 (1977) (allocatur denied) (trial court properly refused to require production of witness who defendant claimed would have helped prove her defense where trial court was not given specific information advising it of testimony which witness had to offer; to be entitled to compulsory process for obtaining witnesses, defendant must establish that person to be produced has **relevant or material** testimony on issues in question). See also Schwartz v. Pittsburgh Public Parking Authority, 63 Pa. Cmwlth. 434, 439 A. 2d 1254 (1981); United States v. Lewis, 836 F.2d 1096, 1101 (8th Cir. 1988) (absent a proper showing that the proposed evidence is both **material and favorable** to the defendant, there is no error in quashing the subpoena). Defendant clearly cannot make the requisite showing that Ms. Cox has relevant, admissible testimony that is favorable to the defense.

The defendant is not entitled to the information he seeks pursuant to the subpoena.

9. The defendant has also misused subpoena power to compel production of materials the prosecution has no obligation to produce. It is clear from the Commonwealth's appellate brief that the Commonwealth's factual assertions were based upon the trial record (a copy of this portion of the Commonwealth's brief is attached). The defense has no right to compel the production of the trial record, as it is a matter of public record, and the defense already has copies of these records. A party cannot compel production of materials when that party has equal access to those materials.

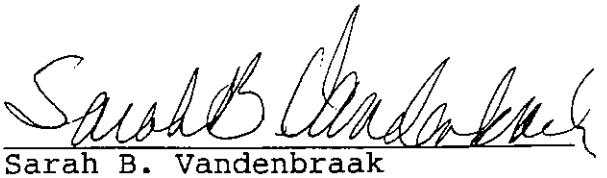
10. To the extent that the defense seeks to compel evidence as to Ms. Cox's to the basis for the factual assertions in the Commonwealth's brief, the defendant impermissibly seeks information protected by the work product doctrine. The prosecution clearly is entitled to protect work product information from discovery (even where, unlike here, discovery is permitted). See Pa.R.Crim.P. 305 G. ("Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the attorney for the Commonwealth or the attorney for the defense, or members of their legal staffs."). The defense is clearly not entitled to question an attorney as to the reasons why she made particular factual assertions in a brief. See Hickman v. Taylor, 329 U.S. 495, 512 (1947) (the Supreme Court recognized "the general policy against invading the privacy of an attorney's course of

preparation."); Foundling Church of Scientology of Washington, D.C., Inc. v. Director, Federal Bureau of Investigations, 104 F.R.D. 459 (D.C. Cir. 1985) (attorney work-product properly invoked to preclude discovery of documents generated by the Department of Justice Criminal Division where index clearly showed that documents were prepared in connection with the criminal process and in anticipation of litigation); In re Murphy, 560 F.2d 326 (8th Cir. 1977) (an attorney's thoughts are inviolate).

CONCLUSION

WHEREFORE, for the foregoing reasons, this Court should quash defendant's subpoena duces tecum served on Assistant District Attorney Marianne Cox.

Respectfully submitted,



Sarah B. Vandenbraak
Chief, Civil Litigation Unit
Counsel for ADA Marianne Cox

August 2, 1995

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

Commonwealth of Pennsylvania	:	Criminal Division
	:	
v.	:	
Mumia Abu-Jamal, a/k/a Wesley Cook	:	Nos. 1357-1358
	:	(January Session, 1982)

VERIFICATION AND
CERTIFICATE OF SERVICE

The undersigned verifies that the foregoing motion is true and correct to the best of her knowledge, information, and belief. The undersigned further acknowledges that this verification is made subject to the penalties for perjury pursuant to 18 Pa.C.S.A. § 4094.

The undersigned hereby certifies that on this date a copy of the foregoing Motion to Quash will be served by hand delivery to the counsel listed below.

Leonard Weinglass, Esquire
Kairys & Rudovsky
924 Cherry Street, Room 500
Philadelphia, PA 19107

Sarah B. Vandenbraak, Chief
Civil Litigation Unit

Date: August 2, 1995

ARGUMENT

I. Trial Issues

DEFENDANT HAS WAIVED HIS CLAIM THAT PEREMPTORY CHALLENGES WERE UTILIZED IN A DISCRIMINATORY MANNER, AND HIS CLAIM IS, IN ANY EVENT, TOTALLY REFUTED BY THE RECORD.

Defendant claims entitlement to a new trial based upon his unsubstantiated allegation that the assistant district attorney exercised his peremptory challenges in a discriminatory manner. Defendant, however, never raised this allegation in the lower court, thereby depriving the trial court of the opportunity of inquiring into the reasons for the exercise of the prosecutor's challenges. Nor did he raise his claim post-verdict, but rather asserted his present allegations for the first time in an affidavit, filed by trial counsel on August 22, 1986, more than four years after trial, which defendant appends to his brief. At the time of voir dire in June, 1982, defendant noted for the record the race of a few venirepersons during questioning. Defendant made no claim either during voir dire or before the panel was sworn, that peremptory challenges were utilized in a discriminatory manner. Indeed, defendant never even noted for the record the racial composition of the jury, but asks this Court for a new trial based upon allegations de hors the record, citing only trial counsel's recollection some four years after

the fact.[2] Defendant's failure to raise his present claim at the time of voir dire and at post-verdict motions is indicative of its lack of substance and should be a basis for foreclosing review. Commonwealth v. Peterkin, 513 A.2d 373, 378 (Pa. 1986); cert. denied, 107 S.Ct. 962, 93 L.Ed 2d 1010 (1987); Commonwealth v. Szuchon, 506 Pa. 228, 256, 484 A.2d 1365 (1984); Commonwealth v. Clair, 458 Pa. 418, 326 A.2d 272 (1974).[3]

2. It is interesting to note that in addition to not raising any claim of racially motivated use of peremptories at the time of voir dire, defense counsel actually expressed a totally different theory for what he considered the small number of blacks on the jury. After the first six jurors were selected, defense counsel appeared on a talk show on the radio station where defendant had previously been employed. During the program counsel expressed the view that the reason only one out of the first six jurors was black was due to black venirepersons' oppösition to the death penalty (N.T. 6/15/82, 68-69, 58-70). The comment was then made that "we blacks should stick together." (N.T. 6/15/82, 69). Trial counsel's remarks about the trial were in violation of the trial court's direction not to discuss the case with the media (N.T. 6/10/82, 4.44), and resulted in subsequent venirepersons being more closely questioned about whether they listened to WDAS radio station.

Despite trial counsel's indiscretion in broadcasting such a statement during the voir dire process, it is noteworthy that he made no claim either "on the air," or in court, that the prosecutor was using his peremptory challenges in a discriminatory manner. The first and only mention of this claim was not made until after defendants conviction when he raised it in a statement that he read during his direct testimony at the penalty phase of trial (N.T. 7/3/82, 13).

3. Whether or not Batson v. Kentucky, 106 S.Ct. 1712, 90 L.Ed 2d 69 (1986), should be applied to cases on direct appeal as a

(footnote continued on next page)

In any event, defendant's claim that the prosecutor systematically used peremptory challenges to exclude blacks from the jury is refuted by the record. Indeed, the very first juror selected was black (N.T. 6/7/82, 174-187; Brief for Defendant a 2). The very next juror that the Commonwealth found acceptable to serve as juror number two was also black, but defendant exercised one of his peremptory challenges to strike this venireperson (N.T. 6/9/82, 3.85-3.92). The Commonwealth also accepted juror number seven, who defendant concedes was black (Brief for Defendant at 2-3; N.T. 6/11/82, 5.53-5.64). The Commonwealth does not dispute defendant's representations as to juror number seven's race, but it is not of record, nor is the race of any of the other selected jurors due to defendant's failure to raise his present claims at trial.[4]

(footnote 3 continued)

a matter of state law, see Commonwealth v. McFeely, 509 Pa. 394, 502 A.2d 167, 169 (1985) (Pennsylvania courts not bound by retroactivity decision in United States v. Johnson, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed 2d 202 (1982), it would only apply to a case where the issue was preserved for review. See Commonwealth v. Hernandez, 498 Pa. 405, 446 A.2d 1268, 1270-1271 (1982) (defendant not entitled to benefit of decision applicable to cases pending on direct appeal given his failure to preserve claim at trial). As defendant failed to properly preserve his allegations, his claim is not even cognizable under the less strigent test of Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed 2d 759 (1965).

4. The trial prosecutor represents that juror number ten was also black. (See Affidavit Appendix A). Had defendant properly raised his claim below, this Court would have had a full record upon which to review defendant's claim, instead of affidavits filed by the litigants. In any event, without regard to the race of juror number ten, defendant has still failed to make out a prima facie showing of discriminatory exercise of peremptory challenge.

The record additionally establishes that the Commonwealth exercised a total of fifteen peremptory challenges; eight of these fifteen were used to strike black venirepersons. The race of the other seven stricken prospective jurors is not of record. Defendant now claims for the first time that three of these remaining seven prospective jurors challenged by the Commonwealth were also black. If defendant at the time of trial thought that the assistant district attorney struck these prosecutive jurors solely due to their race, he would have raised such a claim at the time. Having waited four years after the jury was selected to make this allegation, without record support, his claim should not be considered by the Court.

In any event, the Commonwealth selected three[5] black venirepersons for service on the jury. Had defendant not struck James Burgess, a black person whom the Commonwealth accepted, four out of the twelve empaneled jurors would have been black. The fact that one black juror (juror number one) was excused, early in the trial without objection by defendant, cannot be used to bolster defendant's present allegations about the prosecutor. It was hardly the prosecutor's fault that this juror bolted from the hotel where she was sequestered because her cat became ill (N.T. 6/18/82, 2.36-2.39, 2.45).

The prosecutor here did not exhaust his peremptory challenges, but, as noted above, accepted four black venirepersons

5. See footnote 1 supra.

for the jury (one of whom was stricken by defendant), and exercised almost half of his peremptory challenges against persons whose race does not appear of record, at least four of whom defendant concedes were not minority members.

Moreover, as to all of the peremptory challenges utilized by the assistant district attorney, against both black and white prospective jurors, the cold record, on its face, indicates non-racially motivated reasons for the prosecutor's exercise of his discretionary challenges. Most of the jurors peremptorily struck were unmarried, unemployed or frequently listened to the radio station where defendant had worked as an announcer. Others were either young, answered questions in a very hesitant manner, or expressed serious reservations about the death penalty. Other stricken jurors expressed bias against the police, or in favor of prison inmates, or had difficulty understanding basic legal principles that were explained during voir dire.[6]

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6. A summary of all prospective jurors challenged by the Commonwealth is as follows:

Janet Coates (black) (N.T. 6/7/82, 121-163) 20 years old (121); listened to defendant's radio show (129-130); dropped out of school (134); employed for only three weeks (132); bias against police (133); could not fairly consider Commonwealth's evidence if defendant did not testify (136-159); answered questions incoherently (123, 130, 159); never served on a jury before (121).

Alma Austin (race not of record; defendant claims she is black) (N.T. 6/8/82, 2.47-2.56) strong feelings against death

(footnote continued on next page)

By contrast, the jurors upon whom both the defense and Commonwealth agreed, both principal and alternate jurors, were

(footnote 6 continued)

penalty (2.51-2.54); divorced, living with male friend (2.47-2.48; never served on a jury (2.48).

Verna Brown (black) (N.T. 6/8/82, 2.78-2.86) 22 years-old unmarried with 6-year-old child; unemployed, mother unemployed (2.78-2.79, 2.84); familiar with defendant as announcer (2.82); never served on a jury (2.79).

Beverly Green (race not on record; defenda nt claims she is black) (N.T. 6/8/82, 3.240-3.246) hesitant in answering questions (3.242-2.245); unmarried and young (3.240, 3.246).

Genevieve Gibson (black) (N.T. 6/10/82, 4.72-4.80) temporarily laid off (4.73); six years out of high school (4.74); never served as juror (4.74); familiar with defendant from radio and newspaper (4.78).

Gaitano Ficordimondo (race not on record, defendant concedes he is white) (N.T. 6/10/82, 4.93-4.102) 22-year-old student (4.93, 4.96); never served on jury previously (4.96).

Webster Reddick (black) (N.T. 6/10/82, 4.219-4.238) three years out of high school (4.223); unmaried (4.220); hesitant in answering questions (4.222, 4.224); strong reservations about death penalty (4.226-4.23).

John Finn (race not on record; defendant concedes he is white) priest (5.75); hesitant in answering questions (5.76, 5.79-5-80, 5.82); never served as juror before (5.78).

Carl Lash (black) (N.T. 6/11/82, 5.102-5.115) hearing problem (5.110-5.111); unemployed (5.103); former counselor at prison and close relationship with number of inmates (5.105, 5.113-5.114).

Delores Thiemicke (race not of record; defendant concedes that she is white) (N.T. 6/11/82, 5.191-5.194) unemployed, 24 years old (5.192-5.193); never served as juror (5.193).

(footnote continued on next page)

mature, married or widowed, either employed or retired (or in two cases recently laid off), in many cases had grown children and prior service on a jury, and had lived in the same neighborhood for many years (N.T. 6/7/82, 174-188); (N.T. 6/9/82, 3.191-197); (N.T. 6/10/82, 4.80-4.91); (4.137-4.145); (4.153.4.167); (4.207-4.218); (N.T. 6/11/82, 5.53-5.64); (5.94-5.101); (5.115-5.124); (N.T. 6/15/82, 123-132); (123-132); (N.T. 6/16/82, 298-313); (381-414); (464-474); (481-488); (489-496).

Thus, notwithstanding defendant's waiver of this issue, the record refutes defendant's allegations, and he has failed to make out a prima facie showing of improper exercise of discretionary challenges.

(footnote 6 continued)

Mario Bianchi (race not of record; defendant concedes he is white) (N.T. 6/15/82, 105-116) 32 years old (106); father was victim of violent crime during previous week (106-107); misunderstands presumption of innocence (112-113); familiar with defendant as broadcaster (111).

Wayne Williams (black) (N.T. 6/15/82, 171-180) 21 years old, unmarried (171); never served as juror (172); listened to defendant on radio for years (172-173); worked in similar occupation as defendant (178).

Henry McCoy (black) (N.T. 6/15/82, 218-233) daughter works at same radio station as defendant; had frequent conversations with daughter who expressed disbelief in validity of charges against defendant (223-225, 229-232)

Darlene Sampson (race not of record; defendant alleges she is black) (N.T. 6/16/82, 272-298) 25 years old (173); listened to defendant on radio (276); opposed to death penalty (281-291); sister was recently killed during a crime (277-280, 292-293); expressed view that she could not be fair if trial lengthy (293-297); never served as juror before (276).

[redacted]

SUBPOENA
WITNESS AND SUBPOENA DUCES TECUM

Rec. 13:15 8/1/95 B. Taylor

CITY OF PHILADELPHIA, ss

The Commonwealth of Pennsylvania

Marianne Cox, Office of the District Attorney

Economic Crime Unit

1421 Arch Street 19102, Philadelphia, Pa.

No. 1357-58 Term _____ Greeting:

WE COMMAND YOU, That laying aside all business and excuses whatsoever, you and each of you, be and appear in your proper person before our Judges at Philadelphia, at our Court of Common Pleas Trial Division and/or Municipal Court, to be held at the City Hall, Broad and Market Streets, Room No. 253 **, for the City aforesaid, on** Wednesday **Morning,** 2 August 1995 and duration of proceeding **at 9:00 o'clock, to testify the truth and give evidence on behalf of Commonwealth vs.** Mumia Abu-Jamal **charged with** homicide—post-conviction relief petition and to produce the documents listed on the attached codicil

Witness **the Honorable EDWARD J. BLAKE, President Judge of Common Pleas and/or ALAN K. SILBERSTEIN, President Judge, Municipal Court at Philadelphia, the** 1st **day of** August **AD, 19** 95

VIVIAN T. MILLER *Pro Clerk*

CLERK OF QUARTER SESSIONS

6-148 (Rev. 12/91)

[redacted]

CODICIL

Copies of all records relied upon for factual assertions included in Point I, A. (pp. 16-22) in the Brief for Appellee filed in this case in the Supreme Court of Pennsylvania, Eastern District, E.D. Appeal Docket 1983, No. 51.

You have been served with a subpoena to appear as a witness on the case of Mumia Abu-Jamal. If you have any questions, you may call 925-4400 and ask to speak with a member of the defense team. If you call, please identify yourself as a person who has been subpoenaed, so your call can be properly directed.