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IN THE SUPERIOR COURT OF PENNSYLVANIA

EASTERN DISTRICT

Docket Number 1206 EDA 2023

Commonwealth of Pennsylvania,
Appellee,

v.
Mumia Abu-Jamal
Appellant.

On Appeal from the March 31, 2023 Order and Opinion of the Court of Common Pleas, Philadelphia County (Clemons), Docket Number CP-51-CR-0113571-1982, and from the Court's July 7, 2023 Amended Order and Opinion Denying Post-Conviction Relief

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For 35 years, the Commonwealth withheld a letter its star witness wrote shortly after trial asking the prosecutor about the money owed him, and notes showing the prosecutor's highly race-conscious approach to jury selection. These are major revelations, which require an evidentiary hearing on Appellant's *Brady* and *Batson* claims. The Commonwealth can argue otherwise only by repeatedly ignoring the governing precedent, and key facts, cited in Appellant's opening brief.

I. A Hearing Is Required on Appellant's *Brady* Claim.

A. Appellant's New *Brady* Claim Is Not Speculative.

The Commonwealth characterizes Appellant's *Brady* claim as "speculative." Appellee Br. 40. This is astounding. The claim stems from the recent disclosure of a post-trial letter from Robert Chobert, the Commonwealth's star witness, to the trial prosecutor that said:

Mr. McGill
I have been calling you to find out ***about the money own [sic] to me.***
So here is a letter, finding out about money. Do you need me to sign anything.
How long will it take to get it.
How was your week off good I hope.
Let me know soon, write me back
/s/ Robert Chobert RR. 043-45 (emphasis added).

The Commonwealth had this letter in its files and does not dispute its authenticity. The use of the word "owed"[1] is a strong indication that Mr. Chobert wrote one month

[1] The letter uses the word "own," which is undoubtedly a misspelling of the word "owed."

after Appellant's trial to the prosecutor asking for money that he understood was owed to him because of a previous promise of payment for being a witness for the Commonwealth. This is a far cry from speculation.

The authority cited by the Commonwealth to support this "speculative" argument, *Commonwealth v. Sneed*, 45 A.3d 1096 (Pa. 2012), is wholly inapposite. In *Sneed,* the PCRA petitioner claimed ineffective assistance of his trial counsel, alleging no more than counsel "failed to give an opening statement, which would have laid the foundation for an attack on the witnesses' credibility." *Id.* at 1106-07. Because no specific details were offered, the *Sneed* Court feared that Sneed wanted to use a PCRA hearing as a fishing expedition, *id.*, and emphasized that failure to give an opening statement by itself is not ineffectiveness.

The Commonwealth tries to bolster its argument that Appellant's *Brady* claim is speculative by asserting that, in federal habeas corpus proceedings, the federal district court pointed to evidence from a prior PCRA proceeding that "Chobert never expected a favor for testimony," and the court concluded it was reasonable for the state court to find that Chobert had no cooperation agreement with the prosecution. Appellee Br. 24. This is irrelevant. When the federal court issued its decision in

2001, it had no idea that Mr. Chobert sent a post-trial letter asking for the money owed him.[2]

The Commonwealth has suggested several alternative factual scenarios in an effort to explain Mr. Chobert's letter asking for money he was owed. *See* RR. 146. Even if these alternative interpretations were plausible, the Commonwealth's proffering "reasons why Chobert may have written the prosecutor asking about money," Appellee Br. 37, would simply raise disputed issues of fact that could only be resolved via an evidentiary hearing. *See Commonwealth v. Williams*, 244 A.3d 1281, 1286 (Pa. Super. Ct. 2021); *Commonwealth v. Wah*, 42 A.3d 335, 338 (Pa. Super. Ct. 2012). In any event, the Commonwealth's suggested scenarios—five dollars per day witness fee or expenses during Mr. Chobert's hotel stay for which the Commonwealth footed the bill—are implausible. *See* Appellant Br. 28-30.

The Commonwealth's brief adds an additional theory about Mr. Chobert's letter, suggesting that "the fact that he [Chobert] asked in the letter if he needed 'to sign anything' to receive the money indicates he was presenting a legitimate request and not attempting to cash in on some secret and inappropriate deal with the prosecutor." Appellee Br. 38. But there is no reason to credit Mr. Chobert with the understanding that the offer of payment had to be done "under the table," or that

[2] And the PCRA court knew nothing of the letter when Mr. Chobert testified at a 1995 hearing.

certain types of payments would never require a signature. Certainly, that kind of speculation cannot justify the denial of an evidentiary hearing.

The lack of a certification from Mr. Chobert indicating that he would admit being paid for his trial testimony is likewise no basis to deny relief without an evidentiary hearing. *See, e.g.*, *Commonwealth v. Brown*, No. 289 WDA 2014, 2015 WL 7458864 at *16 (Pa. Super. Ct. Mar. 20, 2015) (non-precedential) (explaining why the PCRA court, based upon the totality of the testimony of a number of witnesses, found the existence of an agreement after an evidentiary hearing even where the agent alleged to have offered an incentive denied doing so). In *Commonwealth v. Brown*, 767 A.2d 576, 583 (Pa. Super. Ct. 2001), this Court recognized the reality that many witnesses are "hostile." At a hearing, the PCRA court would be able to make findings of fact after hearing a full examination of Mr. Chobert, which would include being confronted with his letter and the implausibility of any explanation other than that he was expecting money for his testimony.

B. Appellant Has Established a Material Violation of His *Brady* Rights.

The Commonwealth asks this Court to affirm the lower court's finding that, even if Mr. Chobert had been impeached with the fact that he was promised payment for his testimony, the failure to disclose this fact was not a *Brady* violation because it was non-material. Appellee Br. 40. Appellee's arguments about materiality are either factually incorrect, factually incomplete, or both.

Robert Chobert was the Commonwealth's star witness, and his credibility was of utmost importance. Appellant explains why this is the case in detail in his opening brief. *See* Appellant Br. 13-18. In that brief, Appellant further explains that under *Kyles v. Whitley*, 514 U.S. 449 (1995), and other controlling decisions, the prosecution's suppression of evidence depriving the jury of a fair opportunity to assess the credibility of a principal eyewitness is material because it undermines confidence in the outcome, even when the prosecution's remaining evidence is stronger than the remaining evidence highlighted by the Commonwealth here. *See* Appellant Br. 13-16, 18-19. The Commonwealth has no answer to this controlling precedent, and it does not even address *Kyles* in its brief.

Turning to the remaining evidence highlighted by the Commonwealth, it is undisputed that Mr. Chobert was one of only two witnesses who claimed to have both seen Appellant shoot Officer Faulkner and be able to identify him. The other was Cynthia White. In its brief, the Commonwealth seeks to minimize Mr. Chobert's importance by painting Ms. White as a strong witness who provided consistent versions of what she saw. *See* Appellee Br. 41 & n.17. But, as Appellant has pointed out, Ms. White's credibility was ardently attacked at trial with her prior inconsistent statements, open criminal cases, and inability to answer many questions. *See* Appellant Br. 14. Indeed, the lower court recognized that Ms. White was impeached at trial on a broad array of fronts. *See* RR. 636. At trial, even the

prosecutor acknowledged to the jury that Cynthia White's testimony was problematic in the portion of his closing argument urging the jury to credit Mr. Chobert. *See* Tr. 7/1/82 at 179. Yet, in its account of Ms. White's trial testimony, the Commonwealth omits any mention of how she was cross-examined about many inconsistencies among her various statements regarding, *inter alia*, her description of the perpetrator. *See* Appellee Br. 10, 41.

The Commonwealth also argues that there is no reasonable probability that the verdict would have been different even if the jury learned of a promise to pay Mr. Chobert for his testimony because Mr. Chobert gave several purportedly consistent versions of what he said he observed. *See* Appellee Br. 40. But this assertion overlooks a key discrepancy between Mr. Chobert's trial testimony and his pre-trial statements.

As Appellant has emphasized, Mr. Chobert told police officers on the night of the incident that after the shooting, the shooter ran 30 feet away from the scene. *See* Appellant Br. 23; Tr. 6/19/82 at 236-37. At trial, he testified that the shooter only ran 10 feet. *Id.* This discrepancy was highly significant since, according to the Commonwealth's case, Appellant was found with a gunshot wound on the curb very near to Officer Faulkner. 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 he had in fact seen the shooting, and if Mr. Abu-Jamal was the shooter. In fact, Dessie

Hightower testified at trial that after hearing shots, he saw someone running away from the scene. Tr. 6/28/82 at 126-27. Why would the shooter run 30 feet and then run back to be right next to Officer Faulkner? The Commonwealth blurs this inconsistency when it writes that according to Mr. Chobert, after the shooting, defendant "walked a short distance and fell." Appellee Br. 6. The Commonwealth ignores the 10 feet vs. 30 feet inconsistency and does not address Appellant's point about why this difference was important.

The Commonwealth also argues that impeaching Mr. Chobert about being promised payment was non-material because his testimony was supposedly corroborated by "multiple eyewitnesses." Appellee Br. 42. However, as Appellant has pointed out, Robert Chobert and Cynthia White were the only witnesses to testify to seeing Appellant shoot Officer Faulkner. Appellant Br. 13. Thus, other than the highly impeached Cynthia White, Mr. Chobert was the only evidence presented by the Commonwealth that supported a verdict that Appellant was guilty of first degree murder instead of voluntary manslaughter.[3] Michael Scanlan, the Commonwealth witness who saw parts of the shooting but could not identify the shooter, offered support for a voluntary manslaughter verdict—even if the jurors did determine that Appellant was the shooter—when he testified that, "when I saw the guy [shooter]

[3] As the Commonwealth concedes, the trial court's instructions gave the jury the option of returning a verdict for Voluntary Manslaughter. Tr. 7/2/82 at 27.

running across the lot towards the cop, I knew he was going to help the guy that was getting hit from the billy club." Tr. 6/25/82 at 35. This perspective from a witness to events just before the shooting suggests the possibility of a sudden heat of passion killing. *See* 18 Pa. C.S. § 2503(a). There is at least a reasonable probability that, had Mr. Chobert been impeached with evidence of a promise or expectation of payment, the jury would have found Mr. Abu-Jamal not guilty or, that it would have returned a verdict for manslaughter.

Appellant also lists in his Opening Brief the ways in which Mr. Scanlan's testimony was in direct conflict with Mr. Chobert's and Ms. White's testimony. One example is that Mr. Scanlan said there was no one besides the shooter, the police officer and the Volkswagen driver there, *see* Tr. 6/25/82 at 21, which undermined Ms. White's claim that she was standing on the same sidewalk where Officer Faulkner fell. Another example is Mr. Scanlan said that he did not see a cab behind the police car, *id.* at 20, but that was where Mr. Chobert claimed his cab was parked. The Commonwealth concedes this, but nevertheless asserts that "Scanlan confirmed the other eyewitnesses' presence in the general area." Appellee Br. 12. The Commonwealth supports this assertion with a string of citations to the trial transcript, none of which support this claim. *Id.* Even if Mr. Scanlan had testified to seeing others in the "general area," this suggests the others were simply bystanders nearby, yet Mr. Chobert and Ms. White claimed to have been right at the scene.

In its Brief, the Commonwealth argues that the Pennsylvania Supreme Court already decided that the testimonies of Mr. Scanlan and Mr. Magilton were so damaging that it was "unlikely" that additional impeachment of Mr. Chobert and Ms. White would have impacted the jury's verdict. *See* Appellee Br. 42-43 (citing *Commonwealth v. Abu-Jamal*, 720 A.2d 79, 107 n.34 (Pa. 1998)). However, that decision was in the context of a 1995 PCRA *Brady* claim regarding non-disclosed impeachment evidence quite unlike the evidence in question now. Contrary to the Commonwealth's characterization, the Supreme Court actually said it was "unlikely that any of the above claims, either singularly or cumulatively, could compel a different verdict." *Abu-Jamal*, 720 A.2d at 107 n.34 (emphasis supplied). The claims the Court referenced certainly did not include one based upon a letter from Mr. Chobert asking for the money he was owed since that was not disclosed until over two decades later.

In sum, despite other evidence presented against Appellant, proffered eyewitness Cynthia White was a weak and heavily impeached witness leaving Robert Chobert as the eyewitness that the Commonwealth lauded in its closing argument to the jury. Tr. 7/1/82 at 179. Thus, the spectacular revelation that Mr. Chobert was promised money in exchange for his testimony could have, with a reasonable degree of probability, impacted the jury's verdict.

C. Appellant's *Brady* Claim Is Timely.

The Commonwealth also alleges that Appellant's *Brady* claim is untimely, asserting that "defendant did not demonstrate that he acted with due diligence in learning the facts upon which his claim is based or in bringing the claim." Appellee Br. 35-36. In essence, the Commonwealth asserts that Appellant could have learned of witness Chobert's expectation of payment for his testimony prior to the disclosure of his letter through investigation or questioning Mr. Chobert at earlier proceedings. *Id.* Prior to this brief, the only time the Commonwealth asserted a timeliness problem with regard to the *Brady* claim was in a footnote in its Motion to Dismiss Defendant's Sixth PCRA Petition. *See* RR. 141 n.16.

The Court of Common Pleas correctly rejected that argument, saying that, "the Court finds that this claim is timely and that Defendant could not have learned it sooner through his own due diligence." RR. 332 n.20. The court explained that Petitioner had filed a discovery motion and, had it been granted, "Defendant could have received the Chobert Letter, because there were requests sufficiently detailed to yield this type of impeaching information about Chobert." *Id.* Moreover, according to the lower court, "Defendant called Chobert as a witness and asked about similar financial incentives to testify (assistance with reinstating his license and protective housing), but neither the Commonwealth nor Chobert offered any information that would have led Defendant to suspect that Chobert wrote to McGill

[the trial prosecutor] regarding 'money owe[d]' to him." *Id*. Thus, as the PCRA court recognized, Appellant diligently undertook "reasonable efforts" to obtain this information sooner, *see Commonwealth v. Burton*, 121 A.3d 1063, 1071 (Pa. 2016), and the Commonwealth did not disclose it.

Nor does the fact that Mr. Chobert failed to disclose this agreement when speaking with defense investigators somehow show a lack of diligence by the defense. Years before the 2019 disclosure of Mr. Chobert's letter to ADA McGill asking for his money, defense investigators did talk with Mr. Chobert, who testified in a 1995 PCRA hearing. Nevertheless, the suggestion that Appellant could have learned about a promise for payment earlier misses the point that the Commonwealth concealed Mr. Chobert's letter asking for his money. Had that letter been disclosed, an investigator or lawyer for the defense may have asked Mr. Chobert about that directly and confronted him with his letter. No one from Appellant's team could have been expected to guess and then ask whether Mr. Chobert had written to Mr. McGill asking for money after the trial; nor does the Commonwealth even assert that Mr. Chobert would have disclosed the existence of such a letter had he been asked.

The Court of Common Pleas' finding that Appellant's *Brady* claim is timely is supported by the United States Supreme Court's decision in *Banks v. Dretke*, 540 U.S. 668, 695-97 (2004). As in this case, the *Banks* Court was faced with the State's assertion that a post-conviction petitioner failed to use due diligence in uncovering

the fact that the prosecution paid a major witness for his testimony. *See id.* at 675. The *Banks* Court rejected the State's argument saying, "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Id.* at 695-96. The Court continued, "As we observed in *Strickler*, defense counsel has no 'procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred.'" *Id.* (quoting *Strickler v. Greene*, 527 U.S. 263, 286-87 (1999)). And according to the *Banks* Court, any rule declaring "'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id.* at 696.

This Court should affirm the lower court's conclusion that Appellant's *Brady* claim is timely, and remand for an evidentiary hearing.[4]

[4] The Commonwealth correctly notes that notices of appeal in the prior PCRA proceedings were in fact not filed until January 25, 2019. Appellee Br. 27 n.10. Three days before that, the parties jointly requested that the Court of Common Pleas enter an order rescinding its December 27, 2018 order so that it would not lose jurisdiction and could adjudicate the significance of the documents disclosed by the Commonwealth on January 3, 2019. *See* 1/22/2019 letter. Judge Tucker denied that request, Amended 1/24/2019 Order, and Appellant was then prohibited by law from filing a new PCRA petition until the appeals were resolved. *See Commonwealth v. Lark*, 746 A.2d 585, 588 (Pa. 2000). Mr. Abu-Jamal filed a motion in the Superior Court to remand to the Court of Common Pleas to allow him to litigate claims based on the new evidence. 9/3/2019 Motion to Remand. On October 26, 2021, when the Superior Court dismissed Mr. Abu-Jamal's nunc pro tunc appeals, the remand

II. A Hearing Is Required on Appellant's *Batson* Claim.

Appellant's *Batson* claim is premised on facts not previously known to Appellant—and indeed withheld from Appellant by government officials for over 35 years. As such, and because it was presented within one year of Appellant's first opportunity to do so, it is timely and not waived. *See* 42 Pa. C.S. § 9544(b), § 9545(b)(1)(i), (ii); *id.* (b)(2); Appellant Br. 39 (citing RR. 004-05 ¶¶ 7-8), 52.[5] And, because, under controlling precedent, the new facts underlying Appellant's claim are probative of discrimination, an evidentiary hearing to adjudicate this claim.

A. The New *Batson* Claim Is Timely.

With respect to timeliness, the Commonwealth argues that Appellant "did not act with due diligence in obtaining the facts upon which" the new claim is based. Appellee Br. 45; *see id.* at 45-50. But, as explained in Appellant's opening brief,

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motion was deemed moot. Two months later, Mr. Abu-Jamal filed this PCRA petition. RR. 001.

[5] Contrary to the Commonwealth's assertion, *see* Appellee Br. 45 n.20, the governmental-interference exception applies when, as here, a petitioner identifies "a specific claim that he was unable to discover or develop" due to the Commonwealth's "failure to produce documents." *Commonwealth v. Howard*, 788 A.2d 351, 355 (Pa. 2002); *see* Appellant Br. 39, 47 (further explaining why the work product doctrine did not justify withholding the prosecutor's notes). And, although Appellant satisfies the due diligence standard, his preservation of an argument that it should not apply to the governmental-interference exception is supported by the text of the statute and persuasive judicial opinions. *See Commonwealth v. Towles*, 300 A.3d 400, 419 (Pa. 2003) (Donohue, J., concurring); *id.* at 422 (Wecht, J., concurring).

when a claim is premised on previously undisclosed evidence solely in the possession of the Commonwealth, it is not a PCRA petitioner's fault for not discovering it sooner. *See* Appellant Br. 40-42. In *Commonwealth v. Lambert*, the Pennsylvania Supreme Court recognized that the statute of limitations for claims premised on such evidence does not begin running until the Commonwealth discloses it. *See* 884 A.2d 848, 852 (Pa. 2005). And, in *Banks v. Dretke*, the United States Supreme Court forcefully rejected the Commonwealth's position that a post-conviction petitioner has a burden to discover evidence concealed by the prosecution, as "not tenable in a system constitutionally bound to accord defendants due process." 540 U.S. at 696.

The Commonwealth has no answer to *Lambert* or *Banks*, it simply ignores these decisions. Nor does the Commonwealth cite a single case where a PCRA petitioner was determined not to be diligent for not earlier uncovering facts contained in the prosecution's files and unavailable from any third party.

Even if a petitioner did have an obligation to seek information hidden by the prosecution, Appellant did precisely that. He made repeated efforts to obtain discovery of materials in the prosecution's files that would support his *Batson* claim in connection with his first PCRA petition. *See* Appellant Br. 42-45. Thus, Appellant undertook more than "reasonable efforts . . . to uncover facts" in the

prosecution's files that could support his *Batson* claim, which means he was diligent. *Commonwealth v. Burton*, 121 A.3d 1063, 1071 (Pa. 2016); *see* Appellant Br. 42.[6]

Rather than engage with the foregoing facts and controlling authorities, the Commonwealth insists that Mr. Abu-Jamal was not diligent because he supposedly "could have obtained the information" in Mr. McGill's jury selection notes by calling Mr. McGill to testify at the 1995 PCRA hearing. According to the Commonwealth, "[n]o constraints were placed on" the questions counsel could ask Mr. McGill "with respect to the *Batson* issue." Appellee Br. 46-47.

This argument fails for two reasons. First, the sole question for diligence purposes is whether Mr. Abu-Jamal made "reasonable efforts" to uncover information in support of his *Batson* claim. *See Burton*, 121 A.3d at 1071. Mr. Abu-Jamal repeatedly sought discovery in support of that claim. As such, he was diligent regardless of whether—in the Commonwealth's words—he "could have obtained the information" had he called the trial prosecutor to the stand at the 1995 hearing.

[6] The Commonwealth notes that Appellant did not specifically ask for the prosecutor's jury selection notes during the first PCRA hearing. *See* Appellee Br. 46. But diligence requires "reasonable efforts . . . to uncover facts that may support a claim," *Burton*, 121 A.3d at 1071, not any specific type of discovery request, especially when a petitioner has no notice of what is in the prosecutor's files. In any event, the Commonwealth does not dispute that Mr. Abu-Jamal made discovery requests which, if granted, would have resulted in the disclosure of the notes. *See* Appellant Br. 43-45.

See Burton, 121 A.3d at 1071 (diligence "requires neither perfect vigilance nor punctilious care").

This is particularly true because, at trial, the prosecutor said in open court that asking jurors to identify their race was "irrelevant" and that "it's not necessary for it to be on the record that they are black or white, simply not necessary." Tr. 6/7/82 at 17-20. Especially in light of these statements, Mr. Abu-Jamal's counsel was under no obligation to ask the prosecutor if he was actually tracking jurors by race in his private notes. *See Commonwealth v. Davis*, 86 A.3d 883, 890-91 (Pa. Super. Ct. 2014) (diligence does not require a petitioner to make unreasonable assumptions that contradict the prosecutor's representations at trial); *see also Banks*, 540 U.S. at 696 (emphasizing that "'[o]rdinarily, we presume that public officials have properly discharged their official duties'") (citations omitted).

Second, the Commonwealth is simply wrong in asserting that "[n]o constraints were placed on" Mr. Abu-Jamal's prior counsel with respect to questioning Mr. McGill about *Batson*. The Commonwealth relies on this statement by the Commonwealth's attorney at a July 31, 1995 hearing: "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. *See* Appellee Br. 47. But the Commonwealth ignores the context in which that statement was made.

As described in Appellant's brief, counsel for the Commonwealth and the court repeatedly made clear that Mr. Abu-Jamal's counsel could question Mr. McGill only about subjects on which counsel presented a specific offer of proof. Appellant Br. 48-49. As the court acknowledged in the decision below, at the 1995 hearing, the Commonwealth insisted on a "narrow offer of proof for McGill." RR. 571 n.19.

Forced to make a narrow offer of proof, Mr. Abu-Jamal's counsel did so at the July 31, 1995 hearing. Shortly before the portion of the transcript relied on by the Commonwealth, Mr. Abu-Jamal's counsel explained "[w]e intend to question" Mr. McGill about the only matter counsel was on notice of as a potential line of questioning: Mr. McGill's direct appeal affidavit, which "misrepresented to [SCOPA] by some 30 percent the pattern of racial exclusion which the Commonwealth engaged in in picking this jury." Tr. 7/31/95 at 279-80.

When counsel for the Commonwealth shortly thereafter said that Mr. Abu-Jamal's counsel should be given full latitude to question Mr. McGill about the *Batson* issue "whatever their additional evidence is," *id.* at 292, he was clearly referring to the "additional evidence" counsel had just presented in the narrow offer of proof that the Commonwealth and the court had insisted upon. Nothing in that statement suggests he was suddenly changing his position about the need for a specific offer of proof and would not object to Mr. Abu-Jamal's counsel asking Mr. McGill about any *Batson*-related issues. Mr. Abu-Jamal's counsel would have

reasonably expected to be barred from asking speculative questions he was repeatedly warned not to ask. As the judge who presided over the 1995 hearing explained, he required Mr. Abu-Jamal's counsel to present "the proper foundation for his testimony" before the court even permitted counsel to call Mr. McGill. *Commonwealth v. Cook*, 1995 WL 1315980, at *21 n.8 (Pa. Com. Pl. Sept. 15, 1995).

When the parties reached a stipulation about the racial makeup of the jury, the sole issue counsel was on notice of as warranting further inquiry of Mr. McGill was resolved. As a result, there was no longer any reason for Mr. Abu-Jamal's counsel to call Mr. McGill to the stand. *See* Appellant Br. 51.

The Commonwealth has no answer to these facts and does not even attempt to address them in its brief. Instead, it stresses opinions in federal habeas proceedings referring to the fact that Mr. Abu-Jamal did not call the trial prosecutor to testify at the 1995 hearing. *See* Appellee Br. 47-48. But the federal courts were not presented with the facts set forth above demonstrating why Mr. McGill was not called to testify, and their opinions addressed a discovery request under a federal standard requiring "good cause" at a time when Mr. Abu-Jamal did not have any such cause because the Commonwealth was still withholding the notes. *See Abu-Jamal v. Horn*, No. 99-5089, 2001 WL 1609690, *14 (E.D. Pa. Dec. 18, 2001).

Grasping at straws, the Commonwealth also relies on the fact that in 2001, different counsel for Mr. Abu-Jamal filed an unsuccessful PCRA petition arguing

that his 1995 attorneys provided ineffective assistance by failing to call Mr. McGill. *See* Appellee Br. 49-50. No court accepted that claim, and the reasonableness of Mr. Abu-Jamal's counsel's conduct at the 1995 hearing is not determined based on assertions made by his 2001 counsel in an unsuccessful PCRA petition.

B. The New *Batson* Claim Is Not Waived.

As explained in Appellant's opening brief, case law is clear that a *Batson* claim such as this one, which is premised on newly discovered evidence not knowable by the defense at trial, is not waived. *See id.* at 53-54 (discussing *Commonwealth v. Basemore*, 744 A.2d 717 (Pa. 2000), and *Commonwealth v. Lark*, 746 A.2d 585 (Pa. 2000)).[7]

The Commonwealth scarcely defends the PCRA court's waiver ruling. It notes that in *Commonwealth v. Daniels*, 963 A.2d 409 (Pa. 2009), a *Batson* claim raised in PCRA proceedings failed where trial counsel did not raise it. But, as explained in Appellant's opening brief, unlike here, the new PCRA evidence in *Daniels* would have been available at trial had trial counsel raised a *Batson*

[7] The Commonwealth quotes snippets from *Lark* and *Basemore,* but it makes no effort to refute the analysis in Appellant's opening brief. *Compare* Appellee Br. 57-58 & nn. 28-29 *with* Appellant Br. 53-54. Those cases clearly recognize that a *Batson* claim is not waived or untimely when it is genuinely premised on newly discovered evidence. *See Basemore,* 744 A.2d at 733; *Lark,* 746 A.2d at 588. In *Lark*, the claim nonetheless "fail[ed] for lack of merit," because the new evidence was about actions of a different prosecutor. *Lark,* 746 A.2d at 588-89.

objection, and no party even argued in that case that the claim was not waived because it was premised on newly discovered evidence. *See* Appellant Br. 56-57.[8] The Commonwealth also makes a half-hearted argument that *Batson* doesn't apply at all in this case. *See* Appellee Br. 56-57. But the case cited by the Commonwealth, *Commonwealth v. Smith*, 17 A.3d 873 (Pa. 2004), is inapplicable here. It stands for the proposition that a *Batson* claim resting on evidence available to defense counsel at trial is waived absent a contemporaneous objection, and therefore must be litigated through an ineffective assistance of counsel claim. *See id.* at 894 (citing additional cases applying this waiver analysis). Because Mr. Abu-Jamal relies on new and previously unavailable evidence to support his *Batson* claim, the claim was not waived.

Finally, the Commonwealth misses the mark entirely when it points to previous statements of the Pennsylvania Supreme Court about the lack of evidence supporting an inference of discrimination in this case, and a statement by trial counsel (discussing the unrelated issue of the parties not seeking a non-Philadelphia venire) indicating he did not object to how the process had proceeded. *See* Appellee

[8] The Commonwealth also cites *Commonwealth v. Maxwell*, 232 A.3d 739 (Pa. Super. Ct. 2020), but that case is not about waiver and is plainly inapposite. In *Maxwell*, the only "new" evidence was a hearsay statement about a conversation the petitioner's brother allegedly overheard between the prosecutor and a police officer. *See id.* at 742. This attenuated evidence was, at best, a "newly-willing testimonial source" addressing a previously litigated *Batson* claim. *Id.*

Br. 53, 56. Those statements were made when the Commonwealth was still withholding the powerful evidence of discrimination that it did not disclose until 2019. It is no answer to a *Batson* claim premised on new evidence of discrimination to point to what a court said when it did not know about that evidence.

Mr. Abu-Jamal's *Batson* claim is timely and not waived, and the PCRA court plainly erred by ruling otherwise without an evidentiary hearing. *See Burton*, 121 A.3d at 1074 (remanding for evidentiary hearing because it was "premature" for the PCRA court to resolve questions of diligence without a "factual record"). Particularly given the unique harms caused by *Batson* violations, which "impugn the legitimacy of the judicial process" and "'undermine public confidence in the fairness of our system of justice,'" the merits of Mr. Abu-Jamal's *Batson* claim and any procedural defenses raised by the Commonwealth "are best determined on a full and complete record." *Basemore*, 744 A.2d at 733-34 (quoting *Batson v. Kentucky*, 476 U.S. 79, 87-88 (1986)).

C. A Hearing Is Warranted on the Merits of the New *Batson* Claim.

Unable to mount a persuasive defense of the PCRA court's timeliness or waiver rulings, the Commonwealth devotes much of its *Batson* argument to its claim that Mr. Abu-Jamal is "not entitled to relief" on the merits. Appellee Br. 50; *see id.* at 50-57. But the PCRA court did not rely on that argument in dismissing Mr. Abu-Jamal's petition. With good reason. As explained in Appellant's opening brief, the

newly disclosed jury selection notes show: (a) the trial prosecutor was actively tracking many prospective jurors by race during jury selection, which undermined representations he made in open court that asking jurors about their race was "irrelevant"; (b) the prosecutor made a note emphasizing that, with respect to one prospective juror, "I accepted but D rejected this Black male," revealing a race-conscious approach to jury selection in which the prosecutor appears to have selected a few prospective Black jurors while striking the vast majority of them; and (c) the notes identify characteristics of prospective jurors that the prosecutor highlighted as significant, thereby permitting a side-by-side comparison showing the prosecutor struck prospective Black jurors while accepting white jurors who were similarly situated or less favorable to the prosecution with respect to the relevant characteristics. *See* Appellant Br. 35-38.

This new evidence supports an inference that the prosecutor was influenced by race in jury selection and creates a factual dispute about whether such discrimination occurred, thereby requiring an evidentiary hearing. This is plainly not a case where "'the petitioner's claim is patently frivolous and has no support either in the record or other evidence,'" such that it should be dismissed without a hearing. *Commonwealth v. Williams*, 244 A.3d 1281, 1287 (Pa. Super. 2021) (citation omitted).

In urging this Court to dismiss the claim, the Commonwealth does not even acknowledge the legal standard for when an evidentiary hearing should be held. It likewise ignores the latter two categories of evidence described above. And, as for the sole evidence the Commonwealth does address, its arguments seeking to rebut the inference of discrimination from notes showing the trial prosecutor actively tracked jurors by race are wholly unpersuasive.

As discussed in Appellant's brief, controlling precedent clearly establishes that notes tracking jurors by race "raise[] an inference that the prosecutor struck jurors based on their race," and indeed are "strongly indicative of discriminatory intent." *Commonwealth v. Edwards*, 177 A.3d 963, 973, 975 (Pa. Super. Ct. 2018)[9]; *see also Foster v. Chapman*, 578 U.S. 488, 493-94, 500-01, 513 (2016); *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005). The Commonwealth seeks to distinguish these precedents by pointing to immaterial factual distinctions, but it cannot seriously

[9] The Commonwealth points out that there were also "'other factors' that supported a finding of discrimination," in *Edwards*. Appellee Br. 56 (citation omitted). But that does not undermine the significance of notes tracking prospective jurors by race, which this Court recognized as highly probative evidence in support of a *Batson* claim. *See* 177 A.3d at 973, 975. That principle applies even more clearly here, because in *Edwards* it was not the prosecutor, but the court's staff, who tracked jurors' races on peremptory strike sheets they handed counsel. *See id.* at 968. Nor does any authority support the Commonwealth's suggestion that notes tracking jurors by race are relevant only when peremptory strikes occur later. *See* Appellee Br. 57 n.27. Such notes reflect a race-conscious approach to jury selection whenever they are made.

dispute what matters: the U.S. Supreme Court and this Court have recognized that tracking prospective jurors by race during jury selection is probative evidence in support of a *Batson* claim. *See id.*[10]

The Commonwealth insists that, here, "it was *the defense* who attempted to inject a racial component into the case," and the prosecutor was simply taking the "protective measure" of "keep[ing] track of the race of the jurors" in his private notes to respond to a claim of discrimination. *See* Appellee Br. 53, 55 & n.26. But this is not what the trial prosecutor said was his reason for tracking jurors by race. Mr. McGill addressed this issue in his 2019 affidavit. Far from offering some particular reason for tracking jurors by race in Mr. Abu-Jamal's case, in that affidavit, he stated under oath that his reason for tracking jurors in his private notes was that it "was a standard practice" at the time of Mr. Abu-Jamal's 1982 trial. RR. 0052. Mr. McGill

[10] In *Foster*, the prosecutor's file also contained notes created prior to jury selection. *See* Appellee Br. 54 n.24. But the *Foster* Court specifically pointed to notes made during jury selection, which identified jurors by race, as evidence supporting a *Batson* claim—even though it was not clear who in the prosecutor's office made those notes. *See* 578 U.S. at 494, 501. With respect to *Miller-El*, the Commonwealth asserts: "While the Court referenced the fact that the prosecutors had 'marked the race of each prospective juror on their juror cards,' this was to show that they were following'" their office's "'formal policy to exclude minorities from jury service.'" Appellee Br. 54-55 n.25 (citation omitted). The "formal policy" was "a 20-year-old manual of tips on jury selection," and there was no evidence this manual was in circulation for approximately a decade before Mr. Miller-El's trial. *Miller-El*, 545 U.S. at 266. Here, there is contemporaneous evidence that the District Attorney's Office had a practice of striking Black jurors at the time of Mr. Abu-Jamal's trial. *See* RR. 036 ¶ 65.

did not, however, explain why that was a "standard practice," explain how it was non-discriminatory, or acknowledge the contemporaneous evidence that, in the words of an active trial judge in Philadelphia, the office had a standard practice of using peremptory strikes to exclude Black jurors. *See* RR. 036 ¶ 65.

The Commonwealth's post-hoc justification for the trial prosecutor's conduct must be disregarded in adjudicating Mr. Abu-Jamal's *Batson* claim. *See Miller-El*, 545 U.S. at 252. Indeed, similar to this case, in *Foster*, counsel for the State argued that notes in the prosecution's file identifying prospective jurors by race showed the prosecutor was seeking to "'develop and maintain detailed information on those prospective jurors in order to properly defend against any suggestion that decisions regarding [its] selections were pretextual.'" *Foster*, 578 U.S. at 513 (quoting State's brief). The Supreme Court squarely rejected this post-hoc argument, which "'reek[ed] of afterthought.'" *Id.* (quoting *Miller-El*, 545 U.S. at 246).

The Commonwealth's new post-hoc theory attempting to justify why the trial prosecutor tracked jurors by race is, in any event, unsupported by the record. As an initial matter, the Commonwealth's suggestion that defense counsel sought "to inject racial issues into the case," Appellee Br. 50, is remarkable. The racially charged nature of this case was not "injected" by defense counsel: this is an extremely high-profile alleged cross-racial homicide in which the victim was a police officer and the defendant a prominent radio journalist identified with sympathetic media coverage

of the MOVE organization. Cases in which a defendant is accused of a crime against "an individual of a different race," have been recognized by this Court as creating a "special incentive" for the prosecutor "to select jurors who are of the same racial background as the victim." *Commonwealth v. Jackson*, 562 A.2d 338, 345 (Pa. Super. Ct. 1989); *see also Simmons v. Beyer*, 44 F.3d 1160, 1168 (3d Cir. 1995). Moreover, defense counsel's pretrial statement about a pattern of racial discrimination in the Philadelphia District Attorney's Office at the time of Mr. Abu-Jamal's 1982 trial, *see* Appellee Br. 50-51, is well-supported by other evidence as described above. *See* RR. 036 ¶ 65.

The Commonwealth also seeks to defend the trial prosecutor's tracking of jurors by race on the ground that, in the PCRA Petition, Appellant stated that the trial prosecutor's notes show he "'was seeking to build a record to rebut any claim of discrimination.'" Appellee Br. 55 (quoting PCRA Petition). The PCRA Petition makes that point not about the prosecutor's tracking jurors by race, but in describing the prosecutor's gratuitous reference to race when he wrote "I accepted but D rejected this Black male" in his notes—thereby suggesting he sought to exclude most prospective Black jurors while accepting a token number in an effort to hide his discriminatory motive. *See* Appellant Br. 37.

With respect to the prosecutor's tracking jurors by race, whatever record he "was seeking to build," it was not one designed to ensure the fair adjudication of a

jury discrimination claim. Such a fair adjudication would require that demographic information about prospective jurors (not simply the seated jury) be part of the record to permit review of issues like the prosecutor's strike pattern, disparate questioning based on race, and side-by-side juror comparisons. Here, the trial prosecutor objected to jurors being asked to identify their race in open court, on the ground that such questions were "unnecessary" and "irrelevant." Tr. 6/7/82 at 17-20. As such, the court record lacked key information that is currently provided by the Rule 632 jury questionnaires highlighted by the Commonwealth, *see* Appellee Br. 55 n.26, to allow for a full and fair review of juror discrimination claims.

Contrary to the Commonwealth's assertion, *see id.*, the prosecutor's private notes did not provide some sort of substitute for that information. Those notes (which only tracked race for about half of the prospective jurors) were of course not part of the court record, and Mr. McGill never intended that they would be. As a result, when Mr. Abu-Jamal raised a *Batson* claim on direct appeal, the Pennsylvania Supreme Court did not have an accurate record identifying prospective jurors by race. Indeed, although the trial prosecutor provided an affidavit to that court in addressing the *Batson* claim, he omitted any information about the race of prospective juror A.A., one of the prospective jurors he struck. But his own notes show that A.A. was Black. This was one of the reasons the Pennsylvania Supreme

Court thought the prosecutor struck fewer prospective Black jurors than he actually did in adjudicating the *Batson* claim on direct appeal. *See* RR. 035.

In sum, the Commonwealth's post-hoc justification that the prosecutor was tracking jurors by race to create a record so he could fairly respond to a subsequent jury discrimination challenge is belied by the record. But even if this theory about the prosecutor's motivation suggested by the Commonwealth were plausible, choosing amongst different reasonable inferences about what motivated a prosecutor represents precisely the kind of "'genuine issue[] of material fact in controversy'" where an evidentiary hearing is required. *Williams*, 244 A.3d at 1287 (citation omitted).

III. Conclusion

This Court should vacate the decision below and remand for an evidentiary hearing.

Respectfully submitted,

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COMBINED CERTIFICATES

I, Judith L. Ritter, hereby certify that the following is true:

1. On this 24th day of January 2024, I served a copy of the foregoing upon the following person by filing the same with PAC-File:

   Office of the Philadelphia District Attorney

2. In compliance with Pa.R.App.P. 2135(d), I hereby certify that the foregoing brief complies with the length of brief limits imposed by Pa.R.App.P. 2135(a)(1). Appellant's reply brief contains 6,994 words (excluding those pages and words in the sections exempt pursuant to subsection (b) of rule 2135)) based upon the word count feature of Microsoft Word 2019.

3. This filing complies with the provisions of the "Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts" that require filing confidential information and documents differently than nonconfidential information and documents.

/s/ Judith L. Ritter