IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

290 EDA 2019

COMMONWEALTH OF PENNSYLVANIA,
Appellee

VS.

WESLEY COOK, AKA MUMIA ABU-JAMAL,
Appellant

REPLY BRIEF FOR APPELLANT

Appeal Nunc Pro Tunc Granted as PCRA Relief from the Judgments of Sentence of the Court of Common Pleas of Philadelphia County, Trial Division, Criminal Section, Imposed in Case CP-51-CR-0113571-1982

JUDITH L. RITTER
Pennsylvania Attorney ID # 73429
Widener University-Delaware
Law School
4601 Concord Pike
Wilmington, Delaware 19801
(302) 477-2121
JLRitter@widener.edu

SAMUEL SPITAL
Admitted Pro Hac Vice
NAACP Legal Defense &
Educational Fund, Inc.
40 Rector Street, 5th floor
New York, NY 10006
(212) 965-2200
sspital@naacpldf.org

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In his opening brief, Appellant Mumia Abu-Jamal demonstrated that a new trial in this matter is required for multiple reasons. The Commonwealth has since submitted a response, and Appellant now submits this reply to address four issues.

First, Mr. Abu-Jamal's nunc pro tunc appeals were ordered pursuant to a timely claim of judicial bias and not pursuant to *Williams v. Pennsylvania*. He promptly presented new evidence that supported that claim and properly relied on the decisions of the Court below in amending that petition. *Second*, trial counsel was ineffective. Because counsel was ignorant of *Davis v. Alaska*, jurors never learned that the prosecution's key witness Robert Chobert was on probation for arson and therefore had a motive to favor the prosecution. *Third*, testimony by Yvette Williams—which her declaration stated would have reported a contemporaneous admission by the prosecution's other purported eyewitness, Cynthia White, that Ms. White was lying—was admissible. Ms. White's admission was a statement against interest because it exposed her to criminal liability (she admitted making false statements as a part of a police investigation), and was made to someone whose interests were adverse to hers as Ms. Williams was confronting Ms. White at the time. *Fourth*, the prosecution violated *Batson v. Kentucky*—a conclusion supported by multiple categories of evidence that have not been disputed. And, because the claim rests on new evidence presented, with the Commonwealth's consent, for the

first time in PCRA proceedings, the claim is properly before this Court. For the remaining issues, Appellant rests on the arguments in his opening brief.

I. The PCRA Court Had Jurisdiction to Grant this Nunc Pro Tunc Appeal.

In August 2020, the Pennsylvania Supreme Court decided *Commonwealth v. Reid*, 235 A.3d 1124, and with the Court's permission, Appellant recently filed a supplemental memorandum in this Court explaining why *Reid* does not require dismissal of this appeal. This is because, unlike *Reid*, Appellant was not granted nunc pro tunc appeals based upon the 2016 case, *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), but rather, on newly discovered evidence of judicial bias that he could not have previously discovered with the exercise of due diligence: specifically, a July 15, 1990 letter from then-DA Castille to then-Governor Casey that was in the Commonwealth's files and not previously available to Mr. Abu-Jamal. *See* Supplemental Br., 1/5/21, at 7-10. In its brief, the Commonwealth concedes that *Reid* does not control here. It nevertheless argues that Appellant's due process claim regarding new evidence of bias was not filed in a timely manner and thus the PCRA court did not have jurisdiction to order this appeal. *See* Commonwealth's Br. at 20-21. The Commonwealth is wrong; the bias claim was timely.

Within 60 days of the decision in *Williams v. Pennsylvania*, Appellant filed a PCRA petition in the Court of Common Pleas. On April 28, 2017, that court ruled that the petition satisfied the time requirements of the PCRA based on the newly

discovered fact exception in 42 Pa. C.S.A. § 9545(b)(1)(ii), granted Appellant's request for discovery and gave permission for appellant to file an amended petition after the completion of discovery. *See* Apr. 28, 2017 Order.

During the course of discovery, on October 2, 2017, the Commonwealth disclosed for the first time, the July 15, 1990 letter written by then District Attorney Ronald Castille to the Governor of Pennsylvania. The Commonwealth (perhaps inadvertently) produced this July 15, 1990 letter only to the Court, which in turn disclosed it to counsel for Mr. Abu-Jamal the next day, October 3, 2017. *See* October 3, 2017 Letter from Judge Tucker to Counsel. On October 19th, 2017, Appellant's counsel filed a letter with the Court of Common Pleas stating, *inter alia*, that this newly disclosed letter was evidence of bias and was relevant to the pending PCRA petition. *See* October 19, 2017 Letter from Counsel to Judge Tucker, Docket Number CP-51-CR-0113571-1982 ("October 19, 2017 filing"). At the conclusion of discovery, the court granted Appellant until July 9, 2018, *see* Apr. 30, 2018 Hearing Tr. at 34-35,[1] to amend his pending petition, and an Amended Petition was filed on that date.

According to Pennsylvania law, an amendment to a pending and timely PCRA petition will be deemed timely regardless of the provisions in the PCRA statute.

[1] The transcript for the April 30, 2018 is attached hereto as Supplemental Exhibit A. Citations to that transcript are to the page numbers at the bottom of the transcript pages.

Commonwealth v. Crispell, 193 A.3d 919, 929 (Pa. 2018) (holding that "motions [to amend PCRA petitions] are governed by Rule 905(A). They are not governed by the timeliness provisions of the PCRA"); *Commonwealth v. Flanagan*, 854 A.2d 489, 499 (Pa. 2004) (holding "that amended petitions are not independently subject to the PCRA's time bar"). This is because under Criminal Procedure Rule 905, amendments to PCRA petitions shall be "freely allowed to achieve substantial justice." Pa. R. Cr. P. 905(A); *see Commonwealth v. Padden*, 783 A.2d 299, 308 (Pa. Super. 2001) (stating that Rule 905 "expressly allows a trial court substantial latitude to permit the amendment of the petition at any time after the petition's initial filing"). In its brief, the Commonwealth ignores these special amendment rules entirely.

It is true that *Crispell* speaks of amendments to "timely" PCRA petitions, and the Commonwealth argues that Mr. Abu-Jamal's Fifth PCRA petition was untimely based on *Reid*. *See* Commonwealth Br. at 21. But *Reid* was not decided until August 2020, and Appellant was entitled to rely on the Court of Common Pleas' pre-*Reid* timeliness ruling, and on the ruling that he could amend his petition any time prior to July 9, 2018. The Commonwealth cites no authority for its contrary position, a result that would be grossly unfair and would violate Appellant's due process rights. *See Commonwealth v. Bennett*, 930 A.2d 1264, 1273 (Pa. 2007) (stating, "due process requires that the post conviction process be fundamentally fair").

Consider Appellant's position. Prior to *Reid*, was he to predict that the Court of Common Pleas would be reversed in its timeliness ruling? Basic fairness and due process require that when a petitioner reasonably follows a court's directives, he should not be deprived of his right to have his claim presented and reviewed in a meaningful manner. *See id.*; *see also id.* at 1269 (pointing out the injustice of not allowing a petitioner to reasonably rely on the process utilized by the Superior Court at the time in question); *Padden,* 783 A.2d at 309 (finding that "since the amended petition was filed pursuant to the order of the Trial Court within the time period set by the Trial Court, it was timely filed in accordance with Pa. R. Crim. P. 905(d)"); *Lefkowitz v. Newsome*, 420 U.S. 283, 295 (1975) (rejecting an interpretation of procedural rules that would unfairly prevent the presentation of post-conviction claims and therefore constitute a "a trap for the unwary").

In any event, even if this Court were to discount Mr. Abu-Jamal's reliance on the Court of Common Pleas' rulings, Mr. Abu-Jamal's claim is still timely because he presented this newly discovered evidence in the October 19, 2017 filing, which he filed on the docket in the Court of Common Pleas just sixteen (16) days after he learned of the July 15, 1990 letter. And, in the October 19, 2017 filing, Mr. Abu-Jamal put the Commonwealth on notice not only that he was adding this new evidence to his petition, but that it supported a claim for relief. The October 19, 2017

filing quoted most of the content of the July 15, 1990 letter, and asserted that it was relevant to the pending PCRA petition and in particular:

> The June 15, 1990 letter from Mr. Castille to Governor Casey makes clear that Mr. Castille was particularly focused on capital cases in which the victim was a police officer. In that letter, Mr. Castille emphasized a case involving a defendant named Leslie Beasley who, like Mr. Abu-Jamal, was convicted of killing a police officer. Mr. Castille stressed that Mr. Beasley had been sentenced to death as a "police killer" and wrote: "I urge you to send a clear and dramatic message to all police killers that the death penalty actually means something."

Oct. 19, 2017 filing at 3.

The October 19, 2017 filing further states that the facts revealed by DA Castille's June 15, 1990 letter "in, and of themselves" established a *Williams* claim. *See id*. Thus, the Commonwealth is simply incorrect when it asserts that Mr. Abu-Jamal waited until July 9, 2018 to present a claim based on this newly discovered evidence. *See* Commonwealth's Br. at 21. The October 19, 2017 filing not only presented the key newly discovered facts and made clear they were relevant to the petition, it argued that those facts entitled him to relief.

It does not matter that the October 19, 2017 filing was not styled as an "amendment." As the Pennsylvania Supreme Court has emphasized, such supplemental filings that are accepted and considered by the PCRA court—however labeled—are properly considered "either amended PCRA petitions unto themselves or proper annexes to same." *Commonwealth v. Dennis*, 950 A.2d 945, 958 n.11

(2008). This approach is grounded in the "liberal attitude toward pleadings manifest in Pa. R. Crim. P. 905," and any objection to treating such filings as valid amendments because they are not explicitly labeled as amendments "must fail here and anywhere else it is raised." *Id*. (citing *Commonwealth v. Boyd*, 835 A.2d 812 (Pa. Super. 2003)); *see also Commonwealth v. Brown*, 141 A.3d 491, 504 (Pa. Super. 2016) (finding that by not striking and reviewing it, the PCRA court implicitly allowed a "reply/supplement" to be considered part of the petition under consideration). The PCRA court accepted the October 19, 2017 filing. Then, at an April 30, 2018 hearing before the PCRA court, counsel for Mr. Abu-Jamal not only referred to the allegations in the October 19, 2017 filing, but argued that its contents pertained to general judicial bias. *See* Apr. 30, 2018 Hearing Tr. at 6-10, 15-19. The Commonwealth did not object to counsel's references, and the court did not suggest they were improper; on the contrary, the court and counsel for the Commonwealth addressed the references on the merits. *See id.* at 15-21.

Alternatively, if the October 19, 2017 filing were not treated as an amendment or supplement to Appellant's pending PCRA petition, it would be treated as a new PCRA petition. *See Commonwealth v. Porter*, 35 A.3d 4, 13 (Pa. 2012) (where a new filing labeled a "supplement and amendment" to a pending petition was not treated as an amendment by the court or the parties below, it would be considered a new petition). According to a 2018 decision from this Court, the Court of Common

Pleas has jurisdiction and is permitted to consider a new PCRA petition even while an earlier petition is pending in the same court. *See Commonwealth v. Montgomery*, 181 A.3d 359, 364 (Pa. Super. 2018) (stating that, "we hold that PCRA courts are not jurisdictionally barred from considering multiple PCRA petitions relating to the same judgment of sentence at the same time unless the PCRA court's order regarding a previously filed petition is on appeal"). And, if treated as a new petition, the October 19, 2017 filing is timely because it was filed within 60 days of the disclosure of new evidence supporting the claim presented in that filing.

In sum, although the posture of this case is unusual, it is clear that by October 19, 2017, Mr. Abu-Jamal had a timely petition pending in the PCRA court—either because the October 19, 2017 filing is treated as an amendment to the original Fifth PCRA petition, which makes that petition timely, or because the October 19, 2017 constitutes a new, timely PCRA petition. Thus, when the court on April 18, 2018 authorized Mr. Abu-Jamal to file an amendment on or before July 9, 2018, it was permitting an amendment of a timely petition; and when Mr. Abu-Jamal filed an amended petition on July 9, 2018, he was filing an amendment to a timely petition. In that July 2018 Amended Petition, Mr. Abu-Jamal relied on the July 15, 1990 letter to raise both a *Williams* claim, and to present a new (non-*Williams*-based) claim of judicial bias. In so doing, he presented a valid amendment to a pending, timely-filed post-conviction petition, which is not subject to the PCRA's time limitations. *See*,

e.g., *Crispell*, 193 A.3d at 929; *Commonwealth v. Flanagan*, 854 A.2d 489, 499-500 (Pa. 2004).

For any or all of the reasons set forth above, Appellant's claim of new evidence of judicial bias was presented to the PCRA court in a timely fashion. Neither *Commonwealth v. Reid* nor any other decision supports dismissal of the instant consolidated appeal.

II. Trial Counsel Rendered Ineffective Assistance by Failing to Protect Mr. Abu-Jamal's Constitutional Right to Present the Jury with Evidence Essential to the Credibility of the Prosecution's Key Witness.

In *Davis v. Alaska*, the Supreme Court established a clear legal rule: when, as here, a significant prosecution witness is on probation at the time of trial, the defendant must be permitted to impeach that witness respecting potential bias stemming from the witness's "vulnerable status as a probationer." 415 U.S. 308, 318 (1974); *see id.* at 309. This rule is mandated by the Sixth Amendment because "the partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.'" *Id*. at 316 (quoting Wigmore on Evidence). The rule is so strong that it applies even when (unlike here) the State has a countervailing interest in protecting the confidentiality of juvenile adjudications. *See id*. at 320.

At Mr. Abu-Jamal's trial, the prosecution's most important witness, Robert Chobert, was on probation for arson because he had thrown a bomb into a school.

See Tr. 6/19/82 at 216, 220-22. Defense counsel attempted to cross-examine Mr. Chobert about this, but the prosecution objected. See Tr. 6/19/82 at 216-23. As defense counsel later admitted, he did not know about *Davis*, a 1974 decision, at the time of Mr. Abu-Jamal's 1982 trial. *See* Tr. 7/27/95 at 59, 164. Defense counsel therefore did not raise Mr. Abu-Jamal's constitutional right to cross-examine Mr. Chobert about his arson conviction, and the judge sustained the prosecution's objection. *See* Tr. 6/19/82 at 220-22.

This claim satisfies all three elements the Pennsylvania Supreme Court has identified in analyzing ineffective assistance of counsel claims because the underlying *Davis* claim "is of arguable merit" (indeed is clearly meritorious); trial counsel failed to raise the claim out of ignorance and not because of any "reasonable strategic basis"; and, had counsel presented the jury with evidence of Mr. Chobert's motive to favor the prosecution, "there is a reasonable probability that the outcome of the proceedings would have been different." *Commonwealth v. Kimball*, 724 A.2d 326, 333 (Pa. 1999). *See* Appellant's Br. 16-29. And, it is clear on the face of the record that Mr. Abu-Jamal's direct appeal counsel was ineffective for failing to raise this issue. *See id*. at 30-31.

In response, and despite the clarity of the rule set forth in *Davis*, the Commonwealth insists that there was no ineffective assistance because "the PCRA court correctly concluded that *Davis v. Alaska* did not apply to this case."

Commonwealth's Br. at 28; *see id*. at 28-39. The Commonwealth argues, in the alternative, that Mr. Abu-Jamal "could not have possibly been prejudiced by trial counsel's failure to cross-examine [Mr. Chobert] with respect to his probation." *Id.* at 42. The Commonwealth is wrong on both points.

A. *Davis v. Alaska* Applies to this Case.

In *Davis*, the Supreme Court established a clear legal rule: a criminal defendant has a Sixth Amendment right to cross-examine a prosecution witness about potential bias from his vulnerable status as a probationer. 415 U.S. at 318. The Commonwealth nonetheless argues that *Davis* is distinguishable because, in that case, the defense was prohibited from challenging the witness's denial of ever having been the subject of a similar law enforcement investigation, which could have suggested that he was a suspect in the crime about which he was testifying. *See* Br. at 30-32. But this additional fact—that the witness could have himself been a suspect in *Davis*—was in no way essential to the *Davis* Court's holding and does not obscure the clarity of the legal rule that it established.

The *Davis* Court granted certiorari to

> consider whether the Confrontation Clause requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness' probationary status as a juvenile delinquent when such an impeachment would conflict with a State's asserted interest in preserving the confidentiality of juvenile adjudications of delinquency.

Id. at 309. The *Davis* Court answered this question in the affirmative, holding that a defendant has a right to ask about such bias from a witness's probationary status because it is "admissible to afford a basis for an inference of undue pressure because of [the witness's] vulnerable status as a probationer." *Id*. at 317-18.

The Court additionally noted the witness in *Davis* also could have been questioned about any concern that he was a suspect. But this was an additional source of potential bias on the facts of that case—not the focus of the Court's opinion or one that must be present in order to trigger the protections of the Confrontation Clause. As the Court explained: "The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer, *as well as* of Green's possible concern that he might be a suspect in the investigation." *Id*. at 317-18 (emphasis added). Nowhere in *Davis* did the Court suggest that it was changing the question presented or holding that a confrontation right applied only when there was a basis to infer *both* that the witness was "under pressure because of [the witness's] vulnerable status as a probationer" and also that the witness was concerned he might be a suspect. *Id*.

The Pennsylvania Supreme Court and the Third Circuit Court of Appeals have both recognized the clarity of *Davis*'s rule that a defendant has a constitutional right to cross-examine a witness (even a juvenile witness) about potential bias from the

witness's probationary status. The Pennsylvania Supreme Court has explained: "In *Davis v. Alaska*, the United States Supreme Court held that 'the confrontation clause requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness' probationary status as a juvenile delinquent.'" *Commonwealth v. Murphy*, 591 A.2d 278, 311 (1991) (quoting *Davis*, 415 U.S. at 309).

Likewise, the Third Circuit has explained in granting habeas relief on ineffective assistance of counsel grounds for failing to impeach a prosecution witness with his parole status: "*Davis* held that the inability to expose a witness's parole status to the jury results in a denial of 'the right of effective cross examination, which would be constitutional error of the first magnitude.'" *Grant v. Lockett*, 709 F.3d 224, 236 (3d Cir. 2013) (quoting *Davis*, 415 U.S. at 318) (additional quotation marks omitted), abrogated in part on other grounds by *Dennis v. Sec'y, Pa. Dep't of Corr*. 864 F.3d 263, 292 (3d Cir. 2016). The Third Circuit in *Grant* further explained that, "even if there is no evidence of any *quid pro quo*," the fact of a witness's parole status provides "a strong reason to lie, and to testify in a manner that would help the prosecutor, in the hopes of getting favorable treatment from the Commonwealth, that establishes the potential bias that would have been extremely compelling impeachment evidence." *Id*.

And, while the Commonwealth also cites a number of decisions from this Court and the Pennsylvania Supreme Court, none of those decisions contradicts (or could contradict) *Davis*'s rule. Indeed, the Commonwealth does not cite a single case involving a witness who was on probation at the time of the witness's trial testimony where relief was denied.

Commonwealth v. Baez, 720 A.2d 711 (Pa. 1998), and *Commonwealth v. Bozyk*, 987 A.2d 753 (Pa. Super. 2009), simply recognize that one source of bias discussed in *Davis* as a proper subject of cross-examination is prior police investigations suggesting the witness may himself be a suspect. *See Baez*, 720 A.2d at 726; *Bozyk*, 987 A.2d at 757. Neither case suggests that this additional source of bias is required to bring a case within the rule of *Davis*. To the contrary, in *Baez*, the Pennsylvania Supreme Court emphasized the importance of a witness's probationary status to the rule in *Davis*: "In *Davis*, the Supreme Court held that cross-examination of a crucial witness had been improperly limited so as to preclude reference to that witness' prior *conviction* and the fact that the witness was presently on *probation*." 720 A.2d at 726 (emphasis in original). In *Baez*, the Court rejected the defendant's argument that he had a right to probe whether the witness was "motivated by his fear of being accused of the murder himself, since he had been accused of similar violent crimes" in the past, because the witness had not been convicted of those crimes and was not on probation. *See id*. at 725-26; *see also id*. at 723 n.15.

In *Commonwealth v. Presbury*, 478 A.2d 21 (Pa. Super. 1984), the witness was not on probation, he was incarcerated for another crime. *See id*. at 24. And the likelihood of bias stemming from a witness's vulnerable probationary status is especially acute. Probation can be revoked relatively easily, whereas the hope of leniency for a witness imprisoned is more speculative. This Court recognized this point in *Commonwealth v. Fulton*, explaining "the witness here, having been sentenced [to two to five years imprisonment] was not as amenable to a 'deal' as was" a witness in another case "who was on juvenile probation." 465 A.2d 650, 655 (1983). And, while the Commonwealth emphasizes that *Presbury* stands for the (uncontroversial) proposition that a witness's record "must be relevant" to be admissible, 478 A.2d at 24, *Davis* recognizes that a witness's probationary status is *always* relevant because "the partiality of a witness . . . is 'always relevant as discrediting the witness and affecting the weight of his testimony.'" *Davis*, 415 U.S. at 316.

Notably, in *Presbury*, this Court did not even cite *Davis* in the portion of its opinion discussing whether trial counsel was ineffective for failing to raise the witness's incarcerated status as probative of a possible deal. *See* 478 A.2d at 24-25. Instead, this Court cited its prior decision in *Commonwealth v. Baston*. *See id*. In *Baston*, like this case but unlike *Presbury*, the witness was on probation, but that fact alone was not dispositive because the trial occurred prior to *Davis*, and therefore

"defense counsel's stewardship of the case is not tested in light of *Davis v. Alaska*." *Commonwealth v. Baston*, 363 A.2d 1178, 1185 (Pa. Super. 1976). But, in *Baston*, the Court made clear that, under *Davis*, the witness's probationary status would clearly be a proper subject of cross-examination. The *Baston* Court explained that, although the "Commonwealth does attempt to distinguish *Davis* . . . we are not persuaded by the Commonwealth's attempt at distinguishing the case." *Id*. at n.18. Indeed, the Commonwealth itself appeared to recognize as much: "Essentially, the Commonwealth concedes that *Davis v. Alaska*, 415 U.S. 308 (1974), would permit questions relating to [the witness]'s juvenile status," i.e., that the witness was on juvenile probation. *Id*.

Finally, in *Presbury*, this Court explained that, rather than exploring any potential deal between the witness and the prosecution, trial counsel used a "reasonable alternative" means to explore bias, attempting "to establish the [witness's] bias by showing the enmity which existed between [the witness] and appellant over a period of time," including that they had been involved in a shooting and a fist fight. *See* 478 A.2d at 25. By contrast, here, trial counsel did not employ any reasonable alternative to establishing the witness's bias; he simply failed to defend Appellant's right to present this key source of bias (the witness's probationary status) because he was unaware of the controlling Supreme Court precedent that required the court to allow him to do so. *See* Tr. 7/27/95 at 59, 164.

The Commonwealth next suggests that Mr. Abu-Jamal seeks to rely on a "new" rule that was not announced until the Pennsylvania Supreme Court's decision in *Commonwealth v. Evans*, 512 A.2d 626 (1986). *See* Commonwealth's Br. at 34. That, again, is incorrect. The issue in *Evans* was entirely different than the issue in this case. *Evans* was another case where the witness was not on probation, and the issue before the Court was the defendant's right under the Pennsylvania Constitution to challenge a witness's self-interest by questioning him about potential favored treatment in other pending cases. *See* 512 A.2d at 628-29. What was "new" about *Evans* was the Court's recognition that even in those circumstances (where the witness was not on probation), the Pennsylvania Constitution provides the defendant with such a right to cross-examine the witness about this potential bias. *See id.* at 632.

Indeed, in *Evans*, the Court explained that it had already recognized—in its 1978 decision in *Commonwealth v. Slaughter*—that, under *Davis v. Alaska*, "'the Sixth Amendment right of confrontation requires that a defendant in a state criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness's probationary status as a juvenile delinquent,'" and that this rule applies even when "'such impeachment would conflict with the state's asserted interest in preserving the confidentiality of juvenile delinquency proceedings.'" *Evans*, 512 A.2d at 631 (quoting

Commonwealth v. Slaughter, 394 A.2d 453, 458-59 (Pa. 1978)). Or, as this Court had stated succinctly in *Evans*: "In *Davis v. Alaska*, 415 U.S. 308 (1974), the Supreme Court held that the Sixth and Fourteenth Amendments confer the right to cross-examine a prosecution witness about his vulnerable status as a probationer." 481 A.2d at 629, *overruled on other grounds* 512 A.2d 626, 630, 632 n.4.

Commonwealth v. Walker, 740 A.2d 180 (Pa. 1999), is yet another case cited by the Commonwealth where the witness was not on parole or probation at the time of the appellant's trial. Instead, the witness was on parole when he first identified the defendant as having robbed him to the police, but he was no longer on parole at the time of trial. *See id*. 181. In seeking to preclude defense counsel from eliciting testimony about the witness's prior parole status, the prosecution emphasized that the witness's parole had expired and thus he "was no longer 'under the influence of the Commonwealth.'" *Id*.

Finally, the Commonwealth attempts to distinguish *Commonwealth v. Murphy*, a case that Mr. Abu-Jamal showed in his opening brief is directly on point here. *Compare* Appellant's Br. at 28-29 *with* Commonwealth's Br. at 38-39. In so doing, the Commonwealth comes up with the novel theory that *Murphy* is distinguishable because the witness in that case did not initially identify the defendant, whereas Mr. Chobert identified Mr. Abu-Jamal when he first spoke to police. *See* Commonwealth's Br. at 38-39. The Commonwealth insists that it "would

have been extremely foolish (especially because he was on probation) for Mr. Chobert to have knowingly misdirected [the police] investigation by providing the officers with false information," and "if anything, [Mr. Chobert's probationary status] would have encouraged him to be truthful in what he reported." Br. at 38.

The Commonwealth does not provide a single citation for these assertions. They are not the law. Nothing in *Davis* or *Murphy* suggests (as the Commonwealth would have it) that the *Davis* rule applies only if the witness did not previously identify the defendant, or that this rule does not apply if the witness identified the defendant when first speaking to the police. On the contrary, in *Murphy* itself, the Pennsylvania Supreme Court explained that a witness's probationary status at the time of a prior statement to the police is a source of potential bias subject to cross-examination even when the witness is *not* still on probation at trial. *See Murphy*, 591 A.2d at 280 n.1.[2] The Commonwealth's suggestion that a witness's probationary status gives them a motive to be especially truthful is inconsistent with the entire premise of *Davis* and its progeny, *viz.*, that a witness on probation has a strong

[2] The Court in *Walker* reaffirmed this principle from *Murphy*. *See* 740 A.2d at 183. The *Walker* Court then held that, under the unusual facts in that case—where the witness was a victim who called attention to the fact that he was operating an illegal speakeasy by reporting the crime against him to the police—there was no risk of bias from the witness's probationary status at the time he reported the crime to the police. *See id.* at 185. And, as discussed, in *Walker* the prosecution emphasized that the witness was no longer on probation and thus "no longer 'under the influence of the Commonwealth'" at the time of trial. *Id.* at 181.

motive to testify in a manner that would favor law enforcement in the hopes of receiving favorable treatment.

Davis v. Alaska is directly applicable to this case.

B. There Is a Reasonable Probability that Counsel's Deficient Performance in Failing to Raise *Davis* Affected the Verdict.

Robert Chobert's credibility was key to the prosecution's case because the only other witness who claimed to see the shooting and shooter was heavily impeached at the trial. *See* Appellant's Br. at 22-23. The Commonwealth boldly asserts that there was no reason to believe that Mr. Chobert would have given a false statement just because he was on probation. *See* Commonwealth Br. at 39. According to the Commonwealth, "the only thing that potentially could have created a problem for him with the authorities would have been falsely identifying defendant as the shooter and thereby misdirecting the police investigation in a matter as important as this." *Id.* This theory is not only inconsistent with *Davis*'s central premise that a witness's "vulnerable status as a probationer" is always relevant because it creates an incentive to falsely implicate a defendant, 415 U.S. at 318, it ignores the context surrounding Mr. Chobert's interactions with the police on the night of the shooting. Mr. Chobert did not provide any account to the police until after he saw that Mr. Abu-Jamal had already been arrested and placed into a police wagon. Tr. 6/19/82 at 211-212. To curry favor with the police and avoid problems, Mr. Chobert had an incentive to confirm that the police had apprehended the right

man as opposed to saying something that would dispute the conclusion arrived at by the numerous police officers at the scene.

The arguments now made by the Commonwealth about why Mr. Chobert's probationary status made him more credible find no support in *Davis* and its progeny. A trial prosecutor could present such arguments to the jury at closing once a witness's probationary status has been disclosed, but it is for "the jury, as sole judge of the credibility of a witness," to resolve them. *Davis,* 415 U.S. at 317. And, in considering such arguments, jurors are "entitled to have the benefit of" information showing the witness may be biased as a result of his vulnerable probationary status, so "that they [can] make an informed judgment as to the weight to place on [the witness's] testimony." *Id*. The right to effective assistance of counsel protects a defendant's right to a fair trial, and a trial is not fair when, as here, the jury is denied significant information that bears on a key prosecution witness's credibility. *See Strickland v. Washington*, 466 U.S. 668, 684-87 (1984); *Murphy*, 591 A.2d at 280.

The Commonwealth also seeks to undermine the importance of Robert Chobert's testimony by listing the other pieces of the prosecution's evidence. However, this blurs the fact that only Mr. Chobert and Ms. White identified Appellant as the shooter, and that Ms. White's testimony was heavily impeached at trial. *See* Appellant's Br. at 23. The two other witnesses from the scene, Mr. Scanlan

and Mr. Magilton,[3] did not corroborate Mr. Chobert or Ms. White's testimony. In his Opening Brief, Appellant sets forth the many ways in which the testimony and prior statements of the four witnesses from the scene conflicted with one another. *See* Appellant's Br. at 22-24. Notably, when Mr. Scanlan and Mr. Magilton each was asked about who else they saw on the street when the officer was shot, neither mentioned Cynthia White or any woman for that matter. Tr. 6/25/82 at 21 (Scanlan); Tr. 6/25/82 95-96 (Magilton). And neither saw Mr. Chobert's taxicab parked where he claimed it was. Tr. 6/19/82 at 228 (Scanlan); T6/25/82 at 85-86 (Magilton).[4] And in its most recent brief, the Commonwealth underscores another significant omission in the eyewitness testimony that casts doubt upon the prosecution's case: although the prosecution's theory of the case was that Officer Faulker shot Mr. Abu-Jamal

[3] The transcripts and files in this case are not consistent with respect to the spelling of Mr. Magilton's last name. *Compare* Appellant's Br. at 23-24 *with* Commonwealth's Br. at 7-8.

[4] The Commonwealth does not deny these inconsistencies, rather it characterizes them as relatively insignificant and "not the types of details that would have necessarily been impressed upon the witnesses' minds." Commonwealth's Br. at 41. But questions of who was present at the scene, and the basic events that transpired—the inconsistencies discussed in Mr. Abu-Jamal's opening brief—are precisely the kinds of details that courts have recognized as matters a jury may find significant to credibility. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 444 (1995) (discussing the importance of such details, and emphasizing that "[t]he evolution over time of a given eyewitness's description can be fatal to its reliability"). The significance of the inconsistencies was a jury question. Appellant had a right to have Mr. Chobert's probationary status factored into the jurors' deliberations.

after Mr. Abu-Jamal shot him "none of the witnesses claimed to know when the officer fired back at defendant." Commonwealth's Br. at 69.

Reaching beyond the eyewitness testimony, the Commonwealth also points to Mr. Abu-Jamal being found at the scene and a statement he allegedly made in the hospital. *See* Commonwealth's Br. at 42. But the court below did not rely on this other evidence in adjudicating Mr. Abu-Jamal's *Davis* claim. *See* 30 Phila. Co. Rptr. 1, 90 (1995). With good reason. Even putting aside the substantial evidence casting doubt upon Mr. Abu-Jamal's alleged hospital statement,[5] none of the other evidence would support a first-degree murder conviction in this case.

Robert Chobert's testimony was therefore important to the prosecution for more than his identification of Appellant as the shooter. Mr. Chobert's account of the shooting had to have been factored in by the jury when deciding between a verdict of first-degree murder or of a lesser offense. While the Commonwealth asserts "[i]t is difficult to understand" this point, Commonwealth's Br. at 42 n.13, doubts about Mr. Chobert's credibility would have created doubt about the details he provided of the shootings as well. And without Mr. Chobert's testimony about how the shooting allegedly occurred, the Commonwealth would have been left with

[5] At the 1995 PCRA hearing, police officer Gary Wakshul testified that he and his partner stood guard over Appellant in the hospital during the time that Appellant was alleged to have confessed. Tr. 8/1/95 at 38. Officer Wakshul admitted that shortly thereafter, he told investigating detectives that Appellant made no comments. *Id.*

only one other witness (the badly impeached Ms. White) to support a first-degree murder conviction.[6]

The Commonwealth notes that defense counsel suggested in his closing argument that jurors not "compromise" their verdict and asked them to either find defendant guilty of first-degree murder or not guilty of anything at all. But, having failed to effectively cross-examine Mr. Chobert because of his ignorance of *Davis*, counsel was not in a position to make a reasonable strategic judgment about what theory to pursue in closing argument. *See Wiggins v. Smith*, 539 U.S. 510, 536 (2003). In any event, what matters is that, after hearing counsel's argument, the jury still asked to be reinstructed on lesser counts of murder and on voluntary manslaughter and clearly considered these lesser counts notwithstanding defense counsel's suggestion because they asked for those instructions to be re-read during their deliberations. Appellant's Br. at 27-28. This point strongly supports a finding of prejudice from counsel's failure to establish Mr. Chobert's bias. *See, e.g., Ard v. Catoe*, 642 S.E.2d 590, 598 (S.C. 2007) (in finding *Strickland* prejudice, noting "that the jury apparently did not believe this to be an open-and-shut case of murder

[6] And, while the prosecutor may have done his best to bolster Ms. White's credibility at closing, *see* Commonwealth's Br. at 41 n.12, the Commonwealth cannot and does not deny that the prosecutor's closing statement makes clear that the prosecutor viewed Mr. Chobert, not Ms. White, as the prosecution's key witness. *See* Appellant's Br. at 23; *Kyles*, 519 U.S. at 444 (recognizing the significance of the prosecution's closing in determining the importance of prosecution witnesses and the impact that doubts about their credibility would have on the prosecution's case).

because after deliberating for an hour, the jury asked for further clarification from the trial court on the definitions of murder and involuntary manslaughter"); *see also Commonwealth v. Mattias*, 63 A.3d 807, 813 (Pa. Super. 2013) (looking to content of note sent by jurors during their deliberations as showing importance of evidence not presented to jury in finding prejudice under *Strickland*). Yet it goes unanswered by the Commonwealth.

In sum, Mr. Chobert's testimony was enormously important to the prosecution's case, and there is a reasonable probability that denying Appellant's right to fully cross examine him affected the verdict. The Supreme Court has stressed that "the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend to others." *Kyles v. Whitley*, 514 U.S. 419, 445 (1995) (citing *United States v. Agurs*, 427 U.S. 97, 112-13 (1976)).[7] When, as here,

[7] In its brief, the Commonwealth addresses other aspects of the Court's analysis in *Kyles*, *see* Commonwealth's Br. at 43 n.14, but has no answer on this key point. In *Kyles*, the testimony of two eyewitnesses who testified that they saw the defendant shoot the victim was unaffected by the *Brady* claim raised by Kyles, and yet the Court still found prejudice applying the same standard as the *Strickland* prejudice standard. *See* Appellant's Br. at 25-26. By contrast, the cases cited by the Commonwealth finding a lack of prejudice are readily distinguishable. *See, e.g.*, *Commonwealth v. Cox*, 728 A.2d 923, 933 (Pa. 1999) (no prejudice from counsel's failure to cross-examine a prosecution witness where the defendant's own confessions to the police "were the most probative evidence of his guilt"); *Commonwealth v. Gentile*, 640 A.2d 1309, 1314 (Pa. Super. 1994) (any error in limiting cross-examination of a witness harmless where the witness's testimony was confirmed by, *inter alia*, the defendant's own statements to the police).

the only other eyewitness supporting essential elements of the prosecution's case was extensively impeached at trial, that principle clearly applies.

III. Yvette Williams's Declaration Showing the Prosecution Suppressed Evidence that Witness Cynthia White Lied at Trial Is not Inadmissible Hearsay.

In his 2003 PCRA Petition, Mr. Abu-Jamal offered newly discovered evidence establishing that the prosecution suppressed evidence that Cynthia White lied at Mr. Abu-Jamal's trial when she claimed she observed him shoot Officer Faulkner. *See* Declaration of Yvette Williams, Exhibit 1 to Petition for Habeas Corpus and PCRA Relief, Dec. 8, 2003 (herein "Williams Declaration") at 2. In a sworn notarized statement, Yvette Williams stated that before the trial, she met Ms. White when they were incarcerated together, and Ms. White told her that the police were causing Ms. White to falsely testify against Mr. Abu-Jamal through a combination of threats and bribery that included paying her a lot of money for sex and supplying illegal drugs and drug paraphernalia to her in jail. *See id*. at 2-3. The Commonwealth argues that Yvette Williams's testimony would be inadmissible hearsay and does not fall within the statement against interest hearsay exception. The Commonwealth is wrong. Contrary to its assertions, the statement was against the penal interests of Ms. White because it exposed her to criminal liability, and it is supported by corroborating circumstances that clearly indicate its trustworthiness. Pa. R. Evid. 804(b)(3).

As the Commonwealth notes, *see* Commonwealth's Br. at 53, the context in which this statement was made is very important. *See Commonwealth v. Brown*, 52 A.3d 1139, 1181 (Pa. 2012). Cynthia White's statement to Yvette Williams was made after Ms. Williams, a stranger, accused Ms. White of lying against Mr. Abu Jamal. She asked Ms. White, why are you "lying on that man?" *See* Appellant's Br. at 35 (quoting declaration). Ms. White then admitted that she had lied in the written statements she gave to the police (there were three) and was going to lie on the witness stand during Appellant's trial. Ms. White gave the following reasons for giving the false statements: (1) The police threatened her life; (2) The police gave her money for tricks; and, (3) The police would arrange to have her sent to state prison for her outstanding cases. *See id*.

The Commonwealth claims that Ms. Williams's declaration does not assert that Ms. White intended to commit perjury, and it suggests that, in any event, planning to commit perjury is not a crime and therefore admitting to this was not a statement against Ms. White's interest. *See* Commonwealth's Br. at 51. But, while Ms. White did not use the term "perjury," Ms. White made clear that is what she intended to do, acknowledging that she was lying against Mr. Abu-Jamal because she was "terrified of what the police would do to her . . . if she didn't testify to what they told her to say." Appellant's Br. at 35 (quoting declaration). Moreover, this is not simply a case where the declarant was in a "frame of mind" to commit a crime

that he did not in fact commit. *Commonwealth v. Pompey*, 375 A.2d 163, 165 (Pa. Super. 1977). Ms. White made clear to Ms. Williams she planned to perjure herself by saying she saw Mr. Abu-Jamal shoot Officer Faulkner, and that is precisely how she testified at trial. Indeed, the Commonwealth Court in *Rackley v. Pennsylvania Board of Probation and Parole*, 881 A.2d 69, 71 (2005), found that a declarant's admission that he merely offered to take pictures of children, when his parole conditions violated contact with minor children, was a statement against that declarant's interest.

Moreover, Ms. White's statement exposed her to criminal liability, if not yet for perjury, then for making unsworn falsifications to authorities and/or making false reports to law enforcement authorities in violation of Pennsylvania Crimes Code Sections 4904 and 4906, respectively. *See Cascardo*, 981 A.2d at 257 (stating that it is not relevant that declarant knows which section of the Crimes Code he has violated, rather what matters is that a reasonable person in the declarant's position would think he was admitting to criminal wrongdoing and would not have made those statements unless believing them to be true).

The Commonwealth also argues that even if Cynthia White were admitting to criminal behavior, she was at the same time denying the criminality by claiming that she was being coerced to lie by the police. Commonwealth's Br. at 52. The Commonwealth asserts that she could have used the defense of justification were

she to be prosecuted, and thus what she said did not actually expose her to criminal liability. However, this is not the case. Ms. White admitted to Ms. Williams that she had lied in her official statements but because of her fears, she obviously never intended to make a public claim of coercion as would have been necessary for any justification defense. Additionally, it was highly unlikely that she would have had knowledge of a justification defense, much less that it could be successful (as described below, it would not have been successful). And, the declarant's state of mind is of primary importance in the statement against interest hearsay exception. *See Brown*, 52 A.3d at 1178.

The justification defense under 18 Pa. C.S.A. § 503 would not fit Ms. White's situation. Section 503's choice of evils defense requires the defendant to reasonably assess the need to break the law. *See id*. According to Pennsylvania case law,

> In order to be entitled to an instruction on justification by necessity as a defense to a crime charged, Appellant must offer evidence to show:
> (1) that (he) was faced with a clear and imminent harm, not one which is debatable or speculative;
> (2) that (he) could reasonably expect that (his) actions would be effective in avoiding this greater harm;
> (3) that there is no legal alternative which will be effective in abating the harm; and
> (4) that the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue.

Commonwealth v. Billings, 793 A.2d 914, 916 (Pa. Super. 2002) (emphasis supplied).

Cynthia White's commission of false reporting offenses is not a reasonable choice of evils because she never attempted to report the threats to anyone higher up in law enforcement or to any government official or lawyer. *See Commonwealth v. Merriwether*, 555 A.2d 906, 911 (Pa. Super. 1989) (holding that, "there was a legal alternative available to appellant as he could have notified the authorities and informed them of these threats. Appellant was, therefore, not entitled to the defense of justification"); *Kissinger v. Commonwealth*, 527 A.2d 618, 620 (Pa. Commw. Ct. 1987).

In addition, Ms. White also claimed that she lied in her police statement because the police patronized her work as a prostitute, paying a very high rate. *See* Appellant's Br. at 35 (quoting declaration). This can hardly be viewed as a reasonable choice of evils.

The Commonwealth next argues that there were insufficient corroborating circumstances to support the trustworthiness of the declarant's statement. This is far from true. First it should be noted that most of the Commonwealth's arguments dispute the reliability of Yvette Williams's claim that purported eyewitness Cynthia White made the out of court statement offered. *See* Commonwealth's Br. at 53-54. While the reliability of Ms. Williams has some relevance, the Commonwealth seems to be confusing that person's reliability with the foremost concern, the trustworthiness of Ms. White, the declarant and her statement. After all, Appellant

was proposing to bring in Ms. Williams to testify at a PCRA hearing where she could have been cross-examined by the Commonwealth. Her claim that Ms. White spoke with her and her recounting of what Ms. White said (but not the truth of what she said) would not be hearsay. She would have testified in court about Ms. White's out of court statement. It is Ms. White's statement that requires corroborating circumstances and for which reliability is important. *See Commonwealth v. Robins*, 812 A.2d 514, 525-26 (Pa. 2002) (providing long list of factors to determine reliability of statement against interest, all of which pertain to the declarant and contents of the statement).

The Commonwealth argues that the hearsay statement in question is not admissible because it was not made to a person of authority or to someone whose interests were adverse to the declarant. See Commonwealth's Br. at 54. As the Commonwealth recognizes, this is a disjunctive test: so long as Ms. Williams was either in a position of authority compared to Ms. White, or had interests adverse to Ms. White's, the statement is sufficiently trustworthy to be admissible. *See id.* (citing *Commonwealth v. Bracero*, 473 A.2d 176, 179 (Pa. Super. 1984), aff'd, 528 A.2d 936 (Pa. 1987)). And, the Commonwealth discounts the fact that Ms. Williams's interests were adverse to the interests of Ms. White. This is because Ms. White gave a statement incriminating Mr. Abu Jamal, and Ms. Williams was confronting her about lying.

This was not a situation in which a declarant was trying to impress or curry favor with a compatriot or someone who committed similar crimes. Ms. White would have no incentive to confess to someone confronting her about lying that she had in fact made false statements about a murder if it were untrue. Under the circumstances, it would have been much more in her interest to deny that she was lying rather than admitting it. *See Chambers v. Mississippi*, 410 U.S. 284, 301 (1973) (approving the introduction of a statement against interest, as required by federal constitutional law, by emphasizing the fact that the declarant "stood to benefit nothing by disclosing his role" in the crime). Ms. Williams also stated that while she was admitting she lied, Cynthia White was crying and shaking. *See* Williams Declaration at 2.

By contrast, in *Commonwealth v. Bracero*, 473 A.2d 176 (Pa. Super. 1984), a case cited by the Commonwealth, the statement was deemed not to be to someone with adverse interests where it was made to a person who was giving the declarant a ride from Pennsylvania to Florida. *Id*. at 180. There was no confrontation between passenger and driver as there was between Yvette Williams and Cynthia White.

The last argument that the Commonwealth makes on this point is that other evidence that corroborates Cynthia White's admission that she did not actually witness the crime being committed, is irrelevant. The Commonwealth cites *Commonwealth v. Cascardo*, 981 A.2d 245, 258 (Pa. Super. 2009), which cites

Robins, 812 A.2d 248, for the principle that corroboration for statements against interest may not be provided by other evidence in the case. *See* Commonwealth's Br. at 56. But this distorts the line of cases leading up to *Cascardo*.

In *Robins*, the Pennsylvania Supreme Court discussed limiting the relevant corroborating circumstances to those attendant to making the statement. But this was only with regard to hearsay statements of an accomplice that implicated a co-conspirator. *See Robins*, 812 A.2d at 525 (citing *Lee v. Illinois*, 476 U.S. 530, 543 (1986)) (stating that, "A demonstration of trustworthiness is of particular importance where the hearsay statement is that of an accomplice implicating his coconspirator; as such statements are viewed with great suspicion and are presumptively unreliable"). In fact, in earlier cases in which the propriety of a declaration against interest hearsay exception was being debated, the Pennsylvania Supreme Court approvingly cited the United States Supreme Court case *Chambers v. Mississippi*, in which the Court looked to a number of pieces of evidence outside of the statement for corroboration. *See Commonwealth v. Nash*, 324 A.2d 344, 346 (Pa. 1974) (citing *Chambers*, 410 U.S at 300).

There is no bar to finding corroboration in other evidence in the case where the out of court declarant is not an accomplice or alleged accomplice. Cynthia White was never considered a suspect in Officer Faulkner's killing, and thus her statement

admitting that she lied about what she saw does not carry the suspicion or the unreliability that attends an accomplice's statement that inculpates a defendant.

The Commonwealth argues that even if it were proper to look at the other evidence at trial to corroborate the statement against interest, that evidence was insufficient. *See* Commonwealth's Br. at 56. The statement in question was Cynthia White admitting that she did not in fact see the crime and was lying in her statements to the police when she said she did. The truthfulness of this statement is corroborated by evidence that she gave inconsistent statements to the police and by evidence that she was not in fact even at the scene. *See* Appellant's Br. at 40. The Commonwealth claims that there was proof that she was not lying in her statements because she made a statement within a short time after the shooting. *See* Commonwealth's Br. at 56. But the Commonwealth fails to mention that she gave three statements to the police, and they were not consistent with one another.[8] In addition, Ms. White's trial testimony was confused and replete with claims that she was unable to recall. *See* Appellant's Br. at 23.

The Commonwealth also claims that Ms. White's trial testimony was corroborated by three other eyewitnesses. However, this is incorrect. Two of the four

[8] Examples of the inconsistencies include contradictory statements about whether: there was an altercation between Officer Faulkner and Mr. Abu-Jamal's brother; how many shots were fired before Officer Faulkner fell; and the relative heights of the Officer, the shooter, and Mr. Abu-Jamal's brother. *See* Tr. 6/21/82 at 159-90.

alleged eyewitnesses testified that they either did not see the shooting (Albert Magilton) or did not see the shooter (Mark Scanlan). *See* Appellant's Br. at 23. Plus, neither Mr. Magilton nor Ms. Scanlan saw Cynthia White at the scene. Tr. 6/25/82 at 21 (Scanlan); Tr. 6/25/82 95-96 (Magilton).

For all of the foregoing reasons, Ms. Williams's testimony as described in her declaration about Ms. White's statement against interest was admissible, and the court should have ordered an evidentiary hearing.

IV. Mr. Abu-Jamal Has Presented New Evidence in Support of His Meritorious *Batson* Claim.

In his opening brief, Mr. Abu-Jamal presented substantial evidence supporting an inference that at least one of the prosecution's strikes of prospective Black jurors was motivated at least in part by racial discrimination in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). Specifically:

- The prosecutor's strike rate for prospective Black jurors was over 70%, while his strike rate for non-Black jurors was only 20%. This highly disparate strike rate was more extreme than the Pennsylvania Supreme Court understood it to be when it adjudicated Mr. Abu Jamal's direct appeal, and it would occur by chance far less than 1% of the time. *See* Appellant's Br. at 49-50.
- This case involves a Black defendant and a white victim, where the risk of racial discrimination in peremptory strikes is especially pronounced. *Id*. at 50-51.

- The prosecutor's own statement at trial indicated the prosecutor relied on the "forbidden stereotype," *Powers v. Ohio*, 499 U.S. 400, 416 (1991), that Black jurors would be more likely to favor Mr. Abu-Jamal and not be "fair minded" to the prosecution. *See* Appellant's Br. at 51-52.
- A side-by-side comparison demonstrates that the reasons presented by the Commonwealth on direct appeal as justifying the prosecutor's strikes appeared pretextual because the prosecution accepted non-Black jurors who shared the same characteristics. *See id.* at 52-53. This inference was further supported by the Commonwealth's mischaracterization of Black panelists' testimony in its direct appeal brief. *See id*. at 53.
- Contemporaneous evidence establishes that the Philadelphia District Attorney's Office had a longstanding practice of excluding prospective Black jurors at the time of Appellant's 1982 trial. *See id*. at 53.

In sum, in his opening brief, Mr. Abu-Jamal presented multiple categories of evidence probative of discrimination in support of his *Batson* claim. *See, e.g.*, *Miller-El v. Dretke*, 545 U.S. 231, 240-65 (2005) (granting relief based on similar categories of evidence even under the heightened AEDPA standard). The Commonwealth disputes none of them.

Instead, the Commonwealth seeks to avoid review of this claim, contending it is waived because it was adjudicated on the merits on direct appeal.

Commonwealth's Br. at 78-79. But the Pennsylvania Supreme Court has held in no uncertain terms that "[a]n issue is not previously litigated," within the meaning of 42 Pa. C.S.A. § 9544(a)(2), "when it does not rely solely upon previously litigated evidence." *Commonwealth v. Chmiel*, 173 A.3d 617, 627 (2017) (citing *Commonwealth v. Miller*, 746 A.2d 592, 602 nn.9 & 10 (Pa. 2000)). In other words, while a PCRA applicant cannot relitigate a claim simply by presenting a new theory, *see* Commonwealth Br. 79, presenting new *facts* is different because those new facts mean the claim was not previously litigated. *See Chmiel*, 173 A.3d at 627. Here, Mr. Abu-Jamal's claim was not previously litigated because "it does not rely solely upon previously litigated evidence." *Id*. Instead, he presented new evidence in PCRA proceedings demonstrating the severity of the prosecution's strike pattern.

The Commonwealth appears to recognize that 42 Pa. C.S.A. §§ 9543 and 9544 do not prohibit consideration of a claim in PCRA proceedings when that claim is supported by new evidence. *See* Commonwealth's Br. at 79. But the Commonwealth suggests the new evidence at issue here should not be considered because "the reason why this 'new evidence' was not a part of the record at the time the claim was considered on direct appeal was because defendant did not raise the claim at trial." *Id*. at 79-80. As Mr. Abu-Jamal explained in his opening brief, the lack of such record on direct appeal resulted from ineffective assistance of counsel: trial counsel intended to raise the prosecutor's discrimination in jury selection, which he

recognized as consistent with the district attorney's office custom, and he knew he needed "to have the race of the prospective juror[s] on the record" for an appellate court to review the issue. Appellant's Br. at 56-57; Tr. 7/31/95 at 101. His inattention in failing to raise the issue is classic ineffective assistance of counsel. *See* Appellant's Br. at 57 (citing *Wiggins*, 539 U.S. at 526). And while trial counsel could not have raised a *Batson* claim because the trial occurred before *Batson*, *see* Commonwealth's Br. at 77, counsel could have raised an objection under *Swain v. Alabama*. *See* Appellant's Br. at 56-57.

In any event, the Commonwealth has waived any objection to this Court's considering Mr. Abu-Jamal's *Batson* claim based on the new evidence presented in these PCRA proceedings. As the Commonwealth concedes in its brief, the PCRA court specifically noted that "at the PCRA hearing, the Commonwealth withdrew any objection to defendant presenting evidence on" Mr. Abu-Jamal's *Batson* claim. 30 Phila. Co. Rptr. 1, 102; *see* Commonwealth Br. at 76. After noting this point, the PCRA court proceeded to address the merits of Mr. Abu-Jamal's claim. *See* 30 Phila. Co. Rptr. 1, 102-03. By withdrawing its objection to Mr. Abu-Jamal's presentation of new evidence in support of his *Batson* claim in the PCRA court, the Commonwealth waived any argument that he is foreclosed from litigating the claim in this Court. *See, e.g.*, *Commonwealth v. Brown*, 178 A.3d 1290, 1291 (Pa. 2018) (Dougherty, J., concurring in the dismissal of an appeal by the Commonwealth as

improvidently granted) (quoting Pa. R. A. P. 302(a), which states that "'[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal," and citing *Commonwealth v. Smith*, 131 A.3d 467, 474 (Pa. 2015), for the proposition that "failure to object in lower court results in waiver"). In the PCRA proceedings here, the Commonwealth did not simply fail to raise this objection, but affirmatively abandoned any such objection.

The Commonwealth next argues that the new evidence presented by Mr. Abu-Jamal would have had no impact on the Pennsylvania Supreme Court's direct appeal ruling because, according to the Commonwealth, "in considering this claim the Supreme Court, quite properly, did not focus on the particular number of African Americans the prosecutor removed from the jury." Commonwealth's Br. at 80. That is not correct. In concluding that there was insufficient evidence of discrimination to support Mr. Abu-Jamal's *Batson* claim, the Pennsylvania Supreme Court specifically emphasized that it found "no 'pattern' in the use of peremptories," based on the (false) premise that "eight of the[fifteen] venirepersons" struck by the Commonwealth "were black." *Commonwealth v. Abu-Jamal*, 555 A.2d 846, 850 (1989). And, while the Commonwealth points to other statements the Pennsylvania Supreme Court made in rejecting Mr. Abu-Jamal's *Batson* claim, *see* Commonwealth's Br. at 81, the Pennsylvania Supreme Court did not say those additional points were independent or alternative reasons that would have caused it

to deny relief even if Mr. Abu-Jamal had presented a "'pattern' in the use of peremptories.'" *Abu-Jamal*, 555 A.2d at 850. Because new evidence shows that there was such a pattern, this claim was not previously adjudicated and is properly considered in these PCRA proceedings.

The Commonwealth cites *Commonwealth v. Dennis*, 859 A.2d 1270 (Pa. 2004), but for the same reason, it is inapposite. In *Dennis*, the new evidence addressed only an evidentiary defect the Court had identified on direct appeal but had no impact on the Court's alternative holding that there was no evidence the prosecutor had been motivated by discrimination. *Id*. at 1280. Notably, in *Dennis*, the missing evidence concerned members of the venire *not* struck by the prosecution, and thus had no impact on the strike pattern that was already known to the Court. *See id*. at 1279-80.[9]

[9] In footnotes, the Commonwealth contends that the record is not complete on Mr. Abu-Jamal's *Batson* claim. *See* Br. at 77-78 n.24 (discussing federal habeas opinions) and 82 n.25. The Commonwealth is wrong. As the cases cited by the Commonwealth make clear, *see id*. at 82 n.25, to make a "full and complete record," for a *Batson* claim under Pennsylvania law, the movant must identify "the race of venirepersons stricken by the Commonwealth, the race of prospective jurors acceptable to the Commonwealth but stricken by the defense, and the racial composition of the final jury." *Commonwealth v. Fletcher*, 861 A.2d 898, 909-10 (Pa. 2004) (citation, footnote, and internal quotation marks omitted). Mr. Abu-Jamal has identified all of that information here: the Commonwealth used 10 of its 15 peremptory strikes against Black jurors; one of the four Black jurors acceptable to the Commonwealth was stuck by the defense; and there were initially three seated Black jurors, one of whom was excused after violating the Court's sequestration order. *See* Appellant's Br. at 8-9 & nn. 1-2; 49 & n.5.

On the merits, the Commonwealth contends that Mr. Abu-Jamal must do more than establish a *prima facie* case of discrimination, and that he must "'establish[] actual, purposeful discrimination by a preponderance of the evidence.'" Commonwealth's Br. at 83 (quoting *Commonwealth v. Hutchinson*, 25 A.3d 277, 287 (Pa. 2011)). This was not the standard when Mr. Abu-Jamal litigated his first PCRA petition, and the PCRA court expressly analyzed the issue based on whether Mr. Abu-Jamal had established a *prima facie* case. 30 Phila. Co. 1, 101-03. It is also not the standard that would have been applied at the time of his direct appeal of that petition in 1998. It was not until 2004 that the Pennsylvania Supreme Court endorsed this approach, which it described as an "emerging view." *Commonwealth v. Uderra*, 862 A.2d 74, 86 (Pa. 2004). But, assuming *arguendo* that it is the applicable standard, the compelling evidence Mr. Abu-Jamal has presented establishes such intentional discrimination by a preponderance of the evidence.

As described above, Mr. Abu-Jamal presents multiple categories of evidence that support an inference of intentional discrimination, none of which are disputed by the Commonwealth. The Commonwealth asserts that statistics alone are insufficient to prove a *Batson* violation, and it points to other cases with disparate strike patterns where courts did not find a *Batson* violation. *See* Commonwealth's

Br. at 81-82, 84.[10] But, the Commonwealth ignores that this case is not simply about statistics: it is a combination of a substantially disparate strike pattern with other categories of evidence that support an inference of discrimination. None of the cases cited by the Commonwealth involves a similar combination of evidence.

And the United States Supreme Court has repeatedly found *Batson* violations based on the kind of evidence presented in this case, even under more demanding standards of review. *See, e.g.*, *Miller-El*, 545 U.S. at 240-65 (finding *Batson* violation, even under AEDPA's deferential standard of review, where the prosecutor's racially disparate strike pattern was unlikely to be explained by chance; side-by-side comparisons suggested the prosecutor offered pretextual justifications for striking Black jurors; the prosecution's conduct in jury selection indicated decisions based on race; and the prosecution's office had previously had a policy of excluding Black jurors); *Snyder v. Louisiana*, 552 U.S. 472, 480-84 (2008) (finding *Batson* violation because the prosecutor's stated reason for striking one prospective

[10] Even focusing solely on the strike patterns, the Commonwealth's cases are distinguishable. *See, e.g.*, *Commonwealth v. Blakeney*, 108 A.3d 739, 769 (Pa. 2014) (prosecution only exercised five peremptory strikes, three of which were against white members of the venire); *Commonwealth v. Reid*, 99 A.3d 427, 459-60 (Pa. 2014) (key evidence about the prosecutor's strike pattern was missing, but the record showed that the prosecutor accepted six Black jurors); *Commonwealth v. Simpson*, 66 A.3d 253, 262-63 (Pa. 2013) (prosecution accepted six Black jurors, who served on the jury); *Commonwealth v. Williams*, 863 A.2d 505, 515 (Pa. 2004) (incomplete record, but prosecution accepted at least five Black jurors, who served on the jury).

Black juror appeared suspicious given the juror's actual testimony on the subject, and a side-by-side comparison suggested the reason was pretextual).

And, while it criticizes Mr. Abu-Jamal for not calling the trial prosecutor to testify, *see* Commonwealth's Br. at 84-85, the Commonwealth also chose not to call the trial prosecutor to testify. In sum, Mr. Abu-Jamal has presented powerful evidence of discrimination, which the Commonwealth has not rebutted.

Indeed, in its direct appeal brief, the Commonwealth chose to present an affidavit from the trial prosecutor addressing only the number of Black jurors he selected (four), but not addressing the reasons he struck ten Black jurors. *See* Appellant's Opening Br. Exhibit D (last page of exhibit). By contrast, the Commonwealth chose to proffer purported race-neutral reasons based on the "cold record" from trial. *See* Supplemental Exhibit B.[11] The parties, and the courts, may properly rely on these representations by the Commonwealth in its direct appeal brief as setting forth the Commonwealth's justifications for the prosecutor's strikes. *See generally Commonwealth v. Fulton*, 179 A.3d 475, 487 (Pa. 2018) (ruling that the Commonwealth was estopped from changing its position on direct appeal in a criminal case where the Commonwealth had previously taken a different position in the trial court, and explaining that "'[a]s a general rule, a party to an action is

[11] The exhibits attached to Appellant's opening brief inadvertently included an incorrect page in the excerpts from the Commonwealth's direct appeal brief. The error has been corrected in Supplemental Exhibit B attached hereto.

estopped from assuming a position inconsistent with his or her assertion in a previous action, if his or her contention was successfully maintained.'") (citation omitted). And, as discussed, those justifications cannot withstand scrutiny because side-by-side comparisons show the purported race-neutral reasons applied equally to non-Black jurors whom the prosecutor did not strike, and because the Commonwealth's direct appeal brief mischaracterized some of the testimony by Black jurors.

The Supreme Court has stressed that "'[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" *Snyder*, 552 U.S. at 478 (citation omitted); *accord Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019). The multiple categories of evidence described above, none of which have been rebutted by the state, demonstrate by a preponderance of the evidence that at least one of the prosecution's strikes of prospective Black jurors at Mr. Abu Jamal's trial was motivated, at least in part, by race.

V. Conclusion

This Court should reverse the Court of Common Pleas' denial of relief on the claims discussed herein raised in Mr. Abu-Jamal's first and third PCRA petitions and remand with instructions to grant a new trial.

Respectfully submitted,

/s/ Judith L. Ritter

JUDITH L. RITTER
Pennsylvania Attorney ID# 73429
Widener University-Delaware
Law School
4601 Concord Pike
Wilmington, Delaware 19801
Telephone: (302) 477-2121
Facsimile: (302) 477-2227
E-mail: JLRitter@widener.edu

/s/ *Samuel Spital*

SAMUEL SPITAL
Admitted Pro Hoc Vice
NAACP Legal Defense &
Educational Fund, Inc.
40 Rector Street, 5th floor
New York, New York 10006
Telephone: (212) 965-2200
E-mail: sspital@naacpldf.org

Counsel for Mumia Abu-Jamal

Supplemental Exhibit A

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	CP-51-CR-0113571-1982
	:	CP-51-CR-0222581-1984
WESLEY COOK and	:	
ROBERT S. WHARTON	:	

COURTROOM 1108, STOUT CENTER FOR CRIMINAL JUSTICE

PHILADELPHIA, PENNSYLVANIA

MONDAY, APRIL 30, 2018

BEFORE: THE HONORABLE LEON W. TUCKER, J.

PCRA

LUDYN MENA
OFFICIAL COURT REPORTER

APPEARANCES:

TRACEY KAVANAGH, ESQUIRE
Assistant District Attorney
Counsel for Commonwealth

NANCY WINKELMAN, ESQUIRE
Assistant District Attorney
Co-Counsel for Commonwealth

JUDITH L. RITTER, ESQUIRE
Counsel for Defendant Cook

SAMUEL SPITAL, ESQUIRE
Co-Counsel for Defendant Cook

SEAN NOLAN, ESQUIRE
Counsel for Defendant Wharton

INDEX

COMMONWEALTH'S EVIDENCE

EXHIBITS

DEFENDANT'S EVIDENCE

WITNESS	DR.	CR.	RDR.	RCR.
(No witnesses presented.)				

EXHIBITS

NO.	DESCRIPTION	FOR IDENT.	IN EVD.
(No exhibits presented.)			

P-R-O-C-E-E-D-I-N-G-S

THE COURT: Good morning.

MS. KAVANAGH: Tracey Kavanagh for the Commonwealth.

Ms. Nancy Winkelman.

MR. SPITAL: Good morning, Your Honor. Samuel Spital and Ms. Ritter for Mr. Abu-Jamal.

THE COURT: Why don't you spell your last name.

MR. SPITAL: Spital, S-P-I-T-A-L.

THE COURT: This is a Post Conviction

Relief Act. Now, it's my understanding that the Commonwealth, over the weekend, filed certain documents.

MS. KAVANAGH: Yes, Your Honor.

As Your Honor is aware, on February 26th, 2018, Your Honor gave us a continuance to allow us to search for the missing Castille memo, and any evidence of personal involvement by Mr. Castille in the case of Commonwealth v. Abu-Jamal and in Commonwealth v. Wharton.

On Friday I filed in Commonwealth v. Abu-Jamal the results of our search as well as the Commonwealth's position. And on Saturday I filed a corrected copy in Commonwealth v. Wharton. That, too, includes the Commonwealth's search results and the Commonwealth's position.

In the filings, Your Honor, there's a verification from our paralegal who spent 61 days searching for the missing Castille memo and evidence of Ron Castille's personal involvement. He searched through 72 cases, 433 boxes on the list. He also searched through 48 boxes in the Wharton case and in the Abu-Jamal case. He went to other units and spoke with the leaders of those units. He reviewed files in those units. He checked digital files. He went through the DA archives. He even took a trip to

Harrisburg.

Despite all those efforts, he did not find the missing memo, nor did he find any evidence of any personal involvement by Ronald Castille in these cases. He did find two memos, Your Honor, which I've attached.

One is a draft, an earlier draft -- what appears to be an earlier draft of Ron Castille's letter to the governor. He also found a memo that we believe was related, in the sense that it was a memo with being related to Beasely. We've attached them. And I point out, Your Honor, that neither of those memos or the draft letter mentions Abu-Jamal or the defendant Wharton. And it's the Commonwealth's position, Your Honor, that although Castille was the DA while the direct appeals were pending in Commonwealth v. Abu-Jamal and Commonwealth v. Wharton, and that Castille then sat as a justice or chief justice over subsequent appeals, it's our position that after our massive search that he did not have the requisite significant personal involvement in a critical decision that would give rise to a substantive due process violation as set forth in the Williams decision.

MR. NOLAN: Your Honor, if I may, I'm here on behalf of Mr. Wharton. She's also addressing Mr. Wharton's case.

Sean Nolan, Federal Defender Office.

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Good morning.

THE COURT: Why don't you pull up a seat.

So you heard everything that was said that relates to Mr. Wharton; is that correct?

MR. NOLAN: Yes.

THE COURT: Any objection to these being combined together?

MR. NOLAN: No, sir.

THE COURT: All right. Any response on behalf of Mr. Cook?

MR. SPITAL: Yes, Your Honor.

Your Honor, Ms. Ritter is going to speak further to the remaining discovery issues from the defense's perspective, but I'd like to start by summarizing from the defense's perspective and where we are.

As Your Honor knows, the touchstone at this point under the Williams decision is whether Mr. Castille, when he was a DA, had significant personal involvement in Mr. Abu-Jamal's case, such that he should have been recused when he was on the Pennsylvania Supreme Court here in the prior

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PCRA appeals.

And well before the Williams decision, Mr. Abu-Jamal had raised this issue and had

sought Mr. Castille's and Judge Castille's recusal. And in the 1998 opinion, then, Justice Castille had denied the motion and said that, essentially, given how many cases are handled by the Philadelphia District Attorney's Office, it would be virtually impossible for him to be focused on any individual case. And he said, specifically, that he had no personal connection with this matter.

But we now know from the evidence that has already come to light in this proceeding that those statements were not accurate. We know that when he was the district attorney, Mr. Castille did have a significant personal involvement in capital cases, including capital case appeals. And in particular, that he was very interested in cases where the victim was a police officer.

We know this from the March 1990 memo that Gaele Barthold wrote to then District Attorney Castille, which this Court

highlighted in its review, its en camera review. And the memo shows that Justice Castille, when he was the district attorney, was tracking Philadelphia capital cases in order to identify those cases that, in his view, were ready for execution, and he was seeking to accelerate execution dates in those cases.

Unfortunately, as we've been talking about, the Commonwealth has lost the document, or is unable to find the document that Mr. Castille actually wrote to Ms. Barthold with that request.

But we know from what Ms. Barthold wrote, that Mr. Castille was tracking all the capital cases in Philadelphia on appeal, including Mr. Abu-Jamal's case. We also know, from both this March 1990 document and from a subsequent letter in June of 1990, that when he was DA, Mr. Castille sent to the governor that there had been this policy decision made, that there would be an effort to accelerate vigorously the execution date settings in any case, that in the DA's view, was ready for an execution date.

And most importantly, perhaps, we know from these documents that Mr. Castille wanted to send -- and these are his words, "A clear and dramatic message to -- again his words -- "all police killers, that the death penalty actually means something."

THE COURT: These words that you're referring to, when and where are you quoting from?

MR. SPITAL: This is the June 15, 1990 letter that Mr. Castille wrote when he was the DA to Governor Casey. It was attached in the October 3rd letter that you actually

wrote to us. It had been previously sent to you by the prior administration as part of this case, and you flagged that it had not actually been sent to defense counsel. So it's part of that filing.

THE COURT: Very well.

MR. SPITAL: And what's very significant also about what the documents that the Commonwealth produced just on Friday was that there's an earlier draft of that letter, a June 1st draft, from Ms. Barthold to Mr. Castille. And in that

earlier draft there's no reference to police killers or anything like that. So that's information that's sort of a policy decision that Mr. Castille added to the final document that was sent to Governor Casey, but that was not part of Ms. Barthold's original draft.

The other point I want to make about the documents that Commonwealth just produced, for the first time to us on Friday, is that you can see that Mr. Castille had a particular interest in actually tracking specifically legal arguments that were being made in these kinds of cases. In the Leslie Beasely case, Ms. Barthold went so far as to raise for then DA Castille a specific exhaustion argument that she was talking with him about

making. And this, again, is completely contrary to the characterization that he presented in his 1998 opinion where he was suggesting, essentially, he was hands off. He was not in any way tracking these cases.

So then the remaining issue that I want to talk about, before Ms. Ritter talks about

the next steps from our perspective for discovery, is the consequences of the fact that there is this missing memo, this memo that Mr. Castille wrote to Ms. Barthold before her memo, that you had ordered the Commonwealth to produce, but they've been unable to locate.

And I think it's important to underscore that the Commonwealth itself has repeatedly recognized that this memo, from their own perspective, is essential. They were unable to determine what their position would be on this Williams issue before finding the memo. As we've been talking about, they hired and assigned a paralegal to look for it full time for two months. So from their own perspective, this was a very important memo.

The consequences of the fact that that memo is now unfindable is that there is an adverse inference that must be drawn against the Commonwealth; that the content of the memo would support of Mr. Abu-Jamal's

position in this case. That sort of formed book law of the state going back to cases

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like Willis v. Hardcastle, 19 Pa. Super. 525, that where evidence that would properly be part of a case is within control of the party whose interest it would naturally be to produce it, and, without satisfactory explanation that the evidence is not produced; that there is an adverse inference that can be drawn that the evidence it produced would be unfavorable.

So while we intend to go forward with additional discovery, as Ms. Ritter will discuss, and then to amend our petition, as the Court has suggested previously, we want to begin by making very clear that we believe the record in this case, combined with its adverse inference, clearly establishes that Mr. Abu-Jamal is entitled to a new appeal before an unbias Pennsylvania Appellate Court.

THE COURT: When you say "new appeal," you're simply -- not simply, but what you're really saying is argument, not briefs and all that, of course; is that correct?

MR. SPITAL: That's correct.

THE COURT: Okay.

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MR. SPITAL: Thank you.

MS. KAVANAGH: May I respond?

THE COURT: Yes.

MS. KAVANAGH: Your Honor, one thing missing from the defense argument is in Terrence Williams, not only did Ron Castille's personal involvement, in a personal significant involvement in a critical decision, and the critical decision was authorizing the death penalty. Here, Ron Castille was merely tracking cases for the purpose of Commonwealth, the Blystone decision. And tracking cases is not significant personal involvement.

Moreover, Your Honor, on the letter that the defense refers to, where they say that Ron Castille wrote to the governor and talked about police killers and sending a message, Mr. Abu-Jamal's name was not on that list, neither was Mr. Wharton's.

So from the missing memo we've done our exhaustive search. We are comfortable taking a position, that even in spite of this missing memo, that there was no significant personal involvement by DA

Castille.

And Your Honor, you can't draw an adverse inference for the lost memo, unless there's a finding of fact made. And we submit, Your Honor, that there is no evidence here for any finding of bad faith.

And that if Your Honor looks at the totality of circumstances, these memos from Ms. Barthold, and between Ms. Barthold and DA Castille, that DA Castille was merely asking for a list of cases in light of the Blystone decision that upheld the constitutionality of the death penalty.

If somebody on that list was ready for the direct appeal to have been finished, then their name would go on a letter to the governor urging him to sign a death warrant. However, neither the name of Abu-Jamal or Wharton were on this list. Hence, there was no critical decision made by Ron Castille in this case.

And that's all I have to respond at this time.

THE COURT: So where is the personal significant involvement by Mr. Castille in

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Mr. Cook's case?

MR. SPITAL: In several respects, Your Honor.

So the reason why Mr. Abu-Jamal's name was not on the list, that we've been discussing, was because his case was still pending on direct appeal at the time of that February 1990, March 1990 document. It's very clear. And, again, part of the problem, of course, is that we're missing the memo that Mr. Castille actually sent.

I want to address the adverse inference in a minute.

But it's very clear that Mr. Castille had made a policy decision that would apply to all cases, that he would accelerate the execution as quickly as he could. And by doing an analysis and determining -- well, this case is not technically ready for the setting of the execution date because the case is still pending on direct appeal, that is still personal involvement with significant position in the case.

We also know that when he was the district attorney, Mr. Castille oversaw the

Commonwealth's response to Mr. Abu-Jamal's direct appeal. And, again, Mr. Castille's decision all along has been --

THE COURT: What are you basing that on?

MR. SPITAL: He was the district attorney the entire time. He was the district attorney from 1986 through 1991; which is the entire time when the direct appeal was pending. He signed all the direct appeal briefs for the Commonwealth. But he has taken the position -- the Commonwealth has previously taken the position that that doesn't matter. And even though he signed those briefs, he had nothing to do with any of the arguments in

the case.

THE COURT: Well, it's kind of indicated that there are thousands of cases. Again, that's why the Supreme Court decision mandates that there be a personal significant involvement, as opposed to a stamp or anything else, for that matter.

So that's the crux here, and that's what I want you to address.

MR. SPITAL: Absolutely, Your Honor.

But what we know now, that's what we didn't know before, that's when Mr. Castille denied that motion back in 1998. Then, Justice Castille denied the motion. His premise was I was too busy to focus on the individual specific events of any case. We now know that with respect to capital cases, and particularly with respect to cases where a police officer was a victim, actually, Mr. Castille was highly involved in the details of those cases. So that is a personal involvement that was unknown before.

THE COURT: I guess what I'm trying to get you to do is reduce all of it to its lowest terms.

You say "we know that he had." What is it that you know that you can share with this Court?

MR. SPITAL: We know that Mr. Castille,

then DA Castille, had made a policy decision to accelerate the execution date in all Philadelphia capital cases. We know that he wanted to send a direct message to, again,

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in his words, all police killers. The fact that the only documentary evidence refers to the Leslie Beasely case, specifically, because Mr. Abu-Jamal's case was not yet ready, does not undermine the inference, which from our perspective, is overwhelming that this was a policy decision that applied to all capital cases, particularly cases that involve police killings.

And the other point that I'd like to make about the adverse inference is that it is not correct that the Court can only draw an adverse inference because there are bad dates. Bad dates is one relevant factor in terms of the severity of the sanctions. And the kind of sanction we're talking about here is not a dismissal of a case, or anything like that. Adverse inference is a very, sort of standard inference that is drawn when there is such significant evidence that is unavailable to the other side as a result of exfoliation, essentially. So without this memo we can't know specifically what Mr. Castille said about Mr. Abu-Jamal's case, but we do know

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that he was very interested in all of these cases. That he, in clear inference from Gaele Barthold's memo, had specifically asked about all the cases, including Mr. Abu-Jamal's case.

So in comparison to the Williams case, if anything, here, actually, Mr. Castille, when he was the DA, had a more significant involvement. In the Williams' case, he had sort of stamped-approved to proceed with death penalty in response to a memo from his line prosecutor.

THE COURT: No; there was an actual signature on that.

MR. SPITAL: He had --

THE COURT: A personal signature.

MR. SPITAL: Yes. I'm sorry. He written-approved to proceed with the death penalty. He received the information and approved the line prosecutor and proceeded with the death penalty.

But in this case --

THE COURT: Well, let me just stop you for a second.

So what's the equivalent of that in

this case?

MR. SPITAL: Well, I think there will be several, if not more. First is the missing memo, which while we don't know exactly what it says, but we do know that it

says -- it's a memo from Mr. Castille to Ms. Barthold saying, I need a status update on all these Philadelphia cases, which I will then use -- I think the fair inference is to accelerate the setting of execution dates.

THE COURT: But we don't know that Mr. Cook's name was on there.

MR. SPITAL: Well, I think the inference that Mr. Cook's was one of those was overwhelming because what Ms. Barthold told us in her memo is she provides the status update on all of the cases, including Mr. Abu-Jamal's, so that his case is part of that list.

But what we don't have is the memo from Mr. Castille to Ms. Barthold. But she says, in response to your memo, here is the status update in all these cases, and she includes Mr. Abu-Jamal's in that list.

THE COURT: Okay. Proceed.

MR. SPITAL: So what we have here is clear evidence that when he was a district attorney, Mr. Castille was actively looking at the capital cases that were on appeal and making active decisions to identify those cases that were ready for execution dates, and then to accelerate those processes.

And what we also have, that's even stronger than Williams case, is this

statement that he wants to send a clear and dramatic message to, again, all police killers that the death penalty actually means something.

And the final point I'd like to make about the Williams case is that the analysis in Williams comes from a broader principle where the Court says that its precedence set forth an objective standard that requires recusal when the likelihood of bias on the part of the judge is too high to be constitutionally tolerable. Obviously, every case is going to have different facts. But from the defense perspective, it is clear that standard is met, when as here, at

the time that he was district attorney, Mr. Castille was saying I want to send a clear and direct message to all police killers that the death penalty means something by accelerating execution dates in their case.

And then for that same individual to be acting as a judge, it implicates all the same concerns about unconstitutional bias, about the fact that the judge could be psychologically wedded to his prior position, about the fact that he had a personal impression of the case from the time of the district attorney that, in the eyes of a reasonable observer, would mean

that he should not be sitting on the supposedly impartial tribunal that would then hear the subsequent case.

MS. KAVANAGH: May I respond, Your Honor?

THE COURT: You may.

MS. KAVANAGH: Even if you assume that DA Castille wanted to seek the death penalty in all cases; including police killings, that still wouldn't be enough. If you read

the Williams decision, they talk about significant personal involvement in a critical decision. Here, Castille didn't sign the death penalty, like in Terrence Williams. He didn't even sign the briefs that went on direct appeal. And I point out, too, Your Honor, that in Terrence Williams, that was one of the arguments, that Ron Castille's name was on the brief, and that didn't even make it into the Terrence Williams decision. Obviously, the Court didn't find it significant.

Your Honor, if you look at the totality of circumstances, underlying this missing memo, it's clear that all Ron Castille is asking for was for an update to send to the governor on the status of cases that an execution warrant could be signed. If you assume the worst of what's in that memo, you still are left with the fact that there was

no critical decision made here because the defendant was not on the letter written to the governor. That's the bottom line. That letter, if that's the critical decision that the defense is positing, the defendant,

neither of these defendants were on that letter, and so there was no critical decision, and they don't get relief under Terrence Williams.

THE COURT: Counsel, do you want to jump in at this point?

MR. NOLAN: Yes. I don't have much to add, Your Honor. I'm not going to repeat the arguments that were made, but we rely on the same principles made. And I've argued these cases to Your Honor before, so I won't repeat myself.

But with respect to Mr. Wharton's case, specifically, our argument, as you've seen in our pleadings, is that Ron Castille's name was on the brief. He was the DA at the time of Mr. Wharton's direct appeal.

And then what happened is that -- so that's, basically, our argument as well.

And then what happened is that Mr. Wharton got a new penalty phase granted on that direct appeal. So our position is that Ron Castille was the district attorney opposing that at the time, and then his office lost that case, and then Mr. Wharton

went back for resentencing, got death, again.

By that time Ron Castille was on the PA Supreme Court. He sat on that second direct appeal after the second death sentence, and then he authored the opinion in the PCRA appeal. And in that opinion what's important about that is that some of the issues that were raised on the initial direct appeal were, again, raised in post conviction. And Justice Castille wrote the opinion denying those claims that were similar to the ones that were raised at the time he was the DA who was fighting against Mr. Wharton's appeal.

So that's just some of the specifics of that case that makes it a little different.

THE COURT: But walk me back through, though, the personal significant involvement as district attorney that Mr. Castille, from your position, had.

MR. NOLAN: Our position is that he was the DA. His name was on the brief that was argued in the Pennsylvania Supreme Court at the time of the direct appeal.

THE COURT: Within the Supreme Court, the United States Supreme Court would discount that and say that that really was

not personal significant involvement.

MR. NOLAN: They were silent on that issue on the Williams decision. They did not say that that was not involved. Williams, which was our case, was stronger admittedly than Mr. Wharton's case because of that memo. I get that. But the opinion in Terrence Williams did not discount that. It just didn't address it. It was silent on that issue.

THE COURT: I guess I was kind of assuming that was the discounting, where they don't mention anything.

MR. NOLAN: Understood. Understood.

Our position is that that is direct involvement by Justice Castile. That's strong enough to comport with Williams; the fact that he was the DA and his name was on the brief.

THE COURT: Do you want to address that, Ms. Kavanagh, just those arguments Mr. Wharton's counsel made?

MS. KAVANAGH: Yes, I would just reiterate what I said. The fact that he sat on the second direct appeal is of no moment because there was no significant personal involvement in a critical decision.

Wharton, the fact that his name was on the briefs, as we said, wasn't even mentioned by the Terrence Williams court.

They found that they didn't mention it. They discounted it. They didn't find it significant.

Wharton's name was not on the letter that was, ultimately, sent to the governor. So there was no critical decision. Without substantial personal involvement in a critical decision they're not entitled to relief.

THE COURT: Who's next?

MR. SPITAL: So a couple of points, Your Honor.

First of all, in the Williams case, I think it's important to underscore that one of the points the Supreme Court did make was actually noting that when he was DA, Mr. Castille had sort of taken credit

publicly for having sent 45 notorious killers to death, something like that. So they did, in fact, consider his general role and general statements to some degree.

The other point that is important here is that, as with any other case, part of the fact finding process is drawing reasonable inferences. And that's especially important when it's here the defense is extremely limited in its access to documents and its access to other sort of discovery. So when the argument from the Commonwealth keeps being, well, you know, we don't have the

specific document that Mr. Castille signed naming these two individual defendants. What we can see from the totality of the documents that have been produced is that, when he was DA, Mr. Castille was much more involved in capital appeals than he previously acknowledged.

We know that, again, in the Beasely case, to the level of an exhaustion argument about, you know -- which really is sort of in the weeds of the case. And so in drawing a reasonable inference as to what

Mr. Castille's involvement actually was during these direct appeals, we submit that it's very clear. And with further discovery will become even more clear that the reasonable inference is that, in fact, Mr. Castille was involved in those appeals, in a way that he did not acknowledge in his 1998 opinion, because we already know that so many other things he said in that 1998 opinion about sort of his hands-off approach to these cases, generally, are not correct.

THE COURT: You mention "further discovery," what further discovery?

MS. RITTER: Good morning, Your Honor.

THE COURT: Good morning.

MS. RITTER: Yes, so we've addressed the merits to a large extent this morning, but as I'm sure the Court will recall, when

we embarked on the discovery path, the expectation was that at its conclusion, that we would have time to amend our initial petition to add any claims or support for claims that were discovered. So in that regard, there are a number of things that I want to raise: One is the deposition of

Gaele Barthold. So the Commonwealth has already agreed that counsel for Mr. Abu-Jamal would be able to take the deposition for Ms. Barthold. And I'm sure the Court will remember back on January 17th, in fact, they were ordered to show cause, or she shouldn't be brought to court. And that's what we embarked on in these sort of months long continuances.

At that point I believe the Court actually suggested maybe the parties could figure out a way to, outside of court, take her testimony. So we did that, and we placed on the record on January 17th, that if their position was not changed and the matter was not resolved, that we would come and do that.

So that is something that we intend to do as soon as practical.

Another thing that we have a question about and would like the Commonwealth to, whether it'd be on the record today or by some filing, speak to what instructions

Mr. Nelson, who was their paralegal, was given with regard to looking through the

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boxes. And this is why I'm saying this: The parties, I think, are in agreement that when he started his search, that he was not only looking for the memo, but also any other information that was relevant to whether or not Mr. Castille had the type of involvement that Williams speaks of. And so that's what he was looking for. And, of course, he has reported that he didn't find that.

But we would like to hear a statement from the Commonwealth as to what directions he was given, and this is why: It doesn't have to say in so many words that, you know, Justice Castille or Mr. Castille was addressing a particular thing. Here's the memo at the Abu-Jamal case, and here's what I want to do. But as Mr. Spital was just saying, inferences can be drawn from Mr. Castille's interest involvement, getting even into the issues or the weeds like he did on the Beasely case or was consulted on. That would be relevant. And so what we haven't heard is sort what was asked to him.

So for example, if there was a memo

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from Mr. Castille at the time saying, I want to know about the progress and strategies on

all homicides, with law enforcement officers as the victims, were the instructions given to Mr. Nelson such that he would understand that to be something that would be relevant.

Next, one thing that is very noticeable to us in Paragraph 6 of Mr. Nelson's verification, he speaks of looking at both the physical and the digital files of a number of specific members of the District Attorney's Office.

In our letters to this Court in the discovery litigation, we had been asking that the Commonwealth, not to only look in the case file, but to actually look for personal files that were kept by key supervisors and key lawyers and personnel who were working on the Abu-Jamal case, because there might have memos or notes in their file saying we spoke to Ron's Castille about this. Ron Castille asked about that. And so they apparently report that they have done so.

But noticeably absent from the list of

the files that they looked at, was files of Ron Castille. So we would ask that such files be sought, if they haven't been. Once located, that they be submitted for an in camera review or an explanation as to why that can't be the case.

And so finally, and I would just say

that we do intend to amend our petition, and that we would be able to do that in fairly short order after we complete the specifications that I just indicated.

THE COURT: Be specific. What specifications?

MS. RITTER: The deposition of Ms. Barthold, Mr. Castille's own files, and what they might reveal, and an indication from the Commonwealth as to what instructions were given, as to what they deem to be relevant when they asked Mr. Nelson to look through the numerous files that he did look through.

THE COURT: Ms. Kavanagh.

MS. KAVANAGH: Your Honor, as to the deposition for Gaele Barthold, counsel is correct. Rather than bringing Ms. Barthold

up, we agreed to a deposition. I did speak with her and she doesn't remember anything. But as to instructions to Mr. Nelson --

THE COURT: When and where is it going to happen?

MS. KAVANAGH: I can tell the Court that Ms. Barthold would be available June 1st to June 15th, and July 18th to August 14th.

And I guess counsel could arrange that or we could arrange that together.

THE COURT: Okay.

MS. KAVANAGH: As to the instructions to Mr. Nelson, as Your Honor can see from the verification that Mr. Nelson filed, he searched high and low for the missing memo and for evidence of personal involvement. He looked through anything that had Ron Castille's name, his signature, his initials, anything relating to these two defendants.

THE COURT: Was there a specific file of Mr. Castille?

MS. KAVANAGH: Your Honor, I see in verification under seven, he looked for

responsive documents in the full archives of the District Attorney's Legislative Unit. It was 35 boxes and two filing cabinets. They contained extensive records from the Pennsylvania District Attorney's Association of which Mr. Castille was Legislative Chair, and he found copies of the memo that we've been discussing in those files there. He went to all other units and to our DA's office unit, and any file that was available, he searched.

So if there were still files from Mr. Castille in our office, he searched them. He searched whatever was there.

THE COURT: Okay. But, specifically, was there a specific file of Mr. Castille?

MS. KAVANAGH: May I inquire?

Mr. Nelson is here.

No, he's just advised me that there was no specific file on Mr. Castille.

THE COURT: All right. Anything else?

MS. KAVANAGH: Oh, and I just pointed out, too, when we talk about searching digital files, back in 1990 people were still using typewriters. Now, he didn't

find anything.

MR. NOLAN: I just want to say that on behalf of Mr. Wharton, we're joining these requests for discovery.

THE COURT: Very well.

MS. RITTER: May I just very briefly?

I understand, of course, there was no additional files at the time, but they may have been digitized in the interim.

Just with regard to whether there is a file from Mr. Castile, even if there isn't one located physically in the building in the office of the district attorney, I think given all of the details of this case, that the Commonwealth should, at a minimum, be consulting Mr. Castille about whether he has files that -- because by the fact that there were files from all these -- from the first assistant, the head of the PCRA Unit, the chief of the Appeals Unit, the chief of the Law Division, individual lawyers kept files, and that shouldn't be a surprise to any of

us. So the fact that the District Attorney would not, would be unusual.

And finally, I guess -- I think to the

point when Ms. Kavanagh says that he was looking for anything that had Mr. Castille's name on it and either Abu-Jamal's or Wharton's, I think that sort of misses the point that there very well could be very important papers, documents, memorialization of conferences about Mr. Castille's interest and involvement in formulating strategy with capital cases involving police officers as victims, that he spoke in a number of occasions and writings and in public about that are relevant, whether they're the deciding factors will be for the Court to decide. But I don't think it's logical to say that anything that doesn't have these specific defendants' names on it wouldn't be relevant to his involvement.

MS. KAVANAGH: Judge, he looked for anything with Ron Castille's name on it or the initials RC, so something like that would have been found in his search. Just like when he found the Beasely memo that we've turned over, it didn't mention either defendant, but it mentioned Ron Castille. And that's why he paid particular attention

to it.

Oh, and Your Honor, we'd be happy to reach out to Mr. Castille to see if he has the file.

THE COURT: All right. Very well. Okay.

Where do with go from here?

I mean, I've got my ideas of what should happen, but nonetheless...

MS. RITTER: Well, I guess we can say that efforts will be made. And I haven't spoken to my co-counsel, but we haven't been given a date of the availability of Ms. Barthold until just now. But, hopefully, we can complete that by mid to late June, as opposed to the later window. And depending on what we hear from the Commonwealth about Mr. Castille, you know, I think that --

Where are we? We are in the beginning of May, you know, 60 or 70 days from now would seem right in terms of our ability to complete these matters and have an amended petition with the provisor that if there are wrinkles working out the remaining discovery

issues, that we might ask the Court for more time or to intervene with some of those issues, if they should come up.

THE COURT: So as I see it, you're seeking 60 to 70 days for the filing of the

amended petition, and in the interim, the deposition of Ms. Barthold, as well as inquiry as to whether or not Mr. Castille has the file.

Is that where we are?

MS. KAVANAGH: I believe so, Your Honor.

THE COURT: You join in that?

MR. NOLAN: Yes, I join.

THE COURT: All right. Any adverse position by the Commonwealth?

MS. KAVANAGH: No, Your Honor.

THE COURT: All right. Let's get the date.

THE COURT CRIER: 7/9.

THE COURT: So is July 9 a good date to have all of that in place and have the amended petition filed?

MS. RITTER: Sounds like it will be.

MS. KAVANAGH: Yes, it's a fine date.

MR. NOLAN: Yes, Your Honor.

THE COURT: So July 9th will -- well, will we need to relist this, or are we simply going to come here for the Commonwealth to say they need 60 days to prepare an amended answer?

MS. KAVANAGH: Yes, Your Honor. We'll need time to respond once they file their amended petition or their supplement.

THE COURT: All right. The date that

we come back to court or can we give a 60-day date or 30-day date for the Commonwealth to respond to the amended petition?

MS. KAVANAGH: Thirty days would be fine once they file.

THE COURT: All right.

MS. KAVANAGH: I can just inquire, just to make sure I'm understanding. I would agree. I don't think we need a date for the date that we would file. I would like the opportunity to be heard once both sides have submitted their petitions.

THE COURT: Yes, well, that's what we're figuring out.

So July 9th for the amended petition?

So 30 days subsequent would be enough for the Commonwealth response?

MS. KAVANAGH: Yes.

THE COURT: August 30th for the Commonwealth response.

Do you need additional time or should we just come back on August 9th?

THE COURT CRIER: August 30th.

THE COURT: August 30th back.

MS. KAVANAGH: Would the Commonwealth's response be 30 days and that would be August 30th.

THE COURT: August 9th for the Commonwealth response. And that will give

the parties 20 days or so to digest it. And we'll see where we are on August 30th.

MS. KAVANAGH: Thank you, Your Honor.

MS. RITTER: Thank you, Your Honor.

THE COURT: So August 30, 2018 we'll be back here.

Anything further that we need to address?

MS. KAVANAGH: No, Your Honor.

THE COURT: Court will adjourn until

August 30th.

(Proceedings were concluded.)

CERTIFICATION

I hereby certify that the proceedings and evidence are contained fully and accurately in the stenographic notes taken by me in the above-captioned matter, and this copy is a correct transcript of the same.

_____
Ludyn Mena
Official Court Reporter

(The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or supervision of the certifying reporter.)

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Supplemental Exhibit B

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 51 E.D. APPEAL DOCKET 1983

COMMONWEALTH OF PENNSYLVANIA

v.

MUMIA ABU-JAMAL,
APPELLANT

BRIEF FOR APPELLEE

Appeal from the Judgment of Sentence of the Court of Common Pleas, Trial Division, Criminal Section, of Philadelphia County, as of Information Nos. 1357-1378, January Sessions, 1982.

MARIANNE E. COX
Assistant District Attorney
HUGH J. BURNS, JR.
Assistant District Attorney
RONALD EISENBERG
Chief, Appeals Unit
GAELE McLAUGHLIN BARTHOLD
Deputy District Attorney
WILLIAM G. CHADWICK, JR.
First Assistant District Attorney
RONALD D. CASTILLE
District Attorney

1300 Chestnut Street
Philadelphia, Pennsylvania 19107

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' opposition 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]

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).